suicide,[7] and rejection from parents and close family.[8] Medical and mental health professionals have adopted "gender-affirming care" in response to such concerns.[9] There is limited research regarding the efficacy of gender-affirming care and an emerging concern regarding the long-term risks associated with its treatments. First, this paper will outline the historical background of gender-affirming care, then the paper will shift to a comparative discussion on the growing divergence between the United Kingdom and parts of the United States. Lastly, this paper will conclude with a discussion of the legal implications of gender-affirming care for minors including an analysis of whether minors can adequately consent to such treatments.

II. Historical Background

A. What is Gender Dysphoria

This relatively new phenomenon of individuals identifying as transgender is commonly attributed to society becoming increasingly open to variations in sexuality and gender identity over the last century. "Gender dysphoria" is defined as "a persistent aversion toward some or all of those physical characteristics or social roles that connote one's own biological sex."[10] Among the characteristics considered in a diagnosis of gender dysphoria include: "a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experience/expressed gender," "a strong desire for the primary and/or secondary sex characteristics of the other gender," "a strong desire to be of the other gender," and a strong conviction that one has the typical feelings and reactions of the other gender."[11] The condition is commonly associated with significant experiences of impairment in "social, school and other important areas of functioning."[12] Specifically, "rapid onset gender dysphoria" is a phenomenon in youth with gender dysphoria which typically emerges around puberty.[13]

B. Current Standard of Care

Historically, medical professional organizations have endorsed gender-affirmative care for minors experiencing gender incongruence. The World Health Organization suggests that any "single or combination of a number of social, psychological, behavioral, or medical interventions designed

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[7] Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37 Suicide & Life-Threatening Behavior 527, 528 (2007).
[8] Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. Cal. Interdisc. L.J. 179, 186 (2016).
[9] Gender-affirming care is "a supportive form of health care [that] consists of an array of services [including] medical, surgical, mental health and non-medical services for transgender and non-binary people." US Department of Health and Human Services: Office of Population Affairs, *Gender-affirming care and young people*, https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf, (last visited Sept. 29, 2023).
[10] Miriam Grossman, YOU'RE TEACHING MY CHILD WHAT? 18 (Regnery Publishing, 2009).
[11] Zowie Davy, *What is Gender Dysphoria? A Critical Narrative Review*, 3.1 Transgender Health 159, 160 (2018).
[12] Garima Garg, Ghada Elshimy, and Raman Marwaha, GENDER DYSPHORIA 10 (StatPearls Publishing, 2023).
[13] Greta R. Bauer, Margaret L. Lawson, and Daniel L Metzger, *Do Clinical Data from Transgender Adolescents Support the Phenomenon of "rapid Onset Gender Dysphoria"?,* 243 Journal of Pediatrics 224, 224 (2022).

to support and affirm an individual's gender identity" are appropriate methods.[14] This approach to healthcare aims to alleviate "distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth."[15] The World Professional Association for Transgender Health (WPATH) advises that all treatment options should be offered but only recommends surgery be performed after age 18, and after the individual has lived in their desired gender role for at least two years.[16] The Endocrine Society recommends treating gender-dysphoric adolescents with hormone suppression treatment once they have entered puberty and their gender incongruence persists. [17] The guidelines suggest that most adolescents have the capacity by 16 years old to give informed consent to "partially irreversible treatment."[18] Regarding surgical treatment, the Endocrine Society warns that treating physicians must confirm the treatment criteria used by the referring practitioner and collaborate on decisions regarding gender-affirming surgery.[19] Advocates of gender-affirmative care criticize any delay in transition, arguing that going through puberty only causes more distress between an adolescent's self-identified gender and their biological sex.[20] They rely on studies that suggest transgender people who lack access to gender-affirming care are particularly predisposed to negative outcomes such as depression, anxiety, and suicide.[21] One survey conducted by the Trevor Project revealed that 52% of transgender and nonbinary youth contemplate suicide.[22] Fears that adolescents and children could potentially end their lives without affirmative treatment have shaped much of the guidance in the medical community thus far.

C. Emerging Criticism

Despite the prevalence of minors identifying as transgender and non-binary, there remain many unresolved questions among pediatric physicians and scientists on the long-term outcomes of gender-affirming care. One concern is the lack of evidence-based treatments to support consequential healthcare protocols. Critics point out that in the Endocrine Society's evaluation of its own guidelines, it concluded the "natural history and effects of different cross-sex hormone therapies…are extremely sparse and based on the low quality of evidence."[23] The Endocrine

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[14] World Health Organization [WHO], Gender Incongruence and Transgender Health in the ICD, https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd.

[15] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People [7th Version]*, (2012), https://www.wpath.org/publications/soc.

[16] E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 International Journal of Transgender Health S3, S46 (2022).

[17] Wylie Hembree, Peggy T Cohen-Kettenis, Louis Gooren, Sabine E Hannema, Walter J Meyer, M Hassan Murad, Stephen M Rosenthal, Joshua D Safer, Vin Tangpricha, Guy G T'Sjoen, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, J Clin Endocrinol Metab. 3869, 3871 (2017).

[18] *Id.* at 3780.

[19] *Id.*

[20] Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24.2 Clinical Child Psychology and Psychiatry 223, 228 (2019).

[21] *See* Jack L. Turban, Dana King, Jeremi M. Carswell, and Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145(2) Pediatrics 1, 7 (2020).

[22] The Trevor Project, *The Trevor Project National Survey on LGBTQ Youth Mental Health 2021, https://www.TheTrevorProject.org/survey-2021/* (last visited September 28, 2023).

[23] Wylie C Hembree, Peggy T Cohen-Kettenis, Louis Gooren, Sabine E Hannema, Walter J Meyer, M Hassan Murad, Stephen M Rosenthal, Joshua D Safer, Vin Tangpricha, and Guy G T'Sjoen, *Endocrine Treatment of*

effect on sexual, cognitive, or broader developmental outcomes.[45] The report found that the clinic left young people "at considerable risk" for poor mental health despite aiming to alleviate anxiety associated with gender dysphoria.[46] Furthermore, the studies questioned whether a young person who expresses a desire to transition fully understands its implications.[47] In response to these growing concerns over the clinic's services and gaps in research, England's National Health Service (NHS) adopted new guidance for the treatment of gender dysphoria in minors.[48] The U.K.

pediatric patients."[56]

clinic claimed they only refer puberty blockers to minors if they determine that person is competent to give consent.[91] The High Court reasoned that a determination of whether a person under age sixteen is *Gillick*

Accordingly, the Court of Appeals set aside the High Court's decision, deferring treatment matters to clinicians and patients.[105]

C. US: An Emerging Circuit Split

Despite the uniform endorsement of gender-affirming care among American professional medical associations and the federal government, several states have sought to ban minors from receiving gender-affirming care. The bans have been working their way up through the courts, most recently landing at the Sixth Circuit which reversed a preliminary injunction that has stopped Kentucky and Tennessee's efforts to bar doctors from treating gender-dysphoric youth with puberty blockers and cross sex-hormones.[106] The cases before the court were *L.W. v. Skrmetti* and *Doe v. Thornbury.*[107] Acknowledging that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children," the Sixth Circuit reasoned this narrow right does not extend to "receive new medical or experimental drug treatment.[108] The Sixth Circuit concluded that states have an abiding interest in "preserving the welfare of children…and in protecting the integrity and ethics of the medical profession: sufficient to limit parental freedom.[109] Judicial deference to the legislatures the court writes, is "'especially appropriate where medical and scientific uncertainty exists."[110]

Eighth Circuit upheld the district court's preliminary injunction.[116]

the employers fired adult employees based on stereotypes, whereas the laws before the court "do not deny anyone general healthcare treatment based on any such stereotypes; they merely deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority." [128] The concern about "potentially irreversible medical procedures," the court writes "is not a form of stereotyping."[129]

The case for gender-affirming care is even more vulnerable under the Due Process Clause. The Eleventh Circuit concludes that the use of "these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition."[130] Supreme Court precedent strongly favors a parent's fundamental right to make decisions regarding the care and control of their children. Furthermore, the Eleventh Circuit recognizes that in all cases involving parental authority, there is a "common thread that states properly may limit the authority of parents