

D R A F T
FOR DISCUSSION ONLY

ALTERNATIVES TO BAIL ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12 – 18, 2019



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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 3, 2019

ALTERNATIVES TO BAIL ACT

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1 **Legislative Note:** *In subsection (2), a state should refer to the state’s law as to the officials*
2 *having authority to arrest and should insert the state’s term for a summons to appear or its*
3 *equivalent.*

4
5 *In subsection (6), a state should refer to the state’s law on forfeiture of a secured appearance*
6 *bond and should insert the state’s term for “surety.”*

7
8 **Comment**

9 *Absconding versus nonappearance.* One central challenge of crafting a pretrial release
10 statute is to encourage courts to attend to the differences between pretrial risks. Often, pretrial
11 statutes speak only in terms of “failure to appear.” Nevertheless, there remains a conceptual
12 difference between types of “failure to appear.” Absconding is an intentional act with the
13 purpose of evading justice, while nonappearance may be rooted in impediments—for example, in
14 cognitive limitations or difficult social circumstances. These two distinct types of failure to
15 appear may warrant distinct statutory responses. Thus, the act sometimes treats these risks
16 separately. When it does so, it uses the individual terms “abscond” and “nonappearance.” When
17 the act treats these risks identically, it uses the collective term “failure to appear.”

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

31
32 *Obstruct justice.* Obstruction of justice is not only a legal term of art but also a
33 substantive crime. The act is not intended to disturb a state’s statutory definition of the crime or
34 otherwise impinge upon existing substantive criminal law. To the contrary, the act provides this
35 definition of obstruction of justice for the purpose of the act only.

36
37 **[ARTICLE] 2**

38 **ARREST AND ISSUANCE OF [CITATION] [SUMMONS TO APPEAR]**

39 **SECTION 201. AUTHORITY TO ARREST OR ISSUE [CITATION] [SUMMONS**
40 **TO APPEAR].**

41 (a) Except as provided in law of this state other than this [act], [an authorized official]

1 may arrest an individual only if:

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

5 (2) subject to subsection (b), [the authorized official] has probable cause to
6 believe the individual is committing or has committed an offense and a jail or prison sentence is
7 authorized for the alleged offense by law of this state other than this [act].

8 (b) If [an authorized official] has authority to arrest under subsection (a)(2), but the
9 alleged offense is [a misdemeanor or non-criminal offense] [an offense punishable by no more
10 than [six months] in jail or prison], [the authorized official] may arrest only if:

11 (1) the alleged offense is an offense of [domestic violence, stalking, driving under
12 the influence, or another specified offense];

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

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

17 (4) the individual poses a significant risk of failure to appear, or, before the
18 individual appears in court, of obstructing justice or [causing bodily injury to] [harming]
19 another;

20 (5) an arrest is necessary to:

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

23 (B) carry out a lawful investigation; or

1 (C) obtain [biometric information, meaning fingerprints and other unique
2 biological or physical characteristics of the individual] that a contributing justice agency is
3 required by law other than this [act] to use for identification.

4 (c) If [an authorized official] does not have authority to arrest under this section but has
5 probable cause to believe an individual is committing or has committed an offense, [the
6 authorized official] may issue the individual a [citation] [summons to appear] or take another
7 action authorized by law of this state other than this [act].

8 **Legislative Note:** *In subsection (a), a state should insert the state’s term for an official*
9 *authorized to make arrests.*

10 *In subsection (b)(1), a state should insert the state’s list of offenses sufficiently serious to*
11 *authorize arrest.*

12 *In subsection (b)(5)(C), a state should insert the state’s term and definition for “biometric*
13 *information” or its equivalent.*

14 **Comment**

15 *Except as provided in law of this state other than this [act].* States may authorize
16 officials to arrest for purposes other than initiating criminal prosecution; for example, for the
17 purpose of keeping the peace or initiating civil commitment. The act does not disturb a state’s
18 arrest authority for purposes other than initiating prosecution.

19 *Citations versus arrests.* Given that the primary focus of this act is pretrial release and
20 detention, the reason for including an article on citation versus arrest may not be immediately
21 apparent. However, numerous jurisdictions and commentators have come to appreciate that the
22 implementation of pretrial detention and release policy begins with the police officer on the beat.
23 *See e.g.* BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE:
24 SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30; AMERICAN BAR
25 ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-2.2 (providing that, except in
26 circumscribed situations, “a police officer who has grounds to arrest a person for a minor offense
27 should be required to issue a citation in lieu of taking the accused to the police station or to
28 court”); TENN. CODE ANN. §§ 40-7-118, 40-7-120 (providing for a presumption in favor of
29 citations for misdemeanors); KY. REV. STAT. § 431.015 (2012) (same). More to the point, the
30 Uniform Law Commission’s mission statement for this project included the possibility of
31 expanding the use of citations over arrest. UNIFORM LAW COMMISSION, *New ULC Drafting*
32 *Committee on Alternatives to Bail* (Feb. 2, 2018) (“The drafting committee will be tasked with
33 drafting state legislation that will provide policy solutions to mitigate the harmful effects of
34 money bail. The drafting committee will review critical areas of pretrial justice, such as [inter

1 *alia*]: the encouragement of the use of citations in lieu of arrest for minor offenses.”).

2 Section 201(b) limits authority to arrest for minor offenses. Each state may determine
3 how to define the class of minor offenses subject to this provision; two options, included in
4 brackets, are (1) all misdemeanors and non-criminal offenses, or (2) offenses punishable by no
5 more than a specified term of incarceration. Within the designated class of offenses, 201(b)(1)
6 through (5) enumerate the extenuating circumstances in which arrest is nonetheless permitted.

7
8 *The individual poses a significant risk.* Various provisions throughout the act use the
9 term “significant” (and, more rarely, “extreme”). These modifiers account for the reality that
10 almost any defendant poses *some* risk of failing to appear or even harming a person. As Justice
11 Jackson observed: “Admission to bail always involves a risk that the accused will take flight.
12 That is a calculated risk which the law takes as a price of our system of justice.” *Stack v. Boyle*,
13 342 U.S. 1, 8 (1951) (Jackson, J., dissenting). The task for a pretrial statute, therefore, is to
14 identify when a risk becomes serious enough to justify pre-adjudicative limitations on liberty.

15
16 **SECTION 202. FORM OF [CITATION] [SUMMONS TO APPEAR].**

17 (a) A [citation] [summons to appear] under Section 201(c) must state:

18 (1) the date, time and place an individual who is the subject of the [citation]

19 [summons to appear] must appear in court;

20 (2) that the individual may not, before the individual appears, obstruct justice,

21 violate a protective order, or commit an offense; and

22 (3) the possible consequences of violating the conditions of the [citation]

23 [summons to appear].

24 **Comment**

25
26 *What a citation or summons to appear must state.* The terms of the [citation] [summons
27 to appear] should be provided in words that the defendant can reasonably be expected to
28 understand. This may require including language in a text other than English.

29
30 **SECTION 203. RELEASE AFTER ARREST.** [An authorized official] may release an

31 individual who is the subject of an arrest under Section 201 before a hearing under [Article] 3 by

32 issuing a [citation] [summons to appear]. The [authorized official] may require as a condition of

33 release that the individual executes an unsecured appearance bond.

1 **Legislative Note:** *A state should insert the state’s term and definition for an official authorized*
2 *to release an individual after arrest and before court appearance.*

3
4 **[ARTICLE] 3**

5 **RELEASE HEARING**

6 **SECTION 301. TIMING.**

7 (a) Except as otherwise provided in subsection (b), if an individual who is the subject of
8 an arrest under Section 201 is not released under Section 203, the court shall conduct a release
9 hearing not later than [48] hours after the arrest.

10 (b) In extraordinary circumstances, the court on its own motion or on motion, may
11 continue the hearing under subsection (a) for not more than [48] hours.

12 **Comment**

13 *Extraordinary circumstances.* In other places where the act imposes temporal limits, the
14 provisions allow for multiple potential continuances, at least upon a showing of good cause.
15 With respect to the release hearing, however, the act contemplates that the reasons for delay must
16 be “extraordinary.” The logic is that states already generally use a 48-hour timeline, pursuant to
17 *Riverside v. McLaughlin*, 500 U.S. 44 (1991), which constitutionally guarantees a probable-cause
18 hearing within 48 hours of warrantless arrest (and at which pretrial release decisions are often
19 made). See NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Release Eligibility*,
20 <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx> (listing
21 states that couple release decisions and pretrial hearings).

22
23 Furthermore, research suggests that the most damaging effects of pretrial detention—
24 including disruption to an arrestee’s employment, housing, and child custody or care
25 arrangements—are triggered within three days. See, e.g., *3DaysCount*, Pretrial Justice Institute,
26 <http://projects.pretrial.org/3dayscount>; Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The*
27 *Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from*
28 *Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 211-13 (2018) (finding that pretrial
29 detention of more than three days “significantly increases the probability of conviction,”
30 increases the likelihood of post-adjudication criminal offending, and decreases formal sector
31 employment); CHRISTOPHER T. LOWENKAMP *ET AL.*, ARNOLD FOUNDATION, *THE HIDDEN COSTS*
32 *OF PRETRIAL DETENTION* 4 (2013) (finding that even “2 to 3 days” of detention increases the
33 likelihood of future crime); cf. Paul Heaton, Sandra Mayson & Megan Stevenson, *The*
34 *Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 753
35 (2017) (documenting effects of misdemeanor pretrial detention on case outcomes and future
36 crime, and noting that first few days of detention are a “fairly critical period for making bail”).
37 Time is therefore of the essence for this initial release hearing.

1 **SECTION 303. DETERMINATION OF RISK.**

2 (a) The court, at a release hearing under Section 301, shall determine whether the
3 individual who is the subject of the hearing poses a significant risk of nonappearance,
4 absconding, obstructing justice, violating a protective order, or [causing bodily harm to]
5 [harming] another.

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

7 (1) the severity of the charge;

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

9 (3) the quality of the known evidence against the individual who is the subject of
10 the release hearing under Section 301;

11 (4) the individual's:

12 (A) criminal history;

13 (B) place and length of residence and other community ties; and

14 (C) history of nonappearance or absconding;

15 (5) whether the individual has another pending criminal charge or is serving a
16 criminal sentence; and

17 (6) other relevant information proffered by the individual, the [government], an
18 alleged victim, [or a pretrial services agency].

19 (c) A determination by the court under subsection (a) that the individual who is the
20 subject of the release hearing under Section 301 poses a significant risk must be based on [clear
21 and convincing evidence] [a preponderance of the evidence].

22 **Legislative Note:** *In subsection (a), a state should insert the state's term for the type of harm the*
23 *state concludes is relevant to a pretrial release decision.*
24

1 *In subsection (b)(6), a state should insert the state’s term for the state’s prosecuting authority;*
2 *and the state should insert the state’s term for the state’s pretrial services agency, but only if the*
3 *state has a pretrial services agency or its equivalent.*

4
5 *In subsection (c), a state should choose between a standard of proof of clear and convincing*
6 *evidence and preponderance of the evidence.*

7
8 **Comment**

9 *Severity of the charge versus the seriousness of the alleged offense.* The difference
10 between the “severity of the charge” and the “seriousness of the alleged offense” might not be
11 obvious. The first criterion focuses on the charge in the abstract, whereas the second focuses on
12 the immediate offense in its particulars. Because a sound release decision depends upon
13 distinguishing between specific individuals and offenses, the act requires the court to consider
14 not only the nature and seriousness of the statutory charge but also the particular circumstances
15 alleged. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.3(e)
16 (suggesting that a release or detention decision must be individualized). This reflects what courts
17 do in many jurisdictions already.

18
19 Other provisions of the act use the terms “charge” and “offense” consistently with the
20 usage in this Section. That is to say, except in contexts where an alternative meaning is
21 otherwise apparent, the act uses the term “charge” to refer to the statutory charge that is the
22 subject of the release decision, and it uses the term “alleged offense” to refer to the particular
23 facts and allegations that support this charge.

24
25 *Clear and convincing evidence versus preponderance of the evidence.* As with the right
26 to counsel, the Supreme Court has never articulated a constitutional burden of proof for initial
27 release decisions. *But cf.* United States v. Salerno, 481 U.S. 739 (1987) (suggesting that the
28 findings supporting detention decisions must be made by clear and convincing evidence). But
29 here, too, the jurisprudential landscape is fast-moving and could provide the committee with
30 more clarity before its work is done. For the time being, the act provides a choice of standards in
31 proceedings prior to a detention hearing, at which hearing the act imposes a clear-and-convincing
32 standard.

33
34 **SECTION 304. ORDER OF PRETRIAL RELEASE.**

35 (a) Except as provided under Section 305, if the court determines that an individual who
36 is the subject of the release hearing under Section 301 poses a significant risk under Section
37 303(a), the court shall order pretrial release imposing the least restrictive measure reasonably
38 necessary to reduce the risk to a level below a significant risk.

39 (b) Before issuing an order under subsection (a):

1 (1) If the court finds that the individual who is the subject of the release hearing
2 under Section 301 poses a significant risk of nonappearance, the court shall determine whether
3 practical or voluntary supportive services could be reasonably effective to address an
4 impediment to appearance and manage the risk.

5 (2) If the court finds that the individual who is the subject of the release hearing
6 under Section 301 poses a significant risk of absconding, obstructing justice, violating a
7 protective order or [causing bodily injury to] [harming] a person, the court shall determine
8 whether voluntary supportive services could be reasonably effective to manage the risk.

9 (c) If measures under subsection (b) are not sufficient to reduce the risk to a level below a
10 significant risk, the court shall impose the least restrictive condition of release reasonably
11 necessary to reduce the risk to a level below a significant risk, including:

- 12 (1) mandatory therapeutic treatment or social services;
- 13 (2) a requirement to seek or maintain employment or education;
- 14 (3) a restriction on possession or use of a weapon;
- 15 (4) a restriction on travel;
- 16 (5) a restriction on contact with a specified person;
- 17 (6) a restriction on a specified activity;
- 18 (7) supervision by a [pretrial services agency or] third party;
- 19 (8) electronic monitoring;
- 20 (9) house arrest;
- 21 (10) an unsecured appearance bond;
- 22 (11) subject to subsections (e) and (f), a secured appearance bond;
- 23 (12) a condition or combination of conditions proposed by the individual who is

1 the subject of the release hearing under Section 301;

2 (13) another condition that is reasonably necessary to reduce the risk to a level
3 below a significant risk; or

4 (14) another non-financial condition required by law of this state other than this
5 [act].

6 (d) Before the court requires a secured appearance bond or an unsecured appearance bond
7 as a condition to issuing an order under subsection (a), the court shall consider the personal
8 financial resources and burdens of an individual who is the subject of the release hearing under
9 Section 301, including income, assets, expenses, liabilities, and dependents.

10 (e) The court may require a secured appearance bond as a condition of issuing an order
11 under subsection (a) only if an individual who is the subject of the release hearing under Section
12 301 poses a significant risk of absconding or obstructing justice and a less restrictive measure is
13 not available to reduce the risk to a level below a significant risk.

14 (f) The court may not require a secured appearance bond as a condition to issuing an
15 order under subsection (a):

16 (1) to manage another risk or to keep detained an individual who is the subject of
17 the release hearing under Section 301;

18 (2) for an alleged misdemeanor offense unless the individual has failed to appear
19 [three or more] times in a criminal case or combination of criminal cases, as evidenced by
20 information in a record provided to the court; or

21 (3) in an amount greater than the individual is able, within [24] [48] hours, to
22 satisfy from personal financial resources.

23 (g) The court may not impose a condition that includes a fee in an amount greater than

1 the individual who is the subject of the release hearing under Section 301 is able, within [24]
2 [48] hours, to satisfy from personal financial resources. If the individual is unable to satisfy the
3 fee, the court shall waive or pay the fee or waive the condition that requires the fee.

4 (h) Before the court imposes a condition of release under subsection (c), the court shall
5 permit the [government] and an individual who is the subject of the release hearing under
6 Section 301 to be heard.

7 (i) The order issued under subsection (a) must be in a record. The order must state:

8 (1) the date, time and place an individual who is the subject of the order must
9 appear in court;

10 (2) that the individual may not obstruct justice, violate a protective order, or
11 commit an offense;

12 (3) any additional condition imposed by the court and the reason the court has
13 determined the condition is the least restrictive measure for managing the risk identified by the
14 court; and

15 (4) the possible consequences of violating the conditions of the order.

16 **Legislative Note:** *In subsection (b)(2), a state should insert the state’s term for the type of harm*
17 *the state concludes is relevant to a pretrial release decision.*

18
19

Comment

20 *Least restrictive measure.* A least-restrictive-measure requirement is in keeping with
21 most existing state practice. Approximately twenty states either expressly or implicitly require
22 that conditions of release—especially secured financial conditions—must be the least restrictive
23 available measure to reasonably assure that a legitimate governmental purpose is served. *See*
24 NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*,
25 [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)
26 [conditions.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx); *see also, e.g.*, COLO. REV. STAT. §§ 16-4-103, 16-4-113; 11 DEL. CODE § 2101;
27 AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD 10-5.2 (“[T]he court
28 should impose the least restrictive of release conditions necessary reasonably to ensure the
29 defendant’s appearance in court, protect the safety of the community or any person, and to
30 safeguard the integrity of the judicial process.”). At a somewhat higher level of abstraction, the

1 least-restrictive-measure requirement is likewise in keeping with the presumption that a
2 defendant is entitled to pretrial release. Here, too, approximately twenty states make explicit a
3 presumption of release on personal recognizance (or, at most, on an unsecured appearance bond).
4 *See id.*; *see also, e.g.*, KY. REV. STAT. §§ 431.520, 431.066; COLO. REV. STAT. §§16-4-103, 16-4-
5 113.

6
7 *Practical or voluntary supportive services.* Subsection (b) introduces the use of non-
8 restrictive measures for a court to consider as an alternative to, or in addition to, the conditions of
9 release provided by subsection (c). Just as the act seeks to distinguish between different forms of
10 failure to appear, it seeks to distinguish also between different pretrial measures—here, between
11 release “conditions” and “services.” Non-restrictive measures fall into two categories: practical
12 services and supportive services, each explained below.

13
14 *Practical Services.* Sometimes, when the relevant risk is merely nonappearance (as
15 opposed to a risk of absconding), the least restrictive measure to assure the appearance of a
16 defendant may be a practical service, not a mandatory condition. This is particularly true when
17 the risk of nonappearance is based upon socioeconomic or cognitive inequities of the kind that
18 historically have produced wealth-based and other arbitrary forms of disparity in pretrial release
19 and detention. For instance, defendants may struggle to remember court dates, to get leave from
20 work, or to procure affordable childcare or transportation. *See, e.g.*, Lauryn P. Gouldin, *Defining*
21 *Flight Risk*, 85 U. CHI. L. REV. 677 (2018). Practical services may include sending electronic or
22 other reminders of appearances, scheduling appearances on feasible dates and times, providing
23 assistance with caregiving responsibilities, or providing subsidized transportation to and from
24 court.

25
26 *Voluntary Supportive Services.* The act distinguishes between practical services and
27 voluntary supportive services for the following reason: As indicated above, a practical service is
28 intended to meet a socioeconomic or cognitive impediment to appearance. Thus, a practical
29 service is most (and, for our statutory purposes, only) relevant to manage a risk of
30 nonappearance. By contrast, a supportive service could help to manage any risk of release.
31 Voluntary supportive services may include referrals to organizations that provide therapeutic
32 treatment or social services, including educational, vocational, or housing assistance.

33
34 *The least restrictive condition of release reasonably necessary to reduce the risk to a*
35 *level below a significant risk.* In listing conditions of release, the act does not rank conditions
36 from least to most restrictive. However, it operates on the premise that a secured appearance
37 bond often will be the most restrictive condition. *See, e.g.*, FLA. R. CRIM. P. RULE 3.131
38 (“[T]here is a presumption in favor of release on nonmonetary conditions for any person who is
39 granted pretrial release.”); *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE
40 STANDARDS, STANDARD 10-5.3(a) (“Financial conditions other than unsecured bonds should be
41 imposed only when no other less restrictive condition of release will reasonably ensure the
42 defendant’s appearance in court.”). Moreover, a core purpose of the act is to minimize wealth-
43 based disparities in pretrial release, and secured appearance bonds are the prime drivers of those
44 disparities. Thus, it is important that a court ensure that no lesser (typically, non-financial)
45 condition could manage the relevant risk.

1 *Executing a secured appearance bond.* Consistent with the Uniform Law Commission’s
2 charge to the committee, the act aims to “prohibit the use of money bail *as a mechanism to*
3 *trigger preventative detention.*” UNIFORM LAW COMMISSION, *New ULC Drafting Committee on*
4 *Alternatives to Bail* (Feb. 2, 2018) (emphasis added). However, the act does not endeavor to
5 eliminate entirely the use of secured bond conditions or to eliminate commercial bail bonds. (To
6 date, only four states have prohibited commercial bail bonds outright. *See, e.g.,* WISCONSIN
7 STAT.§ 969.12.) Instead, the act aims simply to limit the use of secured bond conditions to
8 appropriate circumstances and purposes.
9

10 *The court may not require a secured appearance bond as a condition to manage another*
11 *risk [other than a significant risk of absconding or obstructing justice].* The logic is that it is
12 inappropriate for a court to set a secured appearance bond to manage a defendant’s
13 dangerousness. If a defendant is sufficiently dangerous, he should be detained. By contrast, a
14 court should rely upon a secured appearance bond only to manage risks of failure to appear or
15 obstruction of justice. This is the position already of the American Bar Association and a
16 number of jurisdictions. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS,
17 STANDARD 10-5.3(b) (“Financial conditions of release should not be set to prevent future
18 criminal conduct during the pretrial period or to protect the safety of the community or any
19 person.”).
20

21 *Or to keep detained an individual.* This limitation is necessary, because one of the
22 principal purposes of the act is to prevent the use of a secured appearance bond as a functional
23 detention mechanism—at least in circumstances where the defendant does not enjoy the
24 procedural protections of a detention hearing. *Cf.* KANSAS STAT.§22-2801 (seeking to “assure
25 that all persons, regardless of their financial status, shall not needlessly be detained pending their
26 appearance”).
27

28 *In an amount no greater than the defendant is able to satisfy.* In keeping with the
29 commentary immediately above, this provision minimizes the degree to which a secured
30 appearance bond may functionally substitute for a detention order and the procedural protections
31 that go with it. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS, STANDARD
32 10-5.3(a) (“The judicial officer should not impose a financial condition that results in the pretrial
33 detention of the defendant solely due to an inability to pay.”).
34

35 *The court shall inquire into the personal financial resources and burdens of the*
36 *defendant.* The act leaves the shape of this inquiry to judicial discretion. However, some
37 possible criteria include whether the defendant (i) was previously detained pretrial on a secured
38 appearance bond, (ii) is the recipient of means-tested benefits, (iii) has an income below 200% of
39 the federal poverty line, (iv) qualifies for indigent counsel, (v) is unemployed or homeless, or
40 (vi) was recently released from an institutional setting (for example, a jail, prison, hospital, or
41 other treatment facility). As to any of these inquiries or others, a court may also take an affidavit
42 or testimony from a defendant under oath.
43

44 *The court may not require a secured appearance bond for an alleged misdemeanor*
45 *offense unless a record reveals that the defendant has failed to appear [three or more times] in*
46 *any criminal case or combination of cases.* In the literature, the substantive threshold at which

1 an act allows detention (or a particular condition of release) is called an “eligibility net.” The act
2 avoids setting too many eligibility nets. However, it is widely understood that a secured
3 appearance bond is an inappropriate release condition in a trivial case. Thus, the act allows a
4 court to set a secured appearance bond for a misdemeanor charge only if the defendant
5 previously has failed to appear repeatedly in this or another criminal case. The act proposes three
6 previous instances of failure to appear as the threshold.

7
8 *The court may not impose a condition that includes a fee in an amount greater than the*
9 *defendant is able to satisfy.* Court-imposed conditions often carry mandatory fees, and the
10 inability of an indigent defendant to satisfy such a fee may lead to detention just as readily as an
11 inability to satisfy a secured appearance bond. Accordingly, the act requires a court to inquire
12 into a defendant’s ability to pay a fee.

13
14 *The court shall permit the parties to be heard.* Here, the act is purposefully ambiguous.
15 The act seeks to leave to courts the shape and scope of a right to be heard. Often, release
16 hearings do not feature formal presentations of testimony or evidence. At a detention hearing,
17 the defendant enjoys a more robust set of procedural rights, including a right to testify, to present
18 and cross-examine witnesses, to present evidence, and to proffer information. But the act
19 contemplates that the release hearing occurs just too early (and too quickly) to require so much
20 process. Still, the act does provide that the parties have opportunities to make arguments in some
21 form.

22
23 *What the order must state.* The terms of the order should be provided in words that the
24 defendant can reasonably be expected to understand. This may require including text in a
25 language other than English.

26
27 **SECTION 305. ORDER OF TEMPORARY PRETRIAL DETENTION.**

28 (a) At a release hearing under Section 301, the court may issue an order of temporary
29 pretrial detention and detain until a detention hearing an individual who is the subject of the
30 release hearing if the court finds by [clear and convincing evidence] [a preponderance of the
31 evidence] that:

32 (1) an individual charged with a felony poses an extreme risk of nonappearance
33 and a less restrictive measure is not available to reduce the risk to a level below an extreme risk;

34 (2) the individual poses a significant risk of absconding, obstructing justice,
35 violating a protective order, or [causing bodily injury to] [harming] another and a less restrictive
36 measure is not available to reduce the risk to a level below a significant risk level; or

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

3 (b) Before the court issues an order under subsection (a), an individual who is the subject
4 of a release hearing under Section 301 has the right to be heard.

5 (c) If the court issues an order under subsection (a), the court shall state in a record
6 findings of fact and the reason for the order. If the court issues the order on the basis of a risk of
7 nonappearance or absconding, the court shall state why a less restrictive measure is not sufficient
8 to reduce the risk of nonappearance to a level below an extreme risk or to reduce the risk of
9 absconding to a level below a significant risk.

10 **Legislative Note:** *In subsection (a)(2), a state should insert the state’s term for the type of harm*
11 *the state concludes is relevant to a temporary detention decision.*

12 13 **Comment** 14

15 *An individual charged with a felony poses an extreme risk of nonappearance.* Here, the
16 act sets a special detention eligibility net for circumstances where the relevant risk is only
17 nonappearance, as opposed to absconding, obstructing justice, violating a protective order, or
18 harming a person. The logic is that a court should almost always be able to manage inadvertent
19 failures to appear with conditions of release or practical or voluntary supportive services.
20 Further, the act contemplates that detention is never warranted in a misdemeanor case where the
21 only risk is nonappearance.
22

23 *The individual has violated a condition of an order of pretrial release for a pending*
24 *charge.* The act allows a court to issue a *temporary* detention order based only a showing that
25 the defendant has violated a condition of pretrial release. However, as elaborated below, the act
26 requires more before a court may issue a detention order that presumably lasts until adjudication.
27 The latter order follows a procedurally robust detention hearing, at which the government has
28 more opportunity to demonstrate that a defendant poses a sufficiently high and unmanageable
29 release risk.
30

31 *The court shall state why a less restrictive measure is not sufficient to reduce the risk of*
32 *nonappearance to a level below an extreme risk or to reduce the risk of absconding to a level*
33 *below a significant risk.* It is generally accepted today that a risk of failure to appear in many
34 instances may be managed effectively through monitoring (for instance, electronic ankle
35 bracelets). As former Attorney General Eric Holder has observed, technology ensures that
36 “[a]lmost all of these individuals could be released and supervised in their communities—and
37 allowed to pursue and maintain employment and participate in educational opportunities and

1 their normal family lives—without risk of endangering their fellow citizens or fleeing from
2 justice.” BUREAU OF JUSTICE ASSISTANCE, NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE:
3 SUMMARY REPORT OF PROCEEDINGS (Washington, D.C., 2012), at 30. For this reason, the act
4 requires the court to make a record as to the reason that it finds such methods insufficient to
5 reduce the risk of nonappearance.
6

7 [ARTICLE] 4

8 REVIEW HEARING

9 SECTION 401. TIMING.

10 (a) Except as otherwise provided in subsection (b), if an individual subject to an order
11 issued under Section 305(a) remains in detention because the individual has not satisfied a
12 condition of release, the court shall conduct a review hearing not later than [48] [72] hours after
13 the proceeding at which the condition was imposed.

14 (b) The court may continue a review hearing under subsection (a) for not more than [48]
15 [72] hours:

16 (1) on motion of the individual subject to the order issued under Section 305(a);

17 or

18 (2) for good cause, on the court’s own motion or on motion of the [government].

19 Comment

20 *Not later than [48] [72] hours.* The need for speedy review is important when a
21 defendant is ostensibly released but remains detained some days after the release decision. This
22 is especially true considering recent studies finding that even short terms of detention may
23 correlate with increases in recidivism and failure to appear. *See* sources cited in Comment to
24 Section 301, *supra*; *see also* STATE OF UTAH OFFICE OF THE LEGISLATIVE AUDITOR GENERAL,
25 *Report to the Utah Legislature: A Performance Audit of Utah’s Monetary Bail System* 19 (Jan.
26 2017) (“Low-risk defendants who spend just three days in jail are less likely to appear in court
27 and more likely to commit new crimes because of the loss of jobs, housing, and family
28 connections.”); PRETRIAL JUSTICE INSTITUTE, *Pretrial Justice: How Much Does It Cost?* 4-5
29 (Jan. 2017) (finding increases in re-arrest and conviction for those detained even a short time
30 beyond first appearance); *cf.* ODonnell v. Harris Cnty., 892 F.3d 147, 165-66 (5th Cir. 2018)
31 (providing for sequential hearings to review conditions of release that do not result in immediate
32 release).
33

1 **SECTION 402. RIGHT TO COUNSEL.** An individual subject to an order issued
2 under Section 305(a) has a right to counsel at a review hearing under Section 401. If the
3 individual is indigent [insert name of appropriate agency] must provide counsel. [The right to
4 counsel is limited to the hearing.]

5 ***Legislative Note:** A state should refer to the state’s law on the provision of counsel and should
6 insert the state’s term for the state’s agency that has financial responsibility for provision of
7 counsel. A state should determine whether the state’s law permits the bracketed limitation,
8 which clarifies that counsel may be provided on a provisional basis.*

9
10

Comment

11 *Right to Counsel. See supra Comment for Section 302.*

12 **SECTION 403. STANDARD.** In a review hearing under Section 401:

13 (1) The court in determining whether to continue, amend, or eliminate a condition of
14 release that results in detention, shall consider the same criteria and measures in Sections 303
15 and 304.

16 (2) The court may not continue a secured appearance bond that an individual subject to
17 an order issued under Section 304 has been unable to satisfy. If a secured appearance bond is the
18 only condition on which the individual remains detained, the court shall consider the fact of
19 detention as evidence that the individual is unable to satisfy the secured appearance bond.

20 (3) The court may not continue a condition of release that results in detention of an
21 individual subject to an order under Section 304 unless the court finds by [clear and convincing
22 evidence] [a preponderance of the evidence]:

23 (A) an individual charged with a felony poses an extreme risk of nonappearance,
24 and a less restrictive condition is not available to reduce the risk to a level below an extreme risk;
25 or

26 (B) the individual poses a significant risk of absconding, obstructing justice,

1 violating a protective order, or [causing bodily injury to] [harming] another and a less restrictive
2 condition is not available to reduce the risk to a level below a significant risk.

3 (4) If the court continues a condition of release that results in detention of an individual
4 subject to an order under Section 304, or amends a condition in a manner that does not result in
5 release of the individual within [24] hours, the court shall schedule a detention hearing under
6 [Article] 5.

7 **Legislative Note:** *In subsection (3), a state should choose between a standard of proof of clear
8 and convincing evidence and preponderance of the evidence.*

9
10 *In subsection (3)(b), a state should insert the state’s term for the type of harm the state concludes
11 is relevant to a temporary detention decision.*

12 13 **Comment**

14
15 *The court may not continue a secured appearance bond that an individual has been
16 unable to satisfy.* This provision gets to the heart of wealth-based disparities in pretrial release.
17 Again, the logic is not to eliminate reliance upon bond conditions, but rather to ensure that these
18 conditions do not result in functional detention by another name. *Cf.* State v. Briggs, 666
19 N.W.2d 573, 583 (Iowa 2003) (noting that, in certain circumstances, when a defendant cannot
20 satisfy a secured bond condition, “a court is constitutionally bound to accommodate the
21 accused’s predicament”).

22
23 *The court shall consider the fact of detention as evidence that the individual is unable to
24 satisfy the secured appearance bond.* The act contemplates that, when a defendant remains
25 detained on a secured bond condition some days after a court imposed the condition, the most
26 likely explanation is that the defendant cannot satisfy the condition. Other plausible explanations
27 may exist, but the fact of detention still provides strong evidence of inability to pay.

28
29 *If the court continues a condition of release that results in detention, the court shall
30 schedule a detention hearing.* This provision likewise addresses the concern that a condition of
31 release could be used to impose detention without the procedural protections attendant to a
32 detention hearing. The provision compels a court to treat a defendant who remains detained on a
33 condition of release *as if* the defendant were detained formally and to provide the procedural
34 protections of a detention hearing.

35

1 [ARTICLE] 5

2 DETENTION HEARING

3 SECTION 501. TIMING.

4 (a) Except as otherwise provided in subsection (b), if the court issues an order of
5 temporary pretrial detention under Section 305 or continues a condition of release that results in
6 detention of an individual subject to an order issued under Section 304, the court shall conduct a
7 detention hearing not later than [72] [96] hours after the proceeding at which the court issued the
8 order or continued the condition.

9 (b) The court may continue a detention hearing under subsection (a) for not more than
10 [72] [96] hours:

11 (1) on motion of the individual who is the subject of the hearing; or

12 (2) for good cause, on its own motion or on motion of the [government].

13 SECTION 502. RIGHTS.

14 (a) At a detention hearing under Section 501, the individual who is the subject of the
15 hearing has a right to:

16 (1) testify;

17 (2) present and cross-examine witnesses;

18 (3) present evidence; and

19 (4) proffer information.

20 (b) An individual who is the subject of a detention hearing under Section 501 has a right
21 to counsel at the hearing. If the individual is indigent, [insert name of appropriate agency] must
22 provide counsel.

23 *Legislative Note:* A state should refer to the state's law on the provision of counsel and should
24 insert the state's term for the state's agency that has financial responsibility for provision of

1 *counsel.*

2
3 **Comment**

4 *Rights.* Section 502 prescribes rights and temporal limitations that are consistent with the
5 procedural framework for detention hearings that the Supreme Court held constitutional (and,
6 potentially, constitutionally required) in *United States v. Salerno*, 481 U.S. 739 (1987).

7
8 *If the individual is indigent.* In Sections 302 and 402, the act provides a provisional right
9 to counsel at release and review hearings. There, the right does not require a finding of
10 indigency. As explained earlier, the reason is that even an affluent individual might not be able
11 to secure the appearance of counsel at a release or review hearing that happens so early in the
12 process. By the time of a detention hearing, however, timing is no longer so pressing. Thus,
13 subsection (b) adds the contingency of indigency. At the same time, the act contemplates that
14 the right has now ripened into a full right to *trial* counsel. Thus, the right is no longer
15 provisional, subject to a state's normal rules on waiver of counsel.

16
17 **SECTION 503. STANDARD.** In a detention hearing under Section 501:

18 (1) The court may not issue an order of pretrial detention or continue a condition of
19 release that results in detention of an individual who is the subject of the hearing unless the court
20 finds by clear and convincing evidence:

21 (A) an individual charged with a felony poses an extreme risk of nonappearance,
22 and a less restrictive condition is not available to reduce the risk to a level below an extreme risk;
23 or

24 (B) the court finds by clear and convincing evidence that the individual poses a
25 significant risk of absconding, obstructing justice, violating a protective order, or [causing bodily
26 injury to] [harming] another and a less restrictive condition is not available to reduce the risk to a
27 level below a significant risk.

28 (2) The court in determining whether a less restrictive condition is available to reduce the
29 risk to a level below a significant risk, shall consider the same criteria and measures as in
30 Sections 303 and 304.

31 (3) If the court issues an order of pretrial detention or continues a condition of release that

1 results in detention of the individual who is the subject of the hearing, the court shall state in a
2 record findings of fact and the reason for the order. If the court issues an order on the basis of a
3 risk of nonappearance or absconding, the court shall state why a less restrictive measure or
4 condition is not sufficient to reduce the risk of nonappearance to a level below an extreme risk or
5 to reduce the risk of absconding to a level below a significant risk.

6 **Legislative Note:** *In subsection (1)(b), a state should insert the state’s term for the type of harm*
7 *the state concludes is relevant to a detention decision.*

8
9

Comment

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

13
14

[ARTICLE] 6

15

MODIFYING OR [VACATING] AN ORDER

16

SECTION 601. MODIFYING OR [VACATING] BY AGREEMENT. By agreement

17 of the [government] and an individual who is the subject of an order under this [act], the court

18 may:

19

(1) modify an order of pretrial release;

20

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

21

(3) issue an order of pretrial detention.

22 **Legislative Note:** *In subsection 2, a state should insert the state’s term for “vacate” or its*
23 *equivalent.*

24
25

SECTION 602. MOTION TO RECONSIDER.

26

(a) On motion of an individual subject to an order of pretrial release, the court may

27 reconsider the order using the same procedure and standards in [Article] 3, and modify the order

28 by amending or eliminating a condition of release. The court may deny the motion summarily if

1 the motion includes no new relevant information.

2 (b) If new information is provided to the court that is relevant to an order of pretrial
3 release, including evidence that the individual who is subject to the order has violated a condition
4 of release, the court, on its own motion or on motion of the [government], may reconsider the
5 order, using the same procedures and standards in [Article] 3, and may:

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

7 (2) [vacate] the order and issue an order of temporary pretrial detention.

8 (c) If new information is provided to the court that is relevant to an order of pretrial
9 detention, the court, on its own motion or on motion of the individual subject to the order or the
10 [government], may reopen a detention hearing using the procedures and standards in [Article] 5.

11 **Comment**

12
13 *By agreement of an individual, a court may issue an order of pretrial detention. It may*
14 *not be obvious why a defendant would agree to a detention order. However, in circumstances*
15 *where a defendant is already detained on another order, he may prefer a detention order in the*
16 *immediate case (for instance, in order to receive credit for time incarcerated).*

17
18 **[ARTICLE] 7**

19 **MISCELLANEOUS PROVISIONS**

20 **SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
21 applying and construing this uniform act, consideration must be given to the need to promote
22 uniformity of the law with respect to its subject matter among states that enact it.

23
24 **SECTION 702. SAVINGS PROVISIONS.** This [act] does not affect the validity or
25 effect of a law other than this [act] regulating:

26 (1) forfeiture of a secured appearance bond; or

1 (2) arrests for the purpose of keeping the peace or initiating civil commitment.

2 **Comment**

3
4 The committee anticipates that the act may also need to include savings provisions for
5 preexisting and potentially conflicting laws concerning domestic violence and victim’s rights.
6 Alternatively, a state may need to repeal or amend conflicting laws concerning domestic violence
7 and victim’s rights.

8
9 **SECTION 703. SEVERABILITY.** If any provision of this [act] or its application to
10 any person or circumstance is held invalid, the invalidity does not affect other provisions or
11 applications of this [act] which can be given effect without the invalid provision or application,
12 and to this end the provisions of this [act] are severable.

13 **SECTION 704. REPEALS; CONFORMING AMENDMENTS.**

- 14 (a)
- 15 (b)
- 16 (c)

17 **Comment**

18
19 The committee anticipates that a state may need to repeal or amend acts that impose
20 mandatory release conditions for specified charges or categories of charges—for instance,
21 mandatory fees, secured bonds, or other financial conditions.

22
23 **SECTION 705. EFFECTIVE DATE.** This [act] takes effect