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# In the Heat of the Moment: The Implications of State v. Ness on Criminal Defendants' Rights in Minnesota DANCO Proceedings

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**IN THE HEAT OF THE MOMENT: THE IMPLICATIONS OF  
STATE V. NESS ON CRIMINAL DEFENDANTS' RIGHTS IN  
MINNESOTA DANCO PROCEEDINGS**

*Aisha N. Servaty\**

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## I. INTRODUCTION

Michael sat silently as he waited for his name to be called. This was not his first time appearing before a judge. Michael had been arrested multiple times before for getting into arguments with and hitting his wife.<sup>1</sup> The last time he was in court, he was charged with fifth-degree misdemeanor assault and the judge issued a criminal No Contact Order stating he could not have any contact with his wife.<sup>2</sup> Nevertheless, Michael went to his wife's apartment a couple months after the conviction. The police were called, and Michael was arrested for violating the No Contact Order.<sup>3</sup>

Michael did not understand the severity of violating a No Contact Order. Expecting to be charged with a misdemeanor crime, he was shocked when the judge announced that he was being indicted with a felony charge of violating a No Contact Order.<sup>4</sup> Before Michael could question the judge, the court set bail and issued yet another No Contact Order.<sup>5</sup> Michael, confused by what had just occurred, signed the new No Contact Order and was escorted back to his jail cell.<sup>6</sup>

Michael is convinced that his constitutional rights have been infringed upon. Michael alleges the No Contact Order statute is facially invalid because it violates the due process clause of both the United States Constitution and Minnesota State Constitution.<sup>7</sup> How should the district court rule?

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<sup>1</sup> See *infra* text accompanying notes 98–113 (providing the factual background of *Ness*, 834 N.W.2d 177).

<sup>2</sup> See *infra* text accompanying notes 99–100 (stating the criminal charges giving rise to the first Domestic Abuse No Contact Order (DANCO)).

<sup>3</sup> See *infra* text accompanying notes 106–107 (describing the circumstances underlying the first DANCO violation).

<sup>4</sup> See *infra* note 108 and accompanying text (explaining why the first DANCO violation was elevated to a felony offense).

<sup>5</sup> See *infra* text accompanying note 110 (mentioning the issuance of the second DANCO).

<sup>6</sup> See *infra* text accompanying note 111 (describing the procedural process followed in the issuance of the second DANCO).

<sup>7</sup> See *infra* text accompanying notes 114–115 (stating *Ness*'s arguments challenging the constitutionality of MINN. STAT. § 629.75).

In *State v. Ness*, the Minnesota Supreme Court recently upheld the constitutionality of Minnesota Statute § 629.75.<sup>8</sup> The statute grants courts the authority to issue a Domestic Abuse No Contact Order (DANCO) against a defendant in a criminal proceeding involving domestic abuse, harassment, stalking, violation of an existing order for protection, or violation of a prior DANCO.<sup>9</sup> The Minnesota Supreme Court rejected appellant Bryan Paul Ness's arguments that the DANCO statute failed to provide adequate notice and opportunity to be heard and encouraged arbitrary and discriminatory enforcement.<sup>10</sup> The court concluded that a defendant's procedural due process rights are not violated when a DANCO is issued in conjunction with a pretrial hearing because the pretrial hearing satisfies the DANCO statute's hearing requirement.<sup>11</sup> Furthermore, the court found that sufficient checks on judicial discretion exist to eliminate the potential for arbitrary or discriminatory enforcement of the DANCO statute.<sup>12</sup>

Despite *Ness*, Minnesota district courts still face uncertainty when interpreting or applying the DANCO statute.<sup>13</sup> Before *Ness*, no uniform interpretation or application of the DANCO statute among the Minnesota district courts existed.<sup>14</sup> Even after *Ness*, uncertainties remain because the Minnesota legislature has yet to provide clear guidance to courts specifying under what circumstances a court should issue a DANCO.<sup>15</sup> This Note will

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<sup>8</sup> *Ness*, 834 N.W.2d at 186 (providing the Minnesota Supreme Court's holding in *Ness*).

<sup>9</sup> See MINN. STAT. § 629.75, subdiv. 1(a) (2013) (also referred to as the "DANCO statute"). A DANCO may also be issued against a juvenile offender in a delinquency proceeding for domestic abuse, harassment or stalking, violation of an order for protection, or violation of a prior DANCO. *Id.*

<sup>10</sup> See *infra* text accompanying notes 131–134 (explaining the Minnesota Supreme Court's reasoning for upholding the constitutionality of the DANCO statute).

<sup>11</sup> See *infra* note 131 and accompanying text (discussing the Minnesota Supreme Court's emphasis on the DANCO statute's language as evidence of adequate procedural due process).

<sup>12</sup> See *infra* notes 133–134 and accompanying text (noting the limitations imposed by the DANCO statute on judicial discretion).

<sup>13</sup> See *infra* Part IV.C (exploring the uncertainty faced by district courts imposing DANCOs).

<sup>14</sup> See *infra* note 118 and accompanying text (mentioning the lack of legislative guidance and standards for district courts). See also Dan Gunderson, *Law Protecting Domestic Abuse Victims Challenged in State Supreme Court*, MPR NEWS (Nov. 9, 2012), available at <http://minnesota.publicradio.org/display/web/2012/11/09/law/state-supreme-court-constitutionality-domestic-abuse-no-contact-order> (noting that Minnesota district courts routinely approved DANCOs in domestic abuse cases until Ness's appeal when some district courts began to refuse to issue or enforce DANCOs); MINN. COAL. FOR BATTERED WOMEN, MINNESOTA STATE BAR ASSOCIATION GRANT APPLICATION: MINNESOTA COALITION FOR BATTERED WOMEN 3 (May 23, 2013), available at <http://www.mnbar.org/barfoundation/Meeting%20Notices/062813/9%20-%20Minnesota%20Coalition%20for%20Battered%20Women,%20Inc..pdf> ("Challenges to the DANCO statute have been routine in District Court over the past year resulting in confusion and lack of enforcement of orders.").

<sup>15</sup> See *State v. Yang*, No. A11-1377, 2013 WL 4779014, at \*3 (Minn. Ct. App. Sept. 9, 2013) (noting the broad discretion afforded district courts in issuing a DANCO).

examine the impact of the Minnesota Supreme Court's decision in *Ness* on criminal defendants' rights in DANCO proceedings. Part II of this Note provides an overview of the development of domestic violence law in Minnesota and describes the various civil and criminal domestic violence statutes enacted in Minnesota.<sup>16</sup> Part III introduces the underlying facts of *Ness* and examines the reasoning of the district and appellate courts.<sup>17</sup>

Part IV argues that while the Minnesota Supreme Court's holding that the DANCO statute facially provides for adequate notice and opportunity to be heard was ultimately proper, criminal defendants may still bring as-applied constitutional challenges against the DANCO statute.<sup>18</sup> Further, Part IV contends that the lack of Minnesota legislative guidance on the issuance of DANCOs does, in part, encourage arbitrary and discriminatory enforcement.<sup>19</sup> In order to remedy this, Part IV recommends that the Minnesota legislature amend the DANCO statute to clarify when and how a DANCO should be issued.<sup>20</sup>

## II. BACKGROUND

Domestic violence statutes are a relatively recent legal development.<sup>21</sup> During the 1970s, public awareness of domestic abuse grew, and women's rights advocates began to push for legal intervention in domestic violence cases.<sup>22</sup> In response to significant social pressure, state and federal legislatures began enacting domestic violence legislation.<sup>23</sup>

<sup>16</sup> See *infra* Part II (defining domestic abuse and comparing Minnesota's domestic violence statutes).

<sup>17</sup> See *infra* Part III (providing the facts triggering *Ness*'s DANCOs and discussing the district and appellate courts' contrasting interpretations of procedural due process).

<sup>18</sup> See *infra* Part IV.A (asserting that not all criminal defendants will be afforded sufficient due process).

<sup>19</sup> See *infra* Part IV.B (arguing that the lack of explicit standards renders the DANCO statute vague).

<sup>20</sup> See *infra* Part IV.C (suggesting the Minnesota legislature amend the DANCO statute to provide further guidance to courts in interpreting and applying the DANCO statute).

<sup>21</sup> See Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 938 (1999) (providing a review of the development of domestic violence law in the United States).

<sup>22</sup> *Id.* at 938–39 (noting the shift in social perceptions of domestic violence). See also Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 295–96, 307–09 (2004) (describing the history of the American battered women's movement); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993) (discussing the motivations behind domestic violence legal reform efforts).

<sup>23</sup> See Mordini, *supra* note 22, at 317 (noting the social perceptions surrounding domestic violence). Historically, domestic violence was socially and legally viewed as a private matter, outside the concerns and reach of the public law. *Id.* As a result, it took decades for women's and victims' rights advocates to combat the stereotypes surrounding domestic violence and to pressure state legislatures to create laws addressing it. *Id.* at 317–18.

Minnesota was among the first states to enact domestic violence legislation, codifying its first laws in 1979.<sup>24</sup> The Minnesota legislature has periodically revised and updated its domestic violence laws to ensure that the laws effectively protect victims of domestic violence.<sup>25</sup>

### A. Defining Domestic Abuse

A single definition is incapable of capturing the diversity of domestic abuse and domestic violence.<sup>26</sup> As a result, there is often a disconnect between victims' experiences of domestic violence and the law.<sup>27</sup> Minnesota broadly defines domestic violence and domestic abuse in an effort to ensure victims' experiences align with the text of the law.<sup>28</sup> Under Minnesota law, "domestic abuse" is defined as:

the following, if committed against a family or household member by a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3)

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<sup>24</sup> See Shannon M. Heim, *Revisions to Minnesota Domestic Violence Law Affords Greater Protection to Vulnerable Victims*, 37 WM. MITCHELL L. REV. 950, 955 (2011) (discussing the legislative history of Minnesota's domestic violence statutes). Minnesota's Domestic Abuse Act, MINN. STAT. § 518B.01, was codified into law on May 25, 1979. Laws of Minnesota for 1979, Chapter 214—H.F. No. 521, 1979 Leg., 71st Sess. 414, 417 (Minn. 1979), available at <https://www.revisor.mn.gov/data/revisor/law/1979/0/1979-214.pdf> (stating the Domestic Abuse Act's codification date). The original Domestic Abuse Act statute stated that it was an act "relating to domestic abuse; authorizing judicial intervention to provide protection from abuse; prescribing penalties." *Id.* at 414 (detailing the purpose and scope of the Domestic Abuse Act).

<sup>25</sup> Heim, *supra* note 24, at 955–56 (noting the evolution of Minnesota's domestic violence laws). Since 1979, the Minnesota legislature has amended the Domestic Abuse Act to expand its scope, provide stricter penalties for violations, and afford an additional, criminal basis for protection. *Id.*

<sup>26</sup> See Mordini, *supra* note 22, at 300 (remarking on the diversity of domestic abuse definitions); Klein & Orloff, *supra* note 22, at 810 (noting that domestic violence "is an exceedingly complex problem, presenting many unique challenges"). For example, many service providers and counseling programs broadly define domestic abuse to include both physical and psychological abuse. Mordini, *supra* note 22, at 300–01. Conversely, some state statutes exclude relationships where no physical violence or threat of bodily harm has occurred. *Id.*

<sup>27</sup> Mordini, *supra* note 22, at 300–01 (discussing the differences between advocates' definitions of domestic abuse and battery and the legal definitions).

<sup>28</sup> Unlike some state statutes, Minnesota's Domestic Abuse Act does not require physical violence in order for domestic abuse to have occurred. See generally Mordini, *supra* note 22, at 300–01 (providing examples of non-inclusive legal definitions of domestic abuse, such as statutes that require physical violence or threat of bodily harm occur in order for an act to be classified as domestic abuse). This allows more victims of domestic violence to seek legal protection from their abusers. *Id.* As a result, Minnesota's Domestic Abuse Act is a positive example for other states in drafting the language for domestic violence laws. Heim, *supra* note 24, at 953 (noting that academics and lawmakers look to Minnesota law for a positive example of domestic violence laws).

terroristic threats . . . criminal sexual conduct . . . or interference with an emergency call.<sup>29</sup>

Additionally, Minnesota’s definition of “family or household members” encompasses not only individuals related to one another but also persons who have resided together in the past or are involved in a significant romantic or sexual relationship with one another.<sup>30</sup> This Note will use the broad definition of domestic abuse encompassed in the Minnesota Domestic Abuse Act.<sup>31</sup>

### ***B. Minnesota’s Domestic Violence Statutes***

Minnesota’s domestic violence legislation consists of three statutes, two civil and one criminal.<sup>32</sup> Each of these statutes provides a separate basis

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<sup>29</sup> MINN. STAT. § 518B.01, subdiv. 2(a) (2013) (providing Minnesota’s legal definition of domestic abuse). The Domestic Abuse Act cross-references the definitions of terroristic threats, criminal sexual conduct, and interference with an emergency call with other Minnesota statute provisions. *Id.* Those provisions are: MINN. STAT. § 609.713, subdiv. 1 (2013) (providing the meaning of terroristic threats); MINN. STAT. §§ 609.342, 609.344, 609.345, and 609.3451 (2013) (defining criminal sexual conduct); and MINN. STAT. § 609.78, subdiv. 2 (2013) (stating what constitutes interference with an emergency call). *Id.* “Physical harm, bodily injury, and assault” include hitting, kicking, slapping, pushing, and stabbing. *See* Minnesota Judicial Branch, Court Forms, *Instructions to Apply for an OFP*, \*1–2 (2013), available at [http://www.mncourts.gov/forms/public/forms/Domestic\\_Abuse/Order\\_for\\_Protection/OFP101.pdf](http://www.mncourts.gov/forms/public/forms/Domestic_Abuse/Order_for_Protection/OFP101.pdf) (providing examples of the types of acts that constitute domestic abuse). “Fear of imminent physical harm, bodily injury, or assault” includes verbal threats to kill, break bones, or threats to harm someone with a knife or gun. *Id.* “Criminal sexual conduct” includes forced sex or forced contact with intimate body parts. *Id.* “Interference with an emergency call” includes intentionally interrupting or preventing someone from placing an emergency call. *Id.* A six year statute of limitations applies to acts that meet the definition of domestic abuse. MINN. STAT. § 541.05, subdiv. 1(10) (2013).

<sup>30</sup> MINN. STAT. § 518B.01, subdiv. 2(b) (noting the scope of Minnesota’s Domestic Abuse Act). The Domestic Abuse Act defines “family or household members” to mean:

(1) spouses and former spouses; (2) parents and children; (3) persons related by blood; (4) persons who are presently residing together or who have resided together in the past; (5) persons who have a child in common regardless of whether they have been married or have lived together at any time; (6) a man and a woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or lived together at any time; and (7) persons involved in a significant romantic or sexual relationship.

*Id.*

<sup>31</sup> *See supra* note 28 and accompanying text (explaining why Minnesota’s Domestic Abuse Statute is a positive example of domestic violence laws).

<sup>32</sup> *See* MINN. STAT. § 518B.01, subdiv. 4 (providing for a civil Order for Protection); MINN. STAT. § 609.748 (2013) (establishing a civil Harassment Restraining Order); MINN. STAT. § 518B.01, subdiv. 22 (affording for a criminal Domestic Abuse No Contact Order). MINN. STAT. § 518B.01, subdiv. 22 was repealed by the Minnesota Legislature in 2010 and replaced by MINN. STAT. § 629.75, the current DANCO statute. Laws of Minnesota for 2010, Chapter 299–S.F. No. 2437 1, 2009 Leg., 86th Sess., at 1 (Minn.

for a court to intervene and protect victims of domestic violence.<sup>33</sup> The Minnesota legislature has steadily strengthened its domestic violence laws over the past decade, imposing harsher criminal penalties on abusers while improving protections for victims.<sup>34</sup>

### 1. Order for Protection

A civil Order for Protection (OFP) is an important judicial tool for protecting victims of domestic violence.<sup>35</sup> OFPs allow victims of domestic abuse, as well as the victims' families or household members, to petition a civil court for a protective order against their abusers.<sup>36</sup> An OFP is a court order forbidding the abuser from physically harming or causing fear of immediate physical harm to the victim of domestic abuse.<sup>37</sup> A court does not automatically grant OFPs; generally, in order to receive an OFP, the victim (or victim's family or household member) must file a petition with the court and attend a judicial hearing.<sup>38</sup> The petition must allege the existence of

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2010), available at <https://www.revisor.mn.gov/data/revisor/law/2010/0/2010-299.pdf> (describing the law as “[a]n act . . . recodifying and clarifying the domestic abuse no contact order law”).

<sup>33</sup> Heim, *supra* note 24, at 962 (“[O]rders for protection and no contact orders represent some of the most important opportunities to shield victims of domestic violence.”). Civil protective orders are issued at a petitioner’s request through a civil court process. *State v. Ness*, 819 N.W.2d 219, 223 (Minn. Ct. App. 2012), *aff’d Ness*, 834 N.W.2d 177 (2013). Conversely, criminal protective orders are issued by a court against a defendant in a criminal proceeding. *Id.* This distinction was very important to both the Minnesota Court of Appeals’ and Minnesota Supreme Court’s analyses of whether MINN. STAT. § 629.75 provided adequate notice and opportunity to be heard. *Id.* at 223, 226. *See also Ness*, 834 N.W.2d at 184.

<sup>34</sup> Heim, *supra* note 24, at 956 (noting the evolution of Minnesota’s domestic abuse statutes).

<sup>35</sup> Klein & Orloff, *supra* note 22, at 811 (noting the importance of court intervention in protecting domestic violence victims).

<sup>36</sup> MINN. STAT. § 518B.01, subdiv. 4(a) (stating who may file an OFP petition). *See Rebecca Pirius*, Minn. House of Representatives, *Domestic Abuse Laws in Minnesota: An Overview*, \*4 (2012), available at <http://www.house.leg.state.mn.us/hrd/pubs/domabuse.pdf> (discussing the scope of an OFP). In an OFP proceeding, the court may issue an order (1) restraining the abusing party from committing acts of domestic violence; (2) excluding the abusing party from the dwelling that the parties share or from the residence of the petitioner; (3) requiring the abusing party participate in treatment or counseling services; (4) prohibiting the abusing party from contacting the petitioner in person, by phone, mail, email, or messaging, through a third-party, or by any other means; and (5) imposing, in its discretion, other relief it deems necessary for the protection of a family or household member. *See* MINN. STAT. § 518B.01, subdiv. 6(a) (listing the type of relief a court may grant in an OFP proceeding).

<sup>37</sup> Pirius, *supra* note 36, at \*4 (describing the purpose of an OFP).

<sup>38</sup> *See* Minnesota Judicial Branch, Sixth Judicial District, Carlton County, *Filing for an Order for Protection (OFP): How to Obtain an Order for Protection* (2013), available at <http://www.mncourts.gov/district/6/?page=1575> [hereinafter *Filing for an OFP*] (noting that a petition must be filed with the court in order for an OFP to be issued). Not all cases require a judicial hearing be held. *Id.* A hearing is only required if a party or the court requests one be held. *Id.*



domestic abuse, as defined by Minnesota's Domestic Abuse Act, and be accompanied by an affidavit stating the specific facts and circumstances from which judicial relief is sought.<sup>39</sup> The petitioner must also state whether she or he has ever had an OFP in effect against the alleged abuser.<sup>40</sup> Domestic violence advocates often assist victims of domestic violence with the legal process of obtaining an OFP.<sup>41</sup>

The petitioner has two options once the petition is filed.<sup>42</sup> The petitioner may request the issuance of an *ex parte* order, which is a temporary protective order.<sup>43</sup> An *ex parte* order restricts the alleged abuser's access to the victim during the adjudication process and is effective upon notice and service of the order on the alleged abuser (respondent).<sup>44</sup> The *ex parte* order, however, is limited in scope.<sup>45</sup> A more permanent OFP is required when a petitioner seeks relief beyond the scope of the *ex parte* order.<sup>46</sup>

<sup>39</sup> MINN. STAT. § 518B.01, subdiv. 4(b) (listing the OFP petition requirements).

<sup>40</sup> MINN. STAT. § 518B.01, subdiv. 4(c) (imposing an additional requirement that a petitioner must satisfy before an OFP will be issued).

<sup>41</sup> Klein & Orloff, *supra* note 22, at 843–46 (noting that there has been an increase in the need for legal assistance in the form of battered women's advocates because the majority of protective order petitioners are *pro se*).

<sup>42</sup> *Filing for an OFP*, *supra* note 38 (describing the OFP petition process). A petitioner may request a temporary OFP be issued in lieu of, or in addition to, a permanent OFP. *Id.* See MINN. STAT. § 518B.01, subdiv.5 (providing for a temporary OFP).

<sup>43</sup> *Filing for an OFP*, *supra* note 38 (defining an *ex parte* order). To obtain an *ex parte* order, the petitioner must successfully allege an immediate and present danger of domestic abuse. MINN. STAT. § 518B.01, subdiv. 7(a). See also Theresa A. Capistrant & Rebecca Wong, *Orders for Protection: When the Shield Becomes a Sword*, 65 BENCH & BAR MINN., Mar. 2008, available at <http://www.mnbar.org/benchandbar/2008/mar08/ofp.htm> (discussing the process of obtaining an *ex parte* OFP and its effects on alleged abusers).

<sup>44</sup> *Filing for an OFP*, *supra* note 38 (stating the type of relief granted by an *ex parte* order).

<sup>45</sup> Minnesota Judicial Branch, Second Judicial District, Ramsey County, *OFP FAQs: What Happens at Court?* (2013), available at <http://www.mncourts.gov/district/2/?page=1173> [hereinafter *OFP FAQs*] (noting the differences between an *ex parte* order and a permanent OFP). An *ex parte* order may only grant relief by: (1) restraining the abusing party from committing acts of domestic abuse; (2) excluding the abusing party from the dwelling that the parties share or from the residence of the petitioner; (3) excluding the abusing party from petitioner's place of employment; (4) ordering the abusing party to have no contact with the petitioner; (5) continuing all currently available insurance coverage; and (6) providing for the care and treatment of animals owned by the parties. MINN. STAT. § 518B.01, subdiv. 7(a). If an *ex parte* order has been issued and the petitioner seeks only the relief provided under MINN. STAT. §518B.01, subdiv. 7, then no hearing is required unless the court declines to order the requested relief or one of the parties requests a hearing. MINN. STAT. § 518B.01, subdiv. 5(a)–(b). If no hearing is required or requested, the *ex parte* order is effective for a fixed period of time, as determined by the court or until modified by the court pursuant to a judicial hearing. MINN. STAT. §518B.01, subdiv. 7(c). See also MINN. STAT. §518B.01, subdiv. 6(b) (“[A]ny relief granted by an order for protection may be for a period not to exceed two years, except when the court determines a longer period is appropriate.”).

<sup>46</sup> *OFP FAQs*, *supra* note 45 (noting when a permanent OFP is required). A hearing may be requested by either the petitioner or respondent, ordered by the judge, or required by the court if relief requested includes child support or spousal maintenance,

The second option is to request an OFP at a judicial hearing. At the judicial hearing, both the petitioner and respondent are afforded an opportunity to speak on their behalf.<sup>47</sup> The respondent is given the option of admitting to the alleged domestic abuse, denying abuse occurred but agreeing to the order, or denying abuse occurred and requesting an evidentiary hearing.<sup>48</sup> Both parties may present evidence and witness testimony supporting their position at the evidentiary hearing.<sup>49</sup> The judge will then evaluate the evidence and render a decision.<sup>50</sup> If the judge finds domestic abuse occurred, an OFP will be entered against the respondent.<sup>51</sup> Violation of an OFP is subject to criminal penalties.<sup>52</sup> A court may also issue a DANCO against a defendant in a criminal proceeding for violation of an OFP.<sup>53</sup>

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custody, treatment or counseling, restitution, or a distance provision. *Id.* The hearing must occur within fourteen days from the date it was requested or ordered. MINN. STAT. § 518B.01, subdiv. 5(a) (stating a specific period of time in which an OFP judicial hearing must occur).

<sup>47</sup> *OFP FAQs*, *supra* note 45 (discussing the OFP judicial hearing).

<sup>48</sup> Capistrant & Wong, *supra* note 43 (listing the choices a respondent has to choose from at the OFP judicial hearing).

<sup>49</sup> *OFP FAQs*, *supra* note 45 (noting that both parties are afforded an opportunity to be heard).

<sup>50</sup> *Id.* (stating that the court considers all evidence presented before issuing an OFP). A district court must find probable cause that abuse occurred in order to issue an OFP. *Ness*, 834 N.W.2d at 184 (citing *Vogt v. Vogt*, 455 N.W.2d 471, 474 (Minn. 1990) (noting that the issuance of an OFP implies the court found probable cause of physical abuse)). Minnesota case law has established a broad range of acts that may warrant an OFP. Klein & Orloff, *supra* note 22, at 848 (citing *Knuth v. Knuth*, No. C1-92-482, 1992 Minn. App. LEXIS 696, at \*3 (Minn. Ct. App. June 19, 1992) (holding that the Domestic Abuse Act does not require an overt physical act occur to support issuance of a protection order, and noting that past abusive behavior is a factor in determining cause for an order for protection)). Those acts include not only overt physical acts but also verbal threats to inflict fear of imminent physical harm. *Id.*

<sup>51</sup> *OFP FAQs*, *supra* note 45 (discussing when an OFP will be issued). The OFP is effective for up to two years, and may be modified or extended at the request of the petitioner. MINN. STAT. § 518B.01, subdiv. 6(b).

<sup>52</sup> *Pirius*, *supra* note 36, at \*12 (describing the consequences of violating an OFP). Minnesota law provides misdemeanor, gross misdemeanor, and felony penalties for a violation of an OFP issued under the Domestic Abuse Act. *See* MINN. STAT. § 518B.01, subdiv. 14 (listing the criminal penalties for violating an OFP). The law establishes minimum sentences to be applied to misdemeanor, gross misdemeanor, and felony convictions, as well as requiring the court to order the defendant to participate in counseling or other appropriate programs selected by the court. *Id.*

<sup>53</sup> *Pirius*, *supra* note 36, at \*12 (noting the connection between all three of Minnesota's domestic abuse statutes). *See* MINN. STAT. § 629.75, subdiv. 1(a)(4) (listing violation of an OFP as a basis for issuing a DANCO).

## 2. Harassment Restraining Order

Like an OFP, a Harassment Restraining Order (HRO) is a civil protection order that restricts an actor's contact with his or her victim.<sup>54</sup> Unlike OFPs, HROs must be petitioned for by and issued on behalf of a harassment victim.<sup>55</sup> Furthermore, HROs are much narrower in scope than OFPs.<sup>56</sup> Nevertheless, HROs are still an effective tool for protecting victims from abusers because there is no relationship requirement between the parties.<sup>57</sup>

The judicial process of obtaining a HRO is similar to that of an OFP in that a victim of harassment must petition a court and request relief pursuant to the HRO statute.<sup>58</sup> The petition must allege sufficient facts showing harassment occurred and include an affidavit stating the specific

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<sup>54</sup> See LEAGUE OF MINN. CITIES, RISK MANAGEMENT INFORMATION: HARASSMENT RESTRAINING ORDERS, at \*1 (2013), available at <http://www.lmc.org/media/document/1/harassmentrestrainingordersupdate2013.pdf?inline=true> (mentioning the similarities between Minnesota's OFP and HRO statutes). Minnesota law defines "harassment" as:

(1) a single incident of physical or sexual assault or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target; (2) targeted residential picketing; and (3) a pattern of attending public events after being notified that the actor's presence at the event is harassing to another.

MINN. STAT. § 609.748, subdiv. 1(a).

<sup>55</sup> LEAGUE OF MINN. CITIES, *supra* note 54, at \*1 (noting the differences between Minnesota's OFP and HRO statutes). However, when the victim of harassment is a minor, the parent, guardian, or stepparent of the minor may seek a restraining order from the court on behalf of the minor. MINN. STAT. § 609.748, subdiv. 2.

<sup>56</sup> For instance, a HRO may only "(1) [order] the respondent to cease or avoid the harassment of another person; or (2) [order] the respondent to have no contact with another person." MINN. STAT. § 609.748, subdiv. 5(a). Additionally, Minnesota case law has narrowly interpreted the definition of "physical assault" within the HRO statute to encompass only "the intentional infliction of or an attempt to inflict bodily harm upon another." LEAGUE OF MINN. CITIES, *supra* note 54, at \*2 (citing *Peterson v. Johnson*, 755 N.W.2d 758, 762–63 (Minn. Ct. App. 2008)). Similarly, only certain types of words can be considered harassing. *Id.* In order to constitute harassment, words or comments must be more than inappropriate or argumentative—they must be "fighting words" or "true threats." *Id.* (citing *Dunham v. Roer*, 708 N.W.2d 552, 565–66 (Minn. Ct. App. 2006) (defining "fighting words" as words that a reasonable person would understand as being likely to cause the average person to fight and defining "true threats" as comments where the speaker means to communicate a serious intent to commit unlawful violence against a person)).

<sup>57</sup> LEAGUE OF MINN. CITIES, *supra* note 54, at \*1 (noting that the lack of a familial relationship requirement allows more victims of harassment to seek judicial protection from their harassers).

<sup>58</sup> Compare MINN. STAT. § 518B.01, subdiv. 4 (stating the requirements for obtaining an OFP), with MINN. STAT. § 609.748, subdiv. 3(a) (describing the process of requesting a HRO).

facts and circumstances from which judicial relief is sought.<sup>59</sup> The petition must also state whether the petitioner has had a previous restraining order in effect against the respondent.<sup>60</sup> A temporary restraining order may be issued, but its relief is limited.<sup>61</sup> A respondent may request a judicial hearing to challenge the contents of the HRO petition.<sup>62</sup> The court must find that there are reasonable grounds to believe that the respondent has engaged in harassment to grant the HRO.<sup>63</sup> A HRO will be entered against the respondent if the judge determines harassment occurred.<sup>64</sup> Violation of a HRO is subject to criminal penalties.<sup>65</sup>

### 3. Domestic Abuse No Contact Order

A DANCO is a criminal protection order issued by a judicial court against a criminal defendant.<sup>66</sup> Criminal no contact orders are an effective

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<sup>59</sup> MINN. STAT. § 609.748, subdiv. 3(a) (listing the HRO petition requirements). The petition must allege facts sufficient to establish the identity of the alleged harassment victim (petitioner), of the alleged actor (respondent), and that the respondent has engaged in harassment. *Id.*

<sup>60</sup> *Id.* (stating an additional petition requirement that must be satisfied before an HRO will be issued).

<sup>61</sup> MINN. STAT. § 609.748, subdiv. 4(b) (allowing for a temporary HRO to be issued in limited circumstances). A temporary restraining order is only available if the petition sufficiently alleges an immediate and present danger of harassment. *Id.*

<sup>62</sup> MINN. STAT. § 609.748, subdiv. 5(b) (affording a respondent the opportunity to be heard before a HRO is issued).

<sup>63</sup> MINN. STAT. § 609.748, subdiv. 5(b)(3) (stating when a court may issue a HRO).

<sup>64</sup> *Id.* (noting that the court must find “reasonable grounds to believe that the respondent has engaged in harassment” before issuing a HRO).

<sup>65</sup> MINN. STAT. § 609.748, subdiv. 6 (listing the criminal penalties for violating a HRO). *See* LEAGUE OF MINN. CITIES, *supra* note 54, at \*3 (discussing the consequences of violating a HRO). Minnesota law provides misdemeanor, gross misdemeanor, and felony penalties for violation of a HRO and establishes minimum sentences to be imposed, dependent on the facts and circumstances of the case. *Id.* Unlike OFPs, a violation of a HRO issued pursuant to MINN. STAT. § 609.748 does not create a basis for imposition of a DANCO. *Id.* However, if the HRO is committed against a family or household member and issued pursuant to MINN. STAT. § 609.749, then the court may impose a DANCO against a criminal defendant in a proceeding addressing the HRO violation. MINN. STAT. § 629.75, subdiv. 1(a)(2) (listing violation of a HRO as a basis for issuing a DANCO).

<sup>66</sup> *Ness*, 819 N.W.2d at 223 (differentiating DANCOs from OFPs and HROs). A DANCO “may be issued” at the discretion of the judicial officer. MINN. STAT. 629.75, subdiv. 1(b). *See also* State v. Milner, No. A-12-2137, 2013 WL 6152174, at \*3 (Minn. Ct. App. Nov. 25, 2013) (noting that district courts may exercise discretion in determining when to issue a DANCO because the DANCO statute does not require its issuance). A pretrial DANCO is generally issued at a criminal defendant’s first court appearance. SECOND JUDICIAL DIST. VIOLENCE COORDINATING COUNCIL, GUIDELINES AND PROCEDURES FOR DOMESTIC ABUSE-RELATED CRIMINAL CASES 34 (4th ed. 2013), *available at* [http://www.mncourts.gov/Documents/2/Public/Criminal\\_Court/Guidelines\\_DA\\_Related\\_Cases\\_Crim.pdf](http://www.mncourts.gov/Documents/2/Public/Criminal_Court/Guidelines_DA_Related_Cases_Crim.pdf) (providing guidance to courts in handling domestic abuse-related cases). Judges are encouraged to issue DANCOs “whenever applicable.” *Id.* The order itself is typically filled out before the court hearing by the city or county attorney’s office. *Id.* The order includes the name and identifying

tool to help protect victims of domestic violence while the abuser is in the midst of criminal prosecution.<sup>67</sup> They are designed to prevent individuals who have been arrested for domestic violence-related offenses from contacting their victim.<sup>68</sup> Minnesota has two types of DANCOs: (1) pretrial orders issued prior to final disposition of an underlying criminal matter and (2) post-conviction probationary orders.<sup>69</sup> Regardless of which type of DANCO is being imposed on a criminal defendant, it must be issued in conjunction with a criminal proceeding in which the defendant is being charged with or convicted of a domestic violence-related offense.<sup>70</sup>

In 2010, the Minnesota legislature revised the DANCO statute.<sup>71</sup> The new DANCO statute sought to clarify the original DANCO statute.<sup>72</sup> The

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information of the defendant and victim(s) and addresses of locations where the defendant is prohibited from going. *Id.* at 34, 69. Additionally, the order states that the defendant is prohibited from having contact with the victim and that a violation of the order is a crime and may result in the defendant being arrested and charged with further criminal offenses. *Id.* at 69. The defendant receives a copy of the DANCO after the order is signed by the judge. *Id.* at 34. The DANCO remains in effect until the final disposition of the case unless modified or cancelled by written court order before the final disposition. *Id.* Judges are discouraged from canceling a pretrial DANCO before final disposition of the underlying criminal matter. *Id.* at 35. The court considers the facts of the case, stated wishes of the victim and defendant, defendant's criminal history, current posture of the case, and position of the prosecutor in determining whether to cancel an existing pretrial DANCO. *Id.*

<sup>67</sup> Jennifer G. Long et al., *Model Policy For Prosecutors and Judges on Imposing, Modifying and Lifting Criminal No Contact Orders*, BATTERED WOMEN'S JUST. PROJECT, 2 (Feb. 2010), available at [http://www.bwjp.org/files/bwjp/articles/Prosecutors\\_Model\\_Policy\\_No\\_Contact\\_Orders.pdf](http://www.bwjp.org/files/bwjp/articles/Prosecutors_Model_Policy_No_Contact_Orders.pdf) (discussing the effectiveness of DANCOs in protecting domestic abuse victims). DANCOs are routinely issued in domestic abuse cases; approximately 11,000 DANCOs were issued by Minnesota judges in 2012. Patrick Thornton, *All Sides Watching DANCO Challenge at Minnesota Supreme Court*, MINN. LAW. (Jan. 4, 2013) (noting the significant number of DANCOs issued by Minnesota district courts in 2012).

<sup>68</sup> Long et al., *supra* note 67, at 2 (stating the purpose of issuing a DANCO against a criminal defendant). Prosecutors often seek DANCOs to protect victims from being intimidated or coerced by their abusers during the adjudication process. Thornton, *supra* note 67 (noting the motivations of prosecutors for requesting DANCOs). See also Gunderson, *supra* note 14 (noting that the Clay County prosecutor requests a DANCO in every domestic abuse case to protect domestic abuse victims).

<sup>69</sup> MINN. STAT. § 629.75, subdiv. 1(b) (providing for the issuance of a pretrial DANCO or probationary DANCO).

<sup>70</sup> See MINN. STAT. § 629.75, subdiv. 1(a) (stipulating the types of criminal proceedings that may be the basis for imposing a DANCO). To impose a DANCO, the criminal defendant must be before the court in a proceeding for: (1) domestic abuse, (2) harassment or stalking of a family or household member, (3) an OFP violation, or (4) a prior DANCO violation. *Id.* The DANCO itself is "independent of any condition of pretrial release or probation imposed on the defendant . . . [and] may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation." MINN. STAT. § 629.75, subdiv. 1(b).

<sup>71</sup> Laws of Minnesota for 2010, *supra* note 32 (discussing the changes made to Minnesota's DANCO statute).

<sup>72</sup> *Id.* (stating the Minnesota legislature's purpose for replacing MINN. STAT. § 518B.01, subdiv. 22 with MINN. STAT. § 629.75).

Minnesota legislature also imposed stricter criminal penalties for violation of a DANCO.<sup>73</sup> In 2013, the Minnesota legislature eliminated the knowledge requirement from the statute.<sup>74</sup>

***C. Challenging the Constitutionality of Minnesota’s Domestic Violence Statutes***

Minnesota courts have consistently upheld the constitutionality of Minnesota’s civil domestic violence statutes.<sup>75</sup> The Minnesota Court of Appeals has held that a defendant may not challenge the constitutionality of an OFP or HRO after it has been issued in another judicial proceeding.<sup>76</sup> The court explained that a defendant is estopped from appealing a protective order at a subsequent hearing because he had a prior opportunity to directly appeal the protective order and, hence, the matter was finalized.<sup>77</sup>

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<sup>73</sup> Heim, *supra* note 24, at 958–59 (noting the differences between MINN. STAT. §518B.01, subdiv. 22 and MINN. STAT. § 629.75). The new statute’s language makes it a gross misdemeanor offense to violate a DANCO within ten years of a “previous qualified domestic violence-related offense conviction.” MINN. STAT. § 629.75, subdiv. 2(c). A felony offense occurs when the DANCO violation occurs within ten years of the first of two or more “qualified domestic violence related offense convictions” or if the violation occurs while the violator is in possession of a dangerous weapon. MINN. STAT. § 629.75, subdiv. 2(d).

<sup>74</sup> See Laws of Minnesota for 2013, Chapter 47–H.F. No. 1400, 2013 Leg., 88th Sess., at 4 (Minn. 2013), available at <https://www.revisor.mn.gov/data/revisor/law/2013/0/2013-047.pdf> (indicating the changes made to MINN. STAT. § 629.75 in 2013). As a result, a criminal defendant may be convicted for inadvertently violating the DANCO statute. See LEAGUE OF MINN. CITIES, RISK MANAGEMENT INFORMATION: 2013 LEGISLATIVE UPDATE 2 (2013), available at <http://lmc.org/media/document/1/2013legislativeupdate.pdf?inline=true> (highlighting the changes made to Minnesota’s domestic violence protective order statutes).

<sup>75</sup> Trial Court Memorandum at 6–7, *State v. Ness*, 2012 WL 9082737 (Clay County Feb. 9, 2012) (No. 14–CR–11–815), 2012 WL 9045545 (discussing the viability of constitutional challenges to Minnesota’s OFP and HRO statutes).

<sup>76</sup> *Ness*, 819 N.W.2d at 223 (noting that a defendant may not challenge the issuance of a civil protective order in a subsequent proceeding addressing a violation of the order). In its determination, the Minnesota Court of Appeals relied on the prohibition of a defendant from “collaterally attacking” a protective order after it has been issued. *Id.* A collateral attack is “an attack on a judgment in a proceeding other than a direct appeal.” *Id.* (citing BLACK’S LAW DICTIONARY 298 (9th ed. 2009) (defining “collateral attack”)).

<sup>77</sup> *Id.* (discussing why a defendant may not collaterally attack a civil protective order). A defendant’s right to appeal a civil order is governed by Minn. R. Civ. App. P. 103.03(g). *Id.* (stating that a civil defendant may appeal a final order, decision, or judgment resulting from an administrative or special proceeding to the court of appeals). See *State v. Romine*, 757 N.W.2d 884, 889–90 (Minn. Ct. App. 2008) (holding that a defendant charged with violating an OFP could not collaterally attack the OFP because the defendant had the right to directly appeal the issuance of the OFP, but chose not to); see also *State v. Harrington*, 504 N.W.2d 500, 502–03 (Minn. Ct. App. 1993) (holding that a defendant who failed to appeal the validity of a HRO within the statutory appeal time could not collaterally attack the HRO in a subsequent criminal proceeding in which he was charged with violating the HRO).

A DANCO may be issued as a pretrial order prior to final disposition of an underlying criminal matter or as a post-conviction probationary order.<sup>78</sup> Post-conviction probationary DANCOs may be appealed along with the underlying conviction as a final judgment and order of the court.<sup>79</sup> Pretrial DANCOs, however, are distinguishable from OFPs, HROs, and post-conviction probationary DANCOs because they cannot be directly appealed.<sup>80</sup> A criminal defendant may challenge the issuance of a pretrial DANCO in a subsequent proceeding for violation of that DANCO.<sup>81</sup>

The constitutionality of Minnesota's DANCO statute has been challenged primarily on grounds of violating a criminal defendant's constitutional right to due process of law.<sup>82</sup> A defendant may challenge the constitutionality of a law by either arguing it is invalid on its face (facial challenge) or that the law is unconstitutional as applied to the defendant's

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<sup>78</sup> MINN. STAT. § 629.75, subd. 1(b) (stating the two types of DANCOs a court may issue).

<sup>79</sup> *Ness*, 819 N.W.2d at 224 (noting that a defendant may directly appeal the issuance of a probationary DANCO because probationary DANCOs are issued after the final disposition of the underlying criminal matter). A criminal defendant's right to appeal a criminal order to the court of appeals is governed by Minn. R. Crim. P. 28.02, subdvs. 1–2. *Id.* A criminal defendant may appeal adverse final judgments, sentences, or orders allowing or imposing conditions of release. *Id.*

<sup>80</sup> *Id.* (noting that pretrial DANCOs are an exception to the collateral attack prohibition). DANCOs are not final orders of the court and therefore cannot be appealed pursuant to Minn. R. Crim. P. 28.02. *Id.*

<sup>81</sup> *Ness*, 819 N.W.2d at 224 (discussing why a pretrial DANCO should be treated differently than Minnesota's other protective orders). A defendant in a pretrial DANCO hearing does not have a clear right to immediately appeal the issuance of the pretrial DANCO. *Id.* As a result, the defendant may collaterally attack the issuance of the pretrial DANCO in a subsequent proceeding for violation of that DANCO. *Id.* (distinguishing *Davis v. Danielson*, 558 N.W.2d 286, 288 (Minn. Ct. App. 1997) (holding that a defendant cannot collaterally attack a district court order when the order is directly appealable)).

<sup>82</sup> *See, e.g., State v. Achin*, Nos. A12-0437, A12-438, 2012 WL 4774670 (Minn. Ct. App. Oct. 9, 2012), *stay and review granted*, (Minn. Dec. 18, 2012), *review denied and stay vacated*, (Minn. Sept. 17, 2013) (arguing that MINN. STAT. § 629.75 is unconstitutional because it violates a defendant's due process rights); *State v. Jones*, No. A12-0016, 2012 WL 5381847 (Minn. Ct. App. Nov. 05, 2012), *stay and review granted*, (Minn. Jan. 29, 2013), *review denied and stay vacated*, (Minn. Sept. 17, 2013) (maintaining that MINN. STAT. § 629.75 is unconstitutional because it violates procedural due process, substantive due process, and is unconstitutionally vague); *State v. Minnick*, No. A12-0131, 2012 WL 5381850 (Minn. Ct. App. Nov. 05, 2012), *stay and review granted*, (Minn. Jan. 29, 2013), *review denied and stay vacated*, (Minn. Sept. 17, 2013) (contending that MINN. STAT. § 629.75 violates a defendant's procedural and substantive due process rights). The Minnesota Supreme Court postponed reviewing these cases until after *Ness*. *See State v. Achin*, 2012 Minn. LEXIS 705 (Minn. Dec. 18, 2012) (“[F]urther proceedings are stayed pending final disposition of *State v. Ness* . . . .”); *State v. Jones*, 2013 Minn. LEXIS 56 (Minn. Jan. 29, 2013); *State v. Minnick*, 2013 Minn. LEXIS 55 (Minn. Jan. 29, 2013). The court subsequently denied review of the cases after declaring Minnesota's DANCO statute does not violate a defendant's due process rights in *Ness*. *See State v. Achin*, 2013 Minn. LEXIS 435 (Minn. Sept. 17, 2013) (denying review of the petition); *State v. Jones*, 2013 Minn. LEXIS 442 (Minn. Sept. 17, 2013) (stating that the *Ness* opinion was filed July 24, 2013 and denying review of the petition); *State v. Minnick*, 2013 Minn. LEXIS 434 (Minn. Sept. 17, 2013).

particular circumstances (as-applied challenge).<sup>83</sup> In a facial challenge a defendant must prove no application of the law would be constitutional.<sup>84</sup> In an as-applied challenge, however, a defendant must show that while the law is generally constitutional, it was unconstitutionally applied to the defendant.<sup>85</sup> Facial challenges render the entire law unconstitutional.<sup>86</sup> Conversely, as-applied challenges only render the law unconstitutional concerning that particular defendant's case.<sup>87</sup>

Every defendant is afforded a constitutional right to due process of law.<sup>88</sup> The due process provision of the United States Constitution states "no person shall be deprived of life, liberty, or property without due process of law."<sup>89</sup> Similarly, the due process provision of the Minnesota Constitution provides that "no person shall be held to answer for a criminal offense without due process of law."<sup>90</sup> Both the United States Constitution and Minnesota Constitution require a person receive adequate notice and an opportunity to be heard before being deprived of life, liberty, or property.<sup>91</sup> In determining whether a person's right to procedural due process has been violated, the court must first conclude that a protected liberty is implicated.<sup>92</sup> If a protected liberty is implicated, the court must then determine what process is due by applying a balancing test.<sup>93</sup> While the Minnesota Court of Appeals has ruled that a protected liberty is implicated in a DANCO

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<sup>83</sup> Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657–58 (2010) (discussing the two types of constitutional challenges).

<sup>84</sup> *Id.* at 657 (explaining the defendant's burden in a facial challenge).

<sup>85</sup> *Id.* (distinguishing facial challenges from as-applied challenges).

<sup>86</sup> *Id.* at 658 (advising against the use of facial challenges because they render an entire law unconstitutional).

<sup>87</sup> *Id.* (noting that courts favor as-applied challenges because they allow for some deference to the legislative process).

<sup>88</sup> See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006) (discussing procedural due process of law). The basic requirements of procedural due process are notice and meaningful opportunity to be heard. *Id.*

<sup>89</sup> *Ness*, 819 N.W.2d at 225 (quoting U.S. CONST. amends. VI, XIV § 1).

<sup>90</sup> *Id.* (quoting MINN. CONST. art. I, § 7).

<sup>91</sup> *Id.* (quoting *Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 911 (Minn. Ct. App. 2010)).

<sup>92</sup> *Id.* (describing the analysis a court must undergo in determining whether due process of law has been adequately afforded).

<sup>93</sup> *Id.* (explaining the due process analysis arose out of the United States Supreme Court case, *Mathews v. Eldridge*, 424 U.S. 319 (1976)). In undergoing the analysis, a court must balance:

- (1) the private interest that will be affected by the governmental action;
- (2) the risk of erroneous deprivation of this interest through the procedures used and the probable value of additional or substitute procedural safeguards; and
- (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirements would entail.

*Id.*



proceeding, it has yet to find a case in which the liberty is deprived to such an extent as to render the DANCO statute unconstitutional.<sup>94</sup>

### III. STATEMENT OF THE CASE

In *State v. Ness*, the Minnesota Supreme Court further limited the ability of criminal defendants to challenge the constitutionality of the DANCO statute.<sup>95</sup> The Minnesota Supreme Court held that Minnesota Statute § 629.75 does not facially violate a defendant's right to procedural due process because of the context in which the DANCO is issued.<sup>96</sup> The DANCO statute provides a defendant with constitutionally sufficient due process of law through notice of and opportunity to be heard at the underlying criminal matter's proceeding.<sup>97</sup>

#### A. Factual Background

On January 27, 2011, Bryan Paul Ness was arrested for allegedly assaulting his wife, N.R.N.<sup>98</sup> Ness was ultimately charged with gross misdemeanor child endangerment, gross misdemeanor domestic assault,

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<sup>94</sup> *Ness*, 834 N.W.2d at 228 (applying the *Mathews* balancing test to the facts of *Ness*). The Minnesota Court of Appeals determined that the private interest at stake is the defendant's right to contact a family or household member. *Id.* As a result, this interest and the risk of an erroneous deprivation of it through unfair process must be balanced against the nature of the government's interest. *Id.* The court found that there was a significant enough state interest in protecting the victims of domestic violence and upholding the integrity of the judicial process to warrant upholding the constitutionality of the DANCO statute. *Id.*

<sup>95</sup> *Id.* at 183–86 (explaining the Minnesota Supreme Court's reasoning in rejecting Ness's facial procedural due process challenge).

<sup>96</sup> *Id.* at 182–83 (emphasizing the "immediately following" language of MINN. STAT. § 629.75, subdiv. 1(c)).

<sup>97</sup> *Id.* at 183 n.4 (summarizing the Minnesota Supreme Court's holding). The Minnesota Supreme Court suggested that a defendant may still bring an as-applied constitutional challenge to determine whether that particular defendant received constitutionally sufficient notice of the DANCO prior to its issuance. *Id.* Following *Ness*, the Minnesota Court of Appeals has rejected criminal defendants' contentions that the DANCO statute violates procedural due process. *See, e.g., Milner*, 2013 WL 6152174, at \*3 (rejecting a criminal defendant's procedural due process challenge to the DANCO statute due to the Minnesota Supreme Court's holding in *Ness*). Even so, the Minnesota Court of Appeals has not yet barred as-applied constitutional challenges, noting "*Ness* left open the possibility of as-applied challenges". *Id.* Furthermore, in *Milner*, the Minnesota Court of Appeals questioned whether the district court complied with the DANCO statute in issuing the DANCO against Milner, stating "[t]he record does not clearly reveal that a separate proceeding was held for the purpose of issuing the order." *Id.* at \*3 n.1. The court, however, did not address the potential due process violation because Milner had not raised the issue on appeal. *Id.*

<sup>98</sup> Respondent's Brief and Appendix at \*3–5, *State v. Ness*, 819 N.W.2d 219 (Minn. 2012) (Nos. A12-290, A12-291), 2012 WL 8747569 (describing the events leading to the first DANCO).

gross misdemeanor fifth degree assault, and misdemeanor domestic assault.<sup>99</sup> During the initial hearing, the district court issued a pretrial DANCO (DANCO 1) pursuant to Minnesota Statute § 629.75, subdiv. 1(b), prohibiting Ness from contacting N.R.N. and going near N.R.N.'s place of residence.<sup>100</sup> Ness, present and represented by counsel at the hearing, signed DANCO 1.<sup>101</sup> Ness was also served with a copy of DANCO 1 following the hearing.<sup>102</sup>

Ness and his attorney appeared in court on February 14, 2011, and entered a guilty plea to a misdemeanor domestic assault charge.<sup>103</sup> The court accepted the guilty plea and Ness requested an amendment to DANCO 1 to allow him supervised visits with his children.<sup>104</sup> The court granted Ness's request.<sup>105</sup>

On March 6, 2011, Ness went to N.R.N.'s apartment and refused to leave.<sup>106</sup> Police were called and Ness was arrested and charged with violating DANCO 1.<sup>107</sup> The DANCO 1 violation was enhanced to a felony offense because Ness had two "previous qualified domestic violence related convictions" within the past ten years.<sup>108</sup> On March 7, 2011, Ness appeared before the district court for the DANCO 1 violation.<sup>109</sup> The court issued a new pretrial DANCO (DANCO 2) that prohibited Ness from contacting

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<sup>99</sup> *Id.* at \*5 (listing the criminal offenses Ness was ultimately charged with stemming from the January 27, 2011, incident).

<sup>100</sup> Respondent's Brief and Appendix, *supra* note 98, at \*5 (discussing the scope of the first DANCO). DANCO 1 is the first of four DANCOs ultimately issued in this case. *Id.* at \*5–9. DANCO 2 was issued following Ness's first felony DANCO violation. *Id.* at \*7. DANCO 3 was a probationary DANCO issued at sentencing for the fifth-degree misdemeanor assault. *Id.* at \*7–8. DANCO 4 was issued following Ness's second felony DANCO violation. *Id.* at \*9. Of the four DANCOs, only DANCO 1 and DANCO 2 are the subjects of Ness's due process challenge. *Id.* at \*5, 7.

<sup>101</sup> Respondent's Brief and Appendix, *supra* note 98, \*5 (explaining the circumstances in which DANCO 1 was issued).

<sup>102</sup> *Id.* (mentioning that Ness received a copy of DANCO 1).

<sup>103</sup> *Id.* (stating Ness pleaded guilty to a misdemeanor domestic violence-related offense).

<sup>104</sup> Respondent's Brief and Appendix, *supra* note 98, at \*5–6 (discussing Ness's request for modification of DANCO 1).

<sup>105</sup> *Id.* (noting the court did modify DANCO 1). In granting the request the court reminded Ness not to have any contact with N.R.N. and that any further contact would result in a new charge for violating the DANCO. *Id.*

<sup>106</sup> *Id.* at \*6 (describing the events leading to the first DANCO violation).

<sup>107</sup> *Id.* at \*6–7 (establishing Ness's arrest for violating DANCO 1).

<sup>108</sup> Respondent's Brief and Appendix, *supra* note 98, at \*6–7 (discussing why Ness's DANCO violation was enhanced to a felony-level offense). In addition to the guilty plea to domestic assault on February 14, 2011, Ness had a prior conviction for fifth-degree assault in 2009. *Id.* at \*7. Qualified domestic violence-related offenses (QDVROs) include: "first and second-degree murder; assault; domestic assault; criminal sexual conduct; malicious punishment of a child; stalking; interference with an emergency call; terroristic threats; and violating an existing order for protection, *ex parte* order for protection, HRO, or domestic abuse no contact order." MINN. STAT. § 609.02, subdiv. 16 (2013).

<sup>109</sup> Respondent's Brief and Appendix, *supra* note 98, at \*7 (mentioning Ness was present at the judicial hearing for the first DANCO violation).

N.R.N. and restricted him from going to N.R.N.'s residence.<sup>110</sup> Ness was personally served with the new order and signed it.<sup>111</sup> On November 23, 2011, Ness once again appeared at N.R.N.'s apartment and refused to leave.<sup>112</sup> Police arrested Ness and he was charged with a felony violation of a DANCO and gross misdemeanor obstructing legal process.<sup>113</sup>

### ***B. Procedural Background***

In January 2012, Ness filed a motion with the Clay County District Court to dismiss the felony DANCO violation charges.<sup>114</sup> Ness argued that Minnesota Statute § 629.75 is facially unconstitutional because it violates a criminal defendant's right to procedural due process under the United States and Minnesota Constitutions.<sup>115</sup> The district court agreed, holding that the DANCO statute is unconstitutional on due-process grounds.<sup>116</sup> The district court emphasized the lack of effective procedural options available to criminal defendants for contesting the issuance of a DANCO.<sup>117</sup> Furthermore, the district court criticized the lack of legislative guidance or

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<sup>110</sup> *Id.* (noting the scope of the second DANCO). On April 4, 2011, the district court modified DANCO 2 to allow Ness to have telephone contact with N.R.N., and Ness signed the modified order. *Id.*

<sup>111</sup> *Id.* (stating Ness received a copy of DANCO 2 after the judicial hearing).

<sup>112</sup> *Id.* at \*8–9 (describing the events leading to the second DANCO violation).

<sup>113</sup> *Id.* at \*9 (noting the criminal offenses Ness was charged with as a result of the November 23, 2011, incident). The new felony DANCO violation charge was based on Ness's violation of DANCO 2. *Id.* During the arrest, Ness refused to cooperate with police orders and was ultimately charged with obstruction of legal process. *Id.*

<sup>114</sup> *Ness*, 819 N.W.2d at 222 (stating that Ness filed a motion to dismiss the DANCO violation charges prior to the court trial scheduled to address them).

<sup>115</sup> Trial Court Memorandum, *supra* note 75, at 8 (discussing Ness's arguments). Ness argued that the DANCO statute does not provide adequate notice and opportunity to be heard and is unconstitutionally vague. *Id.* A criminal statute violates the void-for-vagueness doctrine "(1) if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute; or (2) if it authorizes or encourages arbitrary and discriminatory enforcement." *Ness*, 819 N.W.2d at 228. At issue in *Ness* was the second type of vagueness, arbitrary and discriminatory enforcement. Trial Court Memorandum, *supra* note 75, at 11.

<sup>116</sup> Trial Court Memorandum, *supra* note 75, at 13 (explaining the district court's reasoning). The district court first determined that Ness may challenge the constitutionality of the DANCO statute in a subsequent proceeding because MINN. STAT. § 629.75 implicates a protected liberty and may be distinguished from Minnesota's OFP and HRO statutes. *See supra* notes 80–81 (discussing the ability of a criminal defendant charged with a pretrial DANCO violation to collaterally attack it in a subsequent criminal proceeding).

<sup>117</sup> Trial Court Memorandum, *supra* note 75, at 9–10 (stressing a defendant's lack of advance notice and opportunity to prepare for the DANCO hearing as evidence of the ineffective process provided for under the DANCO statute). The district court noted that a defendant may or may not be represented by counsel at the pretrial release hearing or have the ability or opportunity to review the petition prior to the DANCO hearing. *Id.* at 9. Furthermore, MINN. STAT. § 629.75, subdvs. 1(b), (c) do not establish a burden of proof for the DANCO proceeding. *Id.*

standards for district courts in issuing a DANCO.<sup>118</sup> The district court determined that the absence of standards or restrictions rendered the statute unconstitutionally vague.<sup>119</sup>

The State appealed the district court's holding to the Minnesota Court of Appeals.<sup>120</sup> The Minnesota Court of Appeals upheld the district court's allowance of the collateral attack, but it reversed the district court's determination that the DANCO statute is unconstitutional.<sup>121</sup> The court found that while there is the possibility a defendant may be erroneously deprived of a constitutionally protected right pending trial, that risk is minimal and justified.<sup>122</sup> The court also determined that the DANCO statute provides a

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<sup>118</sup> *Id.* at 10–11 (observing that MINN. STAT. § 629.75 fails to provide any legislative guidance or standards for a district court to apply when determining whether to issue a DANCO). The DANCO statute defines what a DANCO is and explains in what types of cases a DANCO may be issued. *Id.* at 11. The district court compared the DANCO statute with Minnesota's OFP and HRO statutes. *Id.* at 12. The court noted that both the OFP and HRO statutes contain extensive procedural requirements and guidance, such as: (1) explicitly stating who may petition the court for relief; (2) listing what must be alleged in the petition; (3) providing notice and service requirements; (4) describing under what circumstances a hearing takes place; (5) stating what relief may be provided by the court; and (6) providing the procedures for extending, modifying, or vacating an order. *Id.* The district court stated that the lack of legislative guidance allowed courts "absolute and unfettered discretion in determining when to issue a DANCO." *Id.* at 13. The district court feared such unfettered judicial discretion would "create a great danger that the statute will be applied arbitrarily and inconsistently." *Id.* See also MINN. COAL. FOR BATTERED WOMEN, *supra* note 14; Thornton, *supra* note 67 (noting there has been no uniform application of the DANCO statute by district courts).

<sup>119</sup> Trial Court Memorandum, *supra* note 75, at 13 (finding the DANCO statute void-for-vagueness). The district court rejected the State's argument that a court can judicially fix procedural defects in a statute to remedy any unconstitutional vagueness. *Id.* at 9–10. The State relied on *State v. Coleman*, 731 N.W.2d 531 (Minn. Ct. App. 2007), which held an enhanced sentencing statute constitutional even though the statute lacked specific procedural guidance because a court could adequately protect defendants' rights through "unique judiciary functions." *Id.* at 10. The court distinguished *Coleman* from *Ness*, noting that a court cannot impose limitations on discretion that do not appear on the face of the statute. *Id.* (citing *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985) (holding that courts cannot cure a statute of vagueness by "imposing *post facto* limitations where no such restraints appear on the face of the legislation")).

<sup>120</sup> *Ness*, 819 N.W.2d at 221 (noting the procedural posture of the case).

<sup>121</sup> *Id.* at 230 (discussing the Minnesota Court of Appeals' holding). The Minnesota Court of Appeals agreed with the district court that pretrial DANCOs are not final court orders and therefore do not provide criminal defendants a clear right to appeal the issuance of the DANCO. *Id.* at 224. See *supra* text accompanying note 80 (distinguishing pretrial DANCOs from OFPs and HROs). The Minnesota Court of Appeals did not declare the DANCO statute unconstitutional because criminal defendants are afforded some due process when courts issue DANCOs pursuant to the DANCO statute. *Id.* at 226.

<sup>122</sup> *Ness*, 819 N.W.2d at 228 (rejecting *Ness*'s argument that the DANCO statute violates a defendant's constitutional rights). See *supra* notes 93–94 and accompanying text (discussing the Minnesota Court of Appeals' application of the *Mathews* balancing test to the facts of *Ness*). The Minnesota Court of Appeals noted that the state's significant interest in protecting the victims of domestic violence and upholding the integrity of the judicial process justifies any risk of violating a defendant's right to contact family or household members. *Ness*, 819 N.W.2d at 226, 228. The Minnesota Court of Appeals concluded that sufficient

defendant with adequate notice and an opportunity to be heard.<sup>123</sup> The court noted that while the DANCO statute itself does not contain a notice provision, adequate notice is provided through notice of the underlying criminal charge.<sup>124</sup> Further, the DANCO statute provides some safeguards ensuring defendants are not erroneously deprived of a meaningful opportunity to be heard.<sup>125</sup> Finally, the Minnesota Court of Appeals determined that, while it is true Minnesota Statute § 629.75 does not explicitly set forth the factors the district court should consider in deciding whether to issue a DANCO, the absence of those factors alone is not enough to invalidate the DANCO statute.<sup>126</sup> The court reasoned that a judge's discretion in issuing a DANCO is sufficiently limited because there must be

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safeguards exist to ensure that defendants are not erroneously deprived of their constitutional liberties. *Id.* at 227. Specifically, the court emphasized the requirement that, in order for a district court to issue a DANCO, it must first find sufficient probable cause exists regarding the underlying criminal charge. *Id.*

<sup>123</sup> *Ness*, 819 N.W.2d at 225–28 (referring to the concept of procedural due process as flexible) (citing *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 320 (Minn. Ct. App. 2005)). The degree of notice required is determined on a case-by-case basis. *Id.* at 226 (citing *Comm'r of Natural Res. v. Nicollet Cnty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001), *review denied* (Minn. Nov. 13, 2001)).

<sup>124</sup> *Ness*, 819 N.W.2d at 226 (determining that the DANCO statute provides adequate due process in conjunction with other statutory provisions and safeguards). A DANCO is issued in connection with a criminal proceeding. *Id.* Defendants are provided notice of the underlying criminal charge when the defendant is served with a copy of the complaint. *Id.* The Minnesota Court of Appeals maintained that by receiving notice of the criminal proceeding from which the DANCO is issued, the defendant receives notice of the DANCO because MINN. STAT. § 629.75 specifies with what charges a DANCO may be issued in connection. *Id.*

<sup>125</sup> *Id.* at 227 (noting that due process requires “some form of a hearing” be provided for by the challenged statute to ensure an individual is not deprived of a protected interest) (citing *Mathews*, 424 U.S. at 333). The DANCO statute states that a DANCO “shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided.” MINN. STAT. § 629.75, subdiv. 1(c). By providing for such a proceeding separate from the underlying criminal pretrial hearing, a defendant is provided a meaningful opportunity to challenge the validity of the DANCO. *Ness*, 819 N.W.2d at 227. Furthermore, a defendant may request the court modify or lift the DANCO at a subsequent proceeding. *Id.* at 228. Further, Minnesota case law does not afford criminal defendants the same degree of procedural safeguards at a pretrial hearing as they would receive at a trial. *Id.* at 227 (citing *State v. Rud*, 359 N.W.2d 573, 577 (Minn. 1984)). The Minnesota Court of Appeals concluded that a criminal defendant at a pretrial proceeding, separate from the pretrial hearing, is entitled to “even fewer adversarial safeguards.” *Id.*

<sup>126</sup> *Ness*, 819 N.W.2d at 229 (reversing the district court's holding that the DANCO statute is impermissibly vague). The Minnesota Court of Appeals had previously held that a statute is not void for vagueness when the state is required to show the offense was committed within the definition of the crime charged. *Id.* at 229 (discussing *In re Welfare of K.C.*, 513 N.W.2d 18, 21–22 (Minn. Ct. App. 1994)). The Minnesota Court of Appeals determined that the DANCO statute is not unconstitutionally vague because it requires the DANCO be issued following the underlying criminal charge's hearing, at which the state must prove probable cause. *Id.* at 230.

an underlying, qualified criminal offense before a court can issue a DANCO.<sup>127</sup>

### C. Reasoning of the Court

The Minnesota Supreme Court granted certiorari to hear Ness's case.<sup>128</sup> The only issue before the court was whether Minnesota Statute § 629.75 is facially unconstitutional on due process grounds.<sup>129</sup> The court noted that the challenger bears the burden of proving that the legislation is unconstitutional in all applications in a facial challenge.<sup>130</sup> The court determined that Ness did not meet his burden in establishing that Minnesota Statute § 629.75 fails to provide adequate notice and opportunity to be heard every time a DANCO is issued.<sup>131</sup> As a result, the court found that the

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<sup>127</sup> *Id.* at 229 (noting the DANCO statute sufficiently limits a district court judge's discretion because it requires a specific type of criminal proceeding already be underway in order for a DANCO to be issued). The Minnesota Court of Appeals observed that when setting terms of conditional release, courts are already looking to the factors contained in Minn. R. Crim. P. 6.02, subdiv. 2 for guidance in determining whether to issue a DANCO. *Id.* These factors include "the facts surrounding the arrest, the weight of the evidence against the defendant, the defendant's record of convictions, the seriousness of the offense, the threat posed by contact with the alleged victim, and the preferences of the alleged victim." *Id.* at 229–30. Additionally, the Minnesota Court of Appeals stated that a defendant is not estopped from challenging the issuance of the DANCO at his initial appearance or at a subsequent proceeding. *Id.* at 230.

<sup>128</sup> *Ness*, 834 N.W.2d at 181 (stating the procedural posture of the case).

<sup>129</sup> *Id.* (noting the issues before the court for review). The Minnesota Supreme Court considered whether on its face the DANCO statute: "(1) always fails to provide adequate notice and opportunity to be heard or (2) encourages arbitrary and discriminatory enforcement." *Id.* The State did not challenge the Minnesota Court of Appeals' holding that Ness could collaterally challenge the constitutionality of MINN. STAT. § 629.75, subdiv. 1. *Id.*

<sup>130</sup> *Id.* at 182 (stating that in a facial challenge the defendant must establish that no set of circumstances exists under which the statute would be valid) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Courts rarely declare laws unconstitutional, exercising their power to do so "with extreme caution and only when absolutely necessary." *Id.* (citing *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989)). A facial challenge is the most difficult challenge to successfully assert, making the challenger's burden especially difficult to establish. *Id.* (citing *Salerno*, 481 U.S. at 745).

<sup>131</sup> *Id.* at 183 (analyzing the three subparts of MINN. STAT. § 629.75, subdiv. 1 and determining that the statute does provide for adequate notice and opportunity to be heard). Ness's facial challenge to the DANCO statute could not overcome its heavy burden because the court determined due process was afforded in at least one circumstance. *Id.* The Minnesota Supreme Court compared *Ness* to *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013). *Ness*, 834 N.W.2d at 183. In *McCaughtry*, the Minnesota Supreme Court rejected a defendant's facial challenge to a city ordinance because the ordinance, on its face, provided for judicial discretion in issuing the administrative warrant. *McCaughtry*, 831 N.W.2d at 524. The court concluded that like the ordinance statute in *McCaughtry*, MINN. STAT. § 629.75 provides, on its face, for a subsequent judicial proceeding during which the district court judge may exercise his or her discretion in determining whether to issue the DANCO. *Ness*, 834 N.W.2d at 183. The Minnesota Supreme Court emphasized that it is the "immediately following" requirement of MINN. STAT. § 629.75 that ensures a defendant receives "notice of the conditions to be imposed and an opportunity to challenge those

DANCO statute could not be held to be procedurally inadequate.<sup>132</sup> The Minnesota Supreme Court further determined that Ness failed to establish that Minnesota Statute § 629.75 is unconstitutionally vague because the statute does not encourage arbitrary and discriminatory enforcement.<sup>133</sup> The court noted that while the United States Supreme Court has recognized that laws must provide explicit standards for application to prevent arbitrary and discriminatory enforcement, broad grants of discretion are common and the lack of factors alone does not render the statute unconstitutionally vague.<sup>134</sup>

#### IV. ANALYSIS

District courts need guidance in determining when and how DANCOs should be issued.<sup>135</sup> *Ness* establishes troubling precedent for criminal defendants by essentially eliminating facial challenges to procedural due process as a viable basis to challenge the constitutionality of Minnesota

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conditions in a constitutionally sufficient proceeding immediately before the court imposes a [DANCO].” *Id.*

<sup>132</sup> *Id.* at 182 (explaining that if the statute can be constitutionally applied in one set of facts, it is “inappropriate to speculate regarding other hypothetical circumstances that might arise”) (citing *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 694 (Minn. 2009)).

<sup>133</sup> *Id.* at 184–85 (noting that MINN. STAT. § 629.75 does, on its face, limit a judge’s discretion in issuing DANCOs). The Minnesota Supreme Court determined that, like the OFP and HRO statutes, the DANCO statute provided for sufficient judicial checks to ensure constitutionality. *Id.* For instance, under the terms of MINN. STAT. § 629.75, subdiv. 1(a), a judge may only issue a DANCO to a limited class of individuals. *Id.* at 185. Additionally, subdiv. 1(b) places restrictions on the form of a DANCO and requires a hearing be held. *Id.* Further, subdiv. 1(c) places limitations on when a DANCO may be issued. *Id.* These requirements, coupled with Minn. R. Crim. P. 6.02, act as checks on a court’s authority, ensuring that DANCOs are limited to cases in which:

- (1) the court has made a preliminary finding that there is probable cause to believe that the defendant has committed one of the enumerated offenses,
- (2) the court has considered whether a no contact order is necessary for the safety of the victim or other persons, and
- (3) the court has issued a written order setting forth the conditions of release.

*Id.*

<sup>134</sup> *Ness*, 834 N.W.2d at 184 (stating that a legislature must establish minimal guidelines to govern enforcement of its law in order for the law to avoid being struck down on vagueness grounds) (citing *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999)). A vague law “impermissibly delegates basic policy matters to . . . judges and juries for resolution . . . on a subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* (quoting *In re S.L.J.*, 263 N.W.2d 412, 417 (Minn. 1978) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972))). As a result, laws must provide administrative and judicial bodies with explicit standards regarding their application to prevent arbitrary and discriminatory enforcement. *Id.* The Minnesota Supreme Court notes that broad grants of power are nevertheless common and are sufficiently limited by judicial discretion. *Id.* Judicial discretion is further limited by the principle that “all acts of judicial discretion require ‘conscientious judgment, not arbitrary action.’” *Id.* (quoting *State v. Cottew*, 746 N.W.2d 632, 638 (Minn. 2008)).

<sup>135</sup> See *supra* note 118 and accompanying text (noting the lack of judicial uniformity in interpreting Minnesota’s DANCO statute).

Statute § 629.75.<sup>136</sup> Minnesota's DANCO statute itself fails to provide courts with detailed enough procedural standards and judicial restrictions to render the statute wholly valid.<sup>137</sup> Criminal defendants' constitutionally-protected liberties will continue to be restricted and infringed upon without further legislative guidance.<sup>138</sup>

***A. Some, But Not All, DANCO Proceedings Will Afford Effective Procedural Due Process***

Despite the Minnesota courts' belief that the DANCO statute sufficiently protects criminal defendants' rights, not all criminal defendants receive sufficient procedural due process prior to the issuance of a DANCO.<sup>139</sup> Criminal defendants' procedural due process rights are only upheld when the DANCO is imposed immediately following a pretrial hearing that provides constitutionally sufficient notice and an opportunity to be heard.<sup>140</sup> The initial hearing for the underlying criminal matter must afford a criminal defendant the opportunity to meaningfully participate in the hearing in order to pass constitutional muster.<sup>141</sup> In principle, Minnesota's DANCO statute is constitutional on its face because a criminal defendant is theoretically provided notice and an opportunity to be heard at the hearing regarding the underlying criminal matter.<sup>142</sup> *Ness* essentially forecloses any opportunity for criminal defendants to successfully bring facial challenges against Minnesota Statute § 629.75, subdiv. 1.<sup>143</sup> Nonetheless, the DANCO statute can still be challenged on an as-applied basis.<sup>144</sup>

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<sup>136</sup> See *supra* notes 129–132 and accompanying text (discussing the Minnesota Supreme Court's holding in *Ness*); see also *supra* note 82 (noting the negative impact of the Minnesota Supreme Court's decision in *Ness* on subsequent appeals challenging the constitutionality of MINN. STAT. § 629.75 on due process grounds).

<sup>137</sup> See *supra* notes 133–134 and accompanying text (discussing the void-for-vagueness doctrine).

<sup>138</sup> See *supra* notes 93–94 and accompanying text (providing the Minnesota Court of Appeals' analysis of the *Mathews* balancing test).

<sup>139</sup> See *supra* note 97 and accompanying text (providing an example of when a DANCO may not have been issued in a separate proceeding, thereby potentially violating a defendant's right to due process); see also *supra* note 118 and accompanying text (noting the lack of judicial uniformity in DANCO enforcement).

<sup>140</sup> See *supra* text accompanying notes 130–132 (discussing the Minnesota Supreme Court's holding that *Ness* failed to meet his burden in proving that the DANCO statute is unconstitutional in all applications as required by a facial challenge).

<sup>141</sup> See *supra* note 125 and accompanying text (exploring the statutorily provided protections in the DANCO statute).

<sup>142</sup> See *supra* notes 129–132 (describing the difficulties parties face in raising a facial challenge under the Minnesota Supreme Court's analysis).

<sup>143</sup> See *supra* text accompanying notes 129–132 (providing the Minnesota Supreme Court's holding in *Ness*).

<sup>144</sup> See *supra* notes 83–87 and accompanying text (discussing the facial and as-applied constitutional challenges).



***1. Circumstances Affording Constitutionally Sufficient Procedural Due Process Are Few and Far Between***

The Minnesota Supreme Court's decision to uphold the DANCO statute as constitutional is the result of a tortured analysis, because the court did not limit its analysis solely to the DANCO statute.<sup>145</sup> Generally, a defendant rarely succeeds on a facial challenge due to the onerous burden imposed by the courts, as evidenced by the *Ness* case.<sup>146</sup> In *Ness*, the Minnesota Supreme Court created a theoretical circumstance in which a defendant's procedural due process rights are satisfied by focusing on the rare occasion when a DANCO is issued immediately following a pretrial hearing.<sup>147</sup> In doing so, the Minnesota Supreme Court constructed its own tangential interpretation of the DANCO statute.<sup>148</sup> The court's interpretation relies too heavily on other judicial rules and statutory provisions to ensure that constitutionally sufficient due process is provided to a defendant in a DANCO proceeding.<sup>149</sup>

To render the statute constitutional, the Minnesota Supreme Court was required to supplement the language of Minnesota Statute § 629.75 with other statutory language because the DANCO statute itself does not include a stand-alone notice provision.<sup>150</sup> On its face, the statute provides for a theoretically separate proceeding to occur "immediately following" the conclusion of pretrial proceedings for the underlying criminal matter.<sup>151</sup> Reconstruction of statutes should not be the primary basis for rejecting a defendant's constitutional challenge; courts should judge the constitutionality of a law on the language stated in that law and not on other related or implicated laws.<sup>152</sup> Still, the Minnesota Supreme Court did loosely construct

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<sup>145</sup> See *supra* text accompanying note 97 (noting that the Minnesota Supreme Court suggested a defendant could still bring an as-applied constitutional challenge to determine whether that particular defendant received constitutionally sufficient notice of the DANCO prior to its issuance).

<sup>146</sup> See *supra* notes 130–131 and accompanying text (explaining that the facial challenge is the most difficult challenge to successfully assert).

<sup>147</sup> See *supra* note 129–130 (discussing the *Salerno* test for facial challenges).

<sup>148</sup> See *supra* note 133 (coupling MINN. STAT. § 629.75, subdiv. 1, with Minn. R. Crim. P. 6.02 to establish procedural due process).

<sup>149</sup> See *supra* notes 127, 133 (noting that the Minnesota Supreme Court relied on the context in which a DANCO is issued in determining whether the DANCO statute affords notice and an opportunity to be heard).

<sup>150</sup> See *supra* note 124 and accompanying text (describing the circumstances in which a DANCO is issued and noting that the Minnesota Court of Appeals maintained that the defendant received notice of the DANCO by receiving notice of the criminal proceeding).

<sup>151</sup> See *supra* note 125 and accompanying text (stating that the DANCO statute provides that a DANCO "shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided").

<sup>152</sup> See *supra* note 132 and accompanying text (noting that the Minnesota Supreme Court held that the DANCO could not be held procedurally invalid because it could be

a circumstance in which a defendant's procedural due process rights are not inappropriately restricted.<sup>153</sup> As a result, the Minnesota Supreme Court's holding that Minnesota Statute § 629.75, subdiv. 1 is facially constitutional was proper.<sup>154</sup>

## ***2. The DANCO Statute May Be Successfully Challenged Under the As-Applied Doctrine***

Criminal defendants will not be successful in facially challenging Minnesota Statute § 629.75 after *Ness*.<sup>155</sup> Nevertheless, defendants should still challenge its constitutionality by asserting that the statute was unconstitutionally applied to their particular case.<sup>156</sup> Such challenges will provide courts with the opportunity to establish judicial guidance on when and how a court should issue a DANCO.<sup>157</sup>

*Ness* does not provide controlling precedent for future as-applied challenges against the DANCO statute, because *Ness*'s circumstances are not typical of all DANCO cases.<sup>158</sup> *Ness* received constitutionally sufficient due process because he was afforded a meaningful opportunity to challenge the charges levied against him.<sup>159</sup> Unlike many criminal defendants, *Ness* received the assistance of legal counsel throughout the adjudication process (providing him the opportunity to understand the charges against him) and was warned of the criminal consequences of violating a DANCO.<sup>160</sup> Furthermore, *Ness*'s procedural due process rights were protected because the district court properly conducted the hearings related to the underlying criminal matters and properly issued the DANCOs.<sup>161</sup> Specifically, the trial court issued the DANCOs in relation to, but separate from, the conditions of

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constitutionally applied in one set of facts; therefore, it is "inappropriate to speculate regarding other hypothetical circumstances that might arise").

<sup>153</sup> See *supra* notes 129–133 and accompanying text (describing the Minnesota Supreme Court's analysis of *Ness*'s facial challenge to the DANCO statute).

<sup>154</sup> See *supra* text accompanying note 131 (discussing the Minnesota Supreme Court's holding that the DANCO statute was facially constitutional).

<sup>155</sup> See *supra* notes 129–133 and accompanying text (analyzing the Minnesota Supreme Court's discussion of the facial constitutionality and void-for-vagueness of the DANCO statute).

<sup>156</sup> See *supra* note 97 and accompanying text (noting that a defendant may still bring an as-applied due process constitutional challenge against MINN. STAT. § 629.75).

<sup>157</sup> See *supra* notes 67, 118 (stating the purpose of issuing a DANCO against a criminal defendant, but noting the lack of judicial uniformity in DANCO enforcement).

<sup>158</sup> See *supra* text accompanying notes 101–113 (providing the facts of *Ness*).

<sup>159</sup> See *supra* text accompanying notes 101–103; see also *supra* text accompanying notes 109–111 (noting that *Ness* was represented by legal counsel at his hearings and was given several warnings from the judge overseeing his case).

<sup>160</sup> See *supra* text accompanying notes 101–103, 105 (describing *Ness*'s legal counsel's representation during the hearings).

<sup>161</sup> See *supra* notes 127, 133 and accompanying text (discussing the Minnesota Court of Appeals' and the Minnesota Supreme Court's holdings that there were sufficient limits on a judge's discretion in issuing a DANCO).

release and warned Ness on the record that any violation of the DANCOS may result in further criminal charges.<sup>162</sup> Moreover, Ness's decision to exercise additional rights afforded to him under Minnesota law by successfully petitioning the court to modify his DANCOS further evidences that Ness received due process of law.<sup>163</sup>

The facts of *Ness*, however, are unique and are not representative of all DANCO adjudications.<sup>164</sup> Criminal defendants are often confused, ill-informed, and disorientated during the initial pretrial proceedings.<sup>165</sup> Although Ness received explicit notice of his DANCOS, most defendants do not receive such notice prior to the issuance of the DANCO.<sup>166</sup> Similarly, defendants may or may not be represented by legal counsel during their pretrial hearings.<sup>167</sup> As a result, *pro se* criminal defendants are not afforded the same opportunities to understand the charges against them or the consequences for violating a DANCO.<sup>168</sup>

Additionally, the timeframe for the DANCO hearing provided for under the DANCO statute does not afford criminal defendants sufficient time to respond to the DANCO request.<sup>169</sup> Defendants are not afforded meaningful opportunities to review the orders, subpoena witnesses, or gather evidence to present in their defense by holding the DANCO proceeding "immediately after" the underlying criminal matter's pretrial hearing.<sup>170</sup>

Lack of explicit notice, legal counsel, and meaningful opportunities to respond to DANCO requests do not provide constitutionally sufficient procedural due process.<sup>171</sup> As a result, individual defendants subjected to

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<sup>162</sup> See *supra* notes 101, 105, 110 and accompanying text (noting the circumstances in which the DANCOS were issued).

<sup>163</sup> See *supra* text accompanying note 104; see also *supra* note 125 and accompanying text (discussing the various instances in which Ness exercised his right to modify his DANCOS).

<sup>164</sup> See *supra* note 117 and accompanying text (noting the district court's finding that a defendant may or may not be represented by counsel at the pretrial release hearing or have the ability or opportunity to review the petition prior to the DANCO hearing).

<sup>165</sup> See *supra* text accompanying notes 4–6 (describing the judicial process from a defendant's point of view).

<sup>166</sup> See *supra* note 117 and accompanying text (stating that a defendant's lack of advance notice and opportunity to prepare for the DANCO hearing could be seen as evidence of the ineffective process provided for under the DANCO statute).

<sup>167</sup> See *supra* note 117 and accompanying text (noting not all criminal defendants are represented by legal counsel during a pretrial hearing).

<sup>168</sup> See *supra* notes 117–118 and accompanying text (discussing the various difficulties enumerated by the district court that defendants face in a DANCO hearing).

<sup>169</sup> See *supra* notes 117, 125 and accompanying text (stating that a DANCO "shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided" which may not afford the defendant enough time to prepare for the hearing or seek legal counsel).

<sup>170</sup> See *supra* note 117 and accompanying text (noting the lack of process afforded criminal defendants with regard to the DANCO hearing).

<sup>171</sup> See *supra* notes 117, 125 and accompanying text (discussing the various reasons an "immediate hearing" may not provide adequate constitutional protections for defendants in DANCO hearings).

these circumstances should seek redress in an as-applied challenge to the constitutionality of Minnesota Statute § 629.75, subdiv. 1.<sup>172</sup> The reviewing court would then be able to consider the particular facts of the case rather than merely relying on statutory language and interpretation.<sup>173</sup> As a result, the court may find the DANCO statute unconstitutional as applied to the individual defendant and, therefore, excise the DANCO and its violations from the defendant's criminal record.<sup>174</sup> Holding the DANCO statute narrowly unconstitutional in certain instances will provide district courts with persuasive case law that can be looked to in determining the proper judicial procedure for issuing a DANCO.<sup>175</sup>

***B. The Standard for Determining Vagueness Is Too Strictly Interpreted by Courts***

The Minnesota Supreme Court interpreted the void-for-vagueness doctrine too strictly in *Ness*, because broad grants of judicial power are impermissibly vague and therefore violate principles of due process.<sup>176</sup> Minnesota Statute § 629.75 fails to provide adequate standards and restrictions on its application because it does not contain explicit provisions governing how the statute should be interpreted.<sup>177</sup> As a result, the DANCO statute unjustly encroaches upon defendants' constitutionally protected liberties.<sup>178</sup> Additional safeguards are needed in order to protect criminal defendants' liberties from arbitrary and discriminatory enforcement of the law.<sup>179</sup>

The Minnesota Supreme Court glossed over the issue of vagueness in *Ness*, relying on the statute's "immediately following" language and

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<sup>172</sup> See *supra* text accompanying notes 83–87 (discussing the differences between facial and as-applied constitutional challenges).

<sup>173</sup> See *supra* text accompanying note 85 (stating that in an as-applied challenge a defendant must show that a generally constitutional law was unconstitutionally applied to the defendant).

<sup>174</sup> See *supra* text accompanying note 87 (noting that as-applied challenges only render the law unconstitutional concerning that particular defendant's case).

<sup>175</sup> See *supra* text accompanying note 97 (providing that the Minnesota Supreme Court suggested a defendant may still bring an as-applied constitutional challenge to determine whether that particular defendant received constitutionally sufficient notice of the DANCO prior to its issuance).

<sup>176</sup> See *supra* notes 133–134 and accompanying text (providing the Minnesota Supreme Court's discussion of the void-for-vagueness doctrine in *Ness*).

<sup>177</sup> See *supra* note 118 and accompanying text (noting the lack of judicial uniformity in interpreting Minnesota's DANCO statute).

<sup>178</sup> See *supra* notes 117, 125 and accompanying text (discussing the various reasons why an "immediate hearing" may not provide adequate constitutional protections for defendants in DANCO hearings).

<sup>179</sup> See *supra* notes 117–119 and accompanying text (providing the district court's reasoning for finding that the DANCO statute was unconstitutional).

supplementing it with additional Minnesota procedural rules.<sup>180</sup> In doing so, the Minnesota Supreme Court merely reiterated the language of the DANCO statute rather than explaining how the DANCO statute itself affords due process of law.<sup>181</sup> Minnesota Statute § 629.75 must contain explicit standards independent of other procedures and standards in order to avoid being held unconstitutionally vague.<sup>182</sup>

Courts should not be permitted to reconstruct statutes and superimpose limitations that do not exist on the face of the statute.<sup>183</sup> Courts ought to interpret the statute as it is written when assessing vagueness.<sup>184</sup> To be valid, the DANCO statute itself must include guidelines directing courts when and how to correctly apply the statute.<sup>185</sup>

The Minnesota Supreme Court incorrectly held that the DANCO statute facially limits a judge's discretion in issuing a DANCO.<sup>186</sup> The limitations provided in Minnesota Statute § 629.75, subdiv. 1 do not go far enough to adequately reign in judicial discretion, because those limitations do not effectively prevent arbitrary and discriminatory enforcement.<sup>187</sup> The lack of uniformity among Minnesota's district courts further evidences the DANCO statute's ambiguous language and sweeping grant of unchecked judicial authority.<sup>188</sup> The DANCO statute fails the void-for-vagueness test because it does not facially provide enough limitations on judicial discretion.<sup>189</sup>

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<sup>180</sup> See *supra* text accompanying notes 133–134 (describing the Minnesota Supreme Court's discussion of the void-for-vagueness doctrine in *Ness*).

<sup>181</sup> See *supra* note 134 and accompanying text (discussing the Minnesota Supreme Court's finding that the Legislature commonly gives broad grants of power to administrative and judicial branches that are sufficiently limited by judicial discretion).

<sup>182</sup> See *supra* note 118 and accompanying text (observing that MINN. STAT. § 629.75 fails to provide any legislative guidance or standards for a district court to apply when determining whether to issue a DANCO).

<sup>183</sup> See *supra* note 134 and accompanying text (providing the Minnesota Supreme Court's finding that judicial discretion suffices to provide limitations that may not exist within the statute).

<sup>184</sup> See *supra* notes 127, 132 and accompanying text (noting that the Minnesota Supreme Court held that the DANCO could not be held procedurally invalid because it could be constitutionally applied in one set of facts; therefore, it is "inappropriate to speculate regarding other hypothetical circumstances that might arise").

<sup>185</sup> See *supra* notes 133–134 and accompanying text (providing the Minnesota Supreme Court's discussion of the void-for-vagueness doctrine in *Ness*).

<sup>186</sup> See *supra* notes 133–134 and accompanying text (discussing the Minnesota Supreme Court's holding that the void-for-vagueness doctrine did not apply in *Ness*).

<sup>187</sup> See *supra* notes 117 and accompanying text (noting the absence of legislative standards and factors within the DANCO statute).

<sup>188</sup> See *supra* notes 14, 118–119 and accompanying text (observing the lack of uniformity among district courts in interpreting and enforcing Minnesota's DANCO statute).

<sup>189</sup> See *supra* note 118 and accompanying text (noting that MINN. STAT. § 629.75 fails to provide any legislative guidance or standards for a district court to apply when determining whether to issue a DANCO).

***C. Without Clear Guidance from the Minnesota Legislature, District Courts Will Continue to Struggle in Interpreting the DANCO Statute***

The absence of legislative standards and limitations within Minnesota Statute § 629.75 leaves too much room for judicial discretion and misinterpretation.<sup>190</sup> The Minnesota legislature should amend the DANCO statute to include specific provisions stipulating when and how a court should issue a DANCO.<sup>191</sup> Minnesota courts will continue to inconsistently apply Minnesota Statute § 629.75 until the statute's vagueness is properly addressed.<sup>192</sup>

The Minnesota legislature should emulate the specificity of its OFP and HRO statutes when revising the DANCO statute.<sup>193</sup> In doing so the legislature must break down the elements of a DANCO hearing and the subsequently issued DANCO.<sup>194</sup> Additionally, the Minnesota legislature ought to clarify the “immediately following” language of Minnesota Statute § 629.75, subdiv. 1(c) to ensure that all criminal defendants receive the same procedural due process.<sup>195</sup>

***1. The Minnesota Legislature Ought to Address the DANCO Petition***

The Minnesota legislature should require that a petition be filed and served on the defendant before a DANCO may be issued.<sup>196</sup> This requirement would effectively limit the court's discretion in issuing DANCOs when one is not being sought or the facts of the case do not necessitate the immediate issuance of a DANCO.<sup>197</sup> Moreover, the petition requirement would ensure a defendant receives adequate notice of the DANCO prior to the DANCO proceeding.<sup>198</sup> Explicit notice of the DANCO

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<sup>190</sup> See *supra* note 118 and accompanying text (observing the need for additional checks on judicial discretion in issuing DANCOs).

<sup>191</sup> See *supra* note 118 and accompanying text (comparing the provisions of MINN. STAT. §§ 518B.01, 609.748 with MINN. STAT. § 629.75).

<sup>192</sup> See *supra* note 118 and accompanying text (stressing the lack of uniform interpretation of the DANCO statute due its vague language).

<sup>193</sup> See *supra* notes 36–65 and accompanying text (outlining the various provisions of MINN. STAT. §§ 518B.01, 609.748).

<sup>194</sup> See *supra* note 131 and accompanying text (analyzing the three subparts of MINN. STAT. § 629.75, subdiv. 1).

<sup>195</sup> See *supra* note 125 and accompanying text (quoting MINN. STAT. § 629.75, subdiv. 1(c)).

<sup>196</sup> See *supra* text accompanying notes 38–40, 58–60 (discussing the procedural process of obtaining an OFP and an HRO).

<sup>197</sup> See *supra* note 118 and accompanying text (observing the need for additional checks on judicial discretion in issuing DANCOs).

<sup>198</sup> See *supra* note 117 and accompanying text (highlighting a defendant's lack of advance notice and opportunity to prepare for the DANCO hearing as evidence of ineffective due process under Minnesota's DANCO statute); see also *supra* note 74 and accompanying text (noting that criminal defendants may be convicted for unknowingly violating the DANCO statute).

prior to the DANCO proceeding would provide a defendant with constitutionally sufficient procedural due process.<sup>199</sup>

Similarly, the Minnesota legislature ought to stipulate who may request a DANCO and whether a court may issue a DANCO in the absence of a request from the state or domestic abuse victim.<sup>200</sup> This requirement would encourage uniformity among Minnesota's district courts in the issuance and enforcement of DANCOs.<sup>201</sup> In addition, it would ensure that district courts are not disproportionately imposing DANCOs because there would be an additional check on judicial discretion.<sup>202</sup>

Further, Minnesota Statute § 629.75 should be revised to include a provision discussing the contents of the DANCO petition and order.<sup>203</sup> Under this proposal, the petition must: (a) identify the alleged victim; (b) briefly recite the facts of the case; (c) provide the probable cause supporting the underlying criminal charges leading to the DANCO; and (d) include a statement from the victim indicating whether the victim supports issuing a DANCO.<sup>204</sup> A detailed petition encourages defendants to seek legal advice prior to the DANCO proceeding.<sup>205</sup> Additionally, it provides courts with sufficient information so that judges can conscientiously, rather than arbitrarily, determine whether or not to issue a DANCO in a particular matter.<sup>206</sup>

## ***2. The Minnesota Legislature Must Define the Scope of Relief Available***

The Minnesota legislature must specify the scope of relief the DANCO statute provides.<sup>207</sup> Without further legislative restraints, district courts have too much unfettered discretion allowing them to impermissibly

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<sup>199</sup> See *supra* notes 117–118 and accompanying text (suggesting that separate notice of the DANCO proceeding would ensure effective due process).

<sup>200</sup> See *supra* notes 38–40, 58–60 and accompanying text (specifying who may petition for an OFP and HRO).

<sup>201</sup> See *supra* notes 14, 118–119 and accompanying text (observing the lack of uniformity among district courts in interpreting and enforcing Minnesota's DANCO statute).

<sup>202</sup> See *supra* note 134 and accompanying text (stating that a statute must contain minimal guidelines to govern its enforcement in order for the statute to avoid being struck down on vagueness grounds).

<sup>203</sup> See *supra* text accompanying notes 39–40, 59–60 (listing the petition requirements for Minnesota's OFP and HRO statutes).

<sup>204</sup> See *supra* text accompanying notes 38–40 (discussing the OFP petition requirements); see also *supra* text accompanying notes 58–60 (stating the HRO petition requirements).

<sup>205</sup> See *supra* note 117 and accompanying text (noting that many criminal defendants are not represented by legal counsel during the DANCO proceeding).

<sup>206</sup> See *supra* note 118 and accompanying text (outlining the district court's suggestions for revising MINN. STAT. § 629.75).

<sup>207</sup> See *supra* notes 45–46, 56 and accompanying text (stating the scope of relief provided by Minnesota's OFP and HRO statutes).

apply the DANCO statute.<sup>208</sup> Revising Minnesota Statute § 629.75 to stipulate the scope of relief permitted under the statute will resolve the void-for-vagueness issue by effectively minimizing judicial discretion.<sup>209</sup>

The DANCO statute should clearly state what relief a court may provide in issuing a DANCO.<sup>210</sup> Such relief should include: (a) restraining the defendant from committing further acts of domestic abuse against the alleged victim; (b) prohibiting the defendant from engaging the alleged victim via in person, electronic, or third party contact; and (c) excluding the defendant from the victim's dwelling, place of employment, and a reasonable area surrounding those locations.<sup>211</sup> Judicial relief should be limited to instances where the prosecutor has sufficient probable cause supporting the underlying criminal matter's charges and the defendant has been provided a meaningful opportunity to respond to the charges and DANCO.<sup>212</sup> Where immediate judicial relief is required to protect the alleged victim, the Minnesota legislature should provide for an *ex parte* DANCO to be temporarily issued.<sup>213</sup> The *ex parte* DANCO would expire either at the DANCO proceeding if issued prior to the DANCO proceeding or at the defendant's next scheduled court appearance if issued at the DANCO proceeding.<sup>214</sup> This would allow the victim to receive immediate judicial protection while ensuring that the defendant is not indefinitely deprived of his constitutionally protected rights.<sup>215</sup>

### 3. The Minnesota Legislature Should Clarify the DANCO Proceeding

The Minnesota legislature ought to clarify the “immediately following” language of Minnesota Statute § 629.75.<sup>216</sup> The Minnesota Supreme Court's tortured interpretation of the DANCO statute in *Ness* illustrates the danger of giving courts too much creative license in construing

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<sup>208</sup> See *supra* note 118 and accompanying text (noting the district court's fear that the lack of legislative guidance in interpreting the DANCO statute will result in further arbitrary and discriminatory enforcement of its provisions).

<sup>209</sup> See *supra* note 115 and accompanying text (discussing the void-for-vagueness test).

<sup>210</sup> See *supra* notes 45–46, 56 and accompanying text (describing the relief granted by courts in OFP and HRO hearings).

<sup>211</sup> See *supra* notes 45–46, 56 and accompanying text (noting the type of relief a court may grant in an OFP or HRO proceeding).

<sup>212</sup> See *supra* notes 50, 112 and accompanying text (requiring probable cause be established before a protective order may be issued).

<sup>213</sup> See *supra* notes 42–46 and accompanying text (describing the OFP *ex parte* order).

<sup>214</sup> See *supra* notes 45, 61 and accompanying text (noting the impermanent nature of the *ex parte* OFP and temporary HRO).

<sup>215</sup> See *supra* notes 42–46 and accompanying text (describing the purpose of an *ex parte* order).

<sup>216</sup> See *supra* note 131 and accompanying text (noting the emphasis the Minnesota Supreme Court placed on the phrase “immediately following”).



and applying statutory law.<sup>217</sup> The Minnesota legislature should explicitly state when, where, and how the DANCO proceeding should take place.<sup>218</sup>

The DANCO proceeding must be independent of the underlying criminal matter's hearing.<sup>219</sup> The Minnesota legislature ought to first clarify whether "immediately following" means the same day as or within a reasonable period of time of the underlying criminal matter's hearing.<sup>220</sup> The DANCO statute should be revised to allow the DANCO proceeding to occur within fourteen days of the underlying criminal matter's hearing when both parties agree to the delay.<sup>221</sup> Such a delay would afford the defendant the opportunity to meet with legal counsel, review the DANCO petition, summon witnesses, and present evidence in his defense.<sup>222</sup> An *ex parte* DANCO could be issued to protect the victim and prohibit the defendant from contacting the victim prior to the DANCO proceeding.<sup>223</sup>

These revisions to Minnesota Statute § 629.75 will ensure the independence of the DANCO proceedings from the underlying criminal matter and redirect courts to focus on the DANCO proceeding itself when analyzing issues of due process.<sup>224</sup>

#### ***4. The Minnesota Legislature Should Specify the Circumstances Prompting a DANCO***

Finally, the Minnesota legislature ought to specify under what circumstances a DANCO may be issued, modified, lifted, or terminated.<sup>225</sup> The DANCO statute should explicitly address the factors for a court to consider in determining whether to issue a DANCO.<sup>226</sup> These factors should

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<sup>217</sup> See *supra* notes 131–134 and accompanying text (explaining the Minnesota Supreme Court's reasoning in upholding the constitutionality of MINN. STAT. § 629.75, subd. 1).

<sup>218</sup> See *supra* note 118 and accompanying text (highlighting the inadequacies of Minnesota's DANCO statute).

<sup>219</sup> See *supra* note 70 and accompanying text (emphasizing the independence of the DANCO proceeding from the underlying criminal matter's hearing).

<sup>220</sup> See *supra* note 118 and accompanying text (noting the need for additional legislative guidance in interpreting MINN. STAT. § 629.75).

<sup>221</sup> See *supra* note 46 and accompanying text (stating that an OFP judicial hearing must occur within fourteen days of the petition being filed with the court).

<sup>222</sup> See *supra* note 117 and accompanying text (stressing a defendant's lack of advance notice and opportunity to prepare for the DANCO hearing as evidence of the ineffective process provided for under the DANCO statute).

<sup>223</sup> See *supra* notes 42–46 and accompanying text (discussing the scope of an OFP *ex parte* order).

<sup>224</sup> See *supra* note 133 and accompanying text (discussing the interconnectedness between the DANCO statute and other statutory provisions).

<sup>225</sup> See *supra* note 118 and accompanying text (noting that Minnesota's OFP and HRO statutes have provisions regarding the modification and termination of these civil protective orders).

<sup>226</sup> See *supra* notes 50, 63 and accompanying text (addressing the factors courts should consider in determining whether to issue an OFP or HRO).

include: (a) the facts of the case; (b) the weight of the evidence against the defendant; (c) the defendant's criminal record; (d) the seriousness of the alleged offense; (e) the threat posed by contact with the victim; and (f) the preferences of the victim.<sup>227</sup>

Additionally, the DANCO statute should stipulate under what circumstances a DANCO may be modified.<sup>228</sup> The Minnesota legislature should establish a uniform process for courts to follow when modifying or lifting the terms of an existing DANCO.<sup>229</sup> Further, Minnesota Statute § 629.75 ought to be revised to address when a pretrial DANCO expires or otherwise ceases to exist.<sup>230</sup> DANCOs should be valid for a period of two years or until the final disposition of the underlying criminal matter, whichever occurs first.<sup>231</sup> Uncertainties and inconsistencies among courts will continue unless the DANCO statute explicitly addresses the procedural processes surrounding the enforcement of DANCOs.<sup>232</sup>

## V. CONCLUSION

The Minnesota Supreme Court's holding in *Ness* creates troubling precedent for the future of criminal defendants' rights in Minnesota DANCO proceedings.<sup>233</sup> Further legislative guidance is needed before Minnesota's courts are able to homogeneously interpret and apply Minnesota Statute § 629.75.<sup>234</sup> Until then, Minnesota's legal professionals must be diligent in strictly enforcing the DANCO statute's express language, while also supporting as-applied constitutional challenges, so as to ensure criminal defendants are afforded their constitutionally protected due process rights.<sup>235</sup>

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<sup>227</sup> See *supra* note 127 and accompanying text (listing the factors of Minn. R. Crim. P. 6.02, subdiv. 2).

<sup>228</sup> See *supra* note 125 and accompanying text (stating that a DANCO may be modified by a subsequent court order).

<sup>229</sup> See *supra* notes 45, 118 and accompanying text (noting that an OFP may be judicially modified at a later hearing).

<sup>230</sup> See *supra* notes 45, 51 and accompanying text (discussing the limitations Minnesota's OFP statute imposes on judicial relief).

<sup>231</sup> See *supra* notes 45, 51 and accompanying text (noting that OFPs are only effective for two years from the issuance date unless otherwise stipulated by the court).

<sup>232</sup> See *supra* note 118 and accompanying text (discussing the detailed procedural processes included in Minnesota's OFP and HRO statutes).

<sup>233</sup> See *supra* notes 82, 97, 136 and accompanying text (noting that *Ness* has negative implications on the future of facial constitutional challenges brought against MINN. STAT. § 629.75 on due process grounds).

<sup>234</sup> See *supra* notes 13–15, 135–138 and accompanying text (discussing the need for the Minnesota legislature to revise the current DANCO statute).

<sup>235</sup> See *supra* text accompanying notes 183–185 (criticizing the Minnesota Supreme Court's interpretation of MINN. STAT. § 629.75, subdiv. 1).