The Limitations and Alternatives to Expanding the Equal Pay Act Under *Bostock v. Clayton County, Ga.*

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Introduction

IN THE SUMMER OF 2020, the Supreme Court released an opinion that made it illegal, under Title VII of the Civil Rights Act, to discriminate against an employee based on their sexual orientation or transgender status.[1] The case, *Bostock v. Clayton County, Ga.* ("*Bostock*"),[2] is deemed a win for the LGBT[3] community.[4] Applying a textualist approach, the Court held that an employer who discriminates against an employee due to their sexual orientation or transgender status violates Title VII of the Civil Rights Act.[5] The extended protection of Title VII calls into question whether other federal anti-discrimination statutes will begin to expand protection to include those who identify as part of the LGBT community. In *Bostock*, the Court only addressed sexual orientation and transgender status within its opinion. This Comment focuses on these two statuses.

The Equal Pay Act is designed to protect employees and it seeks to rectify the gender wage gap.[6] The gender wage gap is a persistent

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1. Bostock v. Clayton County. Ga., 140 S. Ct. 1731, 1754 (2020).

2. *Bostock*, 140 S. Ct. 1731.

3. *General Definitions*, UCSF: LESBIAN, GAY, BISEXUAL, & TRANSGENDER RES. CTR., https://lgbt.ucsf.edu/glossary-terms [https://perma.cc/J3QW-DC2C] (LGBT is defined as an "[a]bbreviation for Lesbian, Gay, Bisexual, and Transgender. [It is a]n umbrella term used to refer to the community as a whole").

4. Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR (June 15, 2020, 5:52 PM), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/KU2E-XG6Z].

5. *Bostock*, 140 S. Ct. at 1754.

6. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d).)

problem within employment law.[7] As research begins to include a person's sexual orientation, new data has revealed a present wage gap, unaddressed by the Equal Pay Act, between heterosexual, homosexual, and transgender employees.[8] This Comment addresses whether the textualist reasoning in *Bostock* could apply to the Equal Pay Act to protect LGBT members from wage disparities.

The key difference between Title VII and the Equal Pay Act is that the Equal Pay Act requires proof that a person of one sex is being paid less than a person of the opposite sex. Part I of this Comment focuses on the Equal Pay Act and its legislative history. Part II looks at the data revealing the wage gap between heterosexual, homosexual, and transgender people. Part III analyzes the *Bostock* decision and the Court's expansion of Title VII's protections. Finally, Part IV applies *Bostock*'s textualist approach to the Equal Pay Act and offers different avenues to expand the Equal Pay Act. Part IV also highlights potential issues that could arise if the Court decides to extend *Bostock*'s logic to the Equal Pay Act.

Bostock may not be the win that it was initially thought to be. This Comment concludes that if the Court follows *Bostock*'s reasoning step-by-step, then the Equal Pay Act will likely not be expanded to include people based on their sexual orientation and transgender status because of the phrase "opposite sex." Following a textualist approach, *Bostock* focuses "on the plain meaning of the text of a legal document" and each word is carefully reviewed to determine the meaning of the statute.[9] For the Equal Pay Act, the word "opposite" in the phrase "opposite sex" will act as a hindrance because it will be a difficult word to circumvent under a textualist approach.[10] Though *Bostock*'s textualist approach will likely fail to expand the Equal Pay Act, there are other considerations, including the Department of Justice's March 2021 memorandum, the *Scutt v. Carbbonaro CPAs* case, and the pari materia requirement for Title VII and the Equal Pay Act that the Court may

7. *See* Elise Gould, Jessica Schieder & Kathleen Geier, *What Is the Gender Pay Gap and Is It Real?*, ECON. POL'Y INST. (Oct. 20, 2016), https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/ [https://perma.cc/V9ZQ-FZRV].

8. *See* M.V. Lee Badgett, Holning Lau, Brad Sears & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual orientation and Gender Identity Discrimination*, THE WILLIAMS INST. (Jun. 2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bias-Workplace-SOGI-Discrim-Jun-2007.pdf[https://perma.cc/S6QH-6AN3].

9. *Bostock,* 140 S. Ct. at 1731; BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 5 (2018), https://sgp.fas.org/crs/misc/R45129.pdf [https://perma.cc/9H2L-P9MA].

10. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d).

engage when deciding to expand the Equal Pay Act.[11] Though *Bostock* provides an essential steppingstone to expand the Equal Pay Act, there will be other considerations to achieve the goal of expanding the Equal Pay Act.

I. Legislative History of the Equal Pay Act of 1963

The Equal Pay Act of 1963 "was one of the first federal anti-discrimination laws that addressed wage differences based on gender."[12] Historically, women were not as prevalent in the workforce as men.[13] The inception of the Act was motivated by the fear that women, who were paid less, would entice employers to undercut future wages for men.[14] To circumvent this potential issue, "[t]he Act made it illegal to pay men and women working in the same place different salaries for similar work."[15] The Act states that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work. . . .[16]

To bring a claim under the Equal Pay Act, a plaintiff must prove (1) the employer pays different wages to employees of a different sex at the same establishment, (2) the employees perform substantially equal work, and (3) they do so under substantially equal working conditions.[17]

Congress extensively debated the Equal Pay Act's language while considering the Act.[18] The first equal pay bill introduced in 1945 was titled "Women's Equal Pay Act."[19] Initially, the language in the bill stated that a claim would be brought for "comparable work."[20] However, this wording proved to be an issue and the bill failed to pass.[21]

11. *See infra* Part IV.C.
12. *Equal Pay Act of 1963,* NAT'L PARK SERV. (Apr. 1, 2016), [hereinafter *Equal Pay Act*, NAT'L PARK SERV.] https://www.nps.gov/articles/equal-pay-act.htm#:~:text=the%20Equal%20Pay%20Act%2C%20signed,different%20salaries%20for%20similar%20work[https://perma.cc/MH8R-QD8W].
13. *See id.*
14. *See id.*
15. *Id.*
16. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).
17. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
18. *Equal Pay Act of* 1963, NAT'L PARK SERV., *supra* note 12.
19. *Id.*
20. *Id.*
21. *Id.*

Eventually, Congress settled on the language "equal work," which is defined as jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."[22]

It is well known that when the Court interprets a statute, it often looks to legislative history.[23] If the Equal Pay Act came before the Supreme Court and it decides to apply *Bostock*'s logic, the historical debate over the language may be a weighted factor that the Court will consider.[24] Consequently, it may be difficult for the Court to overlook the phrase "opposite sex" because, based on the legislative history of the Act, the debate over the precise wording of the Equal Pay Act when it was enacted may indicate that "opposite sex" was intended to have a finite and specific definition.

A. The Legislature's Active Role Following the Equal Pay Act's Enactment

Ambiguity in the Equal Pay Act may be resolved when considering its legislative history and intent. One year after the Equal Pay Act was enacted, Title VII prohibited discrimination based on sex in pay and benefits.[25] Title VII provided more support to employees and strengthened the Equal Pay Act because employees could bring claims under both statutes.[26] The statutes are connected because when there is a violation of the Equal Pay Act, there is also a violation of Title VII.[27]

The Equal Pay Act contains exceptions that, if applicable, causes the employee's Equal Pay Act claim to fail because the employer's disparate wage would be defensible.[28] The exceptions in the Act include a seniority system, a merit system, a system where earnings are measured by quality or quality of production, and a differential based on any factor other than sex.[29] The Bennett Amendment was passed to

22. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

23. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1, 3 (2018), https://sgp.fas.org/crs/misc/R45153.pdf [https://perma.cc/JFR8-8J8Z].

24. *See Equal Pay Act of* 1963, NAT'L PARK SERV., *supra* note 12.

25. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

26. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 10 COMPENSATION DISCRIMINATION (2000), https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination [https://perma.cc/66XY-F2Z8].

27. 29 C.F.R. § 1620.27(a) (2021).

28. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

29. *Id.*

reconcile Title VII and the Equal Pay Act exceptions.[30] This amendment sought to ensure that the exceptions to the Equal Pay Act were still valid when a Title VII claim was brought with an Equal Pay Act claim.[31]

The issue to reconcile the Title VII and the Equal Pay Act was considered in *Washington County v. Gunther*.[32] Washington County paid female guards in the female section of the jail substantially lower wages than those paid to male guards in the male section of the jail.[33] The Court held that a seniority system, a merit system, and a system where earnings measured by quality or quality of production, found in the Equal Pay Act, are incorporated into Title VII as affirmative defenses.[34] The fourth affirmative defense of "differential based on any other factor other than sex" was not incorporated.[35] First, the Court relied on legislative history to support its position on the Bennett Amendment.[36] The Court explained that when the Bennett Amendment was introduced, it was considered a technical amendment that was proposed "because of [a] general concern that insufficient attention had been paid to the relation between Equal Pay Act and Title VII. . . ."[37] This development illustrates how the Court continuously relies on legislative history when reviewing claims under the Equal Pay Act.

The next amendment came from the Lilly Ledbetter Fair Pay Act of 2009 ("Lilly Ledbetter Act").[38] Congress enacted the Lilly Ledbetter Act to rectify the *Ledbetter* decision that the Supreme Court issued in 2007.[39] Congress concluded that the Court's decision "undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the in-

30. Bennett Amendment, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (1963) (current version at 28 U.S.C. 2000e-2(h)); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 26.

31. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 26.

32. County of Washington v. Gunther, 452 U.S. 161, 163 (1981).

33. *Id.* at 164–65.

34. *Id.* at 168–69

35. *Id.* at 170–71. *See* 29 U.S.C. § 206(d)(1).

36. *Gunther*, 452 U.S. at 171.

37. *Id.* at 174.

38. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat 5.

39. *See id.*; Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). The Supreme Court held that "any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute." *Id.* at 642–43.

tent of Congress."[40] The Lilly Ledbetter Act overturned the decision and specified that "each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began."[41] The legislature took a different stance on the Lilly Ledbetter Act than the judiciary, and, in doing so, the legislature's decision to enact the Lilly Ledbetter Act resulted in further protections for employees.

B. Additional Acts That Also Rectify the Gender Wage Gap

In addition to the amendments to the Equal Pay Act, Congress has passed numerous other acts to help rectify the gender wage gap.[42] For example, Title IX of the Education Amendments of 1972 ("Title IX")[43] "opened the doors for women to pursue education free from discrimination. . . ."[44] Title IX protected women from unequal pay because employers could not discriminate based on a lack of education to justify wage disparities.[45] The Pregnancy Discrimination Act of 1978 provided stronger protections for pregnant women, which helped eliminate women's fear of losing their jobs when they became pregnant.[46] In addition, the Civil Rights Act of 1991 and the Family Medical Leave Act of 1993 each provided more protections related to family-based gender roles.[47] These laws demonstrate Congress' strong support of closing the gender wage gap.

In the 1960s, women earned "an average of 59 cents on the dollar compared to men."[48] In 2021, women earn 82 cents for every dollar earned by men.[49] Despite judicial and legislative effort to try to close the wage gap with different remedies for victims of discriminatory

40. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat 5.

41. U.S. Equal Emp. Opportunity Comm'n, Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009 (2014), https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009; *see also* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat 5.

42. Nat'l Equal Pay Task Force, Fifty Years After the Equal Pay Act 2, 4 (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf [https://perma.cc/BJC6-K46K].

43. 20 U.S.C. § 1681.

44. Nat'l Equal Pay Task Force, *supra* note 42, at 5.

45. *Title IX Legal Manual*, U.S. Dep't of Just., https://www.justice.gov/crt/title-ix [https://perma.cc/8JH3-CZVN].

46. Nat'l Equal Pay Task Force, *supra* note 42, at 5–6.

47. *Id.*

48. *Equal Pay Act of 1963,* Nat'l Park Serv., *supra* note 12.

49. *The State of the Gender Pay Gap in 2021*, Payscale, https://www.payscale.com/data/gender-pay-gap#section14 [https://perma.cc/9XEL-MANB].

compensation, a prevalent gender wage gap persists.[50] In the fifty-eight years since the passage of the Equal Pay Act and other supporting laws, there has only been an increase of twenty-three cents between the pay of women and men.[51] Since the implementation of the Equal Pay Act, numerous bills passed by the legislature have changed the purpose of the Act to protect underpaid women.[52]

II. Limited Research Shows That LGBT Employees Experience a Wage Gap

One strategy to close the wage gap between LGBT employees and non-LGBT employees is for the Court to consider applying *Bostock*'s reasoning to the Equal Pay Act.[53] Closing the wage gap between LGBT and non-LGBT employees is imperative to help LGBT employees achieve economic parity. Unfortunately, there is not a significant amount of data of the pay gap among LGBT employees, likely because employees do not want to reveal their sexual orientation or transgender status for fear of discrimination.[54] However, from the data available, it is safe to conclude that there is a LGBT wage gap in the workforce today.[55] The data concerning the gay, lesbian, and transgender wage gap is discussed separately.

A. Defining the Gay Men Wage Gap

The first focus area is whether there is a wage gap between gay employees and their coworkers. A study has revealed that "[g]ay men earn 10% to 32% less than similarly qualified heterosexual men."[56] The study further explained the present gap between LGB people and heterosexual people "with the same job and personal characteristic provides another indicator of sexual orientation discrimination."[57] While recent developments have shown that gay men "may be closing an income gap, experts behind [the study] warn that it's too early to

50. *See id.*
51. *See id.*
52. *See* NAT'L EQUAL PAY TASK FORCE, *supra* note 42.
53. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
54. Jessica Baron, *Race, Gender, and LGBTQ+ Wage Gaps are Real—and They End Up Costing Us All,* DIVERSITY JOBS (Dec. 3, 2020), https://www.diversityjobs.com/2020/12/race-gender-lgbtq-wage-gaps/[https://perma.cc/TN9W-SKSW].
55. *See infra* Sections II.A–C.
56. *See* Badgett, Lau, Sears & Ho, *supra* note 8, at 13. (The study uses the acronym LGB (which stands for Lesbian, Gay, Bisexual) for the data on gay men. The study did not include any responses from transgender people in its survey.).
57. *Id.*

draw any firm conclusions."[58] There continues to be a pay difference between gay and heterosexual men, although this gap may be narrowing.[59]

B. Defining the Lesbian Women Wage Gap

The next focus area is whether there is a wage gap among lesbian employees and their male and female coworkers. Though lesbian employees are not at the bottom of the pay scale, the UCLA Williams Institute, in a report titled *The Impact of Wage Equality on Sexual Orientation Poverty Gaps*, reveals that eight percent of women in same sex couples are currently living in poverty.[60] If the gender wage gap was eliminated, the poverty percentage would drop to five percent.[61] Another issue among lesbian couples is that "most lesbians still earn less than either gay or heterosexual men."[62] Therefore, a lesbian couple's two incomes would still be less "than a heterosexual couple because of the gender wage gap . . . ."[63] The income would be less because the lesbian couple does not have the male earner to supplement the discriminatory pay women face.[64] Bringing parity to gender pay would likely remedy this issue.

Lesbian women are seen as earning a "lesbian wage premium," revealing a wage disparity between lesbian and heterosexual women.[65] The "lesbian wage premium" is defined as "the remaining positive wage gap of lesbians' earnings over straight women's earnings once controlling for observable characteristics."[66] However, under this theory, this gap demonstrates that heterosexual women are at a disadvantage as compared to homosexual women.[67] The notion of a lesbian wage premium is rooted in gender stereotyping.[68] It is associated with the idea that straight women are more likely to leave work due to fam-

58. Samantha Allen, *The Gay Wage Gap Is Both Real and Invisible*, DAILY BEAST (Dec. 6, 2017 5:01 AM), https://www.thedailybeast.com/the-gay-wage-gap-is-both-real-and-invisible [https://perma.cc/7BFS-EUZA].

59. *See id.*

60. Alyssa Schneebaum & M.V. Lee Badgett, *The Impact of Wage Equality on Sexual Orientation Poverty Gaps*, WILLIAMS INST. (June 2015), https://williamsinstitute.law.ucla.edu/publications/impact-wage-equality-so-poverty/ [https://perma.cc/2QRS-6HSC].

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.*

65. Alyssa Schneebaum, *Motherhood and the Lesbian Wage Premium* 2 (Univ. Mass. Amherst Econ. Dep't Working Paper Series, Paper No. 04, 2013).

66. *Id.* at 3.

67. *Id.* at 5.

68. *See id.*

ily responsibility; however, such responsibilities were presumed not to exist when considering a lesbian employee.[69] Another reason this premium exists is because lesbians are often associated with stereotypical characteristics such as "assertiveness, dominance, [and] autonomy. . . ."[70] Although lesbian women are seen receiving a premium based on gender stereotypes, a gender wage gap still persists.

The Court in *Bostock* reasoned that an employer cannot discriminate on sexual orientation or transgender status without discriminating against the individual's sex.[71] If the *Bostock* logic is applied to the Equal Pay Act, then it adds another layer of protection to heterosexual women to be paid the same as their lesbian counterparts. If sexual orientation is protected, then it would be a protection for not only those who identify as LGBT, but also protection for heterosexual women.

C. Defining the Transgender Wage Gap

Since *Bostock* included a claim by a transgender employee, the Equal Pay Act must also consider wage disparities among transgender employees and their counterparts. A UCLA Williams Institute study found that .06% of the American population identify as transgender.[72] A different UCLA Williams Institute study noted there is no detailed wage and income analysis of the transgender population.[73] The UCLA Williams Institute study further revealed that a large population of transgender people are unemployed or earn less than $25,000.00 per year.[74] This research indicates that either there is as not enough data on the matter, or the sample size is too small to determine a conclusive result.[75] Due to the limited data or small sample size, it is difficult to conclude that there is a transgender wage gap.[76] However, one study concludes that there is a transgender wage gap which "is especially true for transgender women."[77] The present wage

69. *Id.*
70. *Id.*
71. Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020).
72. Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N.T. Brown, *How Many Adults Identity as Transgender in the United States?*, WILLIAMS INST. 2, 3 (2016).
73. Badgett, Lau, Sears & Ho, *supra* note 8.
74. *Id.*
75. *See id.*
76. *See id.*
77. Crosby Burns, *The Gay and Transgender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 16, 2020, 9:00 AM), https://www.americanprogress.org/issues/lgbtq-rights/news/2012/04/16/11494/the-gay-and-transgender-wage-gap/ [https://perma.cc/ZDP7-57T4]. *See* Jillian Edmonds, *Transgender People Are Facing Incredibly High Rates of Poverty*, NAT'L. WOMEN'S L.

gap could "explain why . . . transgender families live are more likely to poverty."[78] Despite a small sample size and limited data, high poverty rates among the transgender population indicate that there is a wage issue because it seems transgender people are not earning enough of an income.

III. Understanding the Textualist Approach Applied in *Bostock*

The three consolidated cases discussed in *Bostock* began with "an employer fir[ing] a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."[79] The three plaintiffs all identified as part of the LGBT community.[80] Gerald Bostock was fired after participation in a gay recreational softball league,[81] Donald Zarda was fired shortly after he mentioned he was gay,[82] and Aimee Stephens was fired after she wrote a letter explaining that she planned to transition to a woman.[83] Each plaintiff brought an employment discrimination claim under Title VII because they were fired based on their sexual orientation or transgender status.[84]

The circuit courts were split in their application of Title VII.[85] "[T]he Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay. . . ."[86] The Second Circuit held that "sexual orientation discrimination does violate Title VII. . . ."[87] Similarly, the Sixth Circuit, held that "Title VII bars employers from firing employees because of their transgender status."[88] Thus, the Supreme Court granted certiorari to resolve the scope of Title VII's protections for homosexual and transgender persons.[89]

CTR. (Dec. 9, 2016), https://nwlc.org/blog/income-security-is-elusive-for-many-transgender-people-according-to-u-s-transgender-survey/ [https://perma.cc/JF8A-5FC7].

78. Burns, *supra* note 77.
79. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).
80. *Id.* at 1734.
81. *Id.* at 1737–38.
82. *Id.* at 1738.
83. *Id.* at 1737–38.
84. *Id.* at 1738.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

Applying a textualist approach, the Court held that Title VII protections extend to sexual orientation and transgender status.[90] Textualism, in the context of judicial interpretation, "focuses on the plain meaning of the text of a legal document."[91] The reasoning in *Bostock* "embraces a rigorous textualism [approach] without regard to a statute's context or history."[92] Textualism "represents perhaps the apotheosis of judicial minimalism in statutory interpretation: Open the code, read the statue, [and] rule."[93] Following a textualist approach, the Court decided that Title VII prohibits discrimination of an employee based on their sexual orientation or their transgender status.[94]

A. Textualist Reading of the Phrase "Because of Sex"

The *Bostock* Court first attempted to answer what it means to "prohibit[ ] employers from taking certain actions 'because of' sex'" under Title VII.[95] The Court said that the "'because of' test [in Title VII] incorporates the simple and traditional but-for causation."[96] The Court explained that "so long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[97]

The Court used a hypothetical to explain how an employer cannot discriminate against a person because of their sexual orientation or transgender status without discriminating against the individual "because of sex."[98] In the example, there are two employees, one female and one male, that are both attracted to men.[99] The Court stated that "[i]f the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[100] Therefore, if the employer terminates someone simply for their sexual preference, and thus their sexual orientation, then they are discriminating against the employee because they are treating that person dif-

90. *Id.* at 1754.
91. MURRILL, *supra* note 9, at 3.
92. Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUS BLOG (June 15 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/4286-W6ML].
93. *Id.*
94. *Bostock*, 140 S. Ct. at 1755.
95. *Id.* at 1739.
96. *Id.*
97. *Id.*
98. *Id.* at 1741.
99. *Id.*
100. *Id.*

ferently than they would treat a heterosexual person of the opposite sex.[101] This reasoning makes it clear that an employer may not discriminate against someone based on their sexual orientation without discriminating "because of" their sex.[102]

After discussing the hypothetical, the Court considered three leading precedents to support the conclusion that discrimination based on sexual orientation or transgender status constitutes discrimination based on sex.[103] First, the Court turned to *Phillips v. Martin Marietta Corp*, which supported the idea "[t]hat an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII."[104] In *Phillips*, the employer "refused to hire women with young children but did hire men with young children the same age."[105] Next, the Court turned to *Los Angeles Dept. of Water and Power v. Manhart* where female employees had to pay more into pension fund contributions than male employees.[106] The Court decided that the employer violated Title VII because "it could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex."[107] Finally, the Court turned to *Oncale v. Sundowner Offshore Services, Inc.*, where a male employee alleged he was being sexually harassed by other male employees.[108] The Court decided that "[b]ecause the plaintiff alleged that the harassment would not have taken place *but for his sex*—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed."[109] These cases each supported the contentions that the Court was making in its opinion and reinforced those contentions against the dissenters who believed the majority was overstepping its authority.[110]

The Court then focused on the word "individual" in its reading of Title VII.[111] Congress's decision to add "individual" was an important

101. *See id.*
102. *Id.* at 1743.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1744 (emphasis added).
110. *See id.* at 1754. Two dissents are attached to this opinion. *Id.* One dissent is authored by Justice Alito and joined by Justice Thomas. *Id.* The other dissenting opinion is authored by Justice Kavanaugh. *Id.* at 1822.
111. *Bostock*, 140 S. Ct. at 1740–41.

fact the Court considered.[112] It reasoned that if Congress desired a different outcome, it would have "written the law differently" by adding "sex" instead.[113] Earlier in the opinion, "sex" referred to one's "biological distinctions between male and female."[114] Therefore, the use of "sex" could mean that the Court was not focused on male and female, but rather on the individual.[115] The Court further elaborates on the word "individual" by providing an example: "[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex."[116] Therefore, based on this example, it is not the distinction between male and female. Rather, the Court reasoned that Title VII protects the "individual."[117] This difference ultimately led the Court to conclude that "[t]his statute works to protect individuals of both sexes from discrimination and does so equally."[118]

Throughout the opinion, the Court leaned on textualism by interpreting the statute on face value.[119] The Court ended the opinion by acknowledging that "Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected."[120] However, the Court made it clear that this opinion did not add to the "far-reaching consequences" because "[j]udges are not free to overlook plain statutory commands . . . ."[121]

Bostock's reasoning indicates that a statute must be read word for word, and each word must be dissected to extinguish ambiguity.[122] As this Comment turns to the Equal Pay Act, it seems that the difference in the language between Title VII and the Equal Pay Act may be too much of a hurdle for the Court to overlook when applying *Bostock's*

112. *Id.* at 1740–41.

113. *Id.* ("And the meaning of 'individual' was as uncontroversial in 1964 as it is today . . . . Here, again, Congress could have written the law differently. It might have said that 'it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment.' It might have said that there should be no 'sex discrimination,' perhaps implying a focus on differential treatment between the two sexes as groups.").

114. *Id.* at 1739.

115. *Id.* at 1740.

116. *Id.* at 1741.

117. *See id.* at 1754.

118. *Id.* at 1741.

119. *See id.* at 1754.

120. *Id.* at 1754.

121. *Id.*

122. *See* Skrmetti, *supra* note 92.

interpretation of Title VII to a future interpretation of the Equal Pay Act.

IV. Applying *Bostock's* Textualist Approach to the Equal Pay Act

As mentioned, *Bostock* is considered a large win for the LGBT community.[123] This Comment highlights a present wage gap between gay, lesbian, and transgender people when compared to either the opposite sex or compared to a heterosexual person.[124] Application of *Bostock* should be an essential steppingstone to making sure there is not a wage gap based on sexual orientation or transgender status.

A. *Bostock*'s Textualist Approach Cannot Overlook the Word "Opposite" to Expand the Equal Pay Act

The Equal Pay Act states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs . . . .[125]

The first step of the *Bostock* analysis is to review the wording of the Equal Pay Act. The phrase "employees subject to any provisions" is easy to dissect because the Equal Employment Opportunity Commission ("EEOC") has stated that "virtually all employers" are subject to the mandates of the Equal Pay Act.[126] Therefore, if all employers follow the Equal Pay Act, then all employees are subject to its provisions.

Next, the key language is "on the basis of sex." Similarly, Title VII uses the phrases "because of . . . sex" and lists the different protected categories.[127] The word "basis" is defined by Merriam Webster as "something on which something else is established or based."[128] In *Bostock*, the Court stated, "[e]ach employee brought suit under Title VII alleging unlawful discrimination on the *basis of sex*."[129] The Court

123. Totenberg, *supra* note 4. *See supra* Introduction.

124. *See supra* Part II.

125. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d)(1).

126. *Equal Pay/Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/equal-paycompensation-discrimination [https://perma.cc/DKT8-YLQG].

127. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

128. *Basis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/basis [https://perma.cc/VX2L-D8KH].

129. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) (emphasis added).

used the language "on the basis of sex," despite Title VII's language that states the discrimination be "because of sex." This linguistic application in *Bostock* demonstrates that "because of sex" requires a "but for" causation test when analyzing a claim under Title VII.[130] The Court reasoned that Congress could have decided to add the word "'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law."[131] The same reasoning can also apply to the Equal Pay Act. If an employee brings a claim under the Equal Pay Act, the Court should come to the same conclusion as it did in *Bostock*—if there is pay discrimination based on the employee's sexual orientation or transgender status, the discrimination is "because of sex," and, therefore, it should be deemed a violation of the act.[132]

Finally, the word "sex" likely will not be litigated because it will be given the same definition as it was given in *Bostock*, where the Court proceeded on the assumption that sex refers "only to biological distinctions between male and female."[133]

B. Application of Textualism to the Phrase "Opposite Sex" in the Equal Pay Act

Debate over the language may be a weighted factor that the Court may be faced with when considering the extension of *Bostock*'s logic to the Equal Pay Act. The biggest hurdle for the Court to overcome is the phrase "opposite sex."[134] When bringing a claim under the Equal Pay Act, the burden is on the plaintiff to compare themself to a member of the opposite sex who is receiving more pay for the same work, also known as a "comparator."[135] The comparator requirement in the Equal Pay Act specifically requires an opposite sex comparator to establish a claim.[136] *Bostock* may present a hurdle for expanding the Equal Pay Act because, when applying *Bostock*'s textualist approach to sexual orientation and transgender status, it is unclear how "opposite sex" would be interpreted.

130. *Id.* at 1739.

131. *Id.*

132. *See id.*

133. *Id.*

134. Adam P. Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity*, 10 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 35, 41 (2019). *See also* Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 601–02 (5th Cir. 2021).

135. 29 U.S.C. § 206(d)(1).

136. *See* Romero, *supra* note 134, at 42.

Bostock took a textualist approach throughout the opinion.[137] Therefore, if the Equal Pay Act were to come before the Supreme Court in the same manner that Title VII did and with the same textualist approach, then the word "opposite" will cause a heated debate.[138] In *Bostock*, the Court turned to dictionary definitions of certain words or phrases to interpret their meanings.[139] If the Court takes a textualist approach, it will look up how "opposite" was defined when the Equal Pay Act was passed in 1963. Two definitions from the Merriam Webster dictionary seem closest to what the legislature was trying to accomplish—"opposite" is defined as "diametrically different (as in nature or character)" or "contrary to one another or to a thing specified."[140] If the Court applies a textualist approach, it will likely find that "opposite" was written narrowly and was added to the Equal Pay Act to fix the gender pay gap between men and women.[141] The Court is unlikely to overlook the word "opposite" because it continuously repeated that it was not trying expand Title VII, as the Court had in the past.[142]

However, the application of *Bostock*'s holding regarding Title VII may not have the same outcome when applied to the Equal Pay Act. To demonstrate this difference, consider the following hypothetical: a heterosexual man, Bob, and a homosexual man, John, are paid differently because John is attracted to men. The discrimination in the hypothetical is a violation of Title VII, but it will not be a violation of the Equal Pay Act, unless John had a comparator of the opposite sex who was paid more.[143] Under *Bostock*'s analysis, the employer is discriminating on the basis of sex because the discrimination is based on John's sexual orientation.[144] To bring a claim under the Equal Pay Act, John would need to compare his pay to a female employee's pay.[145] A female employee is likely to be paid less than Bob because of the gender wage gap, and therefore will not provide a good comparison for John. If a claim for wage discrimination based on sexual orientation is brought before the Court, and a textualist approach is

137. *Bostock*, 140 S. Ct. at 1738.

138. *See supra* Part III.

139. *See supra* Part III.

140. *Opposite*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/opposite [https://perma.cc/78XC-JFKP].

141. *See supra* Part II.

142. *Bostock*, 140 S. Ct. at 1754.

143. *See* 29 U.S.C. § 206(d).

144. *Bostock*, 140 S. Ct. at 1741.

145. *See* 29 U.S.C. § 206(d).

applied, the Court will look at the text of the Act and, unfortunately, the word "opposite" may prevent the expansion the Equal Pay Act.[146]

To address the hurdle presented by the phrase "opposite sex," the Court can address the word "sex" to extend the necessary protection. Though it may be difficult to interpret the word "sex" to mean anything other than the biological difference between men and women,[147] a new interpretation could open the doors to protect against discrimination based on sexual orientation and transgender status. In a hypothetical, the Court described two employees who were equal in every aspect.[148] Both employees are attracted to men, but one employee is female and the other is male.[149] If the male employee is fired, there has been discrimination on the basis of sex because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[150] As applied to the Equal Pay Act, perhaps "opposite sex" could encompass opposite sexual orientation. If discrimination based on sexual orientation is discrimination based on sex, then "opposite sex" encompasses sexual orientation. This reading of "opposite" encompasses sexual orientation, and it could be a way to apply *Bostock*'s logic to the Equal Pay Act.

The phrase "opposite sex" in the Equal Pay Act's comparator requirement is a hurdle to its expansion.[151] To expand the word "sex," the Court should consider how an employee does not conform to gender stereotypes when they identify as homosexual or transgender. Gender stereotyping is "the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men."[152] The notion that sexes are attracted to an opposite sex is a gender stereotype.[153] If someone is attracted to the same sex, they are defying

146. *See* Skrmetti, *supra* note 92.

147. *See Bostock*, 140 S. Ct. at 1739.

148. *Id.* at 1741.

149. *Id.*

150. *Id.*

151. Romero, *supra* note 134, at 41.

152. *Gender Stereotyping*, UNITED NATIONS HUMAN RTS OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx [https://perma.cc/E4QT-BJ68].

153. *See* Amy M. Rees, Carol Doyle & Jennifer Miesch, *Sexual Orientation, Gender Role Expression, and Stereotyping: The Intersection Between Sexism and Sexual Prejudice (Homophobia)*, AM. COUNS. ASS'N: VISTAS ONLINE (Aug. 12, 2006), https://www.counseling.org/resources/library/vistas/vistas06_online-only/rees.pdf [https://perma.cc/WW6A-C6V7].

that gender stereotype.[154] Therefore, by discriminating against someone for their sexual orientation or transgender status, an employer is discriminating against someone for not conforming to their gender stereotype. Under this approach, "opposite sex" can be defined as comparing the filing employee to a heterosexual employee who conforms to their gender stereotype. This reasoning provides a strong argument that would justify an expansion of the Equal Pay Act.

Courts often look to legislative intent when trying to decipher a statute. In *Bostock*, the Court did not spend much time on legislative intent since it solely focused on reading the text of the statute.[155] However, it can be assumed that it was able to focus on text because of the lack of ambiguity present in the plain language of the statute.[156] If the Court decides that, to resolve the ambiguity in a statute, legislative intent will reveal the real meaning, and the Justices will look to the legislative history and amendments that have followed since the enactment of the Equal Pay Act.[157] The Court may conclude that the intent was to close the gender pay gap as it is between men and women, the typical and traditional meaning of sex.[158] It seems each amendment to the Equal Pay Act was meant to solidify the protection for victims of a wage gap when compared to someone from a different sex.[159] However, if the Court decides to interpret the Equal Pay Act's purpose as closing the wage gap between men and women, then this may be detrimental to providing protections to LGBT individuals.

C. Alternative Solutions to Expand the Equal Pay Act

It has become apparent that *Bostock* is not the win it was initially thought to be.[160] The *Bostock* precedent may not provide the basis for protection against wage disparities based on sexual orientation and transgender status.[161] However, the use of government guidance, Title VII and the Equal Pay Act's pari materia requirement, and a new way to think of the word "opposite," in conjunction with *Bostock* may influ-

154. *Id.*
155. *Bostock*, 140 S. Ct. at 1754.
156. *See* Skrmetti, *supra* note 92.
157. *See supra* Part I.
158. *See supra* Part I.
159. *See* 29 U.S.C. § 206(d).
160. *See supra* Introduction. *See also* William E. Weinberger, *Landmark Supreme Court LGBTQ Ruling Also Presages Some Limits on Protections*, AM. BAR ASS'N (June 23, 2020), https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2020/landmark-supreme-court-lgbtq-ruling-also-presages-some-limits-on-protections/ [https://perma.cc/SE6T-TC8F].
161. *See Bostock*, 140 S. Ct. 1731.

ence the Court to expand protection under the Equal Pay Act to include sexual orientation and transgender status.

The United State Department of Justice ("DOJ") released a memorandum on March 23, 2021, titled *Application of Bostock v. Clayton County to Title IX of the Education Amendment of 1972.*[162] The memorandum revealed that "*Bostock* reasoning applies with equal force to other laws that prohibit sex discrimination. . . ."[163] The DOJ's memorandum provides necessary support for the possibility of expanding the Equal Pay Act because *Bostock* is meant to continue to expand federal protections to sexual orientation and transgender status.[164] *Bostock* is meant to apply to federal anti-discrimination laws "so long as the laws do not contain sufficient indication to the contrary."[165] However, the use of the memorandum raises some arguments against expansion. For example, the language could be used as an argument against why the memorandum should not support an expansion of the Equal Pay Act because a person could highlight the word "opposite." That argument would fail because there is no indication that the Equal Pay Act is not trying to allow sex discrimination, instead it is clearly trying to stop sex discrimination in the form of difference in wages.[166] *Bostock* is still meant to apply to any federal statute that is meant to protect against sex discrimination.[167] If sexual orientation and transgender status discrimination cannot occur without discriminating of sex, then the expansion would be supported.

Recent case law developments also present support for expanding the Equal Pay Act. *Scutt v. Carbonaro CPAs* supports the idea that sexual orientation claims filed under the Equal Pay Act should proceed.[168] In *Scutt,* a transgender employee brought a claim under the Equal Pay Act and claimed that the defendant paid her less than other employees "with the same qualifications who had different religious beliefs or a different sexual orientation."[169] The district court

162. Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., to Fed. Agency C.R. Dirs. & Gen. Couns. (March 26, 2021), https://www.justice.gov/crt/page/file/1383026/download [https://perma.cc/5K5E-64HK].

163. *Id.*

164. *See id.*; *see also* Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf [https://perma.cc/YZ8A-F2GX].

165. Exec. No. Order 13988, 86 Fed. Reg. at 7023.

166. *See* Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d)(1).

167. Exec. No. Order 13988, 86 Fed. Reg. at 7023.

168. *See* Scutt v. Carbonaro CPAs n Mgmt. Grp., No. 20-00362 U.S. Dist. LEXIS 182849, at *29 (D. Haw. Oct. 2, 2020).

169. *Id.* at *5.

cited *Bostock*, holding that the "plaintiff has sufficiently alleged that she has received unequal pay because of her sex."[170] Here, the court used the word "sex" to refer to the plaintiff's sexual orientation.[171] Though the court did not elaborate on why sexual orientation was protected, it used *Bostock* to say that the prima facie case was met.[172] The plaintiff's discrimination claim could proceed,[173] thus showing an early trend toward accepting Equal Pay Act claims based on sexual orientation or transgender discrimination.

The Equal Pay Act must be expanded because it significantly overlaps with Title VII. Congress made this evident in the Bennett Amendment.[174] Congress realized that there was a discrepancy between Title VII and the Equal Pay Act when it was not clear whether the Equal Pay Act exceptions applied to Title VII.[175] Therefore, Congress stepped in to amend the Equal Pay Act, through the Bennett Amendment, which solidified that the Equal Pay Act exceptions applied to Title VII.[176] Congress and the Court both understood that the Equal Pay Act and Title VII are meant to work together.[177]

If sexual orientation and transgender status are not protected under the Equal Pay Act, then the Equal Pay Act and Title VII will undermine each other. The two statutes must "be read in pari materia, and neither should be interpreted in a manner that would undermine the other."[178] For example, if a gay employee files a claim under the Equal Pay Act because a straight man was being paid more than the filing employee, and their work is equal otherwise, the filing employee cannot recover because the straight man would not be seen as an "opposite sex" employee.[179] The Equal Pay Act will not protect the employee because of the comparator requirement.[180] However, if the same claim is brought under Title VII, the outcome will be different because of *Bostock*'s extended protection. This example demonstrates that the two statutes undermine one another because the employee will obtain different outcomes depending on the Act he

170. *Id.* at *29.
171. *Id.*
172. *Id.*
173. *Id.* at *34.
174. *See* Bennett Amendment, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (1963) (current version at 28 U.S.C. 2000e-2(h)).
175. *See* County of Washington v. Gunther, 452 U.S. 161, 176 (1981).
176. *See id.* at 170.
177. *See id.*
178. Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 446 (1976).
179. *See* Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d).
180. *See id.*

files under. For the same claim, the employee will recover under Title VII but not under the Equal Pay Act. This contradiction demonstrates that the Equal Pay Act must align with Title VII to give protection to employees for their sexual orientation and transgender status.

For the two statutes to work together, the Equal Pay Act and Title VII must protect the same categories. The two Acts must work in concert with one another to fully function and achieve the goal of attempting to eliminate the pay gap and protect employees.[181] If the two Acts work together, it will further deter employers from discriminating on sexual orientation and transgender status because the employer would face litigation of both a Title VII violation and an Equal Pay Act violation, which could be a significant cost to the employer.

Though the word "opposite" acts as a hurdle for the expansion of the Equal Pay Act under a textualist approach, it is not the end of the road to protect sexual orientation or transgender status. Through legislative history, the two Acts must be read together and cannot undermine one another. Therefore, it can be concluded that Title VII's expansion must be applied to the Equal Pay Act.

D. Available Exceptions That Bypass the Equal Pay Act

Without expanding, the Equal Pay Act will not achieve its purpose of closing the wage gap between men and women.[182] However, the Equal Pay Act is meant to apply to men and women from different wage earnings based on sex.[183] If the Act is expanded, it will protect heterosexual, homosexual and transgender men and women and achieve its goal of making sure all employees are paid for equal work.[184]

Nonetheless, if the Equal Pay Act is expanded, there is the issue with the comparator requirement in the prima facie part of the case.[185] The comparator requirement is needed to determine if someone is being paid differently than another person.[186] Another avenue

181. *See Laffey*, 567 F.2d at 466.

182. *See supra* Part II.

183. *See Equal Pay for Equal Work*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/equal-pay-for-equal-work#:~:text=the%20Equal%20Pay%20Act%20of,wage%20discrimination%20based%20on%20sex.&text=the%20Equal%20Pay%20Act%20(EPA)%20protects%20both%20men%20and%20women [https://perma.cc/Y48T-3NDZ].

184. *See id.*

185. *See* Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d).

186. *See Closing the "Factor Other Than Sex" Loophole in The Equal Pay Act*, NAT'L WOMEN'S L. CTR., Apr. 2011, https://nwlc.org/sites/default/files/pdfs/4.11.11_factor_other_than_

to rectify the LGBT gap is to eliminate the word "opposite" from the statute.[187] Without the word "opposite," the plaintiff will meet the comparator requirement more easily because they only need to demonstrate that an employee is being paid differently than the filing employee, rather than an employee of the opposite sex who is being paid differently. Another avenue is that the addition of "opposite sexual orientation or transgender status" can be utilized to meet the comparator requirement. For the Equal Pay Act to still align with Title VII, the Equal Pay Act must define "sex" to encompass sexual orientation, or the legislature must get rid of the "opposite sex" requirement.[188]

Even if the Equal Pay Act encompasses sexual orientation and transgender status, it may still not close the LGBT wage gap because of the exceptions in the Act. The Act contains exceptions, including a "(i) seniority system; (ii) a merit system; (iii) a system earnings measured by quality or quantity of production; (iv) or a differential based on any factor other than sex . . . ."[189] For example, an employer may raise the defense that their merit system is based on educational attainment. Unfortunately, LGBT youth, especially those that identify as transgender, have limited education opportunities because they are treated differently than their heterosexual counterparts in school.[190] In addition, there is a national problem of higher rates of LGBT youth experiencing homelessness than their heterosexual counterparts.[191] Due to the homelessness and lack of educational opportunities for LGBT youth, this exception may be used to get around the Equal Pay Act and discriminate against employees based on their sexual orientation and transgender status.

The biggest exception that could be utilized to bypass Equal Pay Act violations is the "any other factor other than sex" exception.[192] This exception has been interpreted to mean that an employer has a

sex_fact_sheet_update.pdf [https://perma.cc/T6UG-5E3C]; *see* Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d).

187. *See* Romero, *supra* note 134.

188. *See id.*

189. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d).

190. *See* Ryan Thoreson, *"Like Walking Through a Hailstorm:" Discrimination Against LGBT Youth in US Schools*, HUM. RTS. WATCH (Dec. 7 2019), https://www.hrw.org/report/2016/12/08/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools# [https://perma.cc/GJY2-9FHA]; *see* Sarah Holder, *Why There's a Homelessness Crisis Among Transgender Teens*, BLOOMBERG CITYLAB (Aug. 20, 2019, 8:10 AM PDT), https://www.bloomberg.com/news/articles/2019-08-20/how-transgender-youth-can-escape-homelessness [https://perma.cc/ZN46-YSBC].

191. *See Homelessness & Housing*, YOUTH.GOV, https://youth.gov/youth-topics/lgbtq-youth/homelessness [https://perma.cc/MR88-MHTD].

192. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d)(1).

list of other reasons they can use to explain why there is a pay difference.[193] This exception has broad meaning because it provides a way for an employer to argue new reasons that fall under the defense, thus giving the employer access to pick and choose which defenses they want to raise when violating the Act. This exception is quite possibly the biggest loophole in the Equal Pay Act because courts have interpreted the Act in ways that "undermine protections against pay discrimination."[194] However, in 2020 the Ninth Circuit decided the case of *Rizo v. Yovino*, where it was held that the factor other than sex exception must be job related.[195] In *Rizo*, the employer used "prior pay" to justify paying male employees more than the plaintiff, a female employee.[196] The opinion explains that when an employer utilizes prior pay as an exception to comply with the Equal Pay Act, it runs into the problem of perpetuating the history of sex-based discrimination.[197] Sex alone, and sex encompassing sexual orientation through *Bostock*, should not be a factor in any employment context.[198]

The Equal Pay Act is not the perfect solution because there is still a wage gap between men and women despite the act being passed more than fifty years ago.[199] If the Act failed to remedy the issue it was designed to fix when there was only one gap to address (male and female), then it seems this Act will not remedy the various gaps between heterosexual and homosexual men, or heterosexual women and homosexual women, or between transgender employees and non-transgender employees. Though the exceptions may be used to avoid compliance with the Equal Pay Act, the Act must align with Title VII so that the Equal Pay Act gives sexual orientation and transgender status the protection they deserve.

Conclusion

The Equal Pay Act's legislative history reveals its primary goal was to make sure there was no wage difference between men and women.[200] The Act is meant to even the playing field in the context of making sure people can earn a living wage without their sex being a

193. *See id.*; *Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act*, *supra* note 186.
194. *Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act*, *supra* note 186, at 2.
195. Rizo v. Yovino, 950 F.3d 1217, 1219 (9th Cir. 2020).
196. *Id.* at 1220.
197. *Id.*
198. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
199. *See supra* Parts I–II.
200. *See supra* Part I.

hinderance on their ability to do so. However, the Equal Pay Act, right now, does not protect people from wage discrimination based on sexual orientation or transgender status.[201]

Bostock utilized textualist reasoning to conclude that, under Title VII, an employer cannot discriminate against someone based on their sexual orientation or transgender status without discriminating because of sex.[202] The ruling in *Bostock* could expand the Equal Pay Act's protections, as it did for Title VII. Applying *Bostock*'s reasoning to the Equal Pay Act, perhaps the word "sex" can include sexual orientation or transgender status so that "opposite sex" can mean someone who is heterosexual or cisgender. The Equal Pay Act must align with Title VII. It has already been decided that *Bostock*'s reasoning extends to Title IX.[203] Therefore, it would follow that the Equal Pay Act protects employees against discrimination on the basis of sexual orientation or transgender status.

However, even if the Equal Pay Act is extended to protect employees based on sexual orientation or transgender status, there are other external factors that must be taken into consideration to address wage disparities among the LGBT community. There is an obvious problem with LGBT youth and their access to quality education. Further, the fact that LGBT homelessness rates are so high can be another factor in limiting their access to education and such lack of education can be a reason why one is paid differently.

In conclusion, if the issue of expanding the Equal Pay Act is presented to the United States Supreme Court, then the Equal Pay Act needs to be extended. *Bostock* provides the important justification for why the Act needs to be extended. It must be extended so the Equal Pay Act and Title VII align. Although there are problems with the Equal Pay Act, it is essential that transgender status and sexual orientation are protected so that its remedies are available to *all* employees.

201. *See* 29 U.S.C. § 206(d)(1).

202. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

203. Memorandum from Pamela S. Karlan to Fed. Agency C.R. Dirs. & Gen. Couns., supra note 162.