UNIFORM PRETRIAL RELEASE AND DETENTION ACT

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ON UNIFORM STATE LAWS

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

TABLE OF CONTENTS

PREFATORY NOTE..... 1

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. 8
SECTION 102. DEFINITIONS. 9
SECTION 103. SCOPE. 12

[[ARTICLE] 2

[CITATION] AND ARREST

SECTION 201. AUTHORITY FOR [CITATION] OR ARREST. 13
SECTION 202. FORM OF [CITATION]. 15
SECTION 203. RELEASE AFTER ARREST. 16
SECTION 204. APPEARANCE ON [CITATION]. 17

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING. 17
SECTION 302. RIGHTS OF ARRESTED INDIVIDUAL. 19
SECTION 303. JUDICIAL DETERMINATION OF RISK. 21
SECTION 304. PRETRIAL RELEASE. 24
SECTION 305. PRACTICAL ASSISTANCE; VOLUNTARY SUPPORTIVE SERVICES. 25
SECTION 306. RESTRICTIVE CONDITION OF RELEASE. 27
SECTION 307. FINANCIAL CONDITION OF RELEASE. 29
SECTION 308. TEMPORARY PRETRIAL DETENTION. 33

[ARTICLE] 4

DETENTION HEARING

SECTION 401. TIMING. 36
SECTION 402. RIGHTS OF DETAINED INDIVIDUAL. 37
SECTION 403. PRETRIAL DETENTION. 38

[ARTICLE] 5

MODIFYING OR VACATING ORDER

SECTION 501. MODIFYING OR VACATING BY AGREEMENT. 39
SECTION 502. MOTION TO MODIFY 40

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION. 40
[SECTION 602. SEVERABILITY]. 40
SECTION 603. TRANSITION. 40
[SECTION 604. REPEALS; CONFORMING AMENDMENTS]. 41
SECTION 605. EFFECTIVE DATE. 41

UNIFORM PRETRIAL RELEASE AND DETENTION ACT

PREFATORY NOTE

The Uniform Pretrial Release and Detention Act (the "Act") responds to broad bipartisan support for changes to pretrial detention practice. Existing practices impose profound social costs as well as heavy fiscal burdens for state and local governments. The Act offers the states an alternative framework to guide pretrial detention and release.

The Need for the Act

There are nearly a half-million people confined in local jails on any given day who have been charged with a crime but not yet tried or convicted.[1] This rate of pretrial detention represents a dramatic increase since the 1980s, and has driven explosive growth in jail populations.[2] Nearly all of these presumptively-innocent people are held in jail because they cannot "make bail."[3]

The consequences of even a few days' detention can be devastating, not only to accused individuals but also to families and communities. Detained defendants lose jobs, housing, and even custody of children.[4] Detention has a negative impact on economic prospects[5] and increases the likelihood of recidivism.[6] Detained defendants often plead guilty in order to go home with sentences of "time served"—even those who might otherwise be acquitted or have their charges dismissed.[7] Meanwhile, taxpayers foot the bill for overcrowded jails.

Because many jurisdictions currently rely heavily on money bail, the costs of detention fall disproportionately on the poor. The accused person who can pay a money bond gets to go home immediately. But many defendants cannot. In the most recent available national data, the median felony bail bond was $10,000, an amount that 40% of defendants could not satisfy.[8] Even among defendants with bonds set no higher than $5000, more than 30% remained in jail, while more affluent defendants—even those who might have posed greater risk—could buy their freedom.[9]

Recent years have seen a wave of efforts to eliminate or mitigate wealth-based disparities in detention. In response to civil rights lawsuits, courts have interpreted the federal Constitution to require a number of safeguards in pretrial processes. Some have held that detention (formally or on money bail) must serve a compelling state interest.[10] Challenges to money-bail "schedules" have led to their abandonment or limitations on their use.[11] Other courts have mandated robust hearings, including recognition of a right to counsel at any proceeding that could result in detention.[12] Two federal appeals courts, one state supreme court, the federal Department of Justice, and at least ten federal district courts have prohibited detention on money bail without individualized consideration of alternatives.[13]

States have also undertaken statutory reform. New Jersey and New Mexico amended their state constitutions and thoroughly revised their pretrial law.[14] California crafted a new statute eliminating cash bail, which will soon be put to voter referendum.[15] New York enacted a comprehensive new pretrial framework.[16] Indiana's Supreme Court promulgated a new court

rule that requires an individualized, evidence-based assessment of each arrestee's risks of flight and of committing harm.[17] In many other states, however, the modifications have remained partial and comparatively *ad hoc*.

The Act responds to the need for a general, comprehensive, and balanced statute to guide courts in making pretrial release and detention decisions for the hundreds of thousands of persons charged with crimes, serious or minor, each year in state courts. In preparing this Act, the Uniform Law Commission worked with and received comments and assistance from numerous observers, including representatives of the Pew Research Center, the National Conference of State Legislatures, the National Center for State Courts, the American Civil Liberties Union, the Southern Poverty Law Center, the National Sheriffs' Association, the District of Columbia Pretrial Services Agency, and the ABA Criminal Justice Section Pretrial Justice Committee.

Objectives of the Act

The Act has three principal goals. The first is to offer a clear, coherent, and workable framework for pretrial release and detention that strikes an appropriate balance between the interests at stake—that is, the individual's interest in liberty and the state's interests in protecting public safety and ensuring the effective administration of justice. The second is to limit restrictions on pretrial liberty to those necessary to meet the state's compelling interests during the pretrial phase. The third is to provide enough flexibility to accommodate variations in state-constitutional structure and policy preferences, as well as evolving state and federal jurisprudence.

The Act is modeled on existing statutory frameworks in the federal system, the District of Columbia, New Jersey, and New Mexico, as well as the pretrial release standards of the American Bar Association and the National Association of Pretrial Services Agencies.[18] The Act is designed to replace a state's existing statutory framework governing pretrial release and detention. Recognizing the prevalence of state constitutional bail provisions and the variance in pretrial detention practices across states, the Act offers a template with sufficient flexibility to enable each state to meet its own needs, consistent with its distinct constitutional law.[19]

Summary of the Act

The Act creates a comprehensive procedural framework for release and detention determinations. It begins with the first interaction between an individual and a law enforcement officer, by providing optional provisions to guide arrest and citation practices. Following this optional set of provisions, the Act requires that an arrested individual be brought before a court within forty-eight hours of arrest for an initial appearance, which the Act calls a "release hearing" (§ 301). This appearance corresponds to what is often labeled an "initial appearance," "first appearance," or "bail hearing."

At the release hearing, the court must determine by clear and convincing evidence whether the accused person is "likely" to engage in certain designated behaviors that would unduly threaten public safety or the administration of justice (§ 303). If not, the court must

release the defendant on recognizance (§ 304(a)). If the court concludes that there is such likelihood, the court must determine the least-restrictive means to address the risk "satisfactorily," taking into account first the availability of any supportive, non-restrictive measure (§§ 305-07). As a general matter, the Act prohibits financial conditions of release that the defendant cannot satisfy (§ 307).

The Act anticipates that a small fraction of defendants may present great enough risks to justify pretrial detention or imposition of unaffordable bail amounts. Specifically, the Act authorizes a court to temporarily detain a defendant or impose unaffordable bail only if it finds that certain substantive and procedural criteria are met (§ 308). If a defendant is held, the Act provides for a prompt detention hearing and establishes substantive and procedural standards that must be satisfied before the court may issue an order of pretrial detention or an order that otherwise *results* in continued detention (§§ 401-03).

The requirements of the detention hearing are critical, because, as the Supreme Court has long recognized, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty the Fifth Amendment's Due Process Clause protects."[20] Although the Court has never articulated the precise due process requirements for a pretrial detention hearing, it did endorse the framework imposed by the federal Bail Reform Act of 1984.[21] The Act therefore adopts the core procedural guarantees of the federal system: the court must provide counsel to an indigent defendant, conduct a robust adversarial hearing, and find by clear and convincing evidence that detention is necessary (§§ 402-03).

Emerging Concerns & Developments

The Act seeks to address a number of outstanding issues of pretrial release and detention practice.

First, as discussed, there is a body of jurisprudence finding that the use of secured-bond "schedules" violates due process and equal protection, at least when a schedule serves as the primary mechanism of release.[22] Accordingly, the Act does not permit the use of schedules for secured bonds, although it does permit the use of schedules for *unsecured* bonds to effect "stationhouse release" (§ 203 and Comment).

Second, there is no jurisprudential consensus on whether due process imposes a particular deadline for an arrested person's initial appearance before a judicial officer .[23] A number of courts have held recently that an initial hearing within forty-eight hours of arrest satisfies due process.[24] The Act therefore suggests that states adopt the forty-eight-hour time frame, although it leaves states with the option to provide otherwise (§ 301 and Comment).

Third, the Supreme Court has not yet determined whether an arrested person has a Sixth Amendment right to counsel at an initial hearing. A number of lower federal courts, however, have held that a first appearance is a "critical stage" of the prosecution for Sixth Amendment purposes.[25] In recognition of the doctrinal uncertainty and of state budgetary constraints, the Act

includes a provision establishing a right to counsel at the release hearing but brackets the provision to allow states to alter or omit it (§ 302 and Comment).

Fourth, it is likewise an open question what substantive and procedural criteria the federal Constitution requires at a detention hearing. In *United States v. Salerno*, the Supreme Court held that the requirements for pretrial detention in the federal Bail Reform Act of 1984 were sufficient to withstand a facial constitutional challenge, but the Court did not specify whether, or to what extent, these requirements are constitutionally mandated.[26] Nonetheless, most existing state pretrial detention regimes include procedural standards quite similar to the Bail Reform Act. The Act largely does the same (§ 403 and Comment).

Fifth, the most complex open jurisprudential question is whether state constitutions require the release of "bailable" defendants. Many state constitutions provide that all arrested persons have a "right to bail on sufficient sureties," with narrow exceptions for defendants charged with certain very serious crimes.[27] The issue is whether this right to bail amounts to a right to release or just a right to the setting of *some* bail amount (whether or not the defendant can satisfy it). In more practical terms, the issue is whether the right to bail translates to a right to "affordable bail" (or other guarantee of release) or just a right to have the court authorize release on conditions that the court deems sufficient.[28] The Act accommodates the debate by requiring states to enumerate the "covered offenses" for which a person may be held in jail pending trial, *either* by a formal detention order *or* as a result of imposition of a financial condition that the defendant cannot meet. If a state's constitution includes a right-to-bail provision that the state interprets as a right to release, then the state must limit its "covered offenses" to only those offenses that are excluded from its constitutional right to bail. If a state's constitution includes a right-to-bail provision that the state does not interpret as a right to release, then the state may enumerate its "covered offenses" independently of its constitutional provision, and may, if it chooses, authorize unaffordable bail even for some "bailable" defendants, provided the other requirements of the Act are met (§§ 102, 308, 403 and Comments).

Conclusion

The process of criminal justice reform underway in so many states has taken on new urgency in light of the economic challenges brought on by the COVID-19 pandemic and the civil unrest occasioned by the death of George Floyd. Pretrial reform is a principal focus of reform efforts. In this environment, the Act provides the states with a statutory framework for release and detention determinations that balances the needs to protect the rights of accused persons, ensure the effective administration of justice, and adequately protect the public.

Endnotes:

[1] Zhen Zeng, Jail Inmates at Midyear 2018, 5 tbl.3 (Bureau of Justice Statistics 2020) (reporting 490,000 unconvicted inmates).

[2] Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020 (Prison Policy Institute, Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (showing four-decade rise in pretrial incarceration from 100,000 to 500,000).

[3] Thomas A. Cohen & Brian A. Reaves, Pretrial Release of Felony Defendants in State Courts 1990-2004 fg.1 & 2 (Bureau of Justice Statistics 2007) (showing that five-in-six felony defendants detained pretrial were held on unpaid cash bonds).

[4] *See, e.g.*, Curry v. Yachera, 835 F.3d 373, 377 (3d Cir. 2016) ("Unable to post his bail, Curry . . . missed the birth of his only child, lost his job, and feared losing his home and vehicle. Ultimately, he pled *nolo contendere* in order to return home."); Nick Pinto, *The Bail Trap*, N.Y.TIMES MAG. (Aug. 13, 2015), http://nyti.ms/1INtghe (reporting the story of a woman who, "five months after her arrest, . . . was still fighting in family court to regain custody of her daughter").

[5] Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018).

[6] Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741–59, 787 (2017).

[7] Dobbie & Yang, *supra* note 5; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUDIES 471 (2016); Heaton *et al.*, *supra*; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529 (2017); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511 (2018); Christopher T. Lowenkamp *et al.*, Laura & John T. Arnold Found., The Hidden Costs of Pretrial Detention (2013).

[8] Brian A. Reaves, Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, tbs. 13 & 16 (Bureau of Justice Statistics 2013). There is no more recent, nationally aggregated data on pretrial bail practice. Plans for a National Pretrial Reporting Program are underway, but the data will likely not be available until 2023 or 2024.

[9] Cohen & Reaves, *supra* note 3, at fg.3 (showing that 30% of felony defendants with bond set at $5,000 or less remained in jail, and that for bonds between $5,000 and 10,000 more than 40% of felony defendants remained in jail); Heaton *et al.*, *supra* note 6, at 711, 716 n.18, 19 & tbl.1 (2017) (finding that, between 2008-2013, 53% of misdemeanor defendants in Harris County, Texas were detained pretrial on bonds of $5,000 or less; and citing similar figures for Baltimore, New York City, and Philadelphia); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, fg.10 (2019) (reporting that, in Philadelphia and Kentucky during 2013, more than 40% of misdemeanor defendants with bonds set at $500 or less were detained); Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Anthony Potts & Guthrie Armstrong, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reform in Georgia*, 54 GA. L. REV. 1169, 1193 (2020) (reporting that across eighteen counties in May through November 2019, "36.72% of those arrested on new misdemeanor charges only, with no other holds, spent three days or more days in jail"); *id.* (reporting that "[f]rom 2000 through 2019, more than half of the 212,091 people booked on new misdemeanor charges [in DeKalb County] without other holds . . . spent three days or more in jail").

[10] Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014) (en banc); Valdez-Jimenez v. Eighth Judicial Dist. Court, 460 P.3d 976 (Nv. 2020); State *v.* Wein, 417 P.3d 787 (Az. 2018);

Simpson v. Miller, 387 P.3d 1270 (Az. 2017); In re Humphrey, 19 Cal. App. 5th 1006 (Ct. App. 2018).

[11] *E.g.* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018); ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).

[12] Valdez-Jimenez v. Eighth Judicial Dist. Court, 460 P.3d 976 (Nv. 2020); Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018); In re Humphrey, 19 Cal. App. 5th 1006 (Ct. App. 2018); Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017).

[13] *E.g. Walker*, 901 F.3d at 1245; *ODonnell*, 892 F.3d at 147; Valdez-Jimenez v. Eighth Judicial Dist. Court, 460 P.3d 976 (Nv. 2020); Daves v. Dallas Cty., 341 F. Supp. 3d 688 (N.D. Tex. 2018); *Caliste*, 329 F. Supp. 3d at 296; Shultz v. State, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); Buffin v. City & Cty. of San Francisco, Civil No. 15-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); ODonnell v. Harris Cty., 251 F. Supp. 3d 1052 (S.D. Tex. 2017); Walker v. City of Calhoun, 2017 WL 2794064 (N.D. Ga. 2017); Thompson v. Moss Point, Civil No. 15-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); Jones v. City of Clanton, Civil No. 215-34, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015); Pierce v. Velda City, Civil No. 15-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015); Cooper v. City of Dothan, Civil No. 15-425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *accord* Statement of Interest of the United States Department of Justice at 1, Varden v. City of Clanton, Civil No. 15-34, ECF Doc. 26 (M.D. Ala., February 13, 2015); Office for Access to Justice, Civil Rights Division, U.S. Dep't of Justice, Dear Colleague Letter 2 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf; *see also* Lee v. Lawson, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional."); State v. Blake, 642 So. 2d 959 (Ala. 1994) (holding that a bail statute violated due process and equal protection by requiring delay before a defendant could be released on recognizance, whereas a person with resources could obtain immediate release by posting money bail); In re Humphrey, 19 Cal. App. 5th 1006 (Ct. App. 2018).

[14] N.J. CONST. art. I, ¶ 11 (amended 2017); N.J. Stat. Ann. § 2A:162-15 *et seq.*; N.M. CONST. art. II, § 13 (amended 2016); N.M. R. Civ. P. Dist. Ct. 5-409(F)(3).

[15] *See, e.g.*, Julia Wick, *Newsletter: The Future of Bail Reform in California*, L.A. TIMES (Jan. 24, 2020), https://www.latimes.com/california/story/2020-01-24/cash-bail-boudin-san-francisco-newsletter.

[16] *See, e.g.*, Taryn Merkl, *New York's Latest Bail Law Changes Explained* (Brennan Center, Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained.

[17] *See* Rule 26, Indiana Rules of Criminal Procedure.

[18] 18 U.S.C. § 3142; D.C. Code Ann. § 23-1321 *et seq.*; N.J. Stat. Ann. § 2A:162-15 *et seq.*; N.M. R. Civ. P. Dist. Ct. 5-409(F)(3); CRIMINAL JUSTICE SECTION STANDARDS: PRETRIAL RELEASE (AM. BAR ASS'N 2002); STANDARDS ON PRETRIAL RELEASE (NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES 2020).

[19] WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 4 CRIM. PROC. § 12(3)(b) (4th ed. 2018) (describing variation in state constitutional bail provisions).

[20] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[21] United States v. Salerno, 481 U.S. 739, 755 (1987).

[22] *E.g.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018); *but cf.* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018) (permitting use of a secured bond schedule provided an indigent arrestee who cannot afford the bond gets an individualized hearing that *results in release* within forty-eight hours of arrest).

[23] Pamela Metzger and Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392 (2020) (noting and exploring this open question of law).

[24] *Walker*, 901 F.3d at 1265-67; *ODonnell*, 892 F.3d at 160-61.

[25] *See* Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) ("The Supreme Court has held that 'critical stages' are those that 'h[o]ld significant consequences for the accused.' There is no question that the issue of pretrial detention is an issue of significant consequence for the accused.") (internal citations omitted); Booth v. Galveston Cty., 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial."); *see also* Heaton *et al.*, *supra* note 6, at 773 (2017) (arguing "that bail-setting should be deemed a 'critical stage' of criminal proceedings" on the basis of new empirical research demonstrating effect of detention on plea-bargaining outcomes).

[26] *Salerno*, 481 U.S. at 755.

[27] LAFAVE *ET AL.*, *supra* note 20.

[28] Historically, there is good evidence that the right to bail was understood as a right to release. *E.g.* 1 Joseph Chitty, A Practical Treatise on the Criminal Law 131 (1816) ("The rule is, . . . bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge."). Nonetheless, a number of modern courts have rejected claims that state constitutional bail clauses create rights to affordable bail. *See generally* Colin Starger and Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018).

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 for 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 [insert the offenses for which the state authorizes pretrial detention or the imposition of a financial condition that cannot be paid within the time prescribed in Article 3].

(5) "Detention hearing" means a hearing 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 conduct that a statute or ordinance proscribes.

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

(10) "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.

(11) "Release hearing" means a hearing under Section 301.

(12) "Release on recognizance" means pretrial release of an individual with no condition other than to appear in court as required and to abide by generally applicable laws.

(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 promise other than through a secured appearance bond to forfeit a specified sum if the individual whose appearance is the subject of the bond absconds or does not appear.

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

If paragraph (3) is included, insert the state's term for an official authorized to issue a citation or the equivalent or make an arrest. The same term should be inserted in Article 2, with the exception of Section 203, and elsewhere in this act where "authorized official" appears in brackets.

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

Comment

Abscond versus not appear. The Act encourages courts to attend to the differences between pretrial risks. Although many pretrial statutes speak only in terms of "failure to appear," there is a conceptual difference between different types of failure to appear. The term "abscond" involves an effort to evade justice, whereas the term "not appear" (or the

corresponding term "nonappearance") involves a failure to appear that 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 only. A person who skips a court date because she would otherwise lose her job has intentionally failed to appear, but this failure is an instance of nonappearance rather than absconding. Absconding entails a purpose to avoid or delay adjudication.

The reason to distinguish 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 risk of absconding may justify more readily the imposition of restrictive conditions. Because these two risks sometimes warrant distinct responses, the Act treats them separately in places. Moreover, a court may diagnose each risk with reliance on distinct evidence. For example, it may be evidence of a risk of absconding that an individual is arrested on route to an international flight, whereas it may be evidence of a risk of nonappearance that an individual lacks reliable transportation. Elsewhere, the Act uses both terms collectively to signal that the risks should be treated identically.

Citation. States use different terms to designate an accusatory instrument used to initiate criminal proceedings without custodial 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. This [act] does not affect the law of this state other than this [act] regarding related matters, including:

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

(2) involuntary civil commitment;

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

(4) appellate review; or

(5) release pending appeal.

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

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 law of this state. 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 replace its current law on citation and arrest with this article.*

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 other 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.

(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 [insert the offenses or offense types for which the state chooses to authorize arrest];

(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 subsection (b)(1) and (c)(3), insert the state's term for parole or the equivalent.*

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

In subsection (c)(1), insert offenses such as domestic violence, stalking, driving under the influence, unlawful possession or use of a firearm, a sexual offense, or other offenses or offense types for which the state chooses to authorize 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. As suggested in Section 103(2), *supra*, 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. Section 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 offense classes, 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* Section 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 Section 201(c)(4)(B) authorizes such action.

Offense classes and offense types. "Offense classes," in the Legislative Note, refers to the grade or seriousness of offenses. "Offense types," in Section 201(c)(1) and the second paragraph of the Legislative Note, refers to the nature of an offense, as in crimes against public safety (e.g., OWI), crimes against the person (e.g., domestic battery), or crimes against property (e.g., theft). Subsection (c)(1) is intended to authorize arrest for offense types that categorically present a risk of imminent trouble or harm in the absence of arrest. The offenses listed in the Legislative Note for subsection (c)(1) are illustrative, but not necessarily exhaustive, of those a state might wish to identify as justifying arrest for such protective purposes.

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

(1) the circumstances of the alleged offense and the provision of law violated;

(2) if court 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 [citation] or committing an offense before the individual's first court appearance.

Comment

A citation must state. Both experience and common sense suggest that presenting this information clearly can help to minimize failures to appear in court. Researchers recently redesigned the New York City summons form, for instance, such that "important information about one's court date and location is moved to the top, the negative consequence of failing to act is boldly displayed, and clear language encourages recipients to show up to court or plead by mail." The redesign alone produced a 13% reduction in failures to appear. Brice Cook *et al.*, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 4 (2018). The citation form should also be written in plain terms that can be readily understood by an average layperson. Depending on the circumstances, this may entail including words in a language other than English.

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 must include the information 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 arrest warrant].]

Legislative Note: *In subsection (b), insert the term or terms for the judicial action or actions the state authorizes 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." *See* the Comment to Section 304, *infra*.

The court may issue [a summons or arrest warrant]. Section 204(b) calls upon a state to designate what a court is authorized to do if an individual does not appear as required by a citation. Options may include allowing a court to issue a summons (or its equivalent) or an arrest warrant or to take some other action or combination of actions consistent with the law of the state, other than this Act.

[ARTICLE] 3

RELEASE HEARING

SECTION 301. TIMING.

(a) Unless an arrested individual is released [under Section 203] after arrest, 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) The court may continue a release hearing:

(1) on motion of the arrested individual; or

(2) in extraordinary circumstances, for not more than [48] hours, on its own or on motion of the [prosecuting authority].

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

Legislative Note: *If the state adopts Article 2, insert the bracketed text in the first sentence of subsection (a).*

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

In subsection (b), insert the state's term for the prosecuting authority. The same term should be inserted elsewhere in this act where "prosecuting authority" appears in brackets.

Comment

Hearing to determine release. Section 301 requires a prompt judicial hearing for release determinations for 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.

Not later than [48] hours. Section 301 proposes a 48-hour timeline for pretrial release decisions. The logic behind a 48-hour timeline is threefold. First, many courts already make pretrial release decisions at the same time as the probable-cause determination, which, under *Riverside v. McLaughlin*, 500 U.S. 44 (1991), is constitutionally required within 48 hours of a warrantless arrest. *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 hearings and probable cause determinations); *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.").

Second, a number of courts have recently taken up constitutional challenges to the timing of pretrial release decisions and have held that a 48-hour window satisfies due process. *See, e.g.*, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun,* 139 S. Ct. 1446 (2019); *ODonnell v. Harris Cty.*, 892 F.3d 160-61 (5th Cir. 2018).

Third, research suggests that the most damaging effects of pretrial detention—including disruption to an arrestee's employment, housing, or child custody or care arrangements, as well as an increased 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*.

For all these reasons, promptness is of the essence. Nevertheless, the Act brackets this requirement in recognition that a 48-hour timeline may be less practical in some jurisdictions. Thus, a state may adopt a different timing requirement, with the possibility that a longer duration may have constitutional risks.

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 reasons for delay must be "extraordinary," such as a natural disaster or terrorist attack, rather than a routine administrative hurdle or resource constraint. The reasoning behind this requirement proceeds from the discussion of timing immediately above. *See* the Comment to Section 301, *supra* ("*Not later than [48] hours*").

SECTION 302. RIGHTS OF ARRESTED INDIVIDUAL.

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

[(b) An arrested 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 provide a statutory right to counsel at the release hearing. Insert the state's term for the agency 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"). Some courts have recently held that an arrested individual has a right to representation if an initial appearance could result in continued detention. *E.g. Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 460 P.3d 976, 987 (Nv. 2020) (holding that "the defendant shall have the right to be represented by counsel" at an initial appearance if the state is requesting a monetary bond); *Booth v. Galveston Cty.*, 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial."); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018), *aff'd on other grounds*, 937 F.3d 525 (5th Cir. 2019) (holding that "due process requires representative counsel at pretrial detention hearings"). This doctrine is evolving, however, and many jurisdictions do not currently provide counsel at initial appearances where release and detention determinations are made. *See generally* John P. Gross, *The Right To Counsel But Not The Presence of Counsel: A Survey of State Criminal Procedures For Pre-Trial Release*, 69 FLA. L. REV. 831 (2018).

Given the jurisprudential uncertainty, the Act, by bracketing Section 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 whether the arrested individual poses a risk that is relevant to pretrial release. The individual poses a relevant risk only if the court determines by clear and convincing evidence that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant harm to another person. The court shall consider:

(1) available information concerning:

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

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

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

(D) whether the individual has a pending charge in another matter or is under criminal justice supervision; [and]

(2) [any relevant information provided by a [pretrial services agency]; and

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

Legislative Note: *Include paragraph (2) if an agency performs pretrial services in the state, insert the name of the appropriate agency, and do the same where the phrase "pretrial services agency" appears elsewhere in the act.*

Comment

Risk that is relevant. The Act, like other comprehensive frameworks for pretrial release and detention, requires a judicial officer to assess whether the accused person presents a relevant 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, Section 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 Section 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 emotional harm or even 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 Section 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 accrue during 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.").

It does not follow, however, that a clear and convincing standard requires the introduction of any particular type of evidence. To the contrary, the Act leaves matters of evidentiary relevance and admissibility to existing state law and court rules.

Pretrial services agency. 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 restrictive conditions of release. 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 Section 303(3). 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. The order must state:

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

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

(b) If the court determines under Section 303 that an arrested individual poses a relevant

risk, the court shall determine under Sections 305, 306, and 307 whether 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 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, Section 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, Sections 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, or both, are available and sufficient to address satisfactorily the risk.

(b) If the court determines that practical assistance or a voluntary supportive service is available and sufficient to address satisfactorily a relevant risk the court identifies 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 Section 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. Or these services may consist of less structured arrangements—for instance, referring defendants to the care of family members or friends.

Address satisfactorily a 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 society that values both liberty and security. 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 "address satisfactorily 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 a voluntary supportive service is not sufficient to address satisfactorily a relevant risk the court identifies under Section 303, the court shall impose the least restrictive condition or conditions reasonably necessary to address satisfactorily the risk and issue an order of pretrial release under Section 304(c).

(b) A restrictive condition under subsection (a) includes:

(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] another person;

(8) active or passive electronic monitoring;

(9) [house arrest];

(10) subject to Section 307, a secured appearance bond or 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 address satisfactorily the relevant risk the court identifies under Section 303.

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

Legislative Note: *In subsection (b)(9), insert the state's term for house arrest.*

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.

Address satisfactorily a 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 Section 102(10), 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* Section 102(10). 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 the arrested individual is able to pay from personal financial resources not later than [24] hours after the condition is imposed. 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 the restrictive condition that requires payment of

the fee.

(b) Before imposing a secured appearance bond or unsecured appearance bond under Section 306, the court shall consider the arrested 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 restrictive condition under Section 306 unless the court determines by clear and convincing evidence that the arrested individual is likely to abscond, not appear, obstruct justice, or violate an order of protection.

(d) Subject to Sections 308 and 403, the court may not impose a secured appearance bond as a restrictive condition under Section 306:

(1) to keep an arrested individual detained;

(2) for a charge that is not a felony, unless the individual [three or more] times has absconded or did not appear in a criminal case or combination of criminal cases; or

(3) the cost of which is an amount greater than the individual is able to pay from personal financial resources not later than [24] hours after the condition is imposed.

Comment

Financial condition of release. Secured financial conditions of release are the principal focus of contemporary pretrial reform efforts, because they 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 abscond, not appear, obstruct justice, or violate an order of protection. 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 authorize forfeiture upon rearrest, 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 an arrested 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)(1), 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 an arrested individual detained."

For a charge that is not a felony, 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)(2) allows a court to set a secured appearance bond for a misdemeanor charge only if the defendant has failed to appear a designated number of times in this or another criminal case.

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 detain the arrested individual temporarily 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 not later than [24] hours after the condition is imposed, 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 that no less restrictive condition is sufficient to address satisfactorily the relevant risk the court identifies under Section 303;

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

(3) [in a case in which the individual is charged with a felony,]it is extremely likely the individual will not appear, and no less restrictive condition is sufficient to address satisfactorily the relevant risk the court identifies under Section 303.

(b) If under subsection (a) the court issues an order to detain the arrested individual temporarily or that imposes a financial condition of release in an amount greater than the individual is able to pay from personal financial resources not later than [24] hours after the condition is imposed, 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 an offense that is not a felony.*

Comment

Covered offense. The Act requires that a state 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. *See* Comment to Section 102(4), *supra*. 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 from personal financial resources. Section 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 Section 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 section is made subject to this section and to Section 403. The exception recognizes that some jurisdictions lack the ability to respond to a serious risk of harm by imposing pretrial detention because their state constitutions prohibit detention without bail except in capital cases (or another very narrow category of cases). Courts in these jurisdictions have relied upon secured bond conditions as functional mechanisms of detention. The Act does not take a position on whether state-constitutional "right-to-bail" provisions permit such *de facto* detention; that is a matter each state must resolve in determining which offenses to designate as "covered offenses." *See* the Comment to Section 308, *supra* ("*Covered offense*"). The Act simply provides that a court may impose a secured bond condition to address a risk of harm to another person *if and only if* the criteria for detention in this section and Section 403 are otherwise satisfied.

The individual has violated 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 requires 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.

In a case in which the individual is charged with a felony, it is extremely likely that the individual will not appear. This Section narrowly limits the circumstances in which a court may order detention or a secured bond that the accused cannot quickly satisfy, if the only relevant risk is nonappearance (as opposed to absconding). As indicated in Section 102(6), *supra*, the term "not appear" corresponds in meaning with "nonappearance"; it refers to a failure to appear in court "without the intent to avoid or delay adjudication." As compared to Section 308(a)(1), which authorizes temporary detention if it is likely that an individual will abscond, Section 308(a)(3) authorizes detention to prevent nonappearance only in felony cases and only if the individual is *extremely* likely to not appear. (In states that already prohibit detention in non-felony cases, the bracketed language in Section 308(a)(2) is unnecessary.)

The reason for this more demanding standard is that, if the risk is simply that an individual will fail to appear because of personal or environmental obstacles to appearance, a court should almost always be able to rely on measures short of detention to mitigate the risk. Such measures might include practical assistance (like text-message reminders, a transportation voucher, or childcare assistance), voluntary supportive services, or restrictive conditions of release.

In setting different standards for detention to prevent nonappearance as opposed to absconding, this provision requires a court to assess the particular nature of the relevant risk at issue—as a court should always do in order to determine what pretrial intervention is the least restrictive measure available to satisfactorily address a relevant risk.

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 of an arrested individual under Section 308, or pretrial release of an arrested individual under Section 304 subject to 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 or on motion of the [prosecuting authority] may continue a detention hearing for good cause for not more than [72] hours.

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

(d) At the conclusion of a 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 chooses for a detention hearing and continuance of the hearing.*

Comment

Not later than [72] hours after issuance of the order. 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 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, the 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 detained individual has a right to:

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

(2) present evidence, call witnesses, 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 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

Rights of detained individual. Section 402 prescribes rights that are consistent with the procedural framework for detention hearings that the Supreme Court endorsed in *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the pretrial detention regime of the federal Bail Reform Act, 18 U.S.C. §3142, against constitutional challenge). 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 in the Comment to Section 302, *supra*, 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, Section 402(a) adds the contingency of indigency.

The detained individual has a right to testify. Consistent with a number of states' preventive 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 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 the detained 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 detained 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 address satisfactorily the relevant risk the court identifies under Section 303; or

(2) [in a case where 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 satisfactorily the relevant risk the court identifies under Section 303.

(c) If under subsection (b) the court issues an order of pretrial detention or continues a restrictive condition of release that results in detention, 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 (b)(2), include the bracketed language only if the state defines "covered offenses" to include an offense that is not a felony.*

Comment

Covered offense; *significant harm to another person; in a case in which the individual is charged with a felony, it is extremely likely that the individual will not appear.* This Section establishes the standard for detention, which essentially mirrors the standard for temporary detention under Section 308 (although it should be noted that the temporary detention standard includes one additional ground for detention, which is the violation of an order of release). *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 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 an individual, the 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 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 the individual subject to the order 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 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 the 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 issued before [the effective date of this [act]].

[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 such as a mandatory fee, a secured bond, or another financial condition.*

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

Legislative Note: *In determining the effective date, the state should determine the amount of time it may need to prepare for implementation of the act.*