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## Reforming California's Conservatorship Laws? How SB 43 Creates More Barriers to Treatment for the Gravely Disabled

James Largent

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# Reforming California’s Conservatorship Laws? How SB 43 Creates More Barriers to Treatment for the Gravely Disabled

James Largent\*

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\* James Largent, Licensed Clinical Social Worker #64560; J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2025; Master of Social Work, University of Southern California, 2004; B.A., Sociology, University of California, San Diego, 1997. Thank you to my friends and family, especially my wife and children for their generosity, support, and encouragement. Thank you for supporting me by reading drafts, discussing ideas, and being patient as I labored on this article in my study for months. I also thank Legislative Editor, Adam Nir, for his tireless support and guidance even when extremely sick—you are a fantastic cheerleader and coach! A huge thank you as well to Lina Yoo for her technical skill. Thank you to Samuel Jang at Disability Rights California for his generosity in sharing his time and insights into conservatorship laws and the legislative process. Finally, thank you to the Law Review staff for their advice and assistance with this article.

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I. INTRODUCTION

Homelessness, substance use disorders, and mental health disorders are at crisis levels in California.<sup>1</sup> Contributing to this chaos, California’s hospitals and board-and-care facilities are closing.<sup>2</sup> “Fifty-two percent of California’s hospitals are operating in the red.”<sup>3</sup> Even more concerning, a common systemic response to people who are homeless and have a dual diagnosis is incarceration.<sup>4</sup>

For people suffering from health and mental health ailments—like Mark Rippee and Thomas Kellogg—problems with receiving healthcare were nothing new.<sup>5</sup> Both men were homeless and received repeated referrals for emergency

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<sup>1</sup> CAL. INTERAGENCY COUNCIL ON HOMELESSNESS, STATEWIDE HOMELESSNESS ASSESSMENT xi (2021) (describing California’s homelessness problems as a “humanitarian crisis”). See also SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSES OF SB 43, at 2 (Apr. 22, 2023) (stating that the mental health crisis is evidenced by people with mental health problems ending up in jail or homeless).

<sup>2</sup> Melissa Gomez & Hannah Fry, *This Rural County Lost Its Only Hospital, Leaving Residents with Dire Healthcare Choices*, L.A. TIMES (June 6, 2023), <https://www.latimes.com/california/story/2023-06-06/madera-county-rural-hospital-closure-some-residents-brace-for-death> (on file with the *University of the Pacific Law Review*) (providing an example of the lack of access to services that over 160,000 Californian’s in Madera County face when they need emergency healthcare). See also Jaelyn Cosgrove, *Homes for Residents with Mental Illnesses Are Closing. Can State Aid Save Them?*, L.A. TIMES (July 8, 2023), <https://www.latimes.com/california/story/2023-07-08/la-county-board-and-care-homes-closing> (on file with the *University of the Pacific Law Review*) (indicating that an estimated 142 board-and-care facilities have closed in California since Jan. 1, 2023, resulting in a loss of 3,057 treatment beds for individuals with mental health disorders that cannot function independently, but do not need inpatient hospitalization).

<sup>3</sup> Gomez & Fry, *supra* note 2; Jaelyn Cosgrove, *Homes for Residents with Mental Illnesses Are Closing. Can State Aid Save Them?*, L.A. TIMES (July 8, 2023) (indicating that an estimated 142 board-and-care facilities have closed in California since Jan. 1, 2023, resulting in a loss of 3,057 treatment beds for individuals with mental health disorders that cannot function independently, but do not need inpatient hospitalization).

<sup>4</sup> *S.F. Will Never Solve the Crisis on Its Streets Alone. What Should California Do About It?*, S.F. CHRON. (June 10, 2023), <https://www.sfchronicle.com/opinion/article/california-mental-illness-health-18136221.php> (on file with the *University of the Pacific Law Review*) (describing the ongoing challenge of providing adequate services and housing for people who are homeless, have mental health disorders, and end up in jail or prison rather than receive the care they need).

<sup>5</sup> Melinda Henneberger, *Vacaville Man Is Blind, Homeless and Schizophrenic. Why Can’t California Help Him?*, SACRAMENTO BEE (Aug. 14, 2022), <https://www.sacbee.com/article263602568.html> (on file with the *University of the Pacific Law Review*). See also *S.F. Will Never Solve the Crisis on Its Streets Alone. What Should California Do About It?*, *supra* note 4 (describing the problems with infrastructure and low admission rates by healthcare providers because they lack the specialization needed to treat people like Mark Rippee with complex health problems like dementia and traumatic brain injuries (TBI’s)); *People v. Kellogg*, 119 Cal.App.4th 593, 598 (4th Dist. 2004) (describing the experience of Thomas Kellogg, a homeless man in San Diego suffering from a dual diagnosis of substance use disorder (alcoholism) and mental health disorder (psychosis) who was incarcerated for public intoxication for roughly six months because there were no viable resources available to meet his combined substance use and mental health needs).

services.<sup>6</sup> Mr. Rippee’s symptoms, including traumatic brain injuries and anosognosia, prevented him from receiving the ongoing care that he required.<sup>7</sup> Mr. Kellogg’s symptoms left providers in a quandary—there were no community services available that could meet his needs.<sup>8</sup> Both men responded well to treatment—when they accepted it—and thus providers could not hold them involuntarily for further treatment once they recovered their ability to provide for themselves.<sup>9</sup> Mr. Rippee, aged fifty-nine, died in November 2022 from pneumonia and sepsis after living on the streets of Vacaville, California for sixteen years.<sup>10</sup> A trial court sentenced Mr. Kellogg to jail for 180 days due to public alcohol intoxication since jail was the only place where his symptoms stabilized.<sup>11</sup>

Current law defines a “gravely disabled” person as someone who suffers from a mental disorder or chronic alcoholism and who is unable to provide food, clothing, or shelter for themselves.<sup>12</sup> Typically, when a hospital admits someone in such a condition, the person must recover these abilities within a period of up to fourteen days of involuntary, inpatient treatment.<sup>13</sup> However, when a patient is

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<sup>6</sup> Jocelyn Wiener, *After Accident They Warned About, Sisters of Mentally Ill Man Blame the State — and Beg Governor to Act*, CAL MATTERS (Feb. 26, 2020), <https://calmatters.org/health/2020/02/mentally-ill-man-accident-treatment-conservatorship-california-mark-ripee> (on file with the *University of the Pacific Law Review*) (describing Mr. Rippee’s refusals to accept necessary treatments like blood transfusions and statements from police indicating that Mr. Rippee had to return to the streets because of a lack of services for people with TBI’s); Kellogg, 119 Cal.App.4th at 599 (stating that Mr. Kellogg was referred for treatment on at least three occasions, but these referrals were unsuccessful).

<sup>7</sup> Henneberger, *supra* note 5 (describing the failed efforts of Mr. Rippee’s siblings to qualify him for a conservatorship when he refused treatment because he legally retained the right to refuse to consent to treatment and he believed that he did not have the physical and mental health symptoms that his doctors and family members observed); *see Anosognosia*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/anosognosia> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*) (“[A]n inability or refusal to recognize a defect or disorder that is clinically evident.”); *Anosognosia*, NAT’L LIBR. OF MED. NAT’L CTR. FOR BIOTECHNOLOGY INFO., <https://www.ncbi.nlm.nih.gov/books/NBK513361> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*) (“[A] neurological condition in which the patient is unaware of their neurological deficit or psychiatric condition. It is associated with mental illness, dementia, and structural brain lesion . . .”).

<sup>8</sup> Kellogg, 119 Cal.App.4th at 598 (providing testimony from a physician that evaluated Mr. Kellogg for conservatorship and who was hesitant to conserve him due to the lack of available resources to meet Mr. Kellogg’s complex substance use, medical, and mental health needs).

<sup>9</sup> Henneberger, *supra* note 5 (describing Mr. Rippee’s cycle of deterioration, in which he would accept care and stabilize his physical and psychiatric symptoms, disqualifying him for conservatorship, only to re-deteriorate again when released back to the streets); Kellogg, 119 Cal.App.4th at 599–600 (citing medical recommendations that Mr. Kellogg was not an appropriate candidate for conservatorship because there were no medical facilities available outside of jail that could meet his medical and psychiatric needs).

<sup>10</sup> Anita Chabria, *California’s Most Famous Homeless Man Is Dead. His Life Should Guide CARE Court*, L.A. TIMES (Feb. 2, 2023), <https://www.latimes.com/california/story/2023-02-02/la-me-column-mark-ripee-california-care-courts-mental-illness-homeless> (on file with the *University of the Pacific Law Review*) (describing the instability and systemic barriers that Mr. Rippee faced as he battled blindness, psychosis, and constant threats to his safety while living near the Solano County main offices).

<sup>11</sup> Kellogg, 119 Cal.App.4th at 599 (describing how Mr. Kellogg stabilized in a jail hospital over a period of weeks to the point where he was “interacting with people in a normal way” again; the court of appeal affirmed the decision to incarcerate him so that he would receive adequate treatment).

<sup>12</sup> CAL. WELF. & INST. CODE § 5008(h)(1)(A), (2) (West 2018) (stating that “gravely disabled” specifically refers to a person that cannot meet their needs for food, clothing, or shelter due to a mental health disorder or chronic alcoholism).

<sup>13</sup> CAL. STATE AUDITOR, LANTERMAN-PETRIS-SHORT ACT: CALIFORNIA HAS NOT ENSURED THAT INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES RECEIVE ADEQUATE ONGOING CARE 12 (2020) (differentiating short-term

unable to recover their ability to provide for these essential needs within the time required, medical providers then consider them for care under a conservatorship.<sup>14</sup> Conservatorship is a court-involved process that strips a patient of their right to make medical decisions and appoints someone else to do this for them.<sup>15</sup>

Alternatively, when a potentially gravely disabled patient recovers the ability to provide for themselves during the initial hospitalization, medical providers release the patient and do not recommend a conservatorship.<sup>16</sup> Mr. Rippee fit this exact situation—he could not be conserved because he would recover his ability to provide for his own food, clothing, and shelter whenever he was hospitalized.<sup>17</sup> When a conservatorship for people like Mr. Rippee or Mr. Kellogg is not possible, the available legal and treatment options become insufficient to address the cyclical problems they face.<sup>18</sup> Given California's grade of "D-" for its approach to involuntary inpatient care, the critical need for redressing involuntary commitment laws remains a daunting challenge.<sup>19</sup>

In 2022, California State Senator Susan Talamantes Eggman introduced SB 43, making it easier to conserve a gravely disabled patient who makes limited progress during initial involuntary treatment.<sup>20</sup> However, SB 43 violates due process rights because it is overinclusive and expands the definition of "gravely disabled" to include those suffering from severe substance use disorders.<sup>21</sup> The bill also provides a hearsay exception that allows psychiatrists to rely on unverified substance abuse treatment records as a basis for recommending that a patient be

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involuntary treatment (in which a patient is held for three days in care), long-term involuntary treatment (in which a patient is held for fourteen days in care plus thirty-day extensions, if needed), and conservatorships (where a patient is held in care lasting up to one year or longer in rare cases).

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> Henneberger, *supra* note 5.

<sup>18</sup> Kellogg, 119 Cal.App.4th at 598 (describing the evidence supporting incarceration due to the inadequacy and lack of treatment resources that Mr. Kellogg needed to stabilize his co-occurring symptoms); Henneberger, *supra* note 5 (describing why the Department of Healthcare Services could not conserve Mr. Rippee after he stabilized in the hospital because he no longer met the definition of gravely disabled). *See also* CAL. PROB. CODE §3208(a)(3) (West 2000) (stating that relatives may petition the court for an order authorizing them to make healthcare decisions when there is a probability that a health condition will result in a serious threat to the physical or mental health of the patient, but only if the patient is unable to give consent).

<sup>19</sup> TREATMENT ADVOCACY CENTER, CALIFORNIA 2, <https://www.treatmentadvocacycenter.org/browse-by-state/california> (last visited on May 28, 2023) (on file with the *University of the Pacific Law Review*) (criticizing California's use of involuntary commitment laws and its ineffective use of best practices). *See also* CAL. STATE AUDITOR, *supra* note 13, at 2 (criticizing the lack of services and coordination of California's mental health system and arguing for critical reforms).

<sup>20</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 9 (quoting Senator Eggman as stating that the intent of SB 43 is to reach people who are dying on the streets or are at risk of incarceration due to psychotic disorders).

<sup>21</sup> SB 43, 2023 Leg., 2023–2024 Sess. (Cal. 2023) (as amended on Sept. 8, 2023, but not enacted) (broadening WIC § 5008(h)(1)(A)'s definition of "gravely disabled" to include people suffering from "a mental health disorder, a severe substance use disorder, or a co-occurring mental health disorder and a severe substance use disorder, [who] are unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care"). *See also* Letter from Cnty. Behav. Health Dir.'s Ass'n to Senator Susan Eggman 1 (Mar. 13, 2023) (on file with the *University of the Pacific Law Review*) (cautioning against the inclusion of substance use disorders in SB 43's definition of gravely disabled due to the likelihood of conserving large numbers of people that do not need to be conserved).

conserved.<sup>22</sup> SB 43 will further burden a system that lacks the resources and sufficient facilities to meet the needs of the people it is currently intended to serve.<sup>23</sup>

As a result, SB 43's definition of "gravely disabled" targets the wrong treatment group—those suffering from severe substance use disorders.<sup>24</sup> To avoid due process concerns, SB 43 should remove the hearsay exception and the reference to substance use disorders in its definition of "gravely disabled".<sup>25</sup> Instead, the bill should focus on the people who need involuntary treatment most—patients with symptoms of anosognosia.<sup>26</sup> SB 43 should also expand funding for mental health treatment resources and treatment beds to meet the needs of people already underserved in California's systems of care.<sup>27</sup>

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<sup>22</sup> SB 43 (as amended on Sept. 8, 2023, but not enacted), *supra* note 21 (creating a hearsay exception that would be codified under a new statute (CAL. WELF. & INST. CODE § 5122(d)(2)) and that allows an expert witness in court to rely on a patient's prior medical, psychiatric, and substance abuse treatment records as a basis for a recommendation to continue involuntary treatment, even if the expert had not treated the patient before and had not verified the truth of such records). *See also* SENATE RULES COMMITTEE, SENATE FLOOR ANALYSES OF SB 43, at 5 (Apr. 27, 2023).

<sup>23</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 18–20 (citing a report by the California Behavioral Health Planning Council indicating that people who currently qualify for involuntary treatment often "languish for days in hospital emergency departments as they await referrals to community-based services or placement in appropriate settings"; also stating that supporters of SB 43 believe that California's current mental health crisis justifies further burdening the systems that provide care).

<sup>24</sup> Thomas Curwen, "Against Their Will": A Proposed Law Would Make it Easier to Detain People with Mental Illness, L.A. TIMES (Apr. 9, 2023), <https://www.latimes.com/california/story/2023-04-09/sb-43-gravely-disabled-mental-illness-bill> (on file with the *University of the Pacific Law Review*) (describing the overreaching effects of SB 43's proposed language that could lead to harm to patients when mandating treatment for substance use disorder or mere denial of mental illness).

<sup>25</sup> Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21 (cautioning against the inclusion of substance use disorders in SB 43's definition of gravely disabled due to the likelihood of conserving large numbers of people that do not need to be conserved). *See also* SENATE JUDICIARY COMMITTEE, *supra* note 2, at 22 (stating that without a way to test hearsay evidence supporting a physician's finding of grave disability, conservatorships would begin to look like the involuntary commitments of the 1950's and 1960's).

<sup>26</sup> Melinda Henneberger, *Opinion: "We" Let Blind, Mentally Ill, Homeless Mark Rippee Die in Vacaville. But Let's Name Names*, SACRAMENTO BEE (Dec. 1, 2022), <https://www.sacbee.com/opinion/article269419817.html> (on file with the *University of the Pacific Law Review*) (describing the importance of including anosognosia in an expanded definition of "gravely disabled"). *See also* SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (citing concerns that the overly broad terms of SB 43 may lead to arbitrary decision making and fail to provide adequate notice).

<sup>27</sup> CAL. STATE AUDITOR, *supra* note 13, at 2 (recommending that the State do a better job funding and providing treatment resources). *See also* Ryan K. McBain, et al., EVALUATION REPORT: ADULT PSYCHIATRIC BED CAPACITY, NEED, AND SHORTAGE ESTIMATES IN CALIFORNIA – 2021, at 3, 4, 24, 25 (RAND CORP.) (2021) (estimating that California currently is short approximately 4,767 inpatient beds and 2,796 subacute (lower level treatment) beds and recommending prioritizing the needs of those with dementia, TBI, and criminal histories since they are the primary cause of bottlenecks in California's systems of care).

## II. LEGAL BACKGROUND

California State Senator Susan Talamantes Eggman proposed SB 43 after years of efforts to reform the Lanterman-Petris-Short Act of 1967 (LPS).<sup>28</sup> While legislators have attempted to reform involuntary commitment laws before, SB 43's scope of reform is unprecedented, to the point that it may be deemed unconstitutional.<sup>29</sup> Section A explains how LPS applies to short-term involuntary treatment.<sup>30</sup> Section B distinguishes how LPS applies to long-term involuntary treatment, referred to as conservatorship.<sup>31</sup> Section C discusses how courts have interpreted a potential conservatee's due process rights under LPS.<sup>32</sup> Section D contemplates the use of anosognosia in involuntary commitment laws in other states.<sup>33</sup> Section E highlights how the underfunding of LPS and a concomitant lack of treatment resources have caused LPS to have a limited benefit.<sup>34</sup>

### A. Initial Short-Term Involuntary Treatment Under LPS

When creating LPS, a primary goal was to end the harsh, indefinite, involuntary treatment of the 1960's asylums and ensure that involuntary treatment only lasted as long as needed.<sup>35</sup> At the time, the psychiatric and judicial evaluations used to place someone in involuntary treatment were somewhat illusory, and courts could not review them or take them on appeal.<sup>36</sup> Once committed, patients who

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<sup>28</sup> The Lanterman-Petris-Short Act of 1967 (or California Mental Health Act of 1967) as codified in CAL. WELF. & INST. CODE §§ 5000–5556 (West 2023). *See also* CAL. STATE AUDITOR, *supra* note 13, at 13 (2020) (providing a timeline of key legislative actions that have impacted mental health services in California); CAL. DEP'T OF HEALTHCARE SERV.'S, LAURA'S LAW: ASSISTED OUTPATIENT TREATMENT DEMONSTRATION PROJECT ACT OF 2002, at 5 (2019) (describing Laura's Law (AB 1421 passed in 2002) as codified at CAL. WELF. & INST. CODE §§ 5345–5349.5 (West 2023) and its involuntary outpatient treatment program, Assisted Outpatient Treatment (AOT), which requires outpatient treatment compliance by patients who are at risk of being gravely disabled and can result in placement in inpatient treatment due to non-compliance with medications or treatment activities); AB 1976, 2020 Leg., 2019–2020 Sess. (Cal. 2020) (enacted) (requiring all California counties to provide Assisted Outpatient Treatment unless the governing body of the county opts out as codified at CAL. WELF. & INST. CODE § 5349(a) (West 2023); SB 1416, 2022 Leg., 2021–2022 Sess. (Cal. 2022) (amended June 15, 2022, but not enacted) (seeking to expand the definition of gravely disabled to include a person who is unable to provide for their own medical needs due to a mental health disorder); SB 1338, 2022 Leg., 2021–2022 Sess. (Cal. 2022) (creating a voluntary court-ordered program called the CARE process for people suffering from psychotic disorders that notably excludes people suffering from TBI's or substance use disorder, as codified at CAL. WELF. & INST. CODE §§ 5970–5987 (West 2023)).

<sup>29</sup> Curwen, *supra* note 24 (referring to Senator Eggman's statements that SB 43 is intended to "fix a broken law . . . all the way" and is more ambitious than prior legislation in its expanded definition of gravely disabled).

<sup>30</sup> *Infra* Section II.A.

<sup>31</sup> *Infra* Section II.B.

<sup>32</sup> *Infra* Section II.C.

<sup>33</sup> *Infra* Section II.D.

<sup>34</sup> *Infra* Section II.E.

<sup>35</sup> Curwen, *supra* note 24 (discussing how LPS stopped the occurrence of "simple" decisions by psychiatrists to commit people with mental health disorders, developmental disabilities, and chronic alcoholism, resulting in state hospitals being "flooded" with patients). *See also* CAL. STATE AUDITOR, *supra* note 13, at 13 (requiring involuntary treatment providers not to cause harm and to balance a patient's rights with their needs for treatment even if they refuse).

<sup>36</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 22 (citing the 1966 "Dilemma Report" stating that the average length of an involuntary commitment hearings in California was 4.7 minutes, meaning that involuntary commitment was virtually automatic). *See also* Curwen, *supra* note 24.

were primarily poor and indigent often languished in inhumane conditions for indefinite periods of time.<sup>37</sup>

LPS grants mental health and medical professionals the authority to provide involuntary treatment to people who are either gravely disabled, a danger to themselves, or a danger to others.<sup>38</sup> The Act establishes three main stages of involuntary treatment, all of which expire automatically unless a designated professional can justify further treatment.<sup>39</sup> A professional placing a patient on an involuntary treatment hold must have probable cause and the provider must rule out the utility of voluntary services first.<sup>40</sup>

Additionally, once a short-term hold is in place, professionals further assess the patient, provide services, and monitor for improvement.<sup>41</sup> LPS safeguards personal rights while ensuring treatment that restores the person to a level of independent functioning, such that they no longer need involuntary treatment.<sup>42</sup> These purposes continue throughout the course of treatment, though a legal review is required for involuntary treatment to continue beyond three-day and fourteen-day holds.<sup>43</sup> Once a patient is considered able to function independently, they are released and their rights to give or refuse consent are restored.<sup>44</sup>

### *B. Conservatorship: A Long-term Form of Involuntary Treatment Under LPS*

If initial involuntary treatment does not work and a patient still cannot function independently, the treating professional refers the matter to the Public Guardian for a conservatorship evaluation.<sup>45</sup> Courts primarily base the decision to conserve someone on the recommendation of two medical providers—one of

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<sup>37</sup> Curwen, *supra* note 24 (describing the former treatments as “misguided, unscientific, and cruel”).

<sup>38</sup> CAL. WELF. & INST. CODE §§ 5008, 5150 (West 2023). *See also* CAL. STATE AUDITOR, *supra* note 13, at 1.

<sup>39</sup> CAL. STATE AUDITOR, *supra* note 13, at 11 (describing how doctors may “hold” someone in involuntary treatment for seventy-two hours (a short-term hold), fourteen days (an extended “hold”), and conservatorships (a yearlong legal mandate to receive treatment, renewable by court orders) limiting a person’s rights to make decisions for themselves while under mandatory, involuntary care based on the recommendation of two physicians).

<sup>40</sup> *Id.* (requiring that the patient be released if there is not probable cause to believe the patient is gravely disabled or a danger to himself or others).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (requiring that the patient be served in the “least restrictive environment” (LRE) and that involuntary treatment stop when it is no longer needed).

<sup>43</sup> *Id.* at 13 (requiring that any treatment beyond an initial three-day “hold” (“hold” refers to involuntary treatment in an inpatient, hospital-like setting in which the patient cannot leave), must involve the appointment of an attorney or advocate and a hearing before a judicial figure). *See also* SB 1227, 2022 Leg., 2021–2022 Sess. (Cal. 2022) as codified at CAL. WELF. & INST. CODE §§ 5270.55, 5270.70 (West 2023) (describing the petition process beyond a fourteen day hold for up to two, thirty-day extensions that a court may grant, with a maximum involuntary detention period of seventy-seven days).

<sup>44</sup> *See* Henneberger, *supra* note 26 (describing the importance of including anosognosia in an expanded definition of “gravely disabled”) (describing the cycle for many gravely disabled people that recover their ability to refuse consent and are released when they improve in involuntary treatment); CAL. WELF. & INST. CODE § 5368 (West 2023) (stating that when conservatorship ends, so does incompetency to make decisions for oneself); CAL. STATE AUDITOR, *supra* note 13, at 11.

<sup>45</sup> CAL. WELF. & INST. CODE § 5352 (West 2023). *See also* CAL. STATE AUDITOR, *supra* note 13, at 13 (requiring a Public Guardian to evaluate the patient and make a recommendation regarding whether the patient would be best served by limiting their rights under a conservatorship due to their inability to safely care for themselves).



whom must be a psychiatrist.<sup>46</sup> A potential conservatee may challenge the recommendation and other evidence through counsel.<sup>47</sup> To receive the grant of conservatorship from the court, a Public Guardian must prove that the patient should be conserved beyond a reasonable doubt.<sup>48</sup> The court must include a finding that the conservatee is suffering from deficits in mental functions that impair their ability to make legal and medical decisions.<sup>49</sup>

Once conserved, a conservator becomes the designee who gives or refuses consent for treatment or release of medical records on behalf of the conservatee.<sup>50</sup> Alternatively, a conservatee may appeal the conservatorship, which must also be judicially reviewed annually to ensure that it is still needed.<sup>51</sup> At any point during the conservatorship, the conservatee may petition the court to partially or fully reinstate the conservatee's rights.<sup>52</sup> A conservatorship ends when the court finds that a conservatee is no longer gravely disabled and has recovered the ability to provide for their own needs.<sup>53</sup>

### C. How Courts Have Supported Due Process Rights in LPS Conservatorship Cases

Historically, California's conservatorship system has been plagued with fraud and abuse.<sup>54</sup> In a recent example, pop singer Britney Spears was the subject of an unnecessary conservatorship for years.<sup>55</sup> As a fundamental right, California

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<sup>46</sup> CAL. WELF. & INST. CODE § 5251(a)(1)–(2) (West 2023) (requiring recommendations from two mental health professionals as part of the burden of proof required to conserve someone). *See also* CAL. STATE AUDITOR, *supra* note 13, at 13.

<sup>47</sup> *Id.* (describing the patient's right to present and challenge evidence—including cross-examining witness statements—used in support of a recommendation for conservatorship).

<sup>48</sup> *Id.*

<sup>49</sup> CAL. PROB. CODE § 811 (West 2023) (describing the wide range of deficits in mental functioning (such as the ability to reason logically) that would serve as the basis for a finding of incapacity, which means that the deficit(s) “significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question”). *See also* CAL. PROB. CODE § 1881 (West 2023) (stating that the inability to give consent means that the person is “unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process”).

<sup>50</sup> CAL. PROB. CODE § 2355 (West 2023) (delineating the responsibility that a conservator has to make decisions according to the conservatee's values or what the conservator believes is in the conservatee's best interest, including medical treatment).

<sup>51</sup> DISABILITY RTS. CAL., HANDBOOK FOR CHALLENGING MENTAL HEALTH CONSERVATORSHIPS 13 (2023).

<sup>52</sup> CAL. PROB. CODE § 3208.5(c) (West 2023). *See also id.* at 13–17.

<sup>53</sup> CAL. WELF. & INST. CODE § 5257 (WEST 2023) (requiring the opinion of a psychiatrist recommending the ending of a conservatorship because the conservatee is no longer gravely disabled). *See also* CAL. PROB. CODE § 1863(c) (West 2023) (describing the legal basis the court must use to terminate a conservatorship).

<sup>54</sup> *See* Scott Gold, Lee Romney, & Evan Halper, *Program for Mentally Ill Eliminated*, L.A. TIMES (Aug. 25, 2007), <https://www.latimes.com/archives/la-xpm-2007-aug-25-me-mental25-story.html> (on file with the *University of the Pacific Law Review*) (discussing reform efforts that responded to the rampant fraud and abuse in California's conservatorship system at that time).

<sup>55</sup> *In re* Conservatorship & Est. of Spears, No. B214749, 2011 WL 311102, at \*4 (Cal. Ct. App. Feb. 2, 2011) (ordering a restraining order against the “friend” that initiated proceedings to conserve Spears due to the abuses he had engaged in towards her); *see also True Crime Daily: Inside the Britney Spears Conservatorship*, TRUE CRIME DAILY THE PODCAST at 26:15–36:40 (Sept. 7, 2021) (downloaded using Podcasts), <https://podcasts.apple.com/us/podcast/true-crime-daily-the-podcast/id1451999167?i=1000534574071> (on file with the *University of the Pacific Law Review*) (discussing the alleged abuses that were uncovered when Britney

courts have affirmed the importance of ensuring due process when weighing the benefits and drawbacks of a conservatorship.<sup>56</sup> The court must protect individuals' rights to fair notice, limited medical hearsay evidence, and privacy—including the right to give or refuse consent during involuntary treatment.<sup>57</sup>

First, the California Constitution requires the same due process protections as the Fourteenth Amendment of the United States Constitution.<sup>58</sup> The U.S. Supreme Court and the California Supreme Court have held that fair notice is required because a conservatorship deprives a conservatee of their liberty.<sup>59</sup> In *Conservatorship of Chambers*, the California Court of Appeal held that the definition of “gravely disabled” in Welfare & Institutions Code Section 5008(h)(1)(A) provided sufficient notice to a potential conservatee.<sup>60</sup> Conversely, when conservatorship statutes are vague, they do not provide fair notice, violating a potential conservatee’s right to due process.<sup>61</sup>

Second, the California Supreme Court considers the right to consent to treatment to be a privacy right—and privacy is protected by the Due Process Clause of the Fourteenth Amendment.<sup>62</sup> The court of appeal has found that revoking a conservatee’s right to refuse treatment must be carefully considered because involuntary treatment can be experienced as harmful.<sup>63</sup> To protect the right of privacy, conservatees initially retain the right to refuse medical treatment after being conserved.<sup>64</sup> Conservatorship courts may only remove a conservatee’s right

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Spears finally got a new attorney and who advocated for her financial and medical decision-making rights to be restored after she had been conserved all the while orchestrating her own highly profitable, elaborate shows in Las Vegas, Nevada for years).

<sup>56</sup> *Conservatorship of Wendland*, 26 Cal.4th 519, 531–32 (2001) (discussing the right to privacy under the California Constitution Art. I, § 1 which “guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of [their] bodily integrity,” including life-sustaining care).

<sup>57</sup> *Conservatorship of Chambers*, 71 Cal. App. 3d 277, 284 (1st Dist. 1977) (holding that fair notice must be provided when conserving someone); *Conservatorship of K.W.*, 13 Cal. App. 5th 1274, 1285 (2017) (affirming due process protections against the use of unverified hearsay medical evidence); *Conservatorship of Wendland*, 26 Cal.4th at 531–32 (discussing a conservatee’s right to privacy).

<sup>58</sup> CAL. CONST. art. I, § 15 (stating “nor shall any state deprive a person of life, liberty, or property, without due process of law”); *see also* U.S. Const. amend. XIV, § 1.

<sup>59</sup> *Addington v. Texas*, 441 U.S. 418, 425 (1979) (recognizing the need for due process protections because civil commitments involve a significant deprivation of liberty); *People v. Barrett*, 54 Cal. 4th 1081, 1098 (2012) (stating that civil commitment proceedings require due process safeguards).

<sup>60</sup> *Conservatorship of Chambers*, 71 Cal. App. 3d at 284 (holding that fair notice to a potential conservatee can only be fairly given if the definition of the term “gravely disabled” is sufficiently precise).

<sup>61</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (citing concerns that the overly broad terms of SB 43 may lead to arbitrary decision-making and fail to provide adequate notice to people that might be conserved). *See also* Letter from Cnty. Behav. Health Dir.’s Ass’n to Senator Susan Eggman 1 (Mar. 13, 2023) (on file with the *University of the Pacific Law Review*) (cautioning against the expansive language of SB 43 due to the likelihood of conserving large numbers of people that do not need to be conserved, such as people who use substances but are able to take care of themselves).

<sup>62</sup> *Conservatorship of Wendland*, 26 Cal.4th 519, 531–32 (2001); CAL. CONST. art. I, § 15; *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J. concurring) (holding in reliance on his dissent in *Poe v. Ullman*, 367 U.S. 497, 551 (1961) that privacy is a value that is “implicit in the concept of ordered liberty” and violations of privacy infringe on the Due Process clause of the Fourteenth Amendment to the U.S. Constitution).

<sup>63</sup> *Riese*, 209 Cal. App. 3d at 1313; *see also* CAL. WELF. & INST. CODE § 5325.1(c) (West 2023) (requiring that a person receiving mental health treatment has a right “to be free from harm”).

<sup>64</sup> *Riese*, 209 Cal. App. 3d at 1315 (relying on CAL. WELF. & INST. CODE § 5331 (West 2023) stating that no person receiving involuntary treatment is presumed to be incompetent, i.e., unable to make decisions for themselves).

to consent after making additional findings to justify such orders.<sup>65</sup> Otherwise, involuntary mental health treatment can become a form of punishment.<sup>66</sup> Courts commonly limit a conservatee's right to consent when symptoms of anosognosia are present.<sup>67</sup> Additionally, courts will primarily revoke the conservatee's right to consent to treatment when they need specific forms of treatment, including medication.<sup>68</sup>

A third due process protection implicated in SB 43 is the protection against the use of unverified hearsay evidence, which California courts have extended to both criminal and conservatorship cases.<sup>69</sup> Article One, Section Fifteen of the California Constitution provides that defendants have a right to confront the witnesses used against them as one protection against losing their liberty.<sup>70</sup> In *Conservatorship of K.W.*, the court of appeal concluded that an expert opinion supporting a conservatorship may not be based on unadmitted hearsay medical evidence.<sup>71</sup> Similarly, in *People v. Jeffrey G.*, the court of appeal found that an expert opinion based on unverified records is irrelevant and lacks probative value.<sup>72</sup> Courts protect potential conservatees' due process rights by ensuring their right to cross-examine and challenge evidence.<sup>73</sup> Additionally, the statutory exception that allows the evaluating psychiatrist to consider hearsay evidence from other providers in the same setting does not apply to substance abuse treatment records.

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<sup>65</sup> Riese, 209 Cal. App. 3d at 1313.

<sup>66</sup> *Conservatorship of Roulet*, 23 Cal. 3d 219, 226 (1979).

<sup>67</sup> See CAL. PROB. CODE § 1881 (West 2023) (describing the symptoms that the court uses as a basis to take away a conservatee's right to consent—the inability to respond knowingly and intelligently to queries about medical treatment or the inability to participate in a treatment decision by means of a rational thought process—both of which overlap with symptoms of anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS (2021), <https://www.nami.org/About-Mental-Illness/Common-with-Mental-Illness/Anosognosia> (on file with the *University of the Pacific Law Review*) (listing two potential symptoms of anosognosia—unawareness of one's own mental illness and inability to perceive one's mental condition accurately); Riese, 209 Cal. App. 3d at 1319, 1322 (finding that “LPS recognizes that a patient may be involuntarily committed but still remain capable of giving informed consent” based on three factors – whether the patient (1) is aware of their situation (including their mental health condition), (2) is able to understand the risks and benefits of treatment, and (3) is able to utilize rational thought processes to evaluate their treatment plan and participate in services).

<sup>68</sup> Riese, 209 Cal. App. 3d at 1318, 1320 (finding that psychosurgery, convulsive treatments, and medication all must be administered with a patient's consent or by court order).

<sup>69</sup> CAL. CONST. art. I, § 15; *People v. Sanchez*, 63 Cal. 4th 665, 685 (2016) (holding that expert opinion that is based on out-of-court hearsay in criminal cases is not admissible—absent an exception—and that a defendant must be given the opportunity to confront the source of the hearsay before the expert's testimony can be admitted). See *Conservatorship of K.W.*, 13 Cal. App. 5th 1274, 1285 (2017) (extending *Sanchez's* protections to civil and conservatorship cases); see also CAL. EVID. CODE § 1200).

<sup>70</sup> CAL. CONST. art. I, § 15.

<sup>71</sup> *Conservatorship of K.W.*, 13 Cal. App. 5th at 1285.

<sup>72</sup> See *People v. Jeffrey G.*, 13 Cal. App. 5th 501, 509 (2017) (concluding that an opinion that is based on hearsay that is not true is irrelevant).

<sup>73</sup> *Conservatorship of K.W.*, 13 Cal. App. 5th at 1285.

*D. The Role of Anosognosia in Involuntary Commitment Laws in Other States*

Anosognosia symptoms could play a more important role when doctors place a patient on an involuntary treatment hold, which is a common starting point for the conservatorship process.<sup>74</sup> Most states include some variation of the definition of “gravely disabled” in their involuntary commitment laws and at least seven states’ definitions include symptoms of anosognosia.<sup>75</sup> Anosognosia symptoms are complex and can confuse providers because of their similarities to “denial”, a symptom that is common in substance abuse and mental health disorders.<sup>76</sup> However, symptoms consistent with anosognosia are already part of the statutory criteria that California courts must consider when evaluating someone for a conservatorship.<sup>77</sup> The symptoms of anosognosia are also included in the definition of “gravely disabled” that is used in criminal proceedings.<sup>78</sup>

*E. The Struggle to Implement LPS as Intended*

Currently, California does not provide an adequate continuum of care for people that receive treatment from its mental health systems.<sup>79</sup> Since LPS’s passage, the Legislature has consistently failed to provide enough mental health treatment services and treatment beds for people that need them.<sup>80</sup> Stakeholders

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<sup>74</sup> Henneberger, *supra* note 26 (describing the importance of including anosognosia in an expanded definition of “gravely disabled”).

<sup>75</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 9–12 (2019) (discussing various definitions of gravely disabled across states such as Alaska, North Carolina, and others that includes symptoms of anosognosia).

<sup>76</sup> See Elyn R. Saks, *Competency to Refuse Medication: Revisiting the Role of Denial of Mental Illness in Capacity Determinations*, 22 S. CAL. REV. L. & SOC. JUST. 167, 179 (2013) (stating that differentiating denial from anosognosia at the time of diagnosis can be confusing because a patient might generally deny the existence of mental illness (which is not uncommon in United States culture) without holding to a patently false belief that occurs in anosognosia).

<sup>77</sup> See CAL. PROB. CODE § 811 (West 2023) (stating that a deficit in the mental functions listed in the statute may be considered only if the deficit “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question,” which is consistent with the definition of anosognosia); see also CAL. PROB. CODE § 1881 (West 2023).

<sup>78</sup> Compare CAL. WELF. & INST. CODE § 5008(h)(1)(A)(2) (West 2018) (stating that “gravely disabled” specifically refers to a person that cannot meet their needs for food, clothing, or shelter due to a mental health disorder or chronic alcoholism), with CAL. WELF. & INST. CODE § 5008(h)(1)(B)(iii) (West 2018) (defining “gravely disabled” for criminal competency proceedings as a person who “is unable to understand the nature and purpose of the proceedings taken against them and to assist counsel in the conduct of their defense in a rational manner” because of a mental health disorder).

<sup>79</sup> CAL. STATE AUDITOR, *supra* note 13, at 3 (finding that over 7,400 people experienced repeated (five or more) involuntary treatments in Los Angeles County between 2015 and 2018 without being connected to community-based services).

<sup>80</sup> See Doug Shuit, *Board And Care: New Approach To Mental Illness*, L.A. TIMES, May 13, 1972, at A1 (on file with the *University of the Pacific Law Review*) (describing the lack of outpatient services available at the time that LPS began, leaving thousands of people released from mental hospitals in the late 1960s without the care they needed); CAL. STATE AUDITOR, *supra* note 13, at 8–10 (providing a timeline of key legislative actions that resulted in a lack of funding, treatment beds, and effective mental health treatment resources in California); Sherry Bebitch Jeffe, *California: Good Aims, Bad Results*, L.A. TIMES (Mar. 22, 1987), <https://www.latimes.com/archives/la-xpm-1987-03-22-op-14759-story.html> (on file with the *University of the Pacific Law Review*) (discussing the negative impact of block grants on mental health services in the 1980’s due

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appear confused because they often disagree about how to meet the needs of people experiencing serious mental illness.<sup>81</sup> Even more problematic, mental health services providers underserve people with serious mental disorders because of the difficulties involved in treating them.<sup>82</sup>

Since the turn of the twentieth century, the California Legislature has attempted to reform mental health services laws to help the homeless and those with mental health disorders.<sup>83</sup> California has passed laws expanding the available treatment types, ensuring funding, and increasing the resources available to those dealing with substance use and mental health disorders.<sup>84</sup> However, despite this progress, these laws have not expanded the term “gravely disabled” to include symptoms of anosognosia or severe substance use disorder.<sup>85</sup> Furthermore, many

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to a severe drop in funding); SENATE JUDICIARY COMMITTEE, *supra* note 2, at 18 (stating that many patients needing placement in state hospitals can wait up to one year for a treatment bed to become available due to insufficient supply and the numbers of people that need beds).

<sup>81</sup> Theresa Clift, *Sacramento Lacks Hundreds of Psychiatric Beds Even After New Facility Built, Grand Jury Finds*, SACRAMENTO BEE (June 12, 2023), [https://www.sacbee.com/news/local/article276230831.html?ac\\_cid=DM810556&ac\\_bid=-1129982838](https://www.sacbee.com/news/local/article276230831.html?ac_cid=DM810556&ac_bid=-1129982838) (on file with the *University of the Pacific Law Review*) (exposing the current lack of agreement and service coordination amongst at least 30 different providers about how to address the mental health and substance abuse needs of the homeless in Sacramento). See also Letter from Disability Rts. Cal. et al., to Sen. Susan Eggman 5 (Mar. 22, 2023) (on file with the *University of the Pacific Law Review*) (challenging the claims by proponents of the effectiveness of Assisted Outpatient Treatment and promoting the benefits of Assertive Community Treatment instead).

<sup>82</sup> Chabria, *supra* note 10 (describing how people with serious mental disorders are the last to be provided services because they are hard to work with and demand tremendous amounts of time from providers).

<sup>83</sup> CAL. STATE AUDITOR, *supra* note 13, at 9 (providing a timeline of key legislative actions that have impacted mental health services in California).

<sup>84</sup> See CAL. DEP'T OF HEALTHCARE SERV.'S, *supra* note 28, at 5, 12; Gold et al., *supra* note 54 (discussing Prop 63's 1% tax on the wealthiest Californians to adequately maintain a fund that the State of California must allocate to mental health services only, preventing the governor and others from pilfering moneys dedicated to mental health services to pay for other things); SB 82 (2013) codified at CAL. WELF. & INST. CODE § 5848.5 (West 2022) (describing the unnecessary hospitalizations of people with mental health disorders that repeatedly visit emergency rooms, cannot be transferred when ready to lower levels of care due to lack of availability, and the misuse of resources such as police personnel who have to wait in hospitals until a more appropriate treatment provider becomes available); AB 1315 codified at CAL. WELF. & INST. CODE § 5835.1 (West 2018) (designating a variety of funding sources intended to assist with early intervention with people suffering psychosis or impairment from mental health disorders); AB 59, 2015 Leg., 2015–2016 Sess. (Cal. 2016) (enacted) (extending Laura's law for 7 more years and aggregating the homeless, mentally ill, and criminal populations of the state under one umbrella for the purposes of compelling portions of these populations to AOT when they are impaired); AB 1976, *supra* note 28 (requiring all California counties unless the governing body of the county opts out) as codified at CAL. WELF. & INST. CODE §§ 5346–5349.1 (West 2023)); SB 507, 2021 Leg., 2020–2021 Sess. (Cal. 2021) (enacted) (changing the conjunctive test of CAL. WELF. & INST. CODE § 5346 (part of Laura's Law) to a disjunctive test, making a petitioner's belief that a potential conservatee needs AOT a sufficient basis by itself (without grave disability or danger to self or others) for the court to order someone to AOT); SB 1338, *supra* note 28 (creating a voluntary court-ordered program called the CARE process for people suffering from psychotic disorders that notably excludes people suffering from TBI's or substance use disorder, as codified at CAL. WELF. & INST. CODE §§ 5970–5987 (West 2023)).

<sup>85</sup> Compare *id.*, with *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one's own mental illness and inability to perceive one's mental condition accurately—that are not present in SB 43's definition of gravely disabled), and SB 43, *supra* note 21 (broadening WIC § 5008(h)(1)(A)'s definition of “gravely disabled” to include people suffering from “a mental health disorder, a severe substance use disorder, or a co-occurring mental health disorder and a severe substance use disorder, [who] are unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care”), and Curwen, *supra* note 24 (describing how SB 43 initially focused on a person's “inability to understand” their disorder and their lack of insight into their disorder as part of the definition of

other states do not include severe substance use disorder in their definitions of “gravely disabled”.<sup>86</sup>

### III. SB 43

SB 43 would amend various portions of LPS.<sup>87</sup> Currently, LPS makes it possible for people who are considered a danger to themselves or others or who are “gravely disabled” to be compelled to involuntary treatment.<sup>88</sup> SB 43 would expand the definition of “gravely disabled” such that people suffering from severe substance use disorders could also be mandated to involuntary treatment.<sup>89</sup> The bill also expands from the inability to provide food, clothing, or shelter, to also cover lack of “personal safety” and “necessary medical care”.<sup>90</sup> SB 43 initially added physical health conditions—including symptoms of anosognosia—to the definition of “gravely disabled” that would make it easier to detain people with such symptoms.<sup>91</sup> However, SB 43’s subsequent amendments removed reference to anosognosia symptoms.<sup>92</sup> Additionally, SB 43 provides a hearsay exception, allowing an expert witness to rely on substance abuse treatment history from other providers when opining a patient is gravely disabled.<sup>93</sup>

### IV. ANALYSIS

There is widespread belief that reforming LPS will resolve the homelessness crisis in California.<sup>94</sup> However, the United States Supreme Court and the California Supreme Court require that courts and service providers maintain due process rights when mandating someone to involuntary treatment or

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gravely disabled, only to have this language removed in later amendments), and AM. PSYCHIATRIC ASS’N: DIAGNOSTICS AND STAT. MANUAL OF MENTAL DISORDERS, 5TH EDITION, TEXT REVISION 543–53, 575–76, 587–88, 601–02, 608–10 (2022) (describing the diagnostic criteria for substance use disorder depending on the number of symptoms present for substances such as alcohol, cannabis, opioids, and other substances).

<sup>86</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 76, at 9–11 (2019).

<sup>87</sup> Compare SB 43, *supra* note 21 (stating that SB 43 will amend various portions of CAL. WELF. & INST. CODE (WIC) §§ 5008 and 5350 among other sections, and will add WIC § 5122), with The Lanterman-Petris-Short Act of 1967 (or California Mental Health Act of 1967) as codified in CAL. WELF. & INST. CODE §§ 5008, 5350 (West 2023).

<sup>88</sup> CAL. WELF. & INST. CODE § 5150 (West 2023) (connecting the finding that someone is gravely disabled as defined in WIC § 5008 (a patient is unable to provide for their own food, clothing, or shelter due to a mental health disorder) to the basis for doctors and courts to take a person into custody for a 72-hour involuntary, inpatient hold and that eventually could lead to a conservatorship).

<sup>89</sup> SB 43, *supra* note 21.

<sup>90</sup> *Id.*

<sup>91</sup> SB 43, 2023 Leg., 2023–2024 Sess. (Cal. 2023) (as amended on Apr. 27, 2023, but not enacted) (including in the definition of gravely disabled under CAL. WELF. & INST. CODE § 5008(h)(1)(C)(iii) the inability of a patient to seek out adequate care because they are unable to understand their disorder or because they lack insight into their need for treatment).

<sup>92</sup> See SB 43, *supra* note 21 (leaving out reference to anosognosia or its symptoms regarding the person’s medical or mental health impairment in CAL. WELF. & INST. CODE § 5008(h)(1)(C)(iii) and only leaving in the person’s inability to understand the conservatorship proceedings).

<sup>93</sup> SB 43, *supra* note 21; see also SENATE RULES COMMITTEE, *supra* note 22, at 5.

<sup>94</sup> See Press Release, Susan Talamantes Eggman, Senator Eggman, Big City Mayors, NAMI California, and Psychiatric Associations Announce Legislation to Improve Behavioral Health Care System (Mar. 1, 2023) (on file with the *University of the Pacific Law Review*) (quoting mayors throughout California that view conservatorship reform as the solution to the problems of homelessness and drug use on the streets of their cities).

conservatorship.<sup>95</sup> Even proponents of expanding the definition of “gravely disabled” agree that safeguards are needed in the context of LPS reform.<sup>96</sup> Section A discusses how adding “severe substance use disorders” to the definition of “gravely disabled” and expanding a hearsay exception—applicable in conservatorship proceedings—would violate due process.<sup>97</sup> Section B explores how adding the diagnosis of anosognosia to the definition of “gravely disabled” will fill gaps in LPS without violating due process.<sup>98</sup> Section C proposes amendments to SB 43 that would provide adequate treatment resources and housing for those who are gravely disabled and often languish while they await the treatment they need.<sup>99</sup>

*A. SB 43's Provisions Violate the Due Process Rights of People With Substance Use Disorders*

SB 43 violates the due process rights of potential conservatees with substance use disorders because it precludes fair notice, obviates the right to refuse consent, and precludes the right to challenge evidence.<sup>100</sup> Section 1 analyzes ways in which the diagnosis of “severe substance use disorder” is too broad to provide fair notice to a substance user.<sup>101</sup> Section 2 explores how adding severe substance use disorder to WIC § 5008's definition of “gravely disabled” violates the due process right to privacy.<sup>102</sup> Section 3 examines how a hearsay exception that covers substance abuse treatment records will also violate due process by precluding a potential conservatee's right to confront witnesses.<sup>103</sup>

*1. SB 43 Violates Due Process Because Its Definition of “Gravely Disabled” Is Too Broad*

First, SB 43 fails to provide fair notice to potential conservatees because the inclusion of “severe substance use disorder” in the definition of “gravely disabled” is overly broad.<sup>104</sup> Substance use disorder includes a panoply of more and less severe disorders depending on the number of symptoms present.<sup>105</sup> At

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<sup>95</sup> *Addington v. Texas*, 441 U.S. at 425 (recognizing the need for due process protections because civil commitments involve a significant deprivation of liberty); *see also* *People v. Barrett*, 54 Cal. 4th 1081, 1098 (2012) (stating that civil commitment proceedings require due process safeguards).

<sup>96</sup> Chabria, *supra* note 10 (warning of the potential dangers of reform legislation like the CARE Act that could curtail civil liberties if not carefully monitored).

<sup>97</sup> *Infra* Section IV.A.

<sup>98</sup> *Infra* Section IV.B.

<sup>99</sup> *Infra* Section IV.C.

<sup>100</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 14, 16, 21 (explaining how SB 43 may violate due process rights to fair notice, consent to treatment, and challenging hearsay evidence in court).

<sup>101</sup> *Infra* Subsection IV.A.1.

<sup>102</sup> *Infra* Subsection IV.A.2.

<sup>103</sup> *Infra* Subsection IV.A.3.

<sup>104</sup> *See* SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (discussing the ways in which vague or overly broad laws may not give notice and could lead to involuntary commitments of people that are not gravely disabled under the current definition in CAL. WELF. & INST. CODE § 5008 (West 2023)).

<sup>105</sup> AM. PSYCHIATRIC ASS'N, *supra* note 85, at 543–53, 575–76, 587–88, 601–02, 608–10 (describing the diagnostic criteria for substance use disorder depending on the number of symptoms present for substances such as alcohol, cannabis, opioids, and other substances).

minimum, severe substance use disorder requires at least six symptoms, but can involve up to eleven different symptoms for a person to qualify for the diagnosis.<sup>106</sup> However, someone with six symptoms could present with an impairment that differs from someone with eleven symptoms; yet both people would fit the criteria for “severe substance use disorder”.<sup>107</sup>

The type of substance can also lead to significant differences in outcome for people with severe substance use disorder.<sup>108</sup> While the U.S. reported no cannabis overdose deaths in 2018, it reported over 31,000 deaths due to fentanyl overdose.<sup>109</sup> The development and course of severe substance use disorder can also manifest in very different ways, leading to varying levels of impairment.<sup>110</sup> Nevertheless, the general criterion of “severe substance use disorder” could potentially qualify users of different substances and levels of impairment for the same conservatorship process.<sup>111</sup>

Thus, it is highly likely that SB 43’s overly broad provisions will lead to unnecessary conservatorships of people with substance use disorders.<sup>112</sup> Adding severe substance use disorder may also result in a disproportionate number of conservatorships for people of color, due to differing severe substance use disorder rates across ethnic groups.<sup>113</sup> Accordingly, SB 43’s definition of “gravely disabled” lacks the precision courts require to provide fair notice, since substance users cannot anticipate how severe a disorder must be to qualify.<sup>114</sup>

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<sup>106</sup> *Id.* (specifying the symptoms for each substance and the diagnostic requirement for “2–3 symptoms” for “mild” substance use disorder, “4–5 symptoms” for “moderate” substance use disorder, and “6 or more symptoms”—up to eleven symptoms depending on the disorder—for “severe” substance use disorder).

<sup>107</sup> *Id.* (highlighting that one person with severe substance use disorder—like cannabis—could be merely preoccupied with substance use and have it affect work performance and social life; another person with severe substance use disorder—like opioids—could experience more severe symptoms, like physical health problems, death, dangerous environments, and severe withdrawal symptoms).

<sup>108</sup> Allana Akhtar, *A Mom was Charged with Murder When Her 4-year-old Died After Eating THC Gummies. Doctors Still Aren't Sure If It's Possible for a Child to Die from a Marijuana Overdose* (Nov. 22, 2022), <https://www.insider.com/can-you-die-from-marijuana-the-overdose-2022-11> (on file with the *University of the Pacific Law Review*) (comparing the differences in death rates among cannabis, alcohol, and opioids).

<sup>109</sup> DEPT. OF JUST./DRUG ENF’T ADMIN., DRUG FACT SHEET: CANNABIS (2020); DEPT. OF JUST./DRUG ENF’T ADMIN., DRUG FACT SHEET: FENTANYL (2020).

<sup>110</sup> AM. PSYCHIATRIC ASS’N, *supra* note 85, at 543–53, 575–76, 587–88, 601–02, 608–10 (describing the differences in symptoms associated with severe opioid use disorder (such as hospitalizations, disease, and death) with the behaviors associated with severe cannabis use disorder (such as use in isolation and interference with daily functioning)).

<sup>111</sup> Letter from Cnty. Behav. Health Dir.’s Ass’n, *supra* note 21, at 2 (cautioning against the inclusion of substance use disorders in SB 43’s definition of gravely disabled due to the likelihood of conserving large numbers of people with substance use disorders that do not need to be conserved).

<sup>112</sup> Letter from Cnty. Behav. Health Dir.’s Ass’n, *supra* note 21, at 2 (expressing concern that many people with substance use disorders would be needlessly subject to conservatorships).

<sup>113</sup> DEP’T OF HEALTH CARE SERV.’S, CALIFORNIA RESPONSE TO THE OVERDOSE CRISIS (2022). *See also* Letter from Cnty. Behav. Health Dir.’s Ass’n to Senator Susan Eggman 2 (Mar. 13, 2023) (on file with the *University of the Pacific Law Review*).

<sup>114</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (Apr. 22, 2023) (citing concerns that the overly broad terms of SB 43 may lead to arbitrary decision making, fail to provide adequate notice, and increase the likelihood of conservatorship). *See also Conservatorship of Chambers*, 71 Cal. App. 3d at 284.



2. SB 43's Definition of "Gravely Disabled" Violates a Patient's Right to Privacy

Second, SB 43's definition of "gravely disabled" violates a potential conservatee's right to privacy by potentially stripping them of their right to consent to substance abuse treatment.<sup>115</sup> Even if a patient is not able to provide their own food, clothing, or shelter, the patient may still be capable of meaningfully consenting to treatment.<sup>116</sup> The California court of appeal has maintained a gravely disabled patient's right to consent to certain treatments during involuntary treatment, including medication.<sup>117</sup> Thus, when conserving someone with severe substance use disorder, courts may face a decision about whether to order common medications used in substance abuse treatment.<sup>118</sup> Yet when a conservatee with severe substance use disorder is still able to refuse consent, courts will likely have to guess about the legality of ordering medication or other treatments.<sup>119</sup>

Conversely, forcing a patient to receive certain treatments potentially violates their right to bodily autonomy, contradicting the purposes of LPS, which requires involuntary treatment not to cause harm.<sup>120</sup> Instead, courts must first find that a potential conservatee has symptoms akin to anosognosia before taking away the right to consent.<sup>121</sup> If a court determines someone with substance use disorder

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<sup>115</sup> Conservatorship of Wendland, 26 Cal.4th at 533. *See also* Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21; Riese, 209 Cal. App. 3d at 1319.

<sup>116</sup> *See* Riese, 209 Cal. App. 3d at 1322 (recognizing that an involuntary patient or a conservatee retains the right to refuse consent to some forms of medical treatment (i.e., medication)—which includes the right to refuse to release records—unless the court orders that the patient's rights be limited based on an evidentiary hearing and finding of incapacity). *See also* Saks, *supra* note 77, at 181 (discussing the potential bases for a legal determination of incompetency to give consent beyond mere denial of a health or mental health disorder, including the patient's denial of obvious physical symptoms (i.e., impulsively pacing), the patient's denial that something is wrong, and/or denial that the patient's doctor believes something is wrong even if the patient disagrees).

<sup>117</sup> Riese, 209 Cal. App. 3d at 1322 (finding that "LPS recognizes that a patient may be involuntarily committed but still remain capable of giving informed consent" based on three factors – whether the patient (1) is aware of their situation (including their mental health condition), (2) is able to understand the risks and benefits of treatment, and (3) is able to utilize rational thought processes to evaluate their treatment plan and participate in services).

<sup>118</sup> *See* NAT'L LIBR. OF MED., NAT'L CTR. FOR BIOTECHNOLOGY INFO., OPIOID USE DISORDER (July 21, 2023) (giving examples of common medications used to treat opioid disorders that would likely have to be authorized by a court if a substance use disorder patient refuses consent).

<sup>119</sup> SB 43, *supra* note 21 (containing no parameters or guidance as to what courts must find first before ordering a conservatee to receive medication in the context of substance abuse treatment).

<sup>120</sup> CAL. WELF. & INST. CODE § 5325.1(c) (West 2023) (codifying that a person receiving mental health treatment has a right "to be free from harm"); *see also* Conservatorship of Wendland, 26 Cal.4th at 530.

<sup>121</sup> *See* CAL. PROB. CODE § 811 (West 2023) (including symptoms such as the inability to plan, organize, and carry out actions in one's own rational self-interest that significantly impair a person's ability understand and appreciate the consequences of their actions, a core problem in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS (2021), <https://www.nami.org/About-Mental-Illness/Common-with-Mental-Illness/Anosognosia> (on file with the *University of the Pacific Law Review*) (listing two potential symptoms of anosognosia—unawareness of one's own mental illness and inability to perceive one's mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to given consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process). *See also* Riese, 209 Cal. App. 3d at 1322 (finding that LPS recognizes that a patient may be involuntarily committed based on three factors – whether the patient: (1) is aware of their situation (including their mental health condition); (2) is able to understand the risks and benefits of treatment; and (3) is able to utilize rational thought processes to evaluate their treatment plan and participate in services).

is “gravely disabled,” SB 43 has the potential to thrust them into involuntary substance abuse treatment without their consent.<sup>122</sup> Moreover, when a doctor recommends conservatorship for a substance user, courts will likely be unsure of what treatment to order when a conservatee does not have symptoms of anosognosia.<sup>123</sup> Thus, if a court—based on SB 43’s definition of “gravely disabled”—orders involuntary substance abuse treatment when a patient still has the capacity to consent, it will violate the conservatee’s right to privacy.<sup>124</sup>

### *3. SB 43’s Hearsay Exception Violates a Potential Conservatee’s Right to Confront Witnesses*

Third, SB 43 creates a hearsay exception that violates due process rights because it precludes a person suffering from severe substance use disorder from cross-examining witnesses and challenging evidence.<sup>125</sup> Courts have already held that when treatment records used in support of a conservatorship are unverified, they are irrelevant.<sup>126</sup> Nevertheless, SB 43’s hearsay exception would allow an evaluating psychiatrist to access and rely on a patient’s unverified external substance abuse treatment records when recommending conservatorship.<sup>127</sup> Federal law prohibits the disclosure of substance abuse treatment records to such an evaluating psychiatrist if the records do not arise from the same setting in which the psychologist works.<sup>128</sup> Thus, potential conservatees should not be conserved without the chance to challenge the hearsay reports of past substance abuse treatment providers that are used as a basis to conserve them.<sup>129</sup> As a result, SB 43’s hearsay exception could potentially return conservatorship hearings to pre-

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<sup>122</sup> Letter from Cnty. Behav. Health Dir.’s Ass’n, *supra* note 21, at 1 (cautioning against the inclusion of substance use disorders in SB 43’s definition of gravely disabled because many people with substance use disorders would be needlessly subject to conservatorships). *See also* Riese, 209 Cal. App. 3d at 1323.

<sup>123</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (Apr. 22, 2023) (citing concerns that the overly broad terms of SB 43 may lead to arbitrary decision making, fail to provide adequate notice, and increase the likelihood of conservatorship). *See also* Riese, 209 Cal. App. 3d at 1323.

<sup>124</sup> *Conservatorship of Wendland*, 26 Cal.4th at 532-33. *See also* *Conservatorship of Roulet*, 23 Cal. 3d at 225 (relying on prior case that states, “[b]ecause involuntary commitment is incarceration against one’s will regardless of whether it is called ‘civil’ or ‘criminal,’ the choice of standard of proof implicates due process considerations which must be resolved by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual”).

<sup>125</sup> *Conservatorship of K.W.*, 13 Cal. App. 5th at 1282.

<sup>126</sup> *Id.* at 1285.

<sup>127</sup> SB 43, 2023, *supra* note 21 (allowing an expert to rely upon a statement that is based on the statements and observations of another provider as long as there is “sufficient indicia of reliability”, which does not require that the records be verified).

<sup>128</sup> Cal. Evid. Code § 1271 (West 1967) (describing the business records exception to hearsay that California courts use to determine if a document created during the regular course of business by a provider working in a separate setting is admissible when a witness who did not author the document relies on it as part of their testimony); SUBSTANCE ABUSE & MENTAL HEALTH SERV.’S ADMIN., OFF. OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH., DISCLOSURE OF SUBSTANCE USE DISORDER PATIENT RECORDS: DOES PART 2 APPLY TO ME? (last visited on July 16, 2023) (stating that federal law prohibits the disclosure of substance abuse treatment records to anyone outside of the substance abuse treatment setting without a patient’s consent, even if the disclosure is to a medical doctor that works in a mixed-use facility that co-houses separate medical and substance abuse treatment services).

<sup>129</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 22 (Apr. 22, 2023) (stating that without a way to test the evidence supporting a physician’s finding of grave disability, conservatorships would begin to look like the involuntary commitments of the 1950’s and 1960’s).

LPS practices and violate the due process rights of a person suffering from severe substance use disorder.<sup>130</sup>

By including severe substance use disorder in the definition of “gravely disabled” and a hearsay exception, SB 43 attempts to ensure treatment for people suffering from severe psychiatric disorders.<sup>131</sup> However, SB 43’s provisions violate due process by failing to provide for fair notice, refusal of treatment, and evidentiary challenges.<sup>132</sup> As a result, SB 43 should be amended to not include a hearsay exception or severe substance use disorder in the definition of “gravely disabled.”<sup>133</sup> Instead, SB 43 should focus on the symptoms of anosognosia that are common to conservatorships in the first place.<sup>134</sup>

### *B. SB 43 Should Include the Symptoms of Anosognosia in the Definition of “Gravely Disabled”*

While SB 43 should not be passed in its current form, it should address the gaps in LPS that lead to inadequate care for gravely disabled people.<sup>135</sup> Adding the symptoms of anosognosia to the definition of “gravely disabled” would support this goal.<sup>136</sup> Within California, sample data indicate that potential symptoms of anosognosia were present in all nine of the cases in which a gravely disabled person was placed on an involuntary hold.<sup>137</sup> Symptoms of anosognosia are already used in criminal proceedings and at the conservatorship phase of the involuntary treatment process.<sup>138</sup> Moreover, at least seven states already include symptoms of

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<sup>130</sup> *Id.* (stating that without a way to test the evidence supporting a physician’s finding of grave disability, conservatorships would begin to look like the involuntary commitments of the 1950’s and 1960’s); *see also* *Addington v. Texas*, 441 U.S. at 425 (recognizing the need for due process protections because civil commitments involve a significant deprivation of liberty).

<sup>131</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 9 (quoting Senator Eggman as stating that the intent of SB 43 is to reach people who are dying on the streets or are at risk of incarceration due to psychotic disorders).

<sup>132</sup> *Id.* at 14, 16, 21.

<sup>133</sup> Letter from Disability Rts. Cal. et al., *supra* note 81, at 10, 13.

<sup>134</sup> Henneberger, *supra* note 26 (describing the importance of including anosognosia in an expanded definition of “gravely disabled” so that people that are unaware of their mental or medical condition can be conserved and receive treatment that they need); *see* CAL. PROB. CODE § 811 (West 2023) (including symptoms such as the inability to plan, organize, and carry out actions in one’s own rational self-interest that significantly impair a person’s ability understand and appreciate the consequences of their actions in the statutory criteria for conserving someone—which are core problems in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one’s own mental illness and inability to perceive one’s mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to give consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process).

<sup>135</sup> Letter from Cnty. Behav. Health Dir.’s Ass’n, *supra* note 21, at 1–5.

<sup>136</sup> Henneberger, *supra* note 26 (describing the importance of including anosognosia in an expanded definition of “gravely disabled”).

<sup>137</sup> CAL. STATE AUDITOR, *supra* note 13, at 19–20 (finding that in a sample of sixty patients across three counties, the inability to plan for one’s needs was present in all nine of the gravely disabled patients).

<sup>138</sup> CAL. WELF. & INST. CODE § 5008(h)(1)(B)(iii) (West 2018) (defining “gravely disabled” for criminal competency proceedings as a person who “is unable to understand the nature and purpose of the proceedings taken against them and to assist counsel in the conduct of their defense in a rational manner” because of a mental health disorder). *See also* CAL. PROB. CODE § 811 (West 2023) (including symptoms such as the inability to plan, organize, and carry out actions in one’s own rational self-interest that significantly impair a person’s ability understand and appreciate the consequences of their actions in the statutory criteria for conserving someone—

anosognosia in their definitions of “gravely disabled”.<sup>139</sup> Thus, there is broad support to include the symptoms of anosognosia in the definition of “gravely disabled”.<sup>140</sup>

Consequently, by including anosognosia symptoms in its definition of “gravely disabled”, SB 43 would more closely align with other conservatorship laws that the courts must consider when conserving someone.<sup>141</sup> In fact, the court of appeal has held that symptoms of anosognosia are foundational to taking away a potential conservatee’s right to consent when ordering a conservatorship.<sup>142</sup> Adding symptoms of anosognosia would also make the bill more precise and meet the due process requirement of fair notice.<sup>143</sup> Thus, adding anosognosia to SB 43’s definition of “gravely disabled” would be a key step in caring for gravely disabled people who are unaware of their own needs.<sup>144</sup>

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core problems in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one’s own mental illness and inability to perceive one’s mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to give consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process).

<sup>139</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 9–11 (citing statutes from states like Alaska and Alabama that include symptoms such as “impairment of judgment” and “lack of awareness” which are also symptoms of anosognosia). *See also Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one’s own mental illness and inability to perceive one’s mental condition accurately).

<sup>140</sup> *See* SB 232 (2023 Leg., 2023-2024 Sess. (Cal. 2023) (as introduced on Jan. 24, 2023, but not enacted) (discussing California State Senator Roger Niello’s attempt to redefine “gravely disabled” to include the condition of anosognosia in his failed bill).

<sup>141</sup> *See* CAL. PROB. CODE § 811 (West 2023) (including symptoms of a potential conservatee such as the inability to plan, organize, and carry out actions in one’s own rational self-interest that significantly impair a person’s ability understand and appreciate the consequences of their actions in the statutory criteria for conserving someone—which are core problems in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one’s own mental illness and inability to perceive one’s mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to give consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process).

<sup>142</sup> *Riese*, 209 Cal. App. 3d at 1322–23 (stating that LPS provides that there must be an evidentiary hearing directed to the question whether the patient is able to understand and knowingly and intelligently act upon information required to be given regarding the treatment—abilities that are absent in anosognosia).

<sup>143</sup> *Conservatorship of Chambers*, 71 Cal. App. 3d at 284 (holding that fair notice to a potential conservatee can only be fairly given if the definition of the term “gravely disabled” is sufficiently precise); *see* CAL. PROB. CODE § 811 (West 2023) (including symptoms such as the inability to plan, organize, and carry out actions in one’s own rational self-interest that significantly impair a person’s ability understand and appreciate the consequences of their actions in its criteria for conserving someone—which are core problems in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one’s own mental illness and inability to perceive one’s mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to give consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process).

<sup>144</sup> *Henneberger*, *supra* note 26.

*C. Housing and Sufficient Treatment Resources Are the Keys to Moving LPS Reform Forward*

SB 43 should be amended because the bill, in its current form, will likely exacerbate existing treatment bottlenecks and cause further delays in treatment for people that desperately need it.<sup>145</sup> SB 43 should focus on ensuring adequate funding to bolster existing treatment resources—including housing, long-term, and short-term treatment bed—because gravely disabled people languish without them.<sup>146</sup> Inadequate funding and a lack of treatment resources are especially common in the case of substance abuse treatment.<sup>147</sup> Without such funding and resources, gravely disabled people will remain at risk of the cyclical problems that devastated Mark Rippee, Thomas Kellogg, and others.<sup>148</sup>

A key starting point to allocating funding and bolstering resources appropriately is for the State to have the data it needs to determine treatment outcome effectiveness.<sup>149</sup> Currently, the Legislature lacks the data it needs to most effectively target the resources it has to the people and services that need it.<sup>150</sup> Poor data causes further delays in admittance and transitions to appropriate levels of care when acute and sub-acute patients need it.<sup>151</sup> Senator Eggman is aware of this problem and is trying to address the need for better data to help improve service coordination through separate legislation.<sup>152</sup>

Having better data would also clarify the effectiveness of programs like Assisted Outpatient Treatment (AOT), which has shown some initial success.<sup>153</sup> Importantly, AOT provides due process protections and national organizations recognize AOT in its various forms as an effective approach to involuntary outpatient treatment.<sup>154</sup> In 2002, California enacted Laura's Law, which created a

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<sup>145</sup> Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21, at 3.

<sup>146</sup> McBain, et al., *supra* note 27, at 25, 27.

<sup>147</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 19 (discussing the realities of federal and state funding, including Medi-Cal, which prevent programs like involuntary substance use disorder treatment from being paid for).

<sup>148</sup> Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21, at 3–4 (recommending that the Legislature increase the funding allotted to facilities, workforce, and services that are currently underfunded).

<sup>149</sup> CAL. STATE AUDITOR, *supra* note 13, at 3 (finding that there are no outcome measures being used to determine if the money being invested actually ties to results).

<sup>150</sup> EVALUATION REPORT: ADULT PSYCHIATRIC BED CAPACITY, NEED, AND SHORTAGE ESTIMATES IN CALIFORNIA – 2021 at 25 (RAND CORP.) (2021) (discussing the problems with accurately estimating the amount of resources needed due to poor data quality); CAL. STATE AUDITOR, *supra* note 13, at 4 (recommending a database that would assist the Legislature in understanding where best to allocate funds).

<sup>151</sup> Chronicle Editorial Board, *supra* note 4.

<sup>152</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 10 (quoting Senator Eggman's concerns about treatment bed availability in her analysis of SB 363, 2023 Leg., 2023–2024 Sess. (Cal. 2023) (as amended on May 18, 2023, but not enacted), which would create a new database of the availability of treatment resources).

<sup>153</sup> TREATMENT ADVOCACY CENTER, MENTAL HEALTH COMMITMENT LAWS: A SURVEY OF THE STATES 10, <https://www.treatmentadvocacycenter.org/browse-by-state/california> (last visited on Aug. 5, 2023) (on file with the *University of the Pacific Law Review*).

<sup>154</sup> See SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 76, at 15, 19–20 (indicating that AOT includes due process protections and is approved by the American Psychiatric Association and the Substance Abuse and Mental Health Services Administration).

system of AOT for those with severe mental health disorders.<sup>155</sup> In AOT, patients are granted greater freedom in the form of outpatient treatment—in lieu of inpatient treatment—in return for compliance with their treatment regime.<sup>156</sup> When they are non-compliant, patients may be mandated to involuntary treatment to ensure their safety and that of others.<sup>157</sup>

AOT has demonstrated good results with mental health disorders and a slight degree of effectiveness in treating substance use disorders.<sup>158</sup> Many states and many California counties have adopted some form of AOT; however, legislation and implementation have been sluggish at best.<sup>159</sup> Additionally, one problem with California's version of AOT is that it excludes people that have been in conservatorships.<sup>160</sup> Thus, the California Legislature should expand AOT to include conservatees and collect more data on such programs to ensure that potential conservatees may also benefit.<sup>161</sup>

In addition to increasing the availability of treatment data and treatment resources, the promise of housing availability would likely increase participation in services among those who are homeless.<sup>162</sup> In Finland, homelessness has decreased dramatically because it provides housing as a core component of recovery.<sup>163</sup> Housing is crucial for people that are homeless because it provides stability and the support they need to consistently attend services and benefit from them.<sup>164</sup> With adequate treatment resources, funding, and housing in place, California could make important strides in moving its involuntary commitment laws forward.<sup>165</sup>

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<sup>155</sup> LAURA'S LAW: ASSISTED OUTPATIENT TREATMENT DEMONSTRATION PROJECT ACT OF 2002, at 5 (2021) (describing Laura's Law (AB 1421 passed in 2002) as codified at CAL. WELF. & INST. CODE §§ 5345–5349.5 (West 2023) in response to the murders of three young people at the hand of a man suffering from severe mental health disorders who was non-compliant with his outpatient treatment regime).

<sup>156</sup> TREATMENT ADVOCACY CENTER, *supra* note 154, at 10.

<sup>157</sup> LAURA'S LAW: ASSISTED OUTPATIENT TREATMENT DEMONSTRATION PROJECT ACT OF 2002, at 16 (2021).

<sup>158</sup> *Id.* at 14, 16.

<sup>159</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 76, at 22 (citing approximately thirty-two states that have AOT laws in place, though implementation is only active in approximately fifteen); CAL. STATE AUDITOR, *supra* note 13, at 2–3 (indicating that fewer than a third of California counties have adopted AOT, though this number has increased since SB 1338 was passed).

<sup>160</sup> CAL. STATE AUDITOR, *supra* note 76, at 3 (highlighting the shortcomings of California's efforts to integrate Assisted Outpatient Treatment in part due to barriers that exclude people who have been in conservatorships from participating and leaving them vulnerable to homelessness).

<sup>161</sup> *Id.* at 3–4 (indicating that barriers to AOT include making people ineligible who have been in a conservatorship and a lack of data to inform how best to fund services for people in need of AOT and other services).

<sup>162</sup> In-person Interview with “Michael”, a member of an outdoor encampment in Sacramento, Cal. (May 10, 2022) (notes on file with the *University of the Pacific Law Review*) (discussing Michael's willingness to participate in court-ordered programs like the CARE Act if they provide housing in addition to needed services since his disability subsidies do not pay him enough to afford rent for an apartment to meet his needs in Sacramento).

<sup>163</sup> Kontrast.at / Kathrin Glösel, *Finland Ends Homelessness and Provides Shelter for All in Need* (Nov. 10, 2020), [https://scoop.me/housing-first-finland-homelessness/?gad=1&gclid=Cj0KCQjwzdOIBhCNARIsAPMwjbzNdZKd6H-RCekxcPKzsbMX2y-NHvuh067AMmj6-jq1Fp\\_8C5OROr8aAo54EALw\\_wcB](https://scoop.me/housing-first-finland-homelessness/?gad=1&gclid=Cj0KCQjwzdOIBhCNARIsAPMwjbzNdZKd6H-RCekxcPKzsbMX2y-NHvuh067AMmj6-jq1Fp_8C5OROr8aAo54EALw_wcB) (on file with the *University of the Pacific Law Review*)

(discussing how effective providing housing is as the first of a variety of services to help people exit homelessness).

<sup>164</sup> *Id.*; see also SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 76, at 28.

<sup>165</sup> See CAL. STATE AUDITOR, *supra* note 13, at 2–3 (stating that providing adequate treatment resources, funding, and housing will make LPS more effective in meeting the needs of Californians with serious mental illness).

## V. CONCLUSION

In the end, the Lanterman-Petris-Short Act of 1967 was never implemented as intended.<sup>166</sup> There is little doubt that LPS reform is needed; however, severe substance use disorder and the hearsay exception must be removed from SB 43 to ensure that reform works.<sup>167</sup> The California Legislature must approach LPS reform in a manner that respects due process rights.<sup>168</sup>

It is also crucial that SB 43 addresses the heart of grave disability—anosognosia—as its symptoms are the basis for many conservatorships in the first place.<sup>169</sup> Moreover, a lack of treatment resources have left providers with little recourse to help gravely disabled patients, other than sending them back out onto the streets.<sup>170</sup> California can do better.<sup>171</sup> SB 43 should be amended with provisions to help gravely disabled people get the services they need, while still giving full effect to their rights.<sup>172</sup> We owe it to them and to every Californian who loves or knows someone that struggles with grave disability.<sup>173</sup>

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<sup>166</sup> *S.F. Will Never Solve the Crisis on its Streets Alone. What Should California Do About It?*, *supra* note 4 (describing the system problems at the time LPS was enacted being similar to the problems facing people with mental health disorders now); *see also* Addington v. Texas, 441 U.S. 418, 425 (1979) (recognizing the need for due process protections because civil commitments involve a significant deprivation of liberty).

<sup>167</sup> *See* SENATE JUDICIARY COMMITTEE, *supra* note 2, at 16 (suggesting the possibility that SB 43 will run afoul of the due process clause because the breadth of SB 43's definition of gravely disabled will lead to the detention of competent persons); Addington v. Texas, 441 U.S. at 425 (recognizing the need for due process protections because civil commitments involve a significant deprivation of liberty); Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21, at 4–5 (describing the potential severe problems that SB 43 will cause due to the lack of services needed to accommodate the additional conservatees that SB 43 will generate).

<sup>168</sup> SENATE JUDICIARY COMMITTEE, *supra* note 2, at 22.

<sup>169</sup> *See* CAL. PROB. CODE § 811 (West 2023) (including symptoms such as the inability to plan, organize, and carry out actions in one's own rational self-interest that significantly impair a person's ability understand and appreciate the consequences of their actions in its criteria for conserving someone—and which are core problems in anosognosia); *Anosognosia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 67 (listing two potential symptoms of anosognosia—unawareness of one's own mental illness and inability to perceive one's mental condition accurately); CAL. PROB. CODE § 1881 (West 2023) (requiring that a conservatee shall be deemed unable to give consent to medical treatment if they are unable to respond knowingly and intelligently to queries about medical treatment or are unable to participate in a treatment decision by means of a rational thought process); Henneberger, *supra* note 26.

<sup>170</sup> Henneberger, *supra* note 26.

<sup>171</sup> TREATMENT ADVOCACY CENTER, *supra* note 153, at 27–28 (describing the approaches of at least twenty-nine other states that more effectively implement their involuntary commitment laws).

<sup>172</sup> Letter from Cnty. Behav. Health Dir.'s Ass'n, *supra* note 21, at 4–5 (describing the severe problems that SB 43 will cause in its current form by expanding conservatorships due to the system's current lack of capacity to care for the large numbers of conservatees that SB 43 will generate). *See also* SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 76, at 6 (discussing criticisms of involuntary commitment laws that can disserve potential conservatees when individual rights are over-protected and when they are under-protected).

<sup>173</sup> Henneberger, *supra* note 5.