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FOR DISCUSSION ONLY

ALTERNATIVES TO BAIL ACT

[Proposed new name: PRETRIAL RELEASE AND DETENTION ACT]

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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January 7, 2020

ALTERNATIVES TO BAIL ACT

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ALTERNATIVES TO BAIL ACT

TABLE OF CONTENTS

[ARTICLE] 1

GENERAL PROVISIONS

[[ARTICLE] 2

ARREST AND ISSUANCE OF [CITATION]

[ARTICLE] 3

RELEASE HEARING

[ARTICLE] 4

DETENTION HEARING

[ARTICLE] 5

MODIFYING OR VACATING ORDER

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

ALTERNATIVES TO BAIL ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Alternatives to Bail Act. [Proposed new name: Pretrial Release and Detention Act.]

SECTION 102. DEFINITIONS. In this [act]:

(1) "Abscond" means fail to make a required appearance in court with the intent to avoid or delay adjudication.

(2) "Charge", used as a noun, means an offense alleged in a complaint, information, indictment, [citation], or similar record.

(3) ["Citation"] means a record issued by [an authorized official] alleging an offense, which may require an individual to appear in court.

[(4) "Detention-eligible offense" means [enumerated offenses]].

(5) "Detention hearing" means a hearing held under Section 401.

(6) "Nonappearance" means failure to make a required appearance in court without the intent to avoid or delay adjudication. "Does not appear", "not appear", and "not to appear" have corresponding meanings.

(7) "Obstruct justice" means interfere with the criminal process with the intent to influence or impede the administration of justice. The term includes tampering with witnesses or evidence.

(8) "Offense" means conduct proscribed by statute.

(9) "Plain language" means words and phrases in a record that an individual to whom the record is directed can reasonably be expected to understand, which may include a language other

than English.

(10) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Release hearing" means a hearing held under Section 301.

(13) "Secured appearance bond" means a promise by a person to forfeit a specified sum that is secured by collateral approved by the court in the form of a deposit, lien, [surety], or proof of access to the collateral, if an individual absconds or does not appear.

(14) "Unsecured appearance bond" means a promise by a person to pay a specified sum that is not secured by collateral, if an individual absconds or does not appear.

Legislative Note: *In paragraphs (2) and (3), insert the state's term for a citation, summons to appear, or the equivalent.*

In paragraph (3) insert the state's term for an official authorized to issue a citation, summons to appear, or the equivalent.

Include paragraph (4) if the state chooses to adopt a limited class of charges for which pretrial detention may be authorized, and insert the state's list of offenses for which detention may be authorized pursuant to Articles 3 and 4.

In paragraphs (13) and (14), insert the state's term for "surety".

Comment

Absconding versus nonappearance. This act encourages courts to attend to the differences between pretrial risks. Often, pretrial statutes speak only in terms of "failure to appear." Nevertheless, there remains a conceptual difference between different types of failure to appear. "Absconding" is an intentional act with the purpose of evading justice, whereas "nonappearance" may result from impediments to appearance—for example, in cognitive limitations or difficult social circumstances. *See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677 (2018). These two distinct types of "failure to appear" sometimes warrant distinct statutory responses. Thus, the act treats these risks separately.

Bail. The act does not define or use the term "bail." This is intentional. Many statutes and commentators use the term as a noun to signify a secured financial condition of release. TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* 16 (Apr. 18, 2017) ("[M]ost of the confusion comes from the fact that many people (indeed, many courts and legislatures) define bail by one of its conditions—money."). Other statutes and commentators use the term according to its historical definition, as "a process of conditional release." *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769). Others use the term "bailable" as an adjective to signify the type of person or charge that qualifies for release. *See, e.g.*, ODonnell v. Harris Cnty., 892 F.3d 147, 166 (5th Cir. 2018) (describing "a state-created liberty interest in being bailable"). The act avoids confusion by using other more precise terms.

Detention-Eligible Offense. See Comment to Section 308, *infra*.

Obstruct justice. "Obstruction of justice" is not only a legal term of art but also a substantive crime. The act does not intend to disturb a state's statutory definition of the crime or otherwise impinge upon states' existing crime definitions. To the contrary, the act provides a definition of "obstruction of justice" for the purpose of the act only.

Offense. The act leaves ambiguous whether the term offense signifies an individual's particular conduct that is proscribed by statute, or the abstract conduct that is proscribed by statute. For the purposes of this act, nothing turns on the distinction, except in Section 303(b)(1), *infra*, wherein the act invites the court to consider both the abstract "nature" and the particular "circumstances" of the alleged offense.

SECTION 103. SCOPE; APPLICABILITY.

(a) This [act] does not affect the validity or effect of a law of this state other than this [act] regulating:

(1) Forfeiture of a secured appearance bond;

(2) An arrest for the purpose of keeping the peace or initiating civil commitment;

(3) A right of a crime victim;

(4) A right of appeal.

(b) This [act] shall apply to arrests made [or [citations] issued] after the effective date of this [act].

Legislative Note: *In subsection (b), insert the state's term for a citation, summons to appear, or the equivalent.*

[[ARTICLE] 2

Legislative Note: *A state should include Article 2 if the state wishes to include an article on citation versus arrest.*

ARREST AND ISSUANCE OF [CITATION]

SECTION 201. AUTHORITY TO ARREST OR ISSUE [CITATION].

(a) Except as otherwise provided by law of this state other than this [act], [an authorized official] may not arrest an individual unless:

(1) the individual is subject to an order of detention from any jurisdiction, including an arrest warrant or order of revocation of probation, [parole], or release for a pending charge or prior conviction; or

(2) subject to subsection (b), [the authorized official] has probable cause to believe the individual is committing or has committed an offense for which a jail or prison sentence is authorized.

(b) If the offense under subsection (a)(2) is [a misdemeanor or non-criminal offense] [punishable by not more than [six months] in jail or prison], [an authorized official] may not arrest an individual unless:

(1) the offense is [domestic violence, stalking, driving under the influence, unlawful firearms possession or use, contempt, or other enumerated offenses or offense types];

(2) the individual fails to provide adequate identification or identifying information lawfully requested by [the authorized official];

(3) the individual is in violation of a condition or order of probation, [parole], or release for a pending charge or prior conviction; or

(4) [the authorized official] reasonably believes arrest is necessary to:

(A) conclude the [authorized official's] interaction with the individual

safely;

(B) carry out a lawful investigation;

(C) protect a person from [serious harm];

(D) prevent the individual from fleeing the jurisdiction; or

(E) obtain information that a [contributing justice agency] is required by law other than this [act] to use for identification.

(c) Regardless of [the authorized official's] authority to arrest under this section, if [the authorized official] has probable cause to believe an individual is committing or has committed an offense, [the authorized official] may issue the individual a [citation] or take other action authorized by law of this state other than this [act].

Legislative Note: *Insert the state's term for a citation, summons to appear, or the equivalent.*

In each subsection, insert the state's term for an official authorized to issue a citation, summons to appear, or the equivalent.

In subsections (a)(1) and (b)(3), insert the state's term for parole, supervised release, community supervision or the equivalent.

In subsection (b), insert the state's list of offense classes for which arrest is not authorized except as provided in subsections (b)(1) through (4).

In subsection (b)(1), insert the state's list of offenses or offense types sufficiently serious to authorize an arrest.

In subsection (b)(4)(C), insert the state's term for the type of harm sufficiently serious to authorize arrest.

Comment

Arrest versus citation. Although this act focuses on release and detention policy following arrest, the implementation of pretrial detention and release policy begins with the police officer on the beat. *See e.g.* BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-2.2 (providing that, except in circumscribed situations, "a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court"); TENN. CODE ANN. §§ 40-7-118, 40-7-120 (providing for a presumption in

favor of citations for misdemeanors); KY. REV. STAT. § 431.015 (2012) (same). For that reason, the Uniform Law Commission's mission statement for this project included the possibility of expanding the use of citations over arrest. UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) ("The drafting committee will be tasked with drafting state legislation that will provide policy solutions to mitigate the harmful effects of money bail. The drafting committee will review critical areas of pretrial justice, such as [*inter alia*]: the encouragement of the use of citations in lieu of arrest for minor offenses."). Nevertheless, the act contemplates that a state may decide not to include an article on citation versus arrest. Thus, the entire article is bracketed.

Arrest. The term "arrest" "has no standard definition in the law." Rachel A. Harmon, *Why Arrest?,* 115 Mich. L. Rev. 307, 309 (2016) ("There is no standard definition of an arrest and no shared nomenclature for the various police practices that start the criminal process and deprive people of their freedom."). *Id.* at 310. Nor does this act require a standard definition of "arrest." For present purposes, it is enough for a state to differentiate between a citation and an arrest, however the state defines the latter.

Except as provided in law of this state other than this act. States may authorize officials to arrest for purposes other than initiating criminal prosecution, including for the purpose of keeping the peace or initiating civil commitment. The act does not disturb a state's arrest authority for purposes other than initiating prosecution.

Arrest-eligibility net. Section 201(b) limits authority to arrest for minor offenses. Each state may determine how to define the class of minor offenses that are subject to this provision. Two options, included in brackets, are (1) all misdemeanors and non-criminal offenses, or (2) offenses punishable by no more than a specified term of incarceration. Within the designated class of offenses, 201(b)(1) through (4) enumerate the extenuating circumstances in which arrest is nonetheless permitted.

SECTION 202. FORM OF [CITATION]. A [citation] must state in plain language:

(1) the alleged offense;

(2) if appearance is required:

(A) when and where the individual must appear; and

(B) how to request a change in appearance date; and

(3) the possible consequences of violating the requirements of the [citation] or committing another offense while the charge in the [citation] is pending.

Legislative Note: *Insert the state's term for a citation, summons to appear, or the equivalent.*

SECTION 203. RELEASE AFTER ARREST. [An authorized official] may release an individual after arrest but before a release hearing by issuing a [citation] under Section 201. The [authorized official] may require as a condition of release that the individual execute an unsecured appearance bond.

Legislative Note: *Insert the state's term for an official authorized to release an individual after arrest but before court appearance.*

Insert the state's term for a citation, summons to appear, or the equivalent.

SECTION 204. APPEARANCE ON [CITATION].

(a) If an individual appears as required by a [citation], the court shall order pretrial release and issue an order including only the information required under Section 304(a).

(b) If an individual, required by a [citation] to appear, absconds or does not appear as required by the [citation], the court may issue an [arrest warrant].]

Legislative Note: *In subsection (a), insert the state's term for a citation, summons to appear, or the equivalent.*

In subsection (b), insert the state's term for an arrest warrant or the equivalent.

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING.

(a) An individual who is arrested is entitled to a hearing for the purpose of releasing the individual pending trial. Except as otherwise provided in subsection (b), the court shall hold a hearing not later than [48] hours after the individual is arrested.

(b) In extraordinary circumstances, the court on its own or on motion of a party may continue a release hearing for not more than [48] hours.

(c) At the conclusion of the hearing, the court shall issue an order of pretrial release or an

order of temporary pretrial detention.

Legislative Note: *In subsections (a) and (b), insert the period the state chooses as the deadline for a release hearing and continuance of the hearing.*

Comment

Extraordinary circumstances. In other places where the act imposes temporal limits, the act allows for multiple continuances, at least upon a showing of good cause. With respect to the release hearing, however, the act contemplates that the reasons for delay must be "extraordinary." The logic is that states already generally follow a 48-hour timeline, pursuant to *Riverside v. McLaughlin*, 500 U.S. 44 (1991), which constitutionally guarantees a probable-cause hearing within 48 hours of warrantless arrest (and at which pretrial release decisions are often made). *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (listing states that couple release decisions and pretrial hearings); *see also, e.g.*, N.J. Stat. Ann. § 2A:162-16 (providing that "the court . . . shall make a pretrial release decision for the eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail).

Furthermore, research suggests that the most damaging effects of pretrial detention—including disruption to an arrestee's employment, housing, and child custody or care arrangements—are often triggered within three days. *See, e.g.*, *3DaysCount*, PRETRIAL JUSTICE INSTITUTE, http://projects.pretrial.org/3dayscount; Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 211-13 (2018) (finding that pretrial detention of more than three days "significantly increases the probability of conviction," increases the likelihood of post-adjudication criminal offending, and decreases formal sector employment); CHRISTOPHER T. LOWENKAMP *ET AL.*, ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION 4 (2013) (finding that even "2 to 3 days" of detention increases the likelihood of future crime); *cf.* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 753 (2017) (documenting effects of misdemeanor pretrial detention on case outcomes and future crime, and noting that first days of detention are a "fairly critical period for making bail"); sources cited in Comment to Section 401, *infra*. Time is therefore of the essence for the release hearing.

[SECTION 302. RIGHT TO COUNSEL. An individual who is arrested has a right to counsel at a release hearing. If the individual is unable to obtain counsel for the hearing, the [authorized agency] shall provide counsel. [The scope of representation under this section may be limited to the subject matter of the hearing.]]

Legislative Note: *[NEED A LEGISLATIVE NOTE FOR WHY THIS ENTIRE SECTION IS*

BRACKETED]

Insert the state's term for the agency that is authorized to provide counsel.

Include the last bracketed sentence if the state chooses to permit limited-scope representation.

Comment

Right to counsel. The existence of a Sixth Amendment right to counsel turns on two questions: (1) whether the right has "attached," and (2) whether the proceeding in question constitutes a "critical stage" of the prosecution. The Supreme Court has held that the right to counsel does "attach" at a defendant's initial appearance before a judicial officer, but the Court has not yet determined whether a release hearing is a "critical stage" of the prosecution. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 194 & n.15 (2008) (clarifying that the right to counsel "attaches" at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty," but reserving judgment on "the scope of an individual's postattachment right to the presence of counsel"). Given the jurisprudential ambiguity, the act offers states the option of codifying a right to counsel at the release hearing. The act does not limit this right to the indigent. The reason is that, because the release hearing happens so quickly, even an affluent individual might not be able to secure the presence of counsel.

A state may choose not to codify a right to counsel at the release hearing, if, for instance, resource constraints prove prohibitive. It should be noted, however, that any fiscal burden of providing counsel at release hearings may be offset by cost savings in other places; for example, by the increased use of cheaper citations over costlier arrests. *See* JANE MESSMER, UNIFORM LAW COMMISSION, *Committee on Scope and Program: Project Proposal Form* (Dec. 13, 2013) ("The use of citations can contribute to lower jail populations and local cost savings. . . . Failing to provide counsel carries enormous costs—human and financial; far exceeding the expense of providing an advocate who can advocate viable and prudent alternatives." (citing studies)). Moreover, there would be no fiscal burden in the several states that already provide for counsel at release hearings. *See, e.g.*, 39 DEL CODE. § 4604 (requiring the appointment of counsel "at every stage of the proceedings following arrest"); *cf.*, BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30 (deeming counsel's presence to be integral to release hearings).

SECTION 303. JUDICIAL DETERMINATION OF RISK.

(a) At a release hearing, the court shall determine whether the individual who is arrested is likely to abscond, not appear, obstruct justice, violate a protection order, or cause [bodily injury to another individual] [harm to another person]. The court shall make the determination by [clear and convincing evidence] [a preponderance of the evidence].

(b) In making a determination under subsection (a), the court shall consider:

(1) the nature, seriousness, and circumstances of the alleged offense;

(2) the weight of the evidence against the individual;

(3) the individual's:

(A) criminal history;

(B) history of absconding or nonappearance;

(C) place and length of residence;

(D) community ties; and

(E) employment and education commitments;

(4) whether the individual has another pending criminal charge or is under criminal justice supervision, including probation or [parole]; and

(5) other relevant information provided by the individual, the [prosecuting authority], [or] an alleged victim[,or the pretrial services agency]].

Legislative Note: *In subsection (a), insert the state's term for the type of harm the state concludes is relevant to a pretrial release decision.*

In subsection (b)(4), insert the state's term for parole, supervised release, or the equivalent.

In subsection (b)(5), insert the state's term for the state's prosecuting authority. If a state has a pretrial services agency or the equivalent, the bracketed clause should be included and the name of the agency should be inserted. If a state does not have this type of agency, omit the bracketed clause.

SECTION 304. ORDER OF PRETRIAL RELEASE.

(a) Except as otherwise provided in subsection (b), the court at a release hearing shall order pretrial release of the individual and state in plain language in the order:

(1) when and where the individual must appear in court;

(2) any practical assistance or voluntary supportive service the individual has

agreed to pursue; and

(3) the possible consequences of violating the conditions of the order or committing an offense while the charge is pending.

(b) If the court determines under Section 303 by [clear-and-convincing evidence][a preponderance of the evidence] that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause [bodily injury to another individual][harm to another person], the court shall determine whether pretrial release of the individual is appropriate under Sections 305, 306, and 307. If the court determines that pretrial release is appropriate, the court shall state in plain language in the order of release the information required by subsection (a) and any restrictive condition or conditions imposed by the court.

Legislative Note: *In subsections (a) and (b), insert the state's term for the type of harm the state concludes is relevant to a pretrial release decision.*

In subsection (b), use the burden of proof the state chooses for the court's determination.

Comment

An order of pretrial release containing only the information required by subsections (c)(1), (2), and (4). Here, the act requires the equivalent of release on personal recognizance in the absence of a risk sufficient to authorize a restrictive condition under Section 306. This requirement is consistent with the law in approximately twenty states, which have codified a presumption of release on personal recognizance (or, at most, on an unsecured appearance bond). *See id.*; *see also*, *e.g.*, KY. REV. STAT. §§ 431.520, 431.066; COLO. REV. STAT. §§16-4-103, 16-4-113.

An order of pretrial release must include. The terms of the order should be provided in words that an individual can reasonably be expected to understand. This may require including text in a language other than English.

SECTION 305. PRACTICAL ASSISTANCE; VOLUNTARY SUPPORTIVE SERVICES.

(a) If the court determines sunder Section 303 it is likely that the individual will not appear, the court shall determine whether practical assistance or voluntary supportive services

are available to address an impediment to appearance.

(b) If the court determines under Section 303 it is likely that the individual will abscond, not appear, obstruct justice, violate a protection order, or cause [bodily injury to another individual] [harm to another person], the court shall determine whether voluntary supportive services are available to address the risk.

Legislative Note: *In subsection (b), insert the state's term for the type of harm the state concludes is relevant to a pretrial release decision.*

Comment

Practical assistance or voluntary supportive services. Section 305 introduces the use of non-restrictive measures for a court to consider as an alternative to, or in addition to, restrictive conditions of release under Section 306, *infra*. Just as the act seeks to distinguish between different forms of failure to appear (that is, between absconding and nonappearance), it also seeks to distinguish between restrictive and nonrestrictive pretrial measures (here, between release "conditions" and "assistance" or "services"). Nonrestrictive pretrial measures fall into two categories: practical assistance and supportive services.

Practical assistance. When the relevant risk is merely nonappearance (as opposed to absconding), the least restrictive measure to assure appearance may be a form of practical assistance. This is particularly true when the risk of nonappearance arises from socioeconomic or cognitive inequities of the kind that historically have produced wealth-based and other arbitrary forms of disparity in pretrial release and detention. For instance, defendants may struggle to remember court dates, to get leave from work, or to procure affordable childcare or transportation. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). Practical assistance may include sending electronic or other reminders of appearances, scheduling appearances with attention to the most feasible dates and times, offering assistance with caregiving responsibilities, or providing subsidized transportation to and from court.

Voluntary supportive services. The act distinguishes between practical assistance and voluntary supportive services for the following reason: As indicated above, practical assistance is intended to address a socioeconomic or cognitive impediment to appearance. By contrast, a supportive service could help to manage any risk of release. Voluntary supportive services may include referrals to organizations that provide therapeutic treatment or social services, including educational, vocational, or housing assistance.

Address the risk. With respect to risk, the act purposefully avoids the term "eliminate" or its equivalent. As Justice Jackson observed: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as a price of our system of justice." Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., dissenting). The task is to distinguish between the kinds of risks endemic to social interaction in a liberal state, and the kinds of risks

serious enough to justify pre-adjudicative limitations on liberty.

SECTION 306. RESTRICTIVE CONDITION OF RELEASE.

(a) If practical assistance or voluntary supportive services are not sufficient to address a risk that the court identifies under Section 303, the court shall impose the least restrictive condition or conditions of release necessary to address the risk. Restrictive conditions include:

(1) mandatory therapeutic treatment or social services;

(2) a requirement to seek or maintain employment or education commitments;

(3) a restriction on possession or use of a weapon;

(4) a restriction on travel;

(5) a restriction on contact with a specified person;

(6) a restriction on a specified activity;

(7) supervision by [the [pretrial services agency] or] a third party;

(8) active or passive electronic monitoring;

(9) house arrest;

(10) subject to Section 307, an unsecured appearance bond;

(11) subject to Section 307, a secured appearance bond;

(12) a condition proposed by the individual;

(13) any other non-financial condition required by law of this state other than this [act]; or

(14) any other condition that is necessary to address the risk.

(b) The court shall state on the record why the restrictive condition or set of conditions imposed is the least restrictive condition or set of conditions necessary to address the risk the court identifies under Section 303.

Legislative Note: *If a state has a pretrial services agency or the equivalent, the bracketed clause in subsection (a)(7) should be included and the name of the agency should be inserted. If a state does not have this type of agency, omit the bracketed clause.*

Comment

Least restrictive condition. A least-restrictive-condition requirement is in keeping with most existing state practice. Approximately twenty states either expressly or implicitly require that conditions of release—especially secured financial conditions—must be the least restrictive available measure to reasonably meet a legitimate governmental interest. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*, http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx; *see also, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.2 ("[T]he court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process."). At a somewhat higher level of abstraction, the least-restrictive-condition requirement is likewise in keeping with the presumption that a defendant is entitled to pretrial release.

In listing conditions of release, the act does not rank conditions from least to most restrictive. However, as suggested in Section 307, *infra*, the act operates on the premise that a secured appearance bond often will be the most restrictive condition. *See, e.g.*, FLA. R. CRIM. P. RULE 3.131 ("[T]here is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release."); *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("Financial conditions other than unsecured bonds should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court."). Moreover, a core purpose of the act is to minimize wealth-based disparities in pretrial release, and secured appearance bonds are the prime drivers of those disparities. Thus, it is important that a court ensure that no lesser (typically, non-financial) condition could manage the relevant risk.

SECTION 307. FINANCIAL CONDITION OF RELEASE.

(a) The court may not impose a restrictive condition under Section 306 that requires initial payment of a fee in a sum greater than the individual is able, within [24] hours, to satisfy from personal financial resources. If the individual is unable to satisfy the fee, the court shall waive or modify the fee or waive or modify the restrictive condition that requires the fee, to the extent necessary to release the individual. If the individual is unable to satisfy a recurring fee, the court shall waive or modify the recurring fee or waive or modify the restrictive condition that

requires the recurring fee, to the extent necessary to keep the individual released.

(b) Before imposing as a restrictive condition of release under Section 306(a)(10) or (11) a secured appearance bond or an unsecured appearance bond, the court shall consider the individual's personal financial resources and burdens, including income, assets, expenses, liabilities, and dependents.

(c) The court may impose as a restrictive condition of release under Section 306(a)(11) a secured appearance bond only if the court has determined that the individual is likely to abscond, not appear, or obstruct justice.

(d) The court may not impose as a restrictive condition of release under Section 306(11) a secured appearance bond:

(1) to keep the individual detained, except as otherwise provided in Section 403;

(2) for a misdemeanor charge, unless the individual has absconded or not appeared [three or more] times in a criminal case or combination of criminal cases, evidenced by information in a record provided to the court; or

(3) in an amount greater than the individual is able, within [24] hours, to satisfy from personal financial resources.

Comment

Financial conditions. The act does not endeavor to eliminate entirely the use of secured bond conditions or to eliminate commercial bail bonds. (To date, only four states have prohibited commercial bail bonds outright. *See, e.g.*, WISCONSIN STAT.§ 969.12.) Instead, the act aims simply to limit the use of secured bond conditions to appropriate circumstances and purposes.

A restrictive condition that requires payment of a fee. Court-imposed conditions often carry mandatory fees, and the inability of an indigent defendant to satisfy such a fee may lead to detention just as readily as an inability to satisfy a secured appearance bond.

Only if an individual is likely to abscond, not appear, or obstruct justice. The logic of prohibiting financial conditions for dangerousness is that it is inappropriate for a court to set a

secured appearance bond to manage this risk. If a defendant is sufficiently dangerous, he should be detained. By contrast, a court should rely upon a secured appearance bond only to manage risks of absconding, nonappearance, or obstruction of justice. This is the position taken already by the American Bar Association and a number of jurisdictions. *See, e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.").

The court may not impose a secured financial condition or fee to keep an individual detained or in a sum greater than the individual is able to satisfy from personal financial resources. These subsections promote the act's principal purpose by preventing a court from using a secured appearance bond (or other financial condition or fee) as a functional detention mechanism (at least in circumstances where an individual has not yet enjoyed the procedural protections of a detention hearing, as described in Article 4, *infra*). UNIFORM LAW COMMISSION, *New ULC Drafting Committee on Alternatives to Bail* (Feb. 2, 2018) (noting that the mission of the proposed act is to "prohibit the use of money bail *as a mechanism to trigger preventative detention*" (emphasis added)); *cf.* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) ("The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay."); KANSAS STAT.§22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance").

To satisfy these subsections, a court not only is forbidden from relying upon a financial condition or fee as a means to detain, but also the court must inquire into the individual's ability to satisfy a financial condition or fee. That said, the act leaves the precise scope and shape of the inquiry to judicial discretion. Some possible criteria include whether the defendant (i) was previously detained pretrial on a secured appearance bond, (ii) is the recipient of means-tested benefits, (iii) has an income below 200% of the federal poverty line, (iv) qualifies for indigent counsel, (v) is unemployed or homeless, or (vi) was recently released from an institutional setting (for example, a jail, prison, hospital, or other treatment facility). And, to satisfy this inquiry, the court may take an affidavit or testimony from a defendant under oath.

The court may not impose a secured appearance bond for a misdemeanor charge unless the individual has absconded or not appeared multiple times in a criminal case or combination of criminal cases. The act contemplates that the need for imposition of a secured financial condition is rare in a misdemeanor case. Thus, it allows a court to set a secured appearance bond for a misdemeanor charge only if the defendant previously has absconded or not appeared repeatedly in this or another criminal case.

SECTION 308. ORDER OF TEMPORARY PRETRIAL DETENTION.

(a) At the conclusion of a release hearing, the court may order pretrial detention of the individual until a detention hearing, if [the individual is charged with a detention-eligible offense and] the court determines by [clear-and-convincing evidence] [a preponderance of the evidence]

that:

(1) if the individual is charged with a felony, it is extremely likely that the individual will not appear and no less restrictive condition is sufficient to address the risk;

(2) it is likely that the individual will abscond, obstruct justice, violate a protection order, or cause [bodily injury to another individual] [harm to another person] and no less restrictive condition is sufficient to address the risk; or

(3) the individual has violated a condition of an order of pretrial release for a pending charge.

(b) Before the court issues an order under subsection (a), the individual has a right to be heard.

(c) If the court issues an order under subsection (a), the court shall state in a record why no less restrictive condition or combination of conditions is sufficient to address the risk the court has identified under subsection (a).

Legislative Note: *In subsection (a), include the bracketed phrase "the individual is charged with a detention-eligible offense" if the state chooses to adopt a limited class of charges for which pretrial detention may be authorized.*

In subsection (a) use the burden of proof the state chooses for the court's determination.

In subsection (a)(2), insert the state's term for the type of harm the state concludes is relevant to a temporary detention decision.

Comment

The individual is charged with [a detention-eligible offense]. This bracketed clause offers states the option of adopting a "detention-eligibility net"—that is, a limited class of charges for which pretrial detention may be authorized. Historically, most state constitutions authorized pretrial detention without bail only in capital cases. Wayne LaFave *et al.*, 4 CRIM. PROC. § 12.3(b) (4th ed.). A number of states expanded their detention-eligibility nets in the 1980s and 1990s. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56 (1985). Many states, however, still limit detention-eligibility to a relatively narrow class of charges. LaFave *et al.*, § 12.3(b); *see also* National Center for State Legislatures, *Pretrial Detention*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-

detention.aspx (June 7, 2013) (last visited Jan. 1, 2020). It may even be the case that due process requires states to limit pretrial detention in this way. The Supreme Court has affirmed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). In *Salerno*, the Supreme Court held that the preventive detention provisions of the federal Bail Reform Act satisfied due process in part because the Act limited detention-eligibility to "a specific category of extremely serious offenses." *Id.* at 750. The Court did not specify whether due process required this limitation or not. But this feature of the federal pretrial detention regime (as it existed in 1987) contributed to the Court's conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. Adopting a detention-eligibility net can thus help to ensure that pretrial liberty defines the norm and that detention remains a constitutional and "carefully limited exception." *Id.* at 755.

The individual is charged with a felony and is extremely likely not to appear. Here, the act sets a special detention-eligibility net where the relevant risk is only nonappearance, as opposed to absconding, obstructing justice, violating an order of protection, or dangerousness. The logic is that a court should almost always be able to manage inadvertent failures to appear through conditions of release, practical assistance or voluntary supportive services. The act does not authorize detention in a misdemeanor case where the only risk is nonappearance (unless the individual has violated condition of release for a pending charge).

The individual has violated a condition of an order of pretrial release for any pending criminal charge. The act allows a court to issue a *temporary* detention order based only a showing that the defendant has violated a condition of pretrial release in a pending case. However, as elaborated below, the act requires more before a court may issue a detention order that presumably lasts until adjudication. The latter order follows a procedurally robust detention hearing, at which the government has more opportunity to demonstrate that a defendant poses a sufficiently high and unmanageable release risk, and the defendant has the opportunity to contest that showing.

The court shall state in a record why no less restrictive condition is sufficient to address the risk. This requirement mirrors the requirement in Section 306 that the court articulate why a restriction on the individual's liberty is necessary.

[ARTICLE] 4

DETENTION HEARING

SECTION 401. TIMING.

(a) If the court orders pretrial detention under Section 308 or imposes a condition under Section 304 or 306 on which the individual is detained, the court shall hold a hearing not later than [72] hours after the completion of the proceeding at which the order was issued to consider

whether the individual should continue to be detained pending trial.

(b) The court on its own or on motion of the [prosecuting authority] may for good cause continue a detention hearing for not more than [72] hours.

(c) The court shall continue a detention hearing on motion of the detained individual.

Legislative Note: *In subsections (a) and (b), insert the period the state chooses as a deadline for the detention hearing and continuance of a detention hearing.*

In subsection (b), insert the state's term for the state's prosecuting authority.

Comment

Not later than [72] hours. The need for speedy review is important (and probably constitutionally required) when an individual is detained without the procedural safeguards of a detention hearing. The need is even greater when the individual ostensibly was released but remains detained on conditions of release some days after the release decision. Indeed, recent studies have found that even short terms of detention may correlate with increases in recidivism and failure to appear. *See* sources cited in Comment to Section 301, *supra*; *see also* STATE OF UTAH OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, *Report to the Utah Legislature: A Performance Audit of Utah's Monetary Bail System* 19 (Jan. 2017) ("Low-risk defendants who spend just three days in jail are less likely to appear in court and more likely to commit new crimes because of the loss of jobs, housing, and family connections."); PRETRIAL JUSTICE INSTITUTE, *Pretrial Justice: How Much Does It Cost?* 4-5 (Jan. 2017) (finding increases in re-arrest and conviction for those detained even a short time beyond first appearance); *cf.* ODonnell v. Harris Cnty., 892 F.3d 147, 165-66 (5th Cir. 2018) (providing for sequential hearings to review conditions of release that do not result in immediate release).

SECTION 402. RIGHTS.

(a) At a detention hearing, the detained individual has a right to counsel. If the individual is indigent, the [authorized agency] shall provide counsel. [The scope of representation under this section may be limited to the subject matter of the hearing.]

(b) At a detention hearing, the detained individual has a right to:

(1) review evidence to be introduced by the [prosecuting authority] before its introduction at the hearing;

(2) present evidence and provide information;

(3) testify; and

(4) cross-examine witnesses.

Legislative Note: *In subsection (a), insert the state's term for the agency that is required to provide counsel. Include the last sentence if the state chooses to permit limited-scope representation.*

In subsection (b)(1), insert the state's term for the state's prosecuting authority.

Comment

Rights. Section 402 prescribes rights that are consistent with the procedural framework for detention hearings that the Supreme Court held constitutional (and, potentially, constitutionally required) in *United States v. Salerno*, 481 U.S. 739 (1987).

If the individual is indigent. In Section 302, the act provides a provisional right to counsel at a release hearing. There, the right does not require a finding of indigency. As explained earlier, the reason is that even an affluent individual might not be able to secure the appearance of counsel at a release or review hearing that happens so early in the process. By the date of a detention hearing, however, timing is no longer so pressing. Thus, subsection (b) adds the contingency of indigency.

SECTION 403. STANDARD.

(a) At a detention hearing, the court shall consider the criteria and restrictive conditions in Sections 303, 306, and 307 to determine whether to order pretrial detention or to continue, amend, or eliminate a restrictive condition of release on which an individual is detained. If a secured appearance bond is the only condition on which the individual is detained, the court shall consider the fact of detention, absent contrary evidence, as evidence that the individual is unable to satisfy the bond.

(b) The court may not order pretrial detention or continue a condition of release that results in detention unless [the individual is charged with a detention-eligible offense and] the court determines by clear-and-convincing evidence that:

(1) if the individual is charged with a felony, it is extremely likely that the individual will not to appear and no less restrictive condition is sufficient to address the risk; or

(2) it is likely that the individual will abscond, obstruct justice, violate a protection order, or cause [bodily injury to another individual] [harm to another person] and no less restrictive condition is sufficient to address the risk.

(c) If the court orders pretrial detention or continues a condition of release that results in detention, the court shall state in a record why no less restrictive condition, including electronic monitoring, is sufficient to address the risk that the court has identified under subsection (b).

Legislative Note: *In subsection (b), include the bracketed phrase if the state chooses to adopt a limited class of charges for which pretrial detention may be authorized.*

In subsection (b)(2), insert the state's term for the type of harm the state concludes is relevant to a detention decision.

Comment

The individual is charged with [a detention-eligible offense]. See Comment to Section 308, *supra*.

Electronic Monitoring. The reference to electronic monitoring is an acknowledgment that the need for detention should be exceedingly rare if the risk at issue is failure to appear, whether nonappearance or absconding. *See generally* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344 (2014). It is generally accepted today that a risk of nonappearance and even absconding may be managed effectively through electronic monitoring, active or passive. As former Attorney General Eric Holder has observed, technology ensures that "[a]lmost all of these individuals could be released and supervised in their communities—and allowed to pursue and maintain employment and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice." BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30.

Expedited trial. If a defendant is detained until adjudication, a court should expedite trial, and many states provide for such a right. However, the act leaves this question to the states and their speedy trial statutes.

[ARTICLE] 5

MODIFYING OR VACATING ORDER

SECTION 501. MODIFYING OR VACATING BY AGREEMENT. By agreement of the [prosecuting authority] and the individual subject to an order issued under [Article] 3 or 4, the court may:

(1) modify an order of pretrial release;

(2) vacate an order of pretrial detention and issue an order of pretrial release; or

(3) issue an order of pretrial detention.

Legislative Note: *Insert the state's term for the state's prosecuting authority.*

Comment

By agreement of an individual, a court may issue an order of pretrial detention. It may not be obvious why a defendant would agree to a detention order. However, in circumstances where a defendant is already detained on another order, he may prefer a detention order in the immediate case (for instance, in order to receive credit for time incarcerated).

SECTION 502. MOTION TO RECONSIDER.

(a) On motion of the individual subject to an order issued under [Article] 3 or 4, the court shall reconsider an order of pretrial release, using the procedure and standards in [Article] 3, and may modify the order by amending or eliminating a restrictive condition of release. The court may deny the motion summarily if the motion does not include new relevant information.

(b) On its own or on motion of the [prosecuting authority], the court may reconsider an order of pretrial release, using the procedures and standards in [Article] 3, if new information is provided to the court that is relevant to the order, including evidence that the individual violated a condition of release. The court may:

(1) modify the order by amending, adding, or eliminating a condition of release;

(2) vacate the order and issue an order of pretrial detention pending a detention

hearing; or

(3) continue the order.

(c) On its own or on motion of the detained individual or the [prosecuting authority], the court may reopen a detention hearing, using the procedures and standards in [Article] 4, if new information is provided to the court that is relevant to an order of pretrial detention.

Legislative Note: *In subsections (b) and (c), insert the state's term for the state's prosecuting authority.*

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

[SECTION 602. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

[SECTION 603. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

Comment

Appeal or conform. A state may need to repeal or amend a statute that imposes mandatory release conditions for an offense or type of offense—for instance, a mandatory fee, a

secured bond, or another financial condition.

SECTION 604. EFFECTIVE DATE. This [act] takes effect . . . .