

DRAFT
FOR DISCUSSION ONLY

UNIFORM PRETRIAL RELEASE AND DETENTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

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UNIFORM PRETRIAL RELEASE AND DETENTION ACT

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1 **UNIFORM PRETRIAL RELEASE AND DETENTION ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

6 **Comment**

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

13
14 The Act is intended to replace a state’s existing statutory law regulating determinations to
15 release or detain individuals pretrial, except certain laws pertaining to related matters, as
16 specified by Section 102, *infra*. The Act offers an approach to pretrial release and detention
17 ~~determinations~~decisions that synthesizes points of consensus among contemporary courts,
18 legislatures, pretrial policy experts, scholars, and advocates. Its core animating principle is that
19 the state may restrict an accused person’s liberty only to the extent necessary to satisfactorily
20 protect the state’s relevant interests during the pretrial period: the appearance of the accused at
21 court proceedings, public safety, and the integrity of the judicial process. Article 2 deals with the
22 officer on the beat. It offers a template for limiting arrest to situations in which a custodial
23 seizure is necessary to initiate prosecution. Article 3 provides courts with a framework for
24 release determinations of those individuals who are arrested and not released from stationhouses.
25 Article 4 details the process and standards for authorizing continued detention pending trial. At
26 each step, the Act requires that any restraint on the accused person’s liberty be the least-
27 restrictive measure necessary to adequately protect the state’s relevant interests.

28
29 In drafting the Act, the Drafting Committee has drawn on the American Bar
30 Association’s PRETRIAL RELEASE STANDARDS (2007); the National Association of Pretrial
31 Services Agencies’ PRETRIAL RELEASE STANDARDS (2020 Edition); the current statutory regimes
32 in the District of Columbia, New Jersey, New Mexico, and the federal system; and the work of
33 countless scholars and advocacy organizations.

34
35 *The term “bail”.* The Act does not use the word “bail” because that term creates
36 needless confusion. For centuries, “bail” referred to the process of release after arrest, typically
37 conditioned on an unsecured pledge of a personal surety. *Holland v. Rosen*, 895 F.3d 272, 291
38 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440 (2018); *see also* Timothy R. Schnacke,
39 FUNDAMENTALS OF BAIL 114 (2014). As American jurisdictions came to rely more heavily on
40 secured bonds and commercial sureties, the process of bail became so closely associated with

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

7 To the extent that a state uses the term “bail” in existing constitutional provisions or in
8 case law or statutory text that is not displaced by this Act, the state should endeavor to read the
9 relevant text consistently with this Act. For example, if case law or a statute uses the term “bail”
10 to refer to a secured appearance bond, that text should be interpreted consistently with the
11 provisions of this Act regulating secured appearance bonds. Alternatively, the state may modify
12 the text of a surviving statute to replace the term “bail”—or another conflicting term—with the
13 appropriate corresponding term from this Act. For instance, as specified by Section 102, the Act
14 does not replace a state’s existing forfeiture statute. If a forfeiture statute were to use the term
15 “bail,” the state could consider altering that language as necessary to avoid confusion or conflict
16 with the terms of this Act.

18 **SECTION 102. SCOPE.** This [act] governs a determination to [arrest,] release[,] or
19 detain an individual pretrial. The act does not affect the validity of a law of this state other than
20 this [act] regarding related matters, including:

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

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

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

24 (4) appellate review; or

25 (5) release pending appeal.

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

28 **Comment**

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

34 Does not affect the validity. The Act does not displace or preempt existing state law
35 regarding the subjects listed. The list is not exhaustive; it merely addresses subjects potentially
36 related to this Act in order to clarify the Act’s precise scope. Although the Act does not displace
37 or preempt laws regarding these subjects, it is important for each jurisdiction to consider the

1 interplay of the Act with existing law in these areas and, if necessary, to address conflicts or
2 ambiguity—for instance, by modifying the language of related law to conform to the terms of
3 this Act.

4
5 **SECTION ~~102~~103. DEFINITIONS.** In this [act]:

6 (1) “Abscond” means fail to appear in court as required with intent to avoid or delay
7 adjudication.

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

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

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

13 (5) “Detention hearing” means a hearing held under Section 401.

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

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

18 (8) “Offense” means the conduct ~~proscribed by that a~~ statute proscribes.

19 (9) “Person” means an individual, estate, business or nonprofit entity, public corporation,
20 government or governmental subdivision, agency, or instrumentality, or other legal entity.

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

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

(12) “Release hearing” means a hearing under Section 301.

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

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

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

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

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

In paragraph (13), insert the state’s term for “surety”.

Comment

Absconding versus nonappearance. ~~This~~The Act encourages courts to attend to the differences between pretrial risks. Often, pretrial statutes speak only in terms of “failure to appear”. Nevertheless, there remains a conceptual difference between different types of failure to appear. “Absconding” has the purpose of evading justice, whereas “nonappearance” may result from impediments to appearance—for example, from cognitive limitations or difficult social circumstances. *See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018). The difference between absconding and nonappearance turns on the presence of a particular purpose. A person who must choose between attending a court date or maintaining her job may be said to have intentionally failed to appear in court, but this failure is an instance of nonappearance rather than absconding. Absconding entails the particular purpose of avoiding or delaying adjudication.

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

1 date, whatever the purpose of the accused person in missing court.

2
3 *Citation.* States use different terms to designate an accusatory instrument used to initiate
4 criminal proceedings without arrest. The Act uses the stand-in term “citation”, but many
5 jurisdictions may use another term, like “summons”, to signify the same. *See, e.g.,* N.Y. CRIM.
6 PROC. LAW § 130.10 (“A summons is a process issued by a local criminal court directing a
7 defendant designated in an [accusatory instrument] to appear before it at a designated future time
8 in connection with such accusatory instrument.”). A state should insert whichever term it uses.

9
10 *Covered offense.* This Act provides for each state to specify the offenses, or offense
11 classes or types, for which a person may be held in custody pending trial (whether on the basis of
12 a detention order or on the basis of a financial condition of release that the accused person cannot
13 satisfy). *See* Section 308 and Article 4, *infra*. Each state should enumerate these offenses or
14 offense classes or types in the definition of “covered offense”, *supra*. Some possibilities include:
15 (i) violent felonies; (ii) all felonies; (iii) all felonies and violent misdemeanors; or (iv) all
16 felonies, violent misdemeanors, and misdemeanors involving domestic violence, stalking,
17 driving under the influence, unlawful firearms possession or use, or contempt. Each state should
18 consult its constitution and case law interpreting relevant state-constitutional provisions when
19 determining what offenses to include as “covered offenses”. For further discussion, *see* the
20 Comment to Section 308, *infra*.

21
22 *Obstruct justice.* “Obstruction of justice” is not only a legal term of art but also a
23 substantive crime. The Act does not intend to disturb a state’s statutory definition of the crime or
24 otherwise impinge upon a state’s existing crime definitions. To the contrary, the Act provides a
25 definition of “obstruction of justice” for the purposes of the Act only.

26
27 *Offense.* ~~The definition of this term leaves some ambiguity as to whether the term~~
28 ~~signifies an individual’s particular alleged conduct that is proscribed by statute, or the abstract~~
29 ~~conduct that is proscribed by statute. For the purposes of this Act, nothing turns on the~~
30 ~~distinction, except in subsections 202(1) and 303(b)(1), *infra*, wherein the Act is specific as to its~~
31 ~~criteria, referencing the abstract “nature” and the particular “circumstances” of the alleged~~
32 ~~offense.~~

33
34 The definition of “offense” intentionally avoids reference to “criminal” laws or penalties,
35 because state and local codes frequently contain offenses that are not officially designated as
36 criminal but that nonetheless may subject violators to arrest or similar pretrial restraints on
37 liberty. *See* Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 151 (2017) (“Consider . . . the
38 officer’s arrest authority . . . —, the police officer needs only probable cause to believe the
39 arrestee has committed an offense—any offense, including even a noncriminal violation”~~”);~~
40 Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24
41 CORNELL J. L. & PUB. POL’Y 319, 338-339 (2014) (collecting cases of authorized arrest for
42 noncriminal offenses). Indeed, some noncriminal offenses even authorize imposition of a
43 postconviction jail sentence. *See, e.g.,* N.Y.P.L. § 70.15 (2019) (“A sentence of imprisonment
44 for a [noncriminal] violation shall be a definite sentence. When such a sentence is imposed the
45 term shall be fixed by the court, and shall not exceed fifteen days.”). Consequently, this Act
46 applies to any offense—criminal or otherwise—that authorizes arrest or similar pretrial restraints

on liberty.

~~**SECTION 103. SCOPE.** This [act] does not affect the validity or effect of a law of this state other than this [act] regarding:~~

~~(1) forfeiture of a secured appearance bond;~~

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

~~(3) a right of a crime victim;~~

~~(4) appellate review; or~~

~~(5) release pending appeal.~~

Comment

~~*Does not affect the validity.* This Section clarifies that 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.~~

[[ARTICLE] 2]

[CITATION] AND ARREST

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

SECTION 201. AUTHORITY FOR [CITATION] OR ARREST.

(a) If [an authorized official] has probable cause to believe an individual is committing or has committed an offense, [the authorized official] may issue the individual a [citation] or take another action authorized by law.

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

(1) the individual is subject to an order of detention from any jurisdiction,

1 including an arrest warrant or order of revocation of probation, [parole], or release; or

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

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

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

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

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

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

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

17 (B) carry out a lawful investigation;

18 (C) protect a person from significant harm; or

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

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

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

24
25 In the introduction to subsection (c), insert the offenses or offense classes or types for which

1 *arrest is not authorized except as provided in paragraphs (1) through (4).*

2
3 *In subsection (c)(1), insert the offenses or offense classes or types sufficiently serious to*
4 *authorize an arrest.*

5
6 ~~*In subsection (c)(4), insert the state's term for the agency authorized to collect reportable events*~~
7 ~~*under the state's Criminal Records Accuracy Act or comparable statute.*~~

8 9 **Comment**

10 *Citation versus arrest.* Although this Act focuses primarily on release and detention
11 policy following arrest, the implementation of pretrial detention and release policy begins with
12 the police officer on the beat. Hence, Article 2 of the Act provides an option to the states to
13 enact a provision requiring citations over arrests in certain circumstance. *See, e.g.,* Bureau of
14 Justice Assistance, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF
15 PROCEEDINGS 30 (2012); American Bar Association, CRIMINAL JUSTICE STANDARDS, STANDARD
16 10-2.2 (providing that, except in circumscribed situations, “a police officer who has grounds to
17 arrest a person for a minor offense should be required to issue a citation in lieu of taking the
18 accused to the police station or to court”); TENN. CODE ANN. §§ 40-7-118, 40-7-120 (providing
19 for a presumption in favor of citations for misdemeanors); KY. REV. STAT. § 431.015 (2012)
20 (same). Nevertheless, the Act contemplates that a state may decide not to include an article on
21 citation versus arrest. Thus, the entire Article 2 is bracketed.

22
23 *Arrest.* The term “arrest” “has no standard definition in the law”. Rachel A.
24 Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 309-10 (2016) (“There is no standard definition
25 of an arrest and no shared nomenclature for the various police practices that start the criminal
26 process and deprive people of their freedom²².”). Nor does this Act undertake to define
27 “arrest”; it is enough for a state to differentiate between a citation (or the equivalent) and an
28 arrest, however the state defines the latter.

29
30 *Except as otherwise provided by law.* A state may authorize officials to arrest for
31 purposes other than initiating criminal prosecution, including for the purpose of keeping the
32 peace or initiating civil commitment. The Act does not disturb a state’s arrest authority for
33 purposes other than initiating prosecution. For further discussion, *see* the Comment to Section
34 303, *infra* (“*Significant harm to another person*”).

35
36 *May not arrest the individual unless.* Subsection 201(c) limits authority to arrest for
37 certain classes or types of minor offenses. Each state may determine how to define the classes or
38 types of minor offenses that are subject to this provision. Two options, included in brackets, are
39 (1) all sub-felony offenses, or (2) offenses punishable by no more than a specified term of
40 incarceration. Within the designated classes or types of offenses, 201(c)(1) through (4)
41 enumerate the extenuating circumstances in which arrest is nonetheless permitted.

42
43 ~~*Adequate identification, orally or through documentation, as lawfully requested. Unless*~~
44 ~~*otherwise required by law, an individual need only respond orally to an officer’s lawful request*~~
45 ~~*to determine the identity information necessary to issue a citation (or the equivalent). In other*~~

1 words, the Act itself does not oblige an individual to carry identification papers in order to avoid
2 an otherwise unauthorized arrest. Other laws may require individuals to carry identification
3 documents in certain circumstances—for instance, when operating a motor vehicle. And, in the
4 first instance, an officer must have probable cause either to issue a citation or make an arrest.
5 See subsection 201(a); see also *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).
6

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

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

9 (2) if appearance is required:

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

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

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

14 **SECTION 203. RELEASE AFTER ARREST.** [An authorized official] may release
15 an individual after arrest and without a release hearing by issuing a [citation] under Section
16 201(a). [The authorized official] may require the individual to execute an unsecured appearance
17 bond as a condition of release.

18 ***Legislative Note:*** *Insert the state’s term for an official authorized to release an individual after*
19 *arrest but before the individual’s first court appearance.*
20

21 22 23 **Comment**

24 *Release after arrest and without a release hearing.* This provision permits policies and
25 practices of “stationhouse release”—or release directly from a police station, booking facility,
26 jail, or other law-enforcement facility—without the need for a judicial hearing. The Act
27 authorizes the imposition of an unsecured bond requirement as a condition of stationhouse
28 release. ~~It does not authorize the use of a secured bond requirement.~~ Many jurisdictions have
29 relied on secured-bond “schedules” to enable release for those able to afford the pre-set bond
30 amounts immediately after arrest, but the constitutionality of that practice is in question, because
31 it produces arbitrary wealth-based disparities in post-arrest pretrial release. *ODonnell v. Harris*
32 *Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (affirming on equal protection and due process grounds
33 the district court’s preliminary injunction, preventing Harris County from imposing secured
34 appearance bonds based upon a misdemeanor bail schedule); *but see Walker v. City of Calhoun,*

1 901 F.3d 1245, 1272 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun*, 139 S.
2 Ct. 1446 (2019) (holding that use of a secured bond schedule did not violate equal protection or
3 due process where indigent arrestees were guaranteed an individualized hearing and release
4 within forty-eight hours of arrest). To err on the side of constitutional caution and to minimize
5 wealth-based disparities, the Act does not permit the use of secured bond schedules for
6 stationhouse release.

7 8 **SECTION 204. APPEARANCE ON [CITATION].**

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

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

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

16 17 **Comment**

18 *Order of pretrial release- on recognizance.* The intent of this provision is to specify that,
19 if an individual appears as required by a citation (or the equivalent), the court should issue an
20 order of pretrial release that is conditioned only on the individual's promise to appear again as
21 required by the court and abide by generally applicable laws—~~what is commonly termed~~ or
22 “release on recognizance”.

23 24 **[ARTICLE] 3**

25 **RELEASE HEARING**

26 **SECTION 301. TIMING.**

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

31 (b) In extraordinary circumstances, the court on its own motion or on motion of a party

1 may continue a release hearing for not more than [48] hours.

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

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

6
7 *In subsections (a) and (b), insert the deadlines the state designates for a release hearing and*
8 *continuance of the hearing.*

9
10 **Comment**

11
12 *Hearing to determine release.* Section 301 requires a prompt judicial hearing for release
13 determinations of those persons who have been arrested and not released from stationhouses
14 pending trial. Section 302 articulates the rights of the arrested person at that hearing. Sections
15 303 through 308 guide the judicial evaluation necessary in order to impose restrictive conditions
16 of release or, in rare cases, detain the individual. Section 303 requires the court to determine,
17 first, whether there is clear and convincing evidence that the individual is likely to engage in
18 conduct that unduly threatens the state’s relevant interests during the pretrial period. If not,
19 Section 304(a) requires that the court release the individual on recognizance. If the court
20 determines that there is a sufficient relevant risk under Section 303, the court then determines the
21 least-restrictive method of release to satisfactorily address the risk under Sections 305, 306, and
22 307. The court should first consider under Section 305 whether a non-restrictive measure—
23 practical assistance or a supportive service—could satisfactorily address the risk. If not, the
24 court should consider under Section 306 what restrictive condition or set of conditions is
25 necessary, abiding by the limits on financial conditions under Section 307. Finally, if the
26 individual is charged with a “covered offense” and certain other criteria are met, the court may,
27 under Section 308, order temporary detention or impose a release condition that the individual
28 cannot immediately satisfy.

29
30 *Extraordinary circumstances.* Under Section 401, the Act allows for continuance of a
31 detention hearing merely for good cause. With respect to the release hearing, however, the Act
32 contemplates that the reasons for delay must be “extraordinary—,” such as a natural disaster or
33 terrorist attack, rather than a routine administrative hurdle or resource constraint. The logic is
34 that many states already follow a 48-hour timeline, under *Riverside v. McLaughlin*, 500 U.S. 44
35 (1991), which constitutionally guarantees a probable-cause hearing within 48 hours of
36 warrantless arrest (and at which pretrial release decisions are often made). *See* National
37 Conference of State Legislatures, PRETRIAL RELEASE ELIGIBILITY,
38 <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx> (listing
39 states that couple release decisions and pretrial hearings); *see, e.g.*, N.J. STAT. ANN. § 2A:162-16
40 (“[T]he court . . . shall make a pretrial release decision for the eligible defendant without
41 unnecessary delay, but in no case later than 48 hours after the eligible defendant’s commitment
42 to jail.”).

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

SECTION 302. RIGHTS OF ARRESTED INDIVIDUAL.

[(a)] An arrested individual has a right to be heard at a release hearing before the court issues an order.

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

Legislative Note: *Include subsection (b) if the state chooses to codify a right to counsel at the release hearing. Insert the state’s term for the agency that is authorized to provide counsel. If the authorized agency varies locally, insert “an authorized agency”. Include the last bracketed sentence if the state chooses to permit limited-scope representation.*

Comment

Right to counsel. The existence of a Sixth Amendment right to counsel turns on two questions: (1) whether the constitutional right has “attached”, and (2) whether the proceeding in question constitutes a “critical stage” of the prosecution. The Supreme Court has held that the right to counsel does “attach” at a defendant’s initial appearance before a judicial officer, but the Court has not yet determined whether a release hearing is a “critical stage” of the prosecution. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 194 & n.15 (2008) (clarifying that the right to counsel “attaches” at “the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty”, but reserving

1 judgment on “the scope of an individual’s post-attachment right to the presence of counsel”).
2 Given the jurisprudential uncertainty, the Act, by bracketing subsection 302(b), offers states the
3 choice of whether to codify a right to counsel at the release hearing. The Act does not limit this
4 right to the indigent. That is because the release hearing often happens so quickly that even an
5 affluent individual may not yet be able to secure the presence of counsel.

6
7 A state may choose not to codify a right to counsel at the release hearing, if, for instance,
8 resource constraints prove prohibitive. It should be noted, however, that any fiscal burden of
9 providing counsel at a release hearing may be offset by cost savings in other places—for
10 example, by the increased use of cheaper citations over costlier arrests. See Jane Messmer,
11 UNIFORM LAW COMMISSION, *Committee on Scope and Program: Project Proposal Form* (Dec.
12 13, 2013) (“The use of citations can contribute to lower jail populations and local cost savings. . .
13 . Failing to provide counsel carries enormous costs—human and financial; far exceeding the
14 expense of providing an advocate who can advocate viable and prudent alternatives.” (citing
15 studies)). Moreover, there would be no fiscal burden in the several states that already provide for
16 counsel at release hearings. See, e.g., 29 DEL CODE. § 4604 (requiring the appointment of
17 counsel “at every stage of the proceedings following arrest”); cf., Bureau of Justice Assistance,
18 NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: SUMMARY REPORT OF PROCEEDINGS 30
19 (Washington, D.C., 2012) (deeming counsel’s presence integral to release hearings).

20
21 If a state chooses to codify a right to counsel at the release hearing, an arrested individual
22 retains the right to waive counsel. In some circumstances, for instance, an individual may wish to
23 waive counsel to facilitate speedier release.

24
25 *Rights of arrested individual versus powers of prosecutor.* Article 3 prescribes only the
26 rights of the arrested individual. It does not address the procedural powers of the prosecutor—
27 for instance, to present evidence, make arguments, or cross-examine defense witnesses. The Act
28 does not establish any required procedures for the release hearing and thereby leaves matters
29 other than the rights of the arrested individual to existing state law and court rules.

30
31 **SECTION 303. JUDICIAL DETERMINATION OF RISK.** At a release hearing, the
32 court shall determine, by clear and convincing evidence, if ~~the~~an arrested individual poses a risk
33 that is relevant to pretrial release. The individual poses a relevant risk only if the individual is
34 likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant
35 harm to another person. ~~The court shall consider~~ Criteria relevant to the court’s determination
36 may include:

- 37 (1) the nature, seriousness, and circumstances of the alleged offense;
38 (2) the weight of the evidence against the individual;

(3) the individual's:

(A) criminal history;

(B) history of absconding or nonappearance;

(C) place and length of residence;

(D) community ties; and

(E) employment and education commitments;

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

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

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

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

In paragraph (5), insert the state's term for the state's prosecuting authority. ~~Insert the state's term for the state's pretrial services agency or the equivalent, if applicable.~~

Comment

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

1 *Abscond versus not appear.* For the reasons discussed in the Comment to Section
2 ~~402103~~, *supra*, the Act draws a distinction between a risk of nonappearance versus a risk of
3 absconding. As indicated in subsection ~~402103~~(6), *supra*, the term “~~not appear~~~~nonappearance~~”
4 corresponds in meaning with “~~nonappearance~~~~not appear~~”, which is defined as “fail to appear in
5 court as required without the intent to avoid or delay adjudication”.

6
7 *Significant harm to another person.* The Act anticipates that not only physical injury and
8 death but also property loss may constitute “significant harm to a person”. This intended reading
9 is supported by the Uniform Law Commission’s conventional definition of “person”, which is
10 adopted in subsection ~~402103~~(9), *supra*: “‘Person’ means an individual, estate, business or
11 nonprofit entity, public corporation, government or governmental subdivision, agency, or
12 instrumentality, or other legal entity.” Given the breadth of the meaning of “person”, it is
13 especially important that the term~~harm be~~ “significant ~~harm~~” is believed to adequately guide
14 the keep a court regarding the risks to be considered. The~~from unduly limiting liberty based on a~~
15 risk of only trivial harm. Finally, the Act does not allow a court to consider whether an
16 individual is likely to cause significant harm to self, because jurisdictions already have other
17 legal regimes for involuntary civil commitment should a person present an acute risk of harm to
18 self, and this Act does not disturb those regimes. For further discussion, *see* the Comment to
19 Section 201, *supra* (“*Except as otherwise provided by law*”).

20
21 *Clear and convincing evidence.* The Supreme Court has never sanctioned a lower
22 standard than clear and convincing evidence when a fundamental liberty is at stake. *See, e.g.,*
23 *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (rejecting a due process challenge to the
24 Federal Bail Reform Act’s preventive detention provisions in part because the Act required the
25 government to “prove its case by clear and convincing evidence”); *Foucha v. Louisiana*, 504
26 U.S. 71, 80 (1992) (invalidating a law that permitted confinement of an insanity acquittee
27 without clear and convincing evidence of dangerousness and mental illness); *Addington v. Texas*,
28 441 U.S. 418 (1979) (requiring a clear and convincing standard for involuntary civil
29 commitment); *Santosky v. Kramer*, 455 U.S. 745, 745 (1982) (noting that clear and convincing
30 evidence is required when “the individual interests at stake in a state proceeding are both
31 ‘particularly important’ and ‘more substantial than mere loss of money’”); *see also Cruzan v.*
32 *Dir., Missouri Dep’t of Health*, 497 U.S. 261, 282 (1990) (discussing “particularly important”
33 interests, including deportation, denaturalization, civil commitment, and termination of parental
34 rights).

35
36 The Act operates on the premise that pretrial liberty is a “particularly important” interest
37 that demands a heightened evidentiary standard, including at a release hearing when a court may
38 issue an order of temporary pretrial detention, as Section 308 permits. *See Salerno*, 481 U.S. at
39 750 (recognizing “the importance and fundamental nature” of pretrial liberty); *id.* at 755 (“In our
40 society liberty is the norm, and detention prior to trial or without trial is the carefully limited
41 exception.”). As discussed in the Comment to Section 301, *supra*, many of the most serious
42 negative consequences of confinement come to pass over the first three days of pretrial
43 detention. Although the Supreme Court has not explicitly held that pretrial detention requires a
44 finding of necessity by clear and convincing evidence, a number of lower courts have. *See, e.g.*
45 *Valdez-Jimenez v. Eighth Judicial District Court in and for County of Clark*, 460 P.3d 976, 980
46 (Nv. 2020) (holding that a court may impose bail that may result in detention “only if the State

1 proves by clear and convincing evidence that it is necessary to ensure the defendant’s presence at
2 future court proceedings or to protect the safety of the community”); *Caliste v. Cantrell*, 329 F.
3 Supp. 3d 296, 313 (E.D. La. 2018) (requiring proof by clear and convincing evidence that
4 pretrial detention is necessary because of “the vital importance of the individual’s interest in
5 pretrial liberty recognized by the Supreme Court”); *Schultz v. Alabama*, 330 F. Supp. 3d 1344,
6 1372 (N.D. Ala. 2018) (“[B]efore ordering an unaffordable secured bond, a judge must find by
7 clear and convincing evidence that pretrial detention is necessary to secure the defendant’s
8 appearance at trial or to protect the public.”). Moreover, a number of existing statutes governing
9 pretrial detention require a finding of necessity by clear and convincing evidence. *See, e.g.*, 18
10 U.S.C. § 3142(e)(1), (f); D.C. CODE § 23-1322 (B)(1), (D); MASS. GEN. LAWS. ANN. ~~CH~~CH. 276, §
11 58A(3); N.J. STAT. ANN. § 2A:162-18(A)(1); N.J. STAT. ANN. § 2A:162-19 (E)(2), (3); N.M. R.
12 CRIM. P. DIST. CT. 5-409(A), (F)(4); WIS. STAT. § 969.035(5), (6)(b); *see also* FLA. R. CRIM. P.
13 3.132 (“The state attorney has the burden of showing beyond a reasonable doubt the need for
14 pretrial detention pursuant to the criteria in section 907.041, Florida Statutes.”).
15

16 *Pretrial services agencies.* Since the 1960s, pretrial services agencies have played a
17 crucial role in assessing and managing pretrial risk, as well as in providing the kind of supportive
18 services and practical assistance contemplated by Section 305, *infra*. And, since they operate at
19 some remove from the adversarial process, they can help ensure the objectivity of determinations
20 of relevant risk. Thus, the United States Department of Justice includes pretrial services as an
21 “essential” element of an effective state or federal pretrial system. National Institute of
22 Corrections, A FRAMEWORK FOR PRETRIAL JUSTICE (2017); *cf.* National Association of Pretrial
23 Services Agencies, NATIONAL STANDARDS ON PRETRIAL RELEASE (2020) (offering
24 comprehensive recommendations for the creation and operation of such agencies). Nevertheless,
25 in many jurisdictions—particularly rural jurisdictions—pretrial services agencies or other similar
26 institutions do not exist. This Act does not mandate the creation of pretrial services agencies.
27 But it does contemplate that in a jurisdiction where such an agency exists already, the pretrial
28 services agency will play a significant role in supporting the court’s assessment of relevant risks
29 under Section 303 and the determination of the least-restrictive measures to manage relevant
30 risks under Sections 305 through 308.
31

32 *Risk assessment instruments.* One of the most controversial questions in pretrial policy is
33 when, whether, and to what degree pretrial release should depend upon actuarial risk-assessment
34 instruments. *See generally* Sarah L. Desmarais & Evan M. Lowder, PRETRIAL RISK ASSESSMENT
35 TOOLS: A PRIMER FOR JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS (2019). Fifteen states
36 currently require courts to use risk-assessment instruments in at least some cases. National
37 Conference of State Legislatures, GUIDANCE FOR SETTING RELEASE CONDITIONS,
38 [http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-](http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx)
39 [conditions.aspx](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,
40 16-4-113. In particular, hundreds of jurisdictions have used the Public Safety Assessment (PSA)
41 tool created by Arnold Ventures. *See* Advancing Pretrial Policy & Research, WHERE THE PSA IS
42 USED, <https://advancingpretrial.org/psa/psa-sites/>. There is widespread concern, however, that
43 the use of actuarial risk assessment instruments may unnecessarily widen the net of defendants
44 who are subject to detention and unnecessary conditions of release. *See, e.g.*, Human Rights
45 Watch, PRESERVING THE PRESUMPTION OF INNOCENCE: A NEW MODEL FOR BAIL REFORM (on file
46 with reporters) (rejecting use of risk-assessment instruments). Risk assessment tools have also

1 generated fierce resistance on racial-equity grounds. *See, e.g.*, The Leadership Conference for
2 Civil Rights, THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS: A SHARED STATEMENT OF
3 CIVIL RIGHTS CONCERNS (2019); David G. Robinson & Logan Koepke, CIVIL RIGHTS AND
4 PRETRIAL RISK ASSESSMENT INSTRUMENTS (2019).

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

15
16 ~~Pretrial services agencies. Since the 1960s, pretrial services agencies have played a crucial role~~
17 ~~in assessing and managing pretrial risk, as well as in providing the kind of supportive services~~
18 ~~and practical assistance contemplated by Section 305, *infra*. The U.S. Department of Justice~~
19 ~~includes pretrial services as an “essential” element of an effective state or federal pretrial system.~~
20 ~~National Institute of Corrections, A FRAMEWORK FOR PRETRIAL JUSTICE (2017); *cf.* NAPSA,~~
21 ~~NATIONAL STANDARDS ON PRETRIAL RELEASE (2020) (offering comprehensive recommendations~~
22 ~~for the creation and operation of such agencies). Nevertheless, in many jurisdictions—~~
23 ~~particularly rural jurisdictions—pretrial services agencies do not exist. This Act does not~~
24 ~~mandate the creation of a pretrial services agency. But it does contemplate that in a jurisdiction~~
25 ~~where such an agency exists already, the pretrial services agency will play a significant role in~~
26 ~~supporting the court’s assessment of relevant risks under Section 303 and the determination of~~
27 ~~the least restrictive measures to manage a relevant risk under Sections 305 through 308.~~

28 29 30 SECTION 304. PRETRIAL RELEASE.

31 (a) Except as otherwise provided in subsection (b), and Section 308, at a release hearing,
32 the court shall issue an order of pretrial release ~~of the~~on recognizance of an arrested individual.

33 The order must state in plain language:

- 34 (1) when and where the individual must appear; and
- 35 (2) the possible consequences of violating the condition~~terms~~ of the order or
- 36 committing an offense while the charge is pending.

37 (b) If the court determines under ~~subsection~~Section 303~~(a)~~ that the ~~arrested~~ individual
38 poses a relevant risk, the court shall determine under Sections 305, 306, and 307 whether pretrial

1 release of the individual is appropriate.

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

6 Comment

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

20 SECTION 305. PRACTICAL ASSISTANCE; VOLUNTARY SUPPORTIVE

21 **SERVICES.** ~~If the court determines under subsection 303(a) that the arrested individual poses a~~
22 ~~risk, the court shall determine whether practical assistance or a voluntary supportive service is~~
23 ~~sufficient to satisfactorily address the risk.~~

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

27 (b) If the court determines that practical assistance or a voluntary supportive service is
28 available and sufficient to satisfactorily address a relevant risk under Section 303, the court shall
29

1 refer the individual to the practical assistance or voluntary supportive service and issue an order
2 of pretrial release under subsection 304(c).

3 **Comment**

4
5 *Practical assistance or a voluntary supportive service.* In determining the least
6 restrictive measure necessary to satisfactorily address a risk under Section 303, a court should
7 begin with the possibility of non-restrictive measures designed to address the circumstances that
8 have contributed to the relevant risk. Under Section 305, therefore, a court is first required to
9 consider whether practical assistance or voluntary supportive services are available to manage
10 the risk, before the court may consider restrictive conditions of release under Section 306, *infra*.
11 For further discussion, *see* the Comment, *infra* (“*Satisfactorily address the risk*”). Many pretrial
12 services agencies already provide such assistance and services.

13
14 *Practical assistance.* When the relevant risk is merely nonappearance (as opposed to
15 absconding), the least restrictive measure to assure appearance may be a form of practical
16 assistance. This is particularly true when the risk of nonappearance arises from socioeconomic
17 or cognitive inequities of the kind that historically have produced wealth-based and other
18 arbitrary forms of disparity in pretrial release and detention. For instance, defendants may
19 struggle to remember court dates, to get leave from work, or to procure affordable childcare or
20 transportation. *See, e.g.,* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018).
21 Practical assistance may include sending electronic or other reminders of appearances,
22 scheduling appearances with attention to the most feasible dates and times, offering assistance
23 with caregiving responsibilities, or providing subsidized transportation to and from court. There
24 is increasing evidence that court-date reminders and other measures that reduce logistical barriers
25 to appearance can dramatically improve appearance rates. *See, e.g.,* Brice Cooke *et al.*, USING
26 BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO
27 APPEAR IN COURT (2018).

28
29 *Voluntary supportive service.* The Act distinguishes between practical assistance and
30 voluntary supportive services for the following reason: As indicated above, practical assistance
31 is intended to address a socioeconomic or cognitive impediment to appearance. By contrast, a
32 supportive service could help to manage any risk of release. Voluntary supportive services may
33 include referrals to organizations that provide voluntary therapeutic treatment or social services,
34 including educational, vocational, or housing assistance.

35
36 *Satisfactorily address the relevant risk.* It is impossible to eliminate risk. As Justice
37 Jackson observed: “Admission to bail always involves a risk that the accused will take flight.
38 That is a calculated risk which the law takes as a price of our system of justice.” *Stack v. Boyle*,
39 342 U.S. 1, 8 (1951) (Jackson, J., dissenting). The difficult task is to specify what degree of risk
40 is tolerable in a free society. This Act takes the position that the state may justifiably restrict an
41 individual’s liberty during the pretrial phase only if there is clear and convincing evidence that
42 one of the adverse events enumerated in Section 303 is likely. Moreover, the state may only
43 restrict the individual’s liberty to the extent reasonably necessary to reduce the risk below that
44 threshold—to the point where the adverse event is no longer likely. Once the risk is reduced to

1 that extent, further restriction is unjustified, even if it remains possible (but unlikely) that the
2 adverse event will occur. ~~If practical assistance or~~ a voluntary supportive service can reduce
3 the risk to that point, no restrictive condition of release is justified. If ~~supportive services and~~
4 practical assistance ~~or a supportive service~~ cannot reduce the risk below that threshold but a
5 restrictive condition can, the restrictive condition is justified—but detention is not. If no non-
6 restrictive measure or restrictive condition or conditions can reduce the risk below that threshold,
7 detention ~~is~~may be justified. The phrase “satisfactorily address the risk” is intended to mean just
8 that: *“reduce the risk to such an extent that the relevant adverse event under Section 303 is no*
9 *longer likely”*.

10
11 Just as it is impossible to eliminate risk altogether, it is likewise impossible to know in
12 advance precisely what effect a non-restrictive supportive measure or restrictive condition will
13 have. Given this uncertainty, the Act intends for courts to consider not only the relevant risks
14 but also the potential collateral consequences of restrictive conditions, like impairment of a
15 defendant’s ability to maintain employment. This concern provides another reason for courts to
16 consider non-restrictive measures first: such measures may more readily address risk without
17 imposing undue collateral consequences.

18 19 **SECTION 306. RESTRICTIVE CONDITION OF RELEASE.**

20 (a) If the court determines under Section 305 that practical assistance or voluntary
21 supportive services are not sufficient to satisfactorily address ~~thea relevant~~ risk under Section
22 303(a), the court shall ~~issue an order of pretrial release of the individual and~~ impose the least
23 restrictive condition or conditions reasonably necessary to satisfactorily address the ~~risk-relevant~~
24 risk and issue an order of pretrial release under subsection 304(c).

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

- 26 (1) mandatory therapeutic treatment or social services;
- 27 (2) a requirement to seek or maintain employment or education commitments;
- 28 (3) a restriction on possession or use of a weapon;
- 29 (4) a restriction on travel;
- 30 (5) a restriction on contact with a specified person;
- 31 (6) a restriction on a specified activity;
- 32 (7) supervision by [a [pretrial services agency] or] a third party;

- (8) active or passive electronic monitoring;
- (9) house arrest;
- (10) subject to Section 307, a secured appearance bond or an unsecured appearance bond;
- (11) a condition proposed by the ~~arrested~~ individual;
- (12) any other non-financial condition required by law of this state other than this [act]; or
- (13) another condition to satisfactorily address the relevant risk under Section 303~~(a)~~.
- (c) The court shall state in a record why the restrictive condition or conditions imposed under subsection (a) are the least restrictive reasonably necessary to satisfactorily address the relevant risk the court has identified under Section 303~~(a)~~.

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

1 restrictive. However, as suggested in Section 307 and its Comment, *infra*, the Act operates on
2 the premise that a secured appearance bond often will be the most restrictive condition. *See, e.g.,*
3 FLA. R. CRIM. P. RULE 3.131 (“[T]here is a presumption in favor of release on nonmonetary
4 conditions for any person who is granted pretrial release.”); *see also* American Bar Association,
5 CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) (“Financial conditions other than unsecured
6 bonds should be imposed only when no other less restrictive condition of release will reasonably
7 ensure the defendant’s appearance in court.”). Moreover, a core purpose of the Act is to
8 minimize wealth-based disparities in pretrial release, and secured appearance bonds are a
9 principal cause of those disparities. Thus, it is important that a court first ensure that no lesser
10 (typically, non-financial) restrictive condition could manage the relevant risk.

11
12 *Satisfactorily address the relevant risk.* In determining whether a condition is reasonably
13 necessary, courts should consult research on the efficacy of particular restrictive conditions at
14 mitigating specific relevant risks. This can be challenging. At the time of this writing, for
15 instance, the existing research suggests that mandatory drug-testing and frequent “reporting in”
16 requirements—obligations that have often been considered useful to support behavior
17 modification—have very limited utility and may be counterproductive. *See, e.g.,* Megan T.
18 Stevenson and Sandra G. Mayson, *Pretrial Detention and Bail*, in ACADEMY FOR JUSTICE, A
19 REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017) (reviewing
20 research); *cf.* Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off*
21 *Without Intense Supervision*, Brookings.edu/blog (July 2, 2018). For further discussion, *see* the
22 Comment to Section 305, *supra* (“*Satisfactorily address the relevant risk*”).

23
24 *In a record.* As defined in subsection ~~402~~103(11), a “record” includes an audio
25 recording. A court may therefore satisfy the requirement to “state in a record” by articulating
26 orally its reasons for imposing a restrictive condition, provided that the oral statement is
27 recorded. In courts that do not record or transcribe proceedings, subsection (c) requires the court
28 to document its reasoning in some other form that is “retrievable in perceivable form”. *See*
29 subsection ~~402~~103(11). For instance, a court may include a brief recitation of its reasoning in its
30 order of pretrial release.

31 32 **SECTION 307. FINANCIAL CONDITION OF RELEASE.**

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

1 the fee.

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

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

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

11 (1) to keep the individual detained;

12 (2) for a non-felony charge, unless the individual has absconded or did not appear
13 [three or more] times in a criminal case or combination of criminal cases, evidenced by
14 information in a record provided to the court; or

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

17 **Comment**

18
19 *Financial condition of release.* Secured financial conditions of release are the principal
20 focus of contemporary pretrial reform efforts. These conditions are the primary source of
21 wealth-based disparities in pretrial release. They result in the unnecessary (and sometimes
22 unintentional) detention of individuals whom the state is not authorized to detain directly. *See*
23 Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643-1680 (2020). The
24 problem is not only with secured bond conditions but also with other conditions of release that
25 may result in detention. Such conditions include restrictive conditions that carry fees or impose
26 other requirements that an individual may not easily be able to satisfy (*e.g.*, a co-signor
27 requirement). Some jurisdictions and proposed laws have responded to this problem by
28 endeavoring to eliminate entirely secured bond conditions. *See, e.g.*, CALIFORNIA SENATE BILL
29 No. 10 (2018) (stayed pending referendum); Andrea Woods & Portia Allen-Kyle, American
30 Civil Liberties Union, A NEW VISION FOR PRETRIAL JUSTICE (2019); Timothy R. Schnacke,

1 “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION
2 (2017). Four states have prohibited commercial bail bonds altogether. 725 ILL. COMP. STAT.
3 ANN. 5/103-9, 5/110-13; KY. REV. STAT. ANN. § 431.510; WIS. STAT. § 969.12; *State v. Epps*,
4 585 P.2d 425, 429 (Or. 1978).

5
6 This Act does not go that far. Instead, Section 307 limits the use of secured bonds to the
7 purposes enumerated in subsection (c) and prohibits a court from imposing a secured bond or
8 other release condition that the individual is unable to satisfy, thereby resulting in continued
9 detention. The Act excepts from this general prohibition, however, those instances when the
10 charge is one for which detention is permissible (a “covered offense”, *see* Section ~~102~~103(4),
11 *supra*), and the court determines that the condition is necessary pursuant to the same criteria and
12 standards that govern direct orders of detention, *see* Sections 308 and 403, *infra*.

13
14 *A restrictive condition that requires payment of a fee.* Court-imposed restrictive
15 conditions often carry mandatory fees, and the inability of an indigent defendant to satisfy such a
16 fee may lead to detention just as readily as an inability to satisfy a secured appearance bond. If a
17 defendant cannot pay a fee, the court should try to waive it. This is not always possible,
18 however. For instance, a third-party vendor may administer a court-ordered treatment program,
19 and the program may carry a fee over which the court has no authority. In such circumstances,
20 the court should waive or modify the condition to eliminate or sufficiently reduce the fee to make
21 it immediately affordable.

22
23 *Likely to obstruct justice, violate an order of protection, abscond, or not appear.*
24 Subsection (c) enumerates the permissible grounds for imposing a secured appearance bond.
25 That is to say, it authorizes a court to use a secured bond to manage ~~only~~ some of the relevant
26 risks under Section 303, *but not* a risk that the individual will cause significant harm to another
27 person. The idea behind this limitation is that it is inappropriate for a court to set a secured
28 appearance bond to prevent harm to others. There are several reasons for this. Historically, the
29 purpose of secured bonds was only to assure appearance. *See Stack v. Boyle*, 342 U.S. 1, 3-4
30 (1951); National Institute of Corrections, *Money as a Criminal Justice Stakeholder* 13-21 (2014).
31 Jurisprudentially, the Supreme Court has held that “the function of bail is limited” and a secured
32 bond amount “must be based upon standards relevant to the *purpose of assuring the presence of*
33 *that defendant*”; accordingly, “[b]ail set at a figure higher than an amount reasonably calculated
34 to fulfill this purpose is ‘excessive’ under the Eighth Amendment”. 342 U.S. at 3-4 (emphasis
35 added). Rationally, it is not logical to impose a financial condition for purposes of public safety.
36 Indeed, in many states, bonds cannot even be forfeited for new criminal activity; rather,
37 forfeiture is tied only to court appearance. *See, e.g., Reem v. Hennessy*, 2017 WL 6539760, slip
38 op. at 7-8 (N.D. Ca. Dec. 21, 2017) (noting that setting a financial condition of release for
39 purposes of public safety is “illogical” in a state where forfeiture is only allowed for failure to
40 appear). Finally, even if a state were to permit re-arrest to trigger forfeiture, there is no robust
41 empirical evidence that financial conditions *do* deter crimes. To the contrary, a number of recent
42 studies have found that dramatic reductions in the use of secured bonds were not associated with
43 any significant increase in rates of pretrial re-arrest. *Cf.* Claire M.B. Brooker, YAKIMA COUNTY
44 PRETRIAL JUSTICE IMPROVEMENTS 6, 16 (2017); Aurelie Ouss & Megan T. Stevenson, BAIL,
45 JAIL, AND PRETRIAL MISCONDUCT: THE INFLUENCE OF PROSECUTORS 24 (Jan. 17, 2020),

1 <https://ssrn.com/abstract=3335138>; New Jersey Judiciary, 2018 REPORT TO THE GOVERNOR AND
2 THE LEGISLATURE 5, 13-14 (2018).

3
4 If a court determines under Section 303 that an individual is likely to cause significant
5 harm to another person, the court should look to other measures that target the risk more directly.
6 And if an individual is shown to be sufficiently dangerous, the individual should be detained
7 after a detention hearing under Article 4. This is the position codified by the American Bar
8 Association, the federal government, the District of Columbia, and a number of other
9 jurisdictions. *See, e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS,
10 STANDARD 10-5.3(b) (“Financial conditions of release should not be set to prevent future
11 criminal conduct during the pretrial period or to protect the safety of the community or any
12 person.”); 18 U.S.C. § 3142(c); D.C. CODE § 23-1321(c)(2); WIS. STAT. § 969.01(4); N.M RULE
13 CRIM. P. 5-401.

14
15 ~~*To keep the individual detained. For a non-felony charge, unless the individual has*~~
16 ~~*absconded or did not appear multiple times. The Act contemplates that the need for imposition*~~
17 ~~*of a secured appearance bond is rare in a misdemeanor case. Thus, subsection (d) allows a court*~~
18 ~~*to set a secured appearance bond for a misdemeanor charge only if the defendant previously has*~~
19 ~~*failed to appear repeatedly in this or another criminal case.*~~

20
21 ~~*An amount greater than the individual is able to pay from personal financial resources.*~~
22 Subsection (d) promotes the Act’s principal purpose by preventing a court from using a secured
23 appearance bond (or other financial condition or fee) as a functional detention mechanism—
24 unless the criteria for detention under Section 308 and Article 4 are satisfied. *See e.g.*, AMERICAN
25 BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(a) (“The judicial officer
26 should not impose a financial condition that results in the pretrial detention of the defendant
27 solely due to an inability to pay.”); 18 U.S.C § 3142(c)(2) (“The judicial officer may not impose
28 a financial condition that results in the pretrial detention of the person.”); D.C. CODE ANN. § 23-
29 1321 (only authorizing a court to impose “a financial condition to reasonably assure the
30 defendant’s presence at all court proceedings that does not result in the preventive detention of
31 the person”, unless criteria for detention are met); KANSAS STAT. § 22-2801 (seeking to “assure
32 that all persons, regardless of their financial status, shall not needlessly be detained pending their
33 appearance”).

34
35 ~~*Under Thus, under*~~ subsection (d), a court is forbidden, except under Sections 308 and
36 403, from relying upon a secured appearance bond or initial or recurring fee as a means “to keep
37 the individual detained”.

38
39 ~~*For a non-felony charge, unless the individual has absconded or did not appear multiple*~~
40 ~~*times. Also, the court necessarily must*~~ The Act contemplates that the need for a secured
41 appearance bond will be rare in misdemeanor cases. Thus, subsection (d) allows a court to set a
42 secured appearance bond for a misdemeanor charge only if the defendant has failed to appear
43 repeatedly in this or another criminal case.

44
45 ~~*In an amount greater than the individual is able to pay from personal financial*~~
46 ~~*resources. The Act requires a court to*~~ inquire into the individual’s ability to satisfy a secured

1 appearance bond or initial or recurring fee. That said, the Act leaves the precise scope and shape
2 of this inquiry for states to regulate locally or leave to judicial discretion. The inquiry might
3 include whether the defendant: (i) was previously detained pretrial on a secured appearance
4 bond; (ii) is the recipient of means-tested benefits; (iii) has an income below 200% of the federal
5 poverty line; (iv) qualifies for indigent counsel; (v) is unemployed or homeless; or (vi) was
6 recently released from an institutional setting (for example, a jail, prison, hospital, or other
7 treatment facility). In conducting this inquiry, the court may take an affidavit or testimony from
8 a defendant under oath.

10 **SECTION 308. TEMPORARY PRETRIAL DETENTION.**

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

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

19 (2) the individual has violated a condition of an order of pretrial release for a
20 pending criminal charge ~~in another matter~~; or

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

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

26 **Legislative Note:** *In subsection (a)(3), include the bracketed language only if the state defines*
27 *“covered offense” to include a non-felony offense.*
28

Comment

Covered offense. As explained in the Comment to Section ~~102~~103, *supra*, the Act requires that a state enumerate the offenses or offense classes or types for which pretrial detention or unaffordable bail are available—which is to say, the state must designate the charges on which a person may be held in jail pending trial if the person presents a relevant risk under Section 303 that no less restrictive measure can adequately reduce. The Act leaves to states the determination of which offenses or offense classes or types to designate as “covered offenses”. The intention of this provision, though, is to limit the pool of defendants for whom detention or unaffordable bail may be imposed.

Historically, most state constitutions authorized pretrial detention without bail in capital cases only. Wayne LaFave *et al.*, 4 CRIM. PROC. § 12.3(b) (4th ed.). A number of states expanded their detention-eligibility nets in the 1980s and 1990s. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56 (1985). Many states, however, still limit detention eligibility to a relatively narrow class of charges. LaFave *et al.*, § 12.3(b); *see also* National Center for State Legislatures, PRETRIAL DETENTION, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> (June 7, 2013). It may even be the case that due process requires states to limit the offenses eligible for pretrial detention. The Supreme Court has affirmed that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception”. *United States v. Salerno*, 481 U.S. 739, 755 (1987). In *Salerno*, the Supreme Court held that the preventive detention provisions of the federal Bail Reform Act satisfied due process in part because the Act limited detention eligibility to “a specific category of extremely serious offenses”. *Id.* at 750. The Court did not specifically say whether due process required this limitation. But this feature of the federal pretrial detention regime contributed to the Court’s conclusion that the statutory framework struck an appropriate balance between managing pretrial risk and protecting individual liberty. *Id.* at 548-55. Due process may additionally require states to specify the charges on which a person may be held in jail pending trial in order to provide fair notice to individuals and to appropriately constrain judicial discretion. *Scione v. Commonwealth*, 114 N.E.3d 74, 85 (Mass. 2019) (holding a portion of Massachusetts pretrial detention statute in violation of Massachusetts’ state-constitutional due process provision on vagueness grounds for failure to adequately specify the offenses eligible for detention). A narrow and clearly defined detention-eligibility net can help to ensure that pretrial liberty remains the norm and that detention is a constitutional and “carefully limited exception”. *Salerno*, 481 U.S. at 755.

Amount greater than the individual is able to pay. Subsection 308(a) permits a court to impose a secured bond condition that a defendant cannot immediately meet if the criteria for temporary detention are otherwise satisfied. Section 308 thus acknowledges that, in some circumstances, such a condition may be the least-restrictive measure that is sufficient to satisfactorily address a relevant risk under Section 303. In these circumstances, the Act simply subjects an unaffordable financial condition to the same substantive and procedural requirements as detention. *See, e.g.*, *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (“[W]here a judge sets bail in an amount so far beyond a defendant’s ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge’s decision must be evaluated in light of the same due process requirements”).

1 applicable to such a deprivation of liberty.”); Sandra G. Mayson, *Detention by Any Other Name*,
2 69 DUKE L.J. 1643 (2020) (arguing “that an order that functionally imposes detention must be
3 treated as an order of detention” and collecting legal authority).

4
5 *Significant harm to another person.* Under subsection 307(c), a court is prohibited from
6 imposing a secured bond condition where the relevant risk is “harm to another person”. By its
7 terms, however, that subsection is made subject to this section and to Section 403. The
8 exception here is in recognition that—notwithstanding the general rule of subsection 307(c)—
9 some states may be compelled, under certain circumstances, to rely upon secured bond
10 conditions to address an otherwise-unmanageable risk of harm to another person. The logic is
11 discussed immediately above. *See* the Comment to Section 308, *supra* (“*Only if the individual is*
12 *charged with a covered offense*”). That is, in some states, constitutional provisions or binding
13 case law may prohibit detention for broad offense classes or types, leaving those states to rely
14 upon secured bond conditions as functional equivalents for detention. In those states, a court
15 may impose a secured bond condition to address a sufficient risk of harm to another person, *if*
16 *and only if* the court complies with Sections 308 and 403.

17
18 *A condition of an order of pretrial release for a pending criminal charge.* The Act
19 allows a court to issue an order of *temporary pretrial detention* based only on a showing that the
20 defendant has violated a condition of pretrial release in a pending *criminal* case. However, as
21 elaborated in Article 4, the Act requires more before a court may issue an order of pretrial
22 detention that presumably lasts until adjudication. The latter order follows a procedurally robust
23 detention hearing, at which the government has more opportunity to demonstrate that a defendant
24 poses a sufficiently high and unmanageable release risk, and the defendant has the opportunity to
25 contest that showing.

26
27 *Extremely likely that the individual will not appear in a case in which the individual is*
28 *charged with a felony.* As indicated in subsection ~~102~~103(6), *supra*, the term “not appear”
29 corresponds in meaning with “nonappearance”, ~~both of which is defined as “fail relate to a failure~~
30 ~~to appear in court as required—~~“without the intent to avoid or delay adjudication”. Here, the Act
31 limits a court’s ability to detain when the relevant risk is nonappearance, as opposed to a risk of
32 absconding, obstructing justice, violating an order of protection, or dangerousness. The logic is
33 that a court should almost always be able to rely upon practical assistance, voluntary supportive
34 services, or *restrictive* conditions of release to minimize the likelihood of failures to appear that
35 lack an intent to avoid or delay adjudication ~~—“nonappearance,” as defined subsection in 102(6),~~
36 ~~*supra*.~~ Therefore, the Act does not authorize detention in a sub-felony case where the risk is
37 nonappearance (unless the individual has violated a condition of release for a pending *criminal*
38 charge, under subsection 308(a)(2)). In sum, this provision permits the court to detain *for*
39 *nonappearance*, but only in felony cases where the defendant is *extremely* likely to not appear.
40 (In states that already prohibit detention in non-felony cases, the bracketed language in
41 subsection 308(a)(2) is unnecessary.)

42
43 *In a record.* This requirement mirrors the requirement in Section 306 that the court
44 articulate why a restrictive condition on the individual’s pretrial liberty is necessary. As in
45 Section 306, an oral statement is sufficient if the proceedings are audio-recorded or transcribed.
46 *See* the Comment to Section 306, *supra*.

1 [ARTICLE] 4

2 DETENTION HEARING

3 SECTION 401. TIMING.

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

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

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

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

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

16
17 Comment

18
19 *Not later than ~~72~~ hours.* The need for speedy review is important (and probably
20 constitutionally required) when an individual is detained without the procedural safeguards of a
21 detention hearing. The need is even greater when the individual ostensibly was released but
22 remains detained on restrictive conditions of pretrial release some days after the release decision.
23 Indeed, recent studies have found that even short terms of detention may correlate with increases
24 in criminality and failure to appear. *See* sources cited in the Comment to Section 301, *supra*; *see*
25 *also* State of Utah Office of the Legislative Auditor General, REPORT TO THE UTAH
26 LEGISLATURE: A PERFORMANCE AUDIT OF UTAH’S MONETARY BAIL SYSTEM 19 (Jan. 2017)
27 (“Low-risk defendants who spend just three days in jail are less likely to appear in court and
28 more likely to commit new crimes because of the loss of jobs, housing, and family
29 connections.”); Pretrial Justice Institute, PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 4-5 (Jan.
30 2017) (finding increases in re-arrest and conviction for those detained even a short time beyond
31 first appearance); *cf.* ODonnell v. Harris Cty., 892 F.3d 147, 165-66 (5th Cir. 2018) (providing
32 for sequential hearings to review conditions of release that do not result in immediate release).
33

1 Some jurisdictions may wish to conduct detention determinations at the initial hearing
2 when an arrested person first appears before a judicial officer. In such cases, there will not be a
3 distinct “release hearing” and “detention hearing”—they will simply occur simultaneously. Even
4 in such circumstances, though, the procedural and substantive requirements of Article 4 govern
5 the detention determination.
6

7 **SECTION 402. RIGHTS OF DETAINED INDIVIDUAL.**

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

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

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

14 (2) present evidence and provide information;

15 (3) testify; and

16 (4) cross-examine witnesses.

17 **Comment**

18 *Rights of detained individual.* Section 402 prescribes rights that are consistent with the
19 procedural framework for detention hearings that the Supreme Court held constitutional (and,
20 potentially, constitutionally required) in *United States v. Salerno*, 481 U.S. 739 (1987). As
21 indicated in the Comment to Section 302, *supra*, the Act prescribes only the rights of the
22 individual, not the procedural powers of the prosecutor. Again, the Act limits its scope to the
23 individual who is its subject and leaves other evidentiary matters to existing state law and court
24 rules.
25

26 *If the individual is indigent.* In Section 302, the Act provides an optional and potentially
27 provisional right to counsel at a release hearing. There, the right does not require a finding of
28 indigency. As explained earlier, the reason is that even an affluent individual may not be able to
29 secure the presence of counsel at a release hearing, which happens earlier in the process. By the
30 date of a detention hearing, however, timing is no longer so pressing. Thus, subsection (b) adds
31 the contingency of indigency.
32

33 *The detained individual has a right to testify.* Consistent with a number of states’
34 preventative detention statutes, the Act contemplates that a defendant’s testimony will not be
35 admissible in subsequent proceedings on questions of guilt. *See, e.g.*, FLA. STAT. ANN. §

907.041(4)(H); N.M. R. CRIM. PRO. DIST. COURT 5-409(F)(3); WIS. STAT. ANN. § 969.035 (6)(e).
However, the Act leaves the question to existing state law and court rules.

SECTION 403. PRETRIAL DETENTION.

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

(b) The court at a detention hearing may ~~not~~ issue an order of pretrial detention or continue a restrictive condition of release that results in detention ~~unless~~only if the individual is charged with a covered offense and the court determines, by clear and convincing evidence, that:

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

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

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

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

Comment

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

1 Section 308, *supra*.

2
3 *In a record.* See the Comments to Sections 306 and 308, *supra*.

4
5 *Expedited trial.* If a defendant ~~is~~remains detained ~~until~~pending adjudication, a court
6 should expedite trial, and many states provide for such a right. However, the Act leaves this
7 question to the states and their existing speedy trial statutes.

8
9 **[ARTICLE 5]**

10 **MODIFYING OR VACATING ORDER**

11 **SECTION 501. MODIFYING OR VACATING BY AGREEMENT.** By agreement
12 of the [prosecuting authority] and ~~the~~an individual subject to an order issued under [Article] 3 or
13 4, the court may:

14 (1) modify an order of pretrial release;

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

16 (3) issue an order of pretrial detention.

17 **Comment**

18
19 *By agreement of the individual, a court may issue an order of pretrial detention.* It may
20 not be obvious why a defendant would agree to an order of pretrial detention. However, in
21 circumstances where a defendant is already detained on another order, the defendant may prefer
22 an order of pretrial detention in the immediate case—for instance, in order to receive credit for
23 time incarcerated.

24
25 **SECTION 502. MOTION TO MODIFY.** On its own motion or on motion of a party,
26 the court may modify an order of pretrial release or detention using the procedures and standards
27 in [Articles] 3 and 4. The court may consider new information relevant to the order, including
28 information that ~~the~~an individual has violated a condition of release. The court may deny the
29 motion summarily if it is not supported by new information.

30 **Comment**

31
32 *On its own motion or on motion of a party.* Section 502 establishes a trilateral and
33 symmetrical standard. Any party—the court, the prosecutor, or the defendant—may make a

1 motion to modify on the same terms.

2
3 [ARTICLE] 6

4 MISCELLANEOUS PROVISIONS

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

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

12 *Legislative Note: Include this section only if the state lacks a general severability statute*
13 *or a decision by the highest court of this state stating a general rule of severability.*
14

15 SECTION 603. TRANSITION. This [act] applies to an arrest made[, [a citation]
16 issued,] or a motion filed on or after [the effective date of this [act]].

17 [SECTION 604. REPEALS; CONFORMING AMENDMENTS.

18 (a)

19 (b)

20 (c)]

21 *Legislative Note: A state may need to repeal or amend a statute that imposes mandatory release*
22 *conditions for an offense or offense class or type such as a mandatory fee, a secured bond, or*
23 *another financial condition.*
24

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

26
27 Comment

28
29 *Effective date of this Act.* Some states may need more time to prepare for implementation
30 of the Act. The amount of lead time is, therefore, left to the enacting state's discretion.