



# FIRE

Foundation for Individual  
Rights and Expression

March 15, 2023

President Tony Allen  
Office of the President  
Delaware State University  
1200 North DuPont Highway  
Dover, Delaware 19901

**URGENT**

Sent via U.S. Mail and Electronic Mail ([president@desu.edu](mailto:president@desu.edu))

Dear President Allen:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by Delaware State University's requirement that students seeking to join its new Safe Space Coalition committees sign a sweeping confidentiality agreement barring them from speaking publicly about the important campus safety issues the Coalition seeks to address. This requirement plainly violates students' First Amendment rights and must be immediately rescinded.

The Safe Space Coalition, formed in the wake of recent widespread student protests over DSU campus safety,<sup>2</sup> "assesses University safety protocols, campus policies, and response services that deal with sexual assaults, domestic violence, harassment, bullying, mental illness, and health-related matters."<sup>3</sup> Students seeking to join the Coalition—many of whom were among the most vocal protesters pushing for change and accountability from the university in recent months—have now found that accountability comes at the price of their silence. Specifically, students must sign an incredibly broad non-disclosure agreement promising to "keep absolutely confidential any and all information related to . . . [their] participation as a

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<sup>1</sup> For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at [thefire.org](http://thefire.org).

<sup>2</sup> Kelly Powers, *Delaware State responds to protest cries with town hall meeting — but it's closed to the public*, USA TODAY (Jan. 20, 2023), <https://www.delawareonline.com/story/news/local/2023/01/20/delaware-state-protest-closed-town-hall-meeting-sexual-assault-case/69822190007/>.

<sup>3</sup> *Safe Space Coalition*, DEL. STATE UNIV., <https://www.desu.edu/student-life/safe-space-coalition> [<https://perma.cc/F89W-FEGB>].

committee member.”<sup>4</sup> DSU’s Director of News Services Carlos Holmes said the agreements seek to “respect the privacy and confidentiality of what we’re doing.”<sup>5</sup> But the existence of some valid concerns about student privacy does not justify silencing all student discussion about safety issues of clear public interest.

Student speech about how a public university uses government funds to implement campus policies and services concerning sexual assault, domestic violence, harassment, bullying, and mental illness is political expression meriting the highest protection under First Amendment standards.<sup>6</sup> Such discussion “has always rested on the highest rung of the hierarchy of First Amendment values,” and falls squarely within the type of speech that the First Amendment protects.<sup>7</sup> DSU’s ban on disclosing any information related to these issues restricts core political speech and runs contrary to DSU’s legal obligations as a public institution bound by the First Amendment.<sup>8</sup>

DSU’s confidentiality agreements are unconstitutional for the further reason they constitute a prior restraint on student speech in a manner untethered to any legitimate university interest. Prior restraints on speech are “the most serious and the least tolerable infringement on” freedom of expression.<sup>9</sup> The risk prior restraints present to freedom of expression is so great that the “chief purpose” in adopting the First Amendment was to prevent their use.<sup>10</sup> Courts, including the Supreme Court, have long held that prior restraints are permissible only in the direst circumstances, such as a demonstrated threat to national security.<sup>11</sup>

While FIRE recognizes DSU has an interest in preventing disclosure of sensitive campus safety information in specific contexts, a ban on disclosing “any and all information related” to a student’s participation in Coalition committees is plainly overbroad in scope, sweeping within

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<sup>4</sup> Safe Space Coalition Confidentiality Agreement (2023), DEL. STATE UNIV. (on file with author); Kelly Powers, Delaware State makes students sign NDAs to work on new coalition for campus safety, USA TODAY (Mar. 14, 2023), <https://www.delawareonline.com/story/news/local/2023/03/14/delaware-state-students-sign-ndas-to-work-on-new-coalition-for-campus-safety/69989862007/>.

<sup>5</sup> Powers, *supra* note 2.

<sup>6</sup> See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (First Amendment’s protection is “at its zenith” when political speech is at issue) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).

<sup>7</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotations omitted); see *Whitney v. California*, 274 U.S. 357, 375 (“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”) (J. Brandeis, concurring).

<sup>8</sup> *E.g., Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

<sup>9</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *Alderman v. Phila. Hous. Auth.*, 496 F.2d 164, 174 (3d Cir. 1974) (“One, the distaste for prior restraint, is firmly rooted in Anglo-American history, public sentiment, and legality.”)

<sup>10</sup> *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

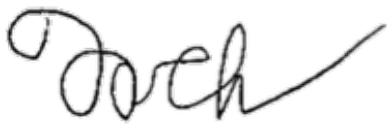
<sup>11</sup> See *N. Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (rejecting call for prior restraint of the so-called “Pentagon papers”); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) (rejecting system of prior review where the court did “not perceive the existence of a compelling state interest”).

its ambit large swathes of student expression far exceeding any private information in which DSU can articulate a defensible interest.<sup>12</sup> Through these confidentiality agreements, DSU prevents once active protesters from continuing to protest, speaking in their personal capacities to journalists about these issues, and even disclosing they're a committee member at all. Troublingly, it would also bar students from disclosing misconduct on the part of Coalition committees, in violation of not only the First Amendment,<sup>13</sup> but also DSU's Whistleblower Policy.<sup>14</sup> These concerns are not abstract, as a journalist recently relayed to FIRE that many sources recently went silent, citing the confidentiality agreements. The journalist said the students expressed fear about discussing campus safety with anyone.

DSU is a government actor with a duty to protect all students' basic rights. It cannot lawfully ask students to trade away one set of rights for another. Free speech, the ability to serve on committees, and student safety must coexist on DSU's campus.

Because this serious violation of students' First Amendment rights remains ongoing, we request confirmation by the close of business on March 20, 2023, that DSU has rescinded the nondisclosure agreements imposed on student Coalition committee members. To this end, FIRE would be happy to assist your administration in creating confidentiality agreements that address DSU's interest in securing confidential information while protecting students' free speech rights.

Sincerely,



Zachary Greenberg  
Senior Program Officer, Student Organizations, Campus Rights Advocacy

Cc: LaKresha R. Moultrie, Vice President of Legal Affairs  
Gwendolyn Scott-Jones, Safe Space Coalition Chair

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<sup>12</sup> *Matter of Subpoena 2018R00776*, 947 F.3d 148, 155 (3d Cir. 2020) (“Nondisclosure orders implicate First Amendment rights because they restrict a service provider’s speech.”).

<sup>13</sup> *See Branzburg v. Hayes*, 408 U.S. 665, 695–96 (1972) (“[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.”).

<sup>14</sup> DEL. STATE UNIV., 4-32: *Whistleblower Policy: Reporting Suspected Wrongdoing and Protection from Retaliation* (Sept. 9, 2012), [https://www.desu.edu/sites/flagship/files/document/31/04-32-whistleblower\\_policy\\_final.pdf](https://www.desu.edu/sites/flagship/files/document/31/04-32-whistleblower_policy_final.pdf). [<https://perma.cc/E2A2-XH6G>]