D R A F T

FOR APPROVAL

UNIFORM PRETRIAL RELEASE AND DETENTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Pretrial Release and Detention Act.

Comment

Pretrial Release and Detention. This Act presents a framework to guide judicial determinations about whether and how to restrict the liberty of individuals accused of crime during the pretrial phase. The Act responds to widespread recognition that high arrest rates and reliance on secured bonds ("money bail") have resulted in unjust and untenable rates of pretrial detention of individuals who lack the means to satisfy bonds. Conversely, individuals with ample resources may purchase freedom even if they pose high flight risks or other relevant threats.

The Act is intended to replace a state's existing statutory law regulating determinations to release or detain individuals pretrial, except certain laws pertaining to related matters, as specified by Section 103, *infra*. The Act offers an approach to pretrial release and detention decisions that synthesizes points of consensus among contemporary courts, legislatures, pretrial policy experts, scholars, and advocates. Its core animating principle is that the state may restrict an accused person's liberty only to the extent necessary to satisfactorily protect the state's relevant interests during the pretrial period: the appearance of the accused at court proceedings, public safety, and the integrity of the judicial process. Article 2 deals with the officer on the beat. It offers a template for limiting arrest to situations in which a custodial seizure is necessary to initiate prosecution. Article 3 provides courts with a framework for release determinations of those individuals who are arrested and not released from stationhouses. Article 4 details the process and standards for authorizing continued detention pending trial. At each step, the Act requires that any restraint on the accused person's liberty be the least-restrictive measure necessary to adequately protect the state's relevant interests.

In drafting the Act, the Drafting Committee has drawn on the American Bar Association's PRETRIAL RELEASE STANDARDS (2007); the National Association of Pretrial Services Agencies' PRETRIAL RELEASE STANDARDS (2020 Edition); the current statutory regimes in the District of Columbia, New Jersey, New Mexico, and the federal system; and the work of countless scholars and advocacy organizations.

The term "bail". The Act does not use the word "bail" because that term creates needless confusion. For centuries, "bail" referred to the process of release after arrest, typically conditioned on an unsecured pledge of a personal surety. *Holland v. Rosen*, 895 F.3d 272, 291 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440 (2018); *see also* Timothy R. Schnacke, FUNDAMENTALS OF BAIL 114 (2014). As American jurisdictions came to rely more heavily on secured bonds and commercial sureties, the process of bail became so closely associated with

secured bonds that many courts and stakeholders now use the word "bail" to signify a secured bond (or "money bail" or "cash bail"). But that usage is far from universal. The Supreme Court's jurisprudence has used "bail" to refer to the process of pretrial release, and several appellate courts and experts continue to use this broader definition. *See, e.g. Rosen*, 895 F.3d 272 at 291. The Act avoids confusion by using other more precise terms.

To the extent that a state uses the term "bail" in existing constitutional provisions or in case law or statutory text that is not displaced by this Act, the state should endeavor to read the relevant text consistently with this Act. For example, if case law or a statute uses the term "bail" to refer to a secured appearance bond, that text should be interpreted consistently with the provisions of this Act regulating secured appearance bonds. Alternatively, the state may modify the text of a surviving statute to replace the term "bail"—or another conflicting term—with the appropriate corresponding term from this Act. For instance, as specified by Section 103, the Act does not replace a state's existing forfeiture statute. If a forfeiture statute were to use the term "bail," the state could consider altering that language as necessary to avoid confusion or conflict with the terms of this Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Abscond" means fail to appear in court as required with intent to avoid or delay adjudication.

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

[(3) ["Citation"] means a record issued by [an authorized official] alleging an offense.]

(4) "Covered offense" means [offenses for which pretrial detention or the imposition of a financial condition that cannot be paid within the time prescribed in Article 3 is authorized].

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

(6) "Not appear" means fail to appear in court as required without intent to avoid or delay adjudication. "Nonappearance" has a corresponding meaning.

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

(8) "Offense" means the conduct that a statute proscribes.

(9) "Person" means an individual, estate, business or nonprofit entity, public corporation,

government or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Plain language" means words that the individual to whom a record is directed can reasonably be expected to understand. The term includes words in a language other than English.

(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 under Section 301.

(13) "Secured appearance bond" means a person's promise, secured by sufficient [surety], deposit, lien or proof of access to collateral, to forfeit a specified sum if the individual whose appearance is the subject of the bond absconds or does not appear.

(14) "Unsecured appearance bond" means a person's unsecured promise to forfeit a specified sum if the individual whose appearance is the subject of the bond absconds or does not appear.

Legislative Note: *In paragraphs (2) and (3), include the state's term for a citation or the equivalent if the state adopts Article 2.*

Include paragraph (3) if the state adopts Article 2.

In paragraph (4), insert the list of offenses or offense classes or types for which detention or the imposition of a financial condition that cannot be paid within the time prescribed in Article 3 is authorized.

In paragraph (13), insert the state's term for "surety".

Comment

Absconding versus nonappearance. The 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" has the purpose of evading justice, whereas "nonappearance" may result from impediments to appearance—for example, from cognitive limitations or difficult social circumstances. *See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). The difference between absconding and nonappearance turns on the presence of a

particular purpose. A person who must choose between attending a court date or maintaining her job may be said to have intentionally failed to appear in court, but this failure is an instance of nonappearance rather than absconding. Absconding entails the particular purpose of avoiding or delaying adjudication.

The reason for distinguishing between a risk of absconding and a risk of nonappearance is that these two distinct risks call for different responses. Supportive measures like court-date reminders, flexible scheduling, and assistance with transportation or childcare may be sufficient to manage a risk of nonappearance. On the other hand, a serious risk of absconding may justify greater restrictions on pretrial liberty. Because these two distinct risks sometimes warrant distinct statutory responses, the Act treats them separately in places. Elsewhere, the Act uses the term "failure to appear" (or the equivalent) to indicate any failure to appear at a required court date, whatever the purpose of the accused person in missing court.

Citation. States use different terms to designate an accusatory instrument used to initiate criminal proceedings without arrest. The Act uses the stand-in term "citation", but many jurisdictions may use another term, like "summons", to signify the same. *See, e.g.*, N.Y. CRIM. PROC. LAW § 130.10 ("A summons is a process issued by a local criminal court directing a defendant designated in an [accusatory instrument] to appear before it at a designated future time in connection with such accusatory instrument."). A state should insert whichever term it uses.

Covered offense. This Act provides for each state to specify the offenses, or offense classes or types, for which a person may be held in custody pending trial (whether on the basis of a detention order or on the basis of a financial condition of release that the accused person cannot satisfy). *See* Section 308 and Article 4, *infra*. Each state should enumerate these offenses or offense classes or types in the definition of "covered offense", *supra*. Some possibilities include: (i) violent felonies; (ii) all felonies; (iii) all felonies and violent misdemeanors; or (iv) all felonies, violent misdemeanors, and misdemeanors involving domestic violence, stalking, driving under the influence, unlawful firearms possession or use, or contempt. Each state should consult its constitution and case law interpreting relevant state-constitutional provisions when determining what offenses to include as "covered offenses". For further discussion, *see* the 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 a state's existing crime definitions. To the contrary, the Act provides a definition of "obstruction of justice" for the purposes of the Act only.

Offense. The definition of "offense" intentionally avoids reference to "criminal" laws or penalties, because state and local codes frequently contain offenses that are not officially designated as criminal but that nonetheless may subject violators to arrest or similar pretrial restraints on liberty. *See* Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 151 (2017) ("Consider . . . the officer's arrest authority . . . , the police officer needs only probable cause to believe the arrestee has committed an offense—any offense, including even a noncriminal violation."); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J. L. & PUB. POL'Y 319, 338-339 (2014) (collecting cases of authorized

arrest for noncriminal offenses). Indeed, some noncriminal offenses even authorize imposition of a postconviction jail sentence. *See, e.g.*, N.Y.P.L. § 70.15 (2019) ("A sentence of imprisonment for a [noncriminal] violation shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed fifteen days."). Consequently, this Act applies to any offense—criminal or otherwise—that authorizes arrest or similar pretrial restraints on liberty.

SECTION 103. SCOPE. This [act] governs a determination to [arrest,] release[,] or detain an individual before trial. The act does not affect the validity of a law of this state other than this [act] regarding related matters, including:

(1) forfeiture, release, or collection of an unsecured or secured appearance bond;

(2) a seizure for the purpose of involuntary civil commitment;

(3) a right of a crime victim, including a right regarding notification;

(4) appellate review; or

(5) release pending appeal.

Legislative Note: *In the first sentence, insert the bracketed text if the state adopts Article 2.*

Comment

Governs a determination to arrest, release, or detain an individual. This language clarifies that the Act is intended to replace a state's existing statutory law regulating determinations to arrest, release, or detain individuals prior to trial (but not related statutes, discussed immediately below).

Does not affect the validity. The Act does not displace or preempt existing state law regarding the subjects listed. The list is not exhaustive; it merely addresses subjects potentially related to this Act in order to clarify the Act's precise scope. Although the Act does not displace or preempt laws regarding these subjects, it is important for each jurisdiction to consider the interplay of the Act with existing law in these areas and, if necessary, to address conflicts or ambiguity—for instance, by modifying the language of related law to conform to the terms of this Act.

[[ARTICLE] 2]

[CITATION] AND ARREST

Legislative Note: *Include Article 2 if the state chooses to include an article on citation and arrest.*

SECTION 201. AUTHORITY FOR [CITATION] OR ARREST.

(a) If [an 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 another action authorized by law.

(b) Except as otherwise provided by law of this state other than this [act], [an authorized official] may arrest an individual only if:

(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; or

(2) subject to subsection (c), [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.

(c) If an offense under subsection (b)(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 the individual unless:

(1) the offense is [domestic violence, stalking, driving under the influence, unlawful firearms possession or use, contempt, a sexual offense, or other listed offense];

(2) the individual fails to provide adequate identification, orally or through documentation, as lawfully requested by [the authorized official];

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

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

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

(B) carry out a lawful investigation;

(C) protect a person from significant harm; or

(D) prevent the individual from fleeing the jurisdiction.

Legislative Note: *In each subsection, insert the state's term for an official authorized to issue a citation or the equivalent.*

In the introduction to subsection (c), insert the offenses or offense classes or types for which arrest is not authorized except as provided in paragraphs (1) through (4).

In subsection (c)(1), insert the offenses or offense classes or types sufficiently serious to authorize an arrest.

Comment

Citation versus arrest. Although this Act focuses primarily on release and detention policy following arrest, the implementation of pretrial detention and release policy begins with the police officer on the beat. Hence, Article 2 of the Act provides an option to the states to enact a provision requiring citations over arrests in certain circumstance. *See, e.g.*, Bureau of Justice Assistance, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS 30 (2012); 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). Nevertheless, the Act contemplates that a state may decide not to include an article on citation versus arrest. Thus, the entire Article 2 is bracketed.

Arrest. The term "arrest" "has no standard definition in the law". Rachel A. Harmon, *Why Arrest?,* 115 MICH. L. REV. 307, 309-10 (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."). Nor does this Act undertake to define "arrest"; it is enough for a state to differentiate between a citation (or the equivalent) and an arrest, however the state defines the latter.

Except as otherwise provided by law. A state 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. For further discussion, *see* the Comment to Section 303, *infra* ("*Significant harm to another person*").

May not arrest the individual unless. Subsection 201(c) limits authority to arrest for certain classes or types of minor offenses. Each state may determine how to define the classes or types of minor offenses that are subject to this provision. Two options, included in brackets, are

(1) all sub-felony offenses, or (2) offenses punishable by no more than a specified term of incarceration. Within the designated classes or types of offenses, 201(c)(1) through (4) enumerate the extenuating circumstances in which arrest is nonetheless permitted.

Adequate identification, orally or through documentation, as lawfully requested. Unless otherwise required by law, an individual need only respond orally to an officer's lawful request to determine the identity information necessary to issue a citation (or the equivalent). In other words, the Act itself does not oblige an individual to carry identification papers in order to avoid an otherwise unauthorized arrest. Other laws may require individuals to carry identification documents in certain circumstances—for instance, when operating a motor vehicle. And, in the first instance, an officer must have probable cause either to issue a citation or make an arrest. *See* subsection 201(a); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

Fingerprinting requirements. Some jurisdictions require law enforcement officers to collect fingerprints from individuals suspected of certain offenses. To the extent that existing state law requires officers to bring such individuals to a police station, booking facility, or other law enforcement facility for fingerprinting, the act contemplates that subsection 201(c)(4)(B) authorizes such action.

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

(1) the circumstances of the alleged offense and the provision of law that it violates;

(2) if appearance is required:

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

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

(3) the possible consequences of violating the requirements of the [citation] or committing another offense before the individual's first court appearance.

SECTION 203. RELEASE AFTER ARREST. [An authorized official] may release an individual after arrest and without a release hearing by issuing a [citation] under Section 201(a). [The authorized official] may require the individual to execute an unsecured appearance bond as a condition of release.

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

Comment

Release after arrest and without a release hearing. This provision permits policies and practices of "stationhouse release"—or release directly from a police station, booking facility, jail, or other law enforcement facility—without the need for a judicial hearing. The Act authorizes the imposition of an unsecured bond requirement as a condition of stationhouse release. Many jurisdictions have relied on secured-bond "schedules" to enable release for those able to afford the pre-set bond amounts immediately after arrest, but the constitutionality of that practice is in question, because it produces arbitrary wealth-based disparities in post-arrest pretrial release. *ODonnell v. Harris Cty.,* 892 F.3d 147, 163 (5th Cir. 2018) (affirming on equal protection and due process grounds the district court's preliminary injunction, preventing Harris County from imposing secured appearance bonds based upon a misdemeanor bail schedule); *but see Walker v. City of Calhoun*, 901 F.3d 1245, 1272 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun*, 139 S. Ct. 1446 (2019) (holding that use of a secured bond schedule did not violate equal protection or due process where indigent arrestees were guaranteed an individualized hearing and release within forty-eight hours of arrest). To err on the side of constitutional caution and to minimize wealth-based disparities, the Act does not permit the use of secured bond schedules for stationhouse release.

SECTION 204. APPEARANCE ON [CITATION].

(a) If an individual appears as required by a [citation], the court shall issue an order of pretrial release on recognizance in the case for which the [citation] was issued. The order shall include the information required under Section 304(a).

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

Legislative Note: *In subsection (b), insert the judicial action the state chooses to authorize if an individual fails to appear.*

Comment

Order of pretrial release on recognizance. The intent of this provision is to specify that, if an individual appears as required by a citation (or the equivalent), the court should issue an order of pretrial release that is conditioned only on the individual's promise to appear again as required by the court and abide by generally applicable laws—or "release on recognizance".

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING.

(a) Unless an arrested individual is released after arrest [under Section 203], the individual is entitled to a hearing to determine release pending trial. Except as otherwise provided in subsection (b), the court shall hold the hearing not later than [48] hours after the arrest.

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

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

Legislative Note: *In the first sentence of subsection (a), insert the bracketed words if the state adopts Article 2.*

In subsections (a) and (b), insert the deadlines the state designates for a release hearing and continuance of the hearing.

Comment

Hearing to determine release. Section 301 requires a prompt judicial hearing for release determinations of those persons who have been arrested and not released from stationhouses pending trial. Section 302 articulates the rights of the arrested person at that hearing. Sections 303 through 308 guide the judicial evaluation necessary in order to impose restrictive conditions of release or, in rare cases, detain the individual. Section 303 requires the court to determine, first, whether there is clear and convincing evidence that the individual is likely to engage in conduct that unduly threatens the state's relevant interests during the pretrial period. If not, Section 304(a) requires that the court release the individual on recognizance. If the court determines that there is a sufficient relevant risk under Section 303, the court then determines the least-restrictive method of release to satisfactorily address the risk under Sections 305, 306, and 307. The court should first consider under Section 305 whether a non-restrictive measure—practical assistance or a supportive service—could satisfactorily address the risk. If not, the court should consider under Section 306 what restrictive condition or set of conditions is necessary, abiding by the limits on financial conditions under Section 307. Finally, if the individual is charged with a "covered offense" and certain other criteria are met, the court may, under Section 308, order temporary detention or impose a release condition that the individual

cannot immediately satisfy.

Extraordinary circumstances. Under Section 401, the Act allows for continuance of a detention hearing merely for good cause. With respect to the release hearing, however, the Act contemplates that the reasons for delay must be "extraordinary," such as a natural disaster or terrorist attack, rather than a routine administrative hurdle or resource constraint. The logic is that many states already follow a 48-hour timeline, under *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, e.g.*, N.J. STAT. ANN. § 2A:162-16 ("[T]he 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, child custody or care arrangements as well as likelihood of conviction—are often triggered within three days. *See, e.g.*, Pretrial Justice Institute, 3DAYSCOUNT, 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 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 the first days of detention are a "fairly critical period for making bail"); sources cited in the Comment to Section 401, *infra*. Therefore, time is of the essence for the release hearing.

SECTION 302. RIGHTS OF ARRESTED INDIVIDUAL.

[(a)] An arrested individual has a right to be heard at a release hearing.

[(b) The individual has a right to counsel at a release hearing. If the individual is unable to obtain counsel for the hearing, [an authorized agency] shall provide counsel. [The scope of representation under this section may be limited to the subject matter of the hearing.]]

Legislative Note: *Include subsection (b) if the state chooses to codify a right to counsel at the release hearing. Insert the state's term for the agency that is authorized to provide counsel. If*

the authorized agency varies locally, insert "an authorized agency". 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 constitutional 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 post-attachment right to the presence of counsel"). Given the jurisprudential uncertainty, the Act, by bracketing subsection 302(b), offers states the choice of whether to codify a right to counsel at the release hearing. The Act does not limit this right to the indigent. That is because the release hearing often happens so quickly that even an affluent individual may not yet 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 a release hearing 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.*, 29 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 30 (Washington, D.C., 2012) (deeming counsel's presence integral to release hearings).

If a state chooses to codify a right to counsel at the release hearing, an arrested individual retains the right to waive counsel. In some circumstances, for instance, an individual may wish to waive counsel to facilitate speedier release.

Rights of arrested individual versus powers of prosecutor. Article 3 prescribes only the rights of the arrested individual. It does not address the procedural powers of the prosecutor—for instance, to present evidence, make arguments, or cross-examine defense witnesses. The Act does not establish any required procedures for the release hearing and thereby leaves matters other than the rights of the arrested individual to existing state law and court rules.

SECTION 303. JUDICIAL DETERMINATION OF RISK. At a release hearing, the court shall determine, by clear and convincing evidence, whether an arrested individual poses a

risk that is relevant to pretrial release. The individual poses a relevant risk only if the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant harm to another person. The court may consider:

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

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

(3) the individual's criminal history, history of absconding or nonappearance, and community ties;

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

[(5) a recommendation of a pretrial services agency or relevant information provided by the agency;] and

(6) other relevant information, including information provided by the individual, the [prosecuting authority], or an alleged victim.

Legislative Note: *Include paragraph (5) if pretrial services agencies operate in the state.*

In paragraph (6), insert the state's term for the state's prosecuting authority.

Comment

Relevant risk. The Act, like other comprehensive frameworks for pretrial release and detention, requires a judicial officer to assess whether the accused person presents a risk and, if so, to determine the least-restrictive method for managing that risk. But not all kinds and degrees of risk justify infringements on pretrial liberty. Section 303 thus requires the court to determine whether the accused person presents a risk of a particular kind ("absconding, not appearing, obstructing justice, violating an order of protection, or causing significant harm to another person") and of a particular degree ("likely"). If the court does *not* find clear and convincing evidence that one of these events is likely to occur in the absence of intervention, subsection 304(a) requires release on recognizance. If the court *does* find clear and convincing evidence that one of these events is likely to occur, Sections 305 through 308 direct the court to determine the least-restrictive measures to satisfactorily address the risk, with the options ranging from non-restrictive assistance and support (Section 305) to temporary detention (Section 308). For further discussion, *see* the Comment to Section 305, *infra* ("*Satisfactorily address the risk*").

Abscond versus not appear. For the reasons discussed in the Comment to Section 102, *supra*, the Act draws a distinction between a risk of nonappearance versus a risk of absconding. As indicated in subsection 102(6), *supra*, the term "nonappearance" corresponds in meaning with "not appear", which is defined as "fail to appear in court as required without the intent to avoid or delay adjudication".

Significant harm to another person. The Act anticipates that not only physical injury and death but also property loss may constitute "significant harm to a person". This intended reading is supported by the Uniform Law Commission's conventional definition of "person", which is adopted in subsection 102(9), *supra*: "'Person' means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity." Given the breadth of the meaning of "person", it is especially important that the harm be "significant" to keep a court from unduly limiting liberty based on a risk of only trivial harm. Finally, the Act does not allow a court to consider whether an individual is likely to cause significant harm to self, because jurisdictions already have other legal regimes for involuntary civil commitment should a person present an acute risk of harm to self, and this Act does not disturb those regimes. For further discussion, *see* the Comment to Section 201, *supra* ("*Except as otherwise provided by law*").

Clear and convincing evidence. The Supreme Court has never sanctioned a lower standard than clear and convincing evidence when a fundamental liberty is at stake. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (rejecting a due process challenge to the Federal Bail Reform Act's preventive detention provisions in part because the Act required the government to "prove its case by clear and convincing evidence"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (invalidating a law that permitted confinement of an insanity acquittee without clear and convincing evidence of dangerousness and mental illness); *Addington v. Texas*, 441 U.S. 418 (1979) (requiring a clear and convincing standard for involuntary civil commitment); *Santosky v. Kramer*, 455 U.S. 745, 745 (1982) (noting that clear and convincing evidence is required when "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money'"); *see also Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282 (1990) (discussing "particularly important" interests, including deportation, denaturalization, civil commitment, and termination of parental rights).

The Act operates on the premise that pretrial liberty is a "particularly important" interest that demands a heightened evidentiary standard, including at a release hearing when a court may issue an order of temporary pretrial detention, as Section 308 permits. *See Salerno*, 481 U.S. at 750 (recognizing "the importance and fundamental nature" of pretrial liberty); *id.* at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). As discussed in the Comment to Section 301, *supra*, many of the most serious negative consequences of confinement come to pass over the first three days of pretrial detention. Although the Supreme Court has not explicitly held that pretrial detention requires a finding of necessity by clear and convincing evidence, a number of lower courts have. *See, e.g. Valdez-Jimenez v. Eighth Judicial District Court in and for County of Clark*, 460 P.3d 976, 980 (Nv. 2020) (holding that a court may impose bail that may result in detention "only if the State proves by clear and convincing evidence that it is necessary to ensure the defendant's presence at

future court proceedings or to protect the safety of the community"); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018) (requiring proof by clear and convincing evidence that pretrial detention is necessary because of "the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court"); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1372 (N.D. Ala. 2018) ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."). Moreover, a number of existing statutes governing pretrial detention require a finding of necessity by clear and convincing evidence. *See, e.g.*, 18 U.S.C. § 3142(e)(1), (f); D.C. CODE § 23-1322 (B)(1), (D); MASS. GEN. LAWS. ANN. CH. 276, § 58A(3); N.J. STAT. ANN. § 2A:162-18(A)(1); N.J. STAT. ANN. § 2A:162-19 (E)(2), (3); N.M. R. CRIM. P. DIST. CT. 5-409(A), (F)(4); WIS. STAT. § 969.035(5), (6)(b); *see also* FLA. R. CRIM. P. 3.132 ("The state attorney has the burden of showing beyond a reasonable doubt the need for pretrial detention pursuant to the criteria in section 907.041, Florida Statutes.").

Pretrial services agencies. Since the 1960s, pretrial services agencies have played a crucial role in assessing and managing pretrial risk, as well as in providing the kind of supportive services and practical assistance contemplated by Section 305, *infra*. And, since they operate at some remove from the adversarial process, they can help ensure the objectivity of determinations of relevant risk. Thus, the United States Department of Justice includes pretrial services as an "essential" element of an effective state or federal pretrial system. National Institute of Corrections, A FRAMEWORK FOR PRETRIAL JUSTICE (2017); *cf.* National Association of Pretrial Services Agencies, NATIONAL STANDARDS ON PRETRIAL RELEASE (2020) (offering comprehensive recommendations for the creation and operation of such agencies). Nevertheless, in many jurisdictions—particularly rural jurisdictions—pretrial services agencies or other similar institutions do not exist. This Act does not mandate the creation of pretrial services agencies. But it does contemplate that in a jurisdiction where such an agency exists already, the pretrial services agency will play a significant role in supporting the court's assessment of relevant risks under Section 303 and the determination of the least-restrictive measures to manage relevant risks under Sections 305 through 308.

Risk assessment instruments. One of the most controversial questions in pretrial policy is when, whether, and to what degree pretrial release should depend upon actuarial risk-assessment instruments. *See generally* Sarah L. Desmarais & Evan M. Lowder, PRETRIAL RISK ASSESSMENT TOOLS: A PRIMER FOR JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS (2019). Fifteen states currently require courts to use risk-assessment instruments in at least some cases. 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, e.g.*, KY. REV. STAT. §§ 431.520, 431.066; COLO. REV. STAT. §§16-4-103, 16-4-113. In particular, hundreds of jurisdictions have used the Public Safety Assessment (PSA) tool created by Arnold Ventures. *See* Advancing Pretrial Policy & Research, WHERE THE PSA IS USED, https://advancingpretrial.org/psa/psa-sites/. There is widespread concern, however, that the use of actuarial risk assessment instruments may unnecessarily widen the net of defendants who are subject to detention and unnecessary conditions of release. *See, e.g.*, Human Rights Watch, PRESERVING THE PRESUMPTION OF INNOCENCE: A NEW MODEL FOR BAIL REFORM (on file with reporters) (rejecting use of risk-assessment instruments). Risk assessment tools have also generated fierce resistance on racial-equity grounds. *See, e.g.*, The Leadership Conference for

Civil Rights, THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS (2019); David G. Robinson & Logan Koepke, CIVIL RIGHTS AND PRETRIAL RISK ASSESSMENT INSTRUMENTS (2019).

This Act neither requires nor prohibits the use of actuarial risk assessment instruments. Jurisdictions may decide not to use such tools, or they may use actuarial instruments and direct or authorize courts to consider statistical risk assessments as "other relevant information" under subsection 303(5). However, states and courts should note that, at present, few tools are competent to assess the specific risks included in the Section 303 inquiry, *supra*. Moreover, even if an actuarial tool places an individual into a "high risk" category, it does not necessarily follow that any of the relevant events listed in Section 303 is "likely" to occur. Lastly, the Act does not allow an actuarial assessment alone to serve as a basis for detention or imposition of a restrictive condition.

SECTION 304. PRETRIAL RELEASE.

(a) Except as otherwise provided in subsection (b) and Section 308, at a release hearing the court shall issue an order of pretrial release on recognizance of an arrested individual. The order must state in plain language:

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

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

(b) If the court determines under Section 303 that the individual poses a relevant risk, the court shall determine whether, under Sections 305, 306, and 307, pretrial release of the individual is appropriate.

(c) If the court determines under Sections 305, 306, and 307 that pretrial release is appropriate, the court shall issue an order of pretrial release. The order must include in plain language the information required under subsection (a) and any restrictive condition imposed by the court.

Comment

Release on recognizance. If a court has not found clear and convincing evidence of a relevant risk under Section 303, subsection 304(a) directs the court to issue an order of release on

personal recognizance. An order of release on recognizance requires the individual to appear at future court hearings and to abide by generally applicable laws but does not impose any further restraint on the individual's pretrial liberty. The requirement of release on recognizance in the absence of a relevant risk is consistent with the law in the approximately twenty states that have codified a presumption of release on recognizance (or, at most, on an unsecured appearance bond). *See, e.g.*, KY. REV. STAT. §§ 431.520, 431.066; COLO. REV. STAT. §§16-4-103, 16-4-113. If the court *has* found clear and convincing evidence of a relevant risk under Section 303, on the other hand, subsections 304(b) and (c) direct the court to impose the least restrictive measure to manage that risk under Sections 305 through 307, except as otherwise provided under Section 308.

SECTION 305. PRACTICAL ASSISTANCE; VOLUNTARY SUPPORTIVE SERVICES.

(a) If the court determines under Section 303 that an arrested individual poses a relevant risk, the court shall determine whether practical assistance or a voluntary supportive service is available and sufficient to satisfactorily address the relevant risk.

(b) If the court determines that practical assistance or a voluntary supportive service is available and sufficient to satisfactorily address a relevant risk that the court has identified under Section 303, the court shall refer the individual to the practical assistance or voluntary supportive service and issue an order of pretrial release under subsection 304(c).

Comment

Practical assistance or a voluntary supportive service. In determining the least restrictive measure necessary to satisfactorily address a risk under Section 303, a court should begin with the possibility of non-restrictive measures designed to address the circumstances that have contributed to the relevant risk. Under Section 305, therefore, a court is first required to consider whether practical assistance or voluntary supportive services are available to manage the risk, before the court may consider restrictive conditions of release under Section 306, *infra*. For further discussion, *see* the Comment, *infra* ("*Satisfactorily address the risk*"). Many pretrial services agencies already provide such assistance and 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. There is increasing evidence that court-date reminders and other measures that reduce logistical barriers to appearance can dramatically improve appearance rates. *See, e.g.*, Brice Cooke *et al*., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018).

Voluntary supportive service. 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 voluntary therapeutic treatment or social services, including educational, vocational, or housing assistance.

Satisfactorily address the relevant risk. It is impossible to eliminate risk. 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 difficult task is to specify what degree of risk is tolerable in a free society. This Act takes the position that the state may justifiably restrict an individual's liberty during the pretrial phase only if there is clear and convincing evidence that one of the adverse events enumerated in Section 303 is likely. Moreover, the state may only restrict the individual's liberty to the extent reasonably necessary to reduce the risk below that threshold—to the point where the adverse event is no longer likely. Once the risk is reduced to that extent, further restriction is unjustified, even if it remains possible (but unlikely) that the adverse event will occur. If practical assistance or a voluntary supportive service can reduce the risk to that point, no restrictive condition of release is justified. If practical assistance or a supportive service *cannot* reduce the risk below that threshold but a restrictive condition can, the restrictive condition is justified—but detention is not. If no non-restrictive measure or restrictive condition or conditions can reduce the risk below that threshold, detention may be justified. The phrase "satisfactorily address the risk" is intended to mean just that: *reduce the risk to such an extent that the relevant adverse event under Section 303 is no longer likely*.

Just as it is impossible to eliminate risk altogether, it is likewise impossible to know in advance precisely what effect a non-restrictive supportive measure or restrictive condition will have. Given this uncertainty, the Act intends for courts to consider not only the relevant risks but also the potential collateral consequences of restrictive conditions, like impairment of a defendant's ability to maintain employment. This concern provides another reason for courts to consider non-restrictive measures first: such measures may more readily address risk without imposing undue collateral consequences.

SECTION 306. RESTRICTIVE CONDITION OF RELEASE.

(a) If the court determines under Section 305 that practical assistance or voluntary supportive services are not sufficient to satisfactorily address a relevant risk the court has identified under Section 303, the court shall impose the least restrictive condition or conditions reasonably necessary to satisfactorily address the relevant risk and issue an order of pretrial release under subsection 304(c).

(b) Restrictive conditions under subsection (a) may include:

(1) mandatory therapeutic treatment or social services;

(2) a requirement to seek to obtain or maintain employment or maintain an education commitment;

(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 [a [pretrial services agency] or] a third party;

(8) active or passive electronic monitoring;

(9) house arrest;

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

(11) a condition proposed by the arrested individual, the [prosecuting authority], or an alleged victim;

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

(13) another condition to satisfactorily address the relevant risk the court has identified under Section 303.

(c) The court shall state in a record why the restrictive condition or conditions imposed under subsection (a) are the least restrictive reasonably necessary to satisfactorily address the relevant risk the court has identified under Section 303.

Legislative Note: *In paragraph (11), insert the state's term for the state's prosecuting authority.*

Comment

Least restrictive condition. Approximately twenty states either expressly or implicitly require that conditions of release—especially secured financial conditions—must be the least restrictive available measures 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, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101; *cf.* 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.").

The least-restrictive-condition requirement is in keeping with a presumption of pretrial release, as discussed in the Comment to Section 304, *supra*. The idea is simply that the state may not punish people before they have been convicted. To the contrary, the state must justify any governmental infringement on pretrial liberty by demonstrating that the state's interests clearly outweigh the individual's liberty interests. The state should bear this considerable burden because physical liberty "lies at the heart of the liberty [the due process clause] protects". *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

In listing conditions of release, the Act does not rank conditions from least to most restrictive. However, as suggested in Section 307 and its Comment, *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 a principal cause of those disparities. Thus, it is important that a court first ensure that no lesser (typically, non-financial) restrictive condition could manage the relevant risk.

Satisfactorily address the relevant risk. In determining whether a condition is reasonably necessary, courts should consult research on the efficacy of particular restrictive conditions at mitigating specific relevant risks. This can be challenging. At the time of this writing, for instance, the existing research suggests that mandatory drug-testing and frequent "reporting in" requirements—obligations that have often been considered useful to support behavior modification—have very limited utility and may be counterproductive. *See, e.g.*, Megan T. Stevenson and Sandra G. Mayson, *Pretrial Detention and Bail*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017) (reviewing research); *cf.* Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, Brookings.edu/blog (July 2, 2018). For further discussion, *see* the Comment to Section 305, *supra* ("*Satisfactorily address the relevant risk*").

In a record. As defined in subsection 102(11), a "record" includes an audio recording. A court may therefore satisfy the requirement to "state in a record" by articulating orally its reasons for imposing a restrictive condition, provided that the oral statement is recorded. In courts that do not record or transcribe proceedings, subsection (c) requires the court to document its reasoning in some other form that is "retrievable in perceivable form". *See* subsection 102(11). For instance, a court may include a brief recitation of its reasoning in its order of pretrial release.

SECTION 307. FINANCIAL CONDITION OF RELEASE.

(a) Subject to Sections 308 and 403, the court may not impose a restrictive condition under Section 306 that requires initial payment of a fee in a sum greater than an arrested individual is able to pay from personal financial resources within [24] hours. If the individual is unable to pay the fee, the court shall waive or modify the fee, or waive or modify the restrictive condition that requires payment of the fee, to the extent necessary to release the individual. If the individual is unable to pay a recurring fee, the court shall waive or modify the recurring fee, or waive or modify the restrictive condition that requires payment of the fee.

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

(c) Subject to Sections 308 and 403, the court may not impose a secured appearance bond as a condition of release unless the court determines, by clear and convincing evidence, that the individual is likely to obstruct justice, violate an order of protection, abscond, or not appear.

(d) Subject to Sections 308 and 403, the court may not impose a secured appearance bond:

(1) to keep the individual detained;

(2) for a non-felony charge, unless the individual has absconded or did not appear [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 to pay from personal financial resources within [24] hours.

Comment

Financial condition of release. Secured financial conditions of release are the principal focus of contemporary pretrial reform efforts. These conditions are the primary source of wealth-based disparities in pretrial release. They result in the unnecessary (and sometimes unintentional) detention of individuals whom the state is not authorized to detain directly. *See* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643-1680 (2020). The problem is not only with secured bond conditions but also with other conditions of release that may result in detention. Such conditions include restrictive conditions that carry fees or impose other requirements that an individual may not easily be able to satisfy (*e.g.*, a co-signor requirement). Some jurisdictions and proposed laws have responded to this problem by endeavoring to eliminate entirely secured bond conditions. *See*, *e.g.*, CALIFORNIA SENATE BILL NO. 10 (2018) (stayed pending referendum); Andrea Woods & Portia Allen-Kyle, American Civil Liberties Union, A NEW VISION FOR PRETRIAL JUSTICE (2019); Timothy R. Schnacke, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (2017). Four states have prohibited commercial bail bonds altogether. 725 ILL. COMP. STAT. ANN. 5/103-9, 5/110-13; KY. REV. STAT. ANN. § 431.510; WIS. STAT. § 969.12; *State v. Epps*, 585 P.2d 425, 429 (Or. 1978).

This Act does not go that far. Instead, Section 307 limits the use of secured bonds to the purposes enumerated in subsection (c) and prohibits a court from imposing a secured bond or other release condition that the individual is unable to satisfy, thereby resulting in continued detention. The Act excepts from this general prohibition, however, those instances when the charge is one for which detention is permissible (a "covered offense", *see* Section 102(4), *supra*), and the court determines that the condition is necessary pursuant to the same criteria and standards that govern direct orders of detention, *see* Sections 308 and 403, *infra*.

A restrictive condition that requires payment of a fee. Court-imposed restrictive 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. If a

defendant cannot pay a fee, the court should try to waive it. This is not always possible, however. For instance, a third-party vendor may administer a court-ordered treatment program, and the program may carry a fee over which the court has no authority. In such circumstances, the court should waive or modify the condition to eliminate or sufficiently reduce the fee to make it immediately affordable.

Likely to obstruct justice, violate an order of protection, abscond, or not appear. Subsection (c) enumerates the permissible grounds for imposing a secured appearance bond. That is to say, it authorizes a court to use a secured bond to manage some of the relevant risks under Section 303, *but not* a risk that the individual will cause significant harm to another person. The idea behind this limitation is that it is inappropriate for a court to set a secured appearance bond to prevent harm to others. There are several reasons for this. Historically, the purpose of secured bonds was only to assure appearance. *See Stack v. Boyle*, 342 U.S. 1, 3-4 (1951); National Institute of Corrections, *Money as a Criminal Justice Stakeholder* 13-21 (2014). Jurisprudentially, the Supreme Court has held that "the function of bail is limited" and a secured bond amount "must be based upon standards relevant to the *purpose of assuring the presence of that defendant*"; accordingly, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment". 342 U.S. at 3-4 (emphasis added). Rationally, it is not logical to impose a financial condition for purposes of public safety. Indeed, in many states, bonds cannot even be forfeited for new criminal activity; rather, forfeiture is tied only to court appearance. *See, e.g.*, *Reem v. Hennessy*, 2017 WL 6539760, slip op. at 7-8 (N.D. Ca. Dec. 21, 2017) (noting that setting a financial condition of release for purposes of public safety is "illogical" in a state where forfeiture is only allowed for failure to appear). Finally, even if a state were to permit re-arrest to trigger forfeiture, there is no robust empirical evidence that financial conditions *do* deter crimes. To the contrary, a number of recent studies have found that dramatic reductions in the use of secured bonds were not associated with any significant increase in rates of pretrial re-arrest. *Cf.* Claire M.B. Brooker, YAKIMA COUNTY PRETRIAL JUSTICE IMPROVEMENTS 6, 16 (2017); Aurelie Ouss & Megan T. Stevenson, BAIL, JAIL, AND PRETRIAL MISCONDUCT: THE INFLUENCE OF PROSECUTORS 24 (Jan. 17, 2020), https://ssrn.com/abstract=3335138; New Jersey Judiciary, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 5, 13-14 (2018).

If a court determines under Section 303 that an individual is likely to cause significant harm to another person, the court should look to other measures that target the risk more directly. And if an individual is shown to be sufficiently dangerous, the individual should be detained after a detention hearing under Article 4. This is the position codified by the American Bar Association, the federal government, the District of Columbia, and a number of other 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."); 18 U.S.C. § 3142(c); D.C. CODE § 23-1321(c)(2); WIS. STAT. § 969.01(4); N.M RULE CRIM. P. 5-401.

To keep the individual detained. Subsection (d) promotes 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—unless the criteria for detention under Section 308 and

Article 4 are satisfied. *See e.g.*, 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."); 18 U.S.C § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); D.C. CODE ANN. § 23-1321 (only authorizing a court to impose "a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person", unless criteria for detention are met); KANSAS STAT.§22-2801 (seeking to "assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance"). Thus, under subsection (d), a court is forbidden, except under Sections 308 and 403, from relying upon a secured appearance bond or initial or recurring fee as a means "to keep the individual detained".

For a non-felony charge, unless the individual has absconded or did not appear multiple times. The Act contemplates that the need for a secured appearance bond will be rare in misdemeanor cases. Thus, subsection (d) allows a court to set a secured appearance bond for a misdemeanor charge only if the defendant has failed to appear repeatedly in this or another criminal case.

In an amount greater than the individual is able to pay from personal financial resources. The Act requires a court to inquire into the individual's ability to satisfy a secured appearance bond or initial or recurring fee. That said, the Act leaves the precise scope and shape of this inquiry for states to regulate locally or leave to judicial discretion. The inquiry might 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). In conducting this inquiry, the court may take an affidavit or testimony from a defendant under oath.

SECTION 308. TEMPORARY PRETRIAL DETENTION.

(a) At the conclusion of a release hearing, the court may issue an order to temporarily detain the arrested individual until a detention hearing, or may impose a financial condition of release in an amount greater than the individual is able to pay from personal financial resources within [24] hours, only if the individual is charged with a covered offense and the court determines, by clear and convincing evidence, that:

(1) it is likely that the individual will abscond, obstruct justice, violate an order of protection, or cause significant harm to another person and no less restrictive condition is sufficient to satisfactorily address the risk;

(2) the individual has violated a condition of an order of pretrial release for a pending criminal charge; or

(3) it is extremely likely that the individual will not appear, and no less restrictive condition is sufficient to satisfactorily address the risk[, in a case in which the individual is charged with a felony].

(b) If the court issues an order under subsection (a), the court shall state its reasons in a record, including why no less restrictive condition or combination of conditions is sufficient.

Legislative Note: *In subsection (a)(3), include the bracketed language only if the state defines "covered offense" to include a non-felony offense.*

Comment

Covered offense. As explained in the Comment to Section 102, *supra*, the Act requires that a state enumerate the offenses or offense classes or types for which pretrial detention or unaffordable bail are available—which is to say, the state must designate the charges on which a person may be held in jail pending trial if the person presents a relevant risk under Section 303 that no less restrictive measure can adequately reduce. The Act leaves to states the determination of which offenses or offense classes or types to designate as "covered offenses". The intention of this provision, though, is to limit the pool of defendants for whom detention or unaffordable bail may be imposed.

Historically, most state constitutions authorized pretrial detention without bail in capital cases only. 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). It may even be the case that due process requires states to limit the offenses eligible for pretrial detention. 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 specifically say whether due process required this limitation. But this feature of the federal pretrial detention regime contributed to the Court's conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. *Id.* at 548-55. Due process may additionally require states to specify the charges on which a person may be held in jail pending trial in order to provide fair notice to

individuals and to appropriately constrain judicial discretion. *Scione v. Commonwealth*, 114 N.E.3d 74, 85 (Mass. 2019) (holding a portion of Massachusetts pretrial detention statute in violation of Massachusetts' state-constitutional due process provision on vagueness grounds for failure to adequately specify the offenses eligible for detention). A narrow and clearly defined detention-eligibility net can help to ensure that pretrial liberty remains the norm and that detention is a constitutional and "carefully limited exception". *Salerno*, 481 U.S. at 755.

Amount greater than the individual is able to pay. Subsection 308(a) permits a court to impose a secured bond condition that a defendant cannot immediately meet if the criteria for temporary detention are otherwise satisfied. Section 308 thus acknowledges that, in some circumstances, such a condition may be the least-restrictive measure that is sufficient to satisfactorily address a relevant risk under Section 303. In these circumstances, the Act simply subjects an unaffordable financial condition to the same substantive and procedural requirements as detention. *See*, *e.g.*, Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017) ("[W]here a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020) (arguing "that an order that functionally imposes detention must be treated as an order of detention" and collecting legal authority).

Significant harm to another person. Under subsection 307(c), a court is prohibited from imposing a secured bond condition where the relevant risk is "harm to another person". By its terms, however, that subsection is made subject to this section and to Section 403. The exception here is in recognition that—notwithstanding the general rule of subsection 307(c)—some states may be compelled, under certain circumstances, to rely upon secured bond conditions to address an otherwise-unmanageable risk of harm to another person. The logic is discussed immediately above. *See* the Comment to Section 308, *supra* ("*Only if the individual is charged with a covered offense*"). That is, in some states, constitutional provisions or binding case law may prohibit detention for broad offense classes or types, leaving those states to rely upon secured bond conditions as functional equivalents for detention. In those states, a court may impose a secured bond condition to address a sufficient risk of harm to another person, *if and only if* the court complies with Sections 308 and 403.

A condition of an order of pretrial release for a pending criminal charge. The Act allows a court to issue an order of *temporary pretrial detention* based only on a showing that the defendant has violated a condition of pretrial release in a pending criminal case. However, as elaborated in Article 4, the Act requires more before a court may issue an order of pretrial detention 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.

Extremely likely that the individual will not appear in a case in which the individual is charged with a felony. As indicated in subsection 102(6), *supra*, the term "not appear" corresponds in meaning with "nonappearance", both of which relate to a failure to appear in

court "without the intent to avoid or delay adjudication". Here, the Act limits a court's ability to detain when the relevant risk is nonappearance, as opposed to a risk of absconding, obstructing justice, violating an order of protection, or dangerousness. The logic is that a court should almost always be able to rely upon practical assistance, voluntary supportive services, or restrictive conditions of release to minimize the likelihood of failures to appear that lack an intent to avoid or delay adjudication. Therefore, the Act does not authorize detention in a sub-felony case where the risk is nonappearance (unless the individual has violated a condition of release for a pending criminal charge, under subsection 308(a)(2)). In sum, this provision permits the court to detain for nonappearance, but only in felony cases where the defendant is *extremely* likely to not appear. (In states that already prohibit detention in non-felony cases, the bracketed language in subsection 308(a)(2) is unnecessary.)

In a record. This requirement mirrors the requirement in Section 306 that the court articulate why a restrictive condition on the individual's pretrial liberty is necessary. As in Section 306, an oral statement is sufficient if the proceedings are audio-recorded or transcribed. *See* the Comment to Section 306, *supra*.

[ARTICLE] 4

DETENTION HEARING

SECTION 401. TIMING.

(a) If the court issues an order of temporary pretrial detention under Section 308, or of pretrial release under Section 304 and imposes a restrictive condition that results in continued detention of the individual, the court shall hold a hearing to consider continued detention of the individual pending trial. The hearing must be held not later than [72] hours after issuance of the order.

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

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

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

Legislative Note: *In subsections (a) and (b), insert the deadlines the state specifies for a detention hearing and continuance of the hearing.*

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 restrictive conditions of pretrial release some days after the release decision. Indeed, recent studies have found that even short terms of detention may correlate with increases in criminality and failure to appear. *See* sources cited in the 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 Cty., 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).

Some jurisdictions may wish to conduct detention determinations at the initial hearing when an arrested person first appears before a judicial officer. In such cases, there will not be a distinct "release hearing" and "detention hearing"—they will simply occur simultaneously. Even in such circumstances, though, the procedural and substantive requirements of Article 4 govern the detention determination.

SECTION 402. RIGHTS OF DETAINED INDIVIDUAL.

(a) At a detention hearing, a detained individual has a right to counsel. If the individual is indigent, [an 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 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.

Comment

Rights of detained individual. 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). As indicated in the Comment to Section 302, *supra*, the Act prescribes only the rights of the individual, not the procedural powers of the prosecutor. Again, the Act limits its scope to the individual who is its subject and leaves other evidentiary matters to existing state law and court rules.

If the individual is indigent. In Section 302, the Act provides an optional and potentially 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 may not be able to secure the presence of counsel at a release hearing, which happens earlier 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.

The detained individual has a right to testify. Consistent with a number of states' preventative detention statutes, the Act contemplates that a defendant's testimony will not be admissible in subsequent proceedings on questions of guilt. *See, e.g.*, FLA. STAT. ANN. § 907.041(4)(H); N.M. R. CRIM. PRO. DIST. COURT 5-409(F)(3); WIS. STAT. ANN. § 969.035 (6)(e). However, the Act leaves the question to existing state law and court rules.

SECTION 403. PRETRIAL DETENTION.

(a) At a detention hearing, the court shall consider the criteria and restrictive conditions in Sections 303 through 307 to determine whether to issue an order of pretrial detention or continue, amend, or eliminate a restrictive condition that has resulted in continued detention of an individual. If failure to satisfy a secured appearance bond or pay a fee is the only reason the individual continues to be detained, the fact of detention is prima facie evidence that the individual is unable to satisfy the bond or pay the fee.

(b) The court at a detention hearing may issue an order of pretrial detention or continue a restrictive condition of release that results in detention only if the individual is charged with a covered offense and the court determines, by clear and convincing evidence, that:

(1) it is likely that the individual will abscond, obstruct justice, violate an order of protection, or cause significant harm to another person and no less restrictive condition is sufficient to satisfactorily address the risk; or

(2) it is extremely likely that the individual will not appear, and no less restrictive condition is sufficient to satisfactorily address the risk[, in a case where the individual is charged with a felony].

(c) If the court issues an order under subsection (b), the court shall state in a record why no less restrictive condition is sufficient.

Legislative Note: *In subsection (b)(2), include the bracketed language only if the state defines "covered offenses" to include a non-felony offense.*

Comment

Covered offense; *significant harm to another person; extremely likely that the individual will not appear in a case in which the individual is charged with a felony.* *See* the Comment to Section 308, *supra*.

In a record. *See* the Comments to Sections 306 and 308, *supra*.

Expedited trial. If a defendant remains detained pending 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 existing speedy trial statutes.

[ARTICLE 5]

MODIFYING OR VACATING ORDER

SECTION 501. MODIFYING OR VACATING BY AGREEMENT. By agreement of the [prosecuting authority] and an 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.

Comment

By agreement of the individual, a court may issue an order of pretrial detention. It may not be obvious why a defendant would agree to an order of pretrial detention. However, in circumstances where a defendant is already detained on another order, the defendant may prefer

an order of pretrial detention in the immediate case—for instance, in order to receive credit for time incarcerated.

SECTION 502. MOTION TO MODIFY. On its own motion or on motion of a party, the court may modify an order of pretrial release or detention using the procedures and standards in [Articles] 3 and 4. The court may consider new information relevant to the order, including information that an individual has violated a condition of release. The court may deny the motion summarily if it is not supported by new information.

Comment

On its own motion or on motion of a party. Section 502 establishes a trilateral and symmetrical standard. Any party—the court, the prosecutor, or the defendant—may make a motion to modify on the same terms.

[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. TRANSITION. This [act] applies to an arrest made[, [a citation] issued,] or a release or detention hearing held on or after [the effective date of this [act]], including a hearing to enforce, modify, or vacate a release or detention order entered before the

[act's] effective date.

[SECTION 604. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

Legislative Note: *A state may need to repeal or amend a statute that imposes mandatory release conditions for an offense or offense class or type such as a mandatory fee, a secured bond, or another financial condition.*

SECTION 605. EFFECTIVE DATE. This [act] takes effect . . . .

Comment

Effective date of this Act. Some states may need more time to prepare for implementation of the Act. The amount of lead time is, therefore, left to the enacting state's discretion.