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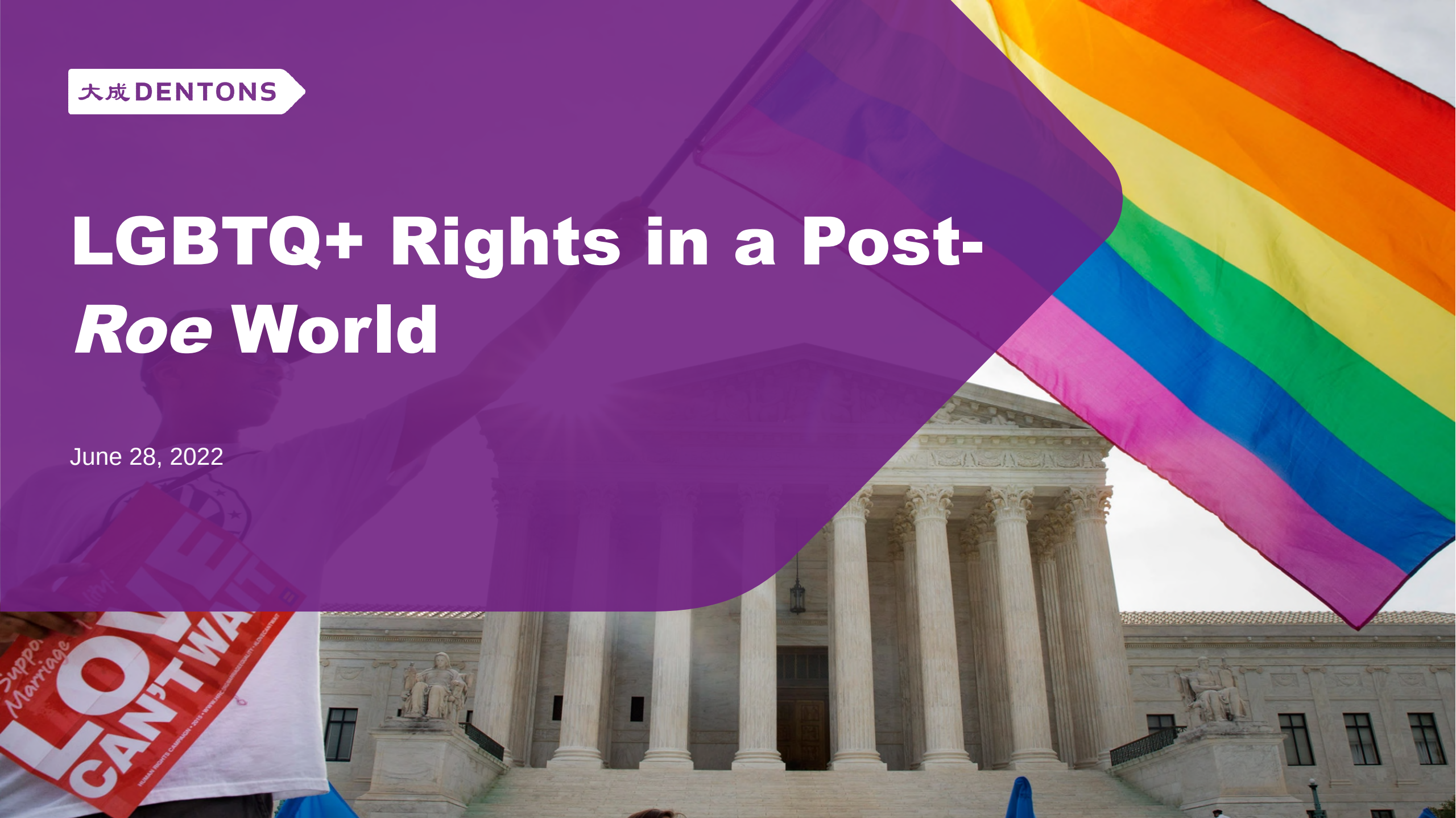
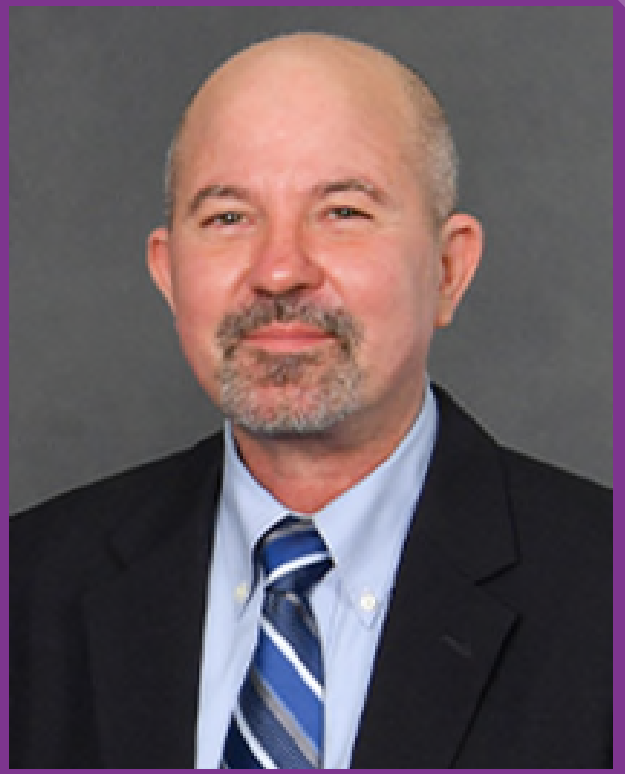
LGBTQ+ Rights in a Post-*Roe* World

June 28, 2022



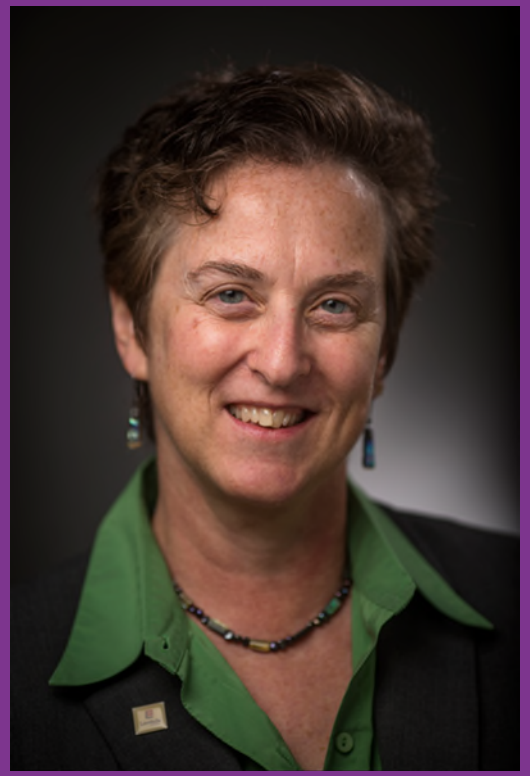
Shannon Minter (he/him/his)

- Shannon Minter is the Legal Director of the National Center for Lesbian Rights (NCLR), one of the nation's leading advocacy organizations for lesbian, gay, bisexual, and transgender people.
- Minter was lead counsel for same-sex couples in the landmark California marriage equality case which held that same-sex couples have the fundamental right to marry and that laws that discriminate based on sexual orientation are inherently discriminatory and subject to the highest level of constitutional scrutiny.
- Minter was also NCLR's lead attorney in Christian Legal Society v. Martinez, a U.S. Supreme Court decision upholding student group policies prohibiting discrimination based on sexual orientation and gender identity, and rejecting the argument that such policies violated a student group's rights to freedom of speech, religion, and association. NCLR represented Hastings Outlaw, an LGBTQ student group who intervened to help defend the nondiscrimination policy.



Jennifer C. Pizer (she/her/hers)

- Jennifer C. Pizer is the Law and Policy Director for Lambda Legal. Pizer has been a leading voice for ending marriage discrimination against lesbian and gay couples, for stopping anti-LGBT discrimination in employment, health care, and education, and against the misuse of religion to discriminate.
- Pizer was lead counsel in *Majors v. Jeanes*, the successful federal case against Arizona's ban on marriage for same-sex couples. She also was co-counsel in the litigation that won marriage for same-sex couples in California in 2008, and then protected the marriages 18,000 lesbian and gay couples celebrated there before passage of Proposition 8. In 2013-2014, Pizer co-authored a series of friend-of-the-court briefs explaining the threats to LGBT people of the religious challenges by Hobby Lobby and other businesses to the Affordable Care Act's birth control insurance rule. In 2008, she won a unanimous California Supreme Court victory for Guadalupe Benitez, a lesbian denied infertility care due to her doctors' discriminatory religious objections.



Evan Wolfson (he/him/his)

- Dentons Senior Counsel Evan Wolfson is an internationally recognized civil rights lawyer and strategist. He was the founder and president of Freedom to Marry, the pioneering campaign which drove the successful strategy that won same-sex couples the right to marry throughout the United States.
- Widely acknowledged as the architect of the marriage equality movement, Evan has been an advocate for human rights around the world since 1983, when he wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990s he served as co-counsel in the historic Hawaii marriage case that launched the ongoing global freedom to marry conversation, and has participated in numerous gay rights and HIV/AIDS cases.
- Evan is the author of the landmark work Why Marriage Matters: America, Equality, and Gay People's Right to Marry (Simon & Schuster, 2004), and was named one of "the 100 most influential lawyers in America" by the National Law Journal.

"Let us realize the arc of the moral universe is long but it bends toward justice”

—Rev. Dr. Martin Luther King, Jr.

DEVASTATING PRECEDENT

- Already reeling from the AIDS crisis, the United States Supreme Court dealt a punishing blow in 1986 to gay liberation, **finding that proscriptions against same-sex intimate relations had "ancient roots.“**

  - In 1982, Michael Hardwick was charged with violating a Georgia statute that criminalized sodomy (between any two people) after police entered his home with an invalid warrant. The penalty for a single act was incarceration for up to twenty years.
  - Hardwick challenged the law as a violation of privacy and his fundamental rights under the Fourteenth Amendment.

"DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITION"

- In a 5-4 decision, which repeatedly termed Hardwick a "practicing homosexual," the Court held that Georgia's statute was constitutional, writing that **"there is no such thing as a fundamental right to commit homosexual sodomy."**

  - **Laws against "homosexual conduct" have "ancient roots," the Court reasoned, and thus could not be "implicit in the concept of…liberty" or "deeply rooted in this Nation's history and tradition."**

  - The Court's openly hostile decision in *Bowers* deeply influenced LGBTQ life for two decades--and mobilized the community into action.

"SPECIAL RIGHTS"

1996 marked a crucial shift for the LGBTQ legal movement.

- In response to municipal nondiscrimination ordinances in Aspen, Boulder, and Denver, Colorado, Christian conservatives passed a statewide constitutional amendment through a ballot initiative that prevented state or local governments from recognizing gays or bisexuals as a protected class.

- Colorado argued that the amendment simply prevented gays and lesbians from acquiring "special rights."

A FOUNDATION FOR FUTURE VICTORIES

In *Romer v. Evans*, the Court found the Equal Protection Clause prohibited states from denying homosexuals the same basic legal protections that heterosexuals receive.

- In a 6-3 decision, the Court wrote: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."
- The US Constitution does not permit "laws of this sort ... [they] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. **If… 'equal protection of the laws' means anything, it must at the very least mean that a bare…desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."**

A FOUNDATION FOR FUTURE VICTORIES

Seventeen years after *Bowers*, the Supreme Court finally invalidated state sodomy laws (13 states still criminalized sodomy at the time).

In *Lawrence v. Texas*, the Court explicitly held that lesbian, gay, and bisexual people "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."

- Previously, in *Griswold v. Connecticut* (1965), the Court recognized that married couples had a right to privacy based on the Fourth Amendment's protection from warrantless search and seizure.
- *Eisenstadt v. Baird* (1972) expanded sexual privacy rights to unmarried individuals.

FROM SEX TO MARRIAGE

In *Windsor v. United States* (2013), the Supreme Court invalidated Section 3 of the Defense of Marriage Act (DOMA), which prevented the federal government from recognizing same-sex marriages.

On June 26, 2015, 43 years after finding no "substantial federal question" in state bans on same-sex marriage (*Baker v. Nelson*), **the US Supreme Court ruled in *Obergefell v. Hodges* that denying same-sex couples the freedom to marry violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to US Constitution.**

THE RIGHT TO ABORTION

The Court's logic in *Bowers*—that rights must be "deeply rooted in this nation's history and tradition"—is used by the *Court in Dobbs v. Jackson Women's Health Organization* to test whether a right to abortion exists.

In *Dobbs*, Justice Alito wrote that **"the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'... When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion."

IMPLICATIONS FOR LGBTQ PROGRESS?

LGBTQ constitutional protections rely on the same legal principles as reproductive justice precedents. But in invalidating *Roe* and *Casey*, the Court wrote that **"[w]e have long held that stare decisis is 'not an inexorable command.'"** The question then becomes: is America's LGBTQ community in jeopardy of backsliding after decades of progress?

Dobbs provides five conditions for overturning precedent:

- 1) the nature of their error, 2) the quality of their reasoning, 3) the "workability" of the rules they imposed on the country, 4) their disruptive effect on other areas of the law, and 5) the absence of concrete reliance.

IMPLICATIONS FOR LGBTQ PROGRESS?

In *Dobbs*, the Supreme Court said that Roe "short-circuited the democratic process by closing it to the large number of Americans who disagreed" with abortion.

It also held that "Roe and Casey have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions." Doctrines such as marriage and contraception.

- **YES, BUT?** Justice Alito, writing for the majority: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

SUPREME COURT'S HISTORY OF OVERTURNING PRECEDENT

While the US Supreme Court is disinclined to upset established precedent, it has nonetheless overturned nearly 250 earlier rulings in its history. These decisions generally follow a few basic principles:

- To grant states more autonomy: *Gregg v. Georgia* (1976)
- To keep up with national progress and evolving public opinion: *Brown v. Board of Education* (1954), *Lawrence v. Texas* (2003)
- To account for technological advances: *South Dakota v. Wayfair, Inc.* (2018)
- To bestow individual civil rights: *Obergefell v. Hodges* (2015)

LIBERAL JUSTICES SOUND ALARM FOR OTHER RIGHTS

Justices Breyer, Sotomayor, and Kagan don't buy the majority's logic in their dissent in *Dobbs*: **"The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history'...** The majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].'

- **"So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid- 19th century are insecure.** Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."

SIGNAL TO REPUBLICAN STATE LEGISLATURES

Justice Thomas' concurring opinion in *Dobbs* can be read as an open invitation to states keen to precipitate test cases: **"In future cases, we should reconsider all of this Court's substantive due process precedents,"** Thomas wrote, pointing to *Lawrence* and *Obergefell*. **"Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.“**

- Areas of possible impact include same-sex intimate relations, marriage, contraception, and trans-affirming healthcare.

SIMILARITIES AND DIFFERENCES BETWEEN ABORTION, MARRIAGE

Neither abortion nor same-sex marriage are expressly enumerated in the US Constitution. Marriage is far more recent precedent but public opinion has and remains overwhelmingly in favor of it.

After decades of campaigning by LGBTQ activists—triggered in part by the Court's abrasive ruling in *Bowers*—60 percent of Americans supported the freedom to marry for gays and lesbians by June 2015 when Obergefell was decided. (Gallup 2015). Today, that number has grown to 70 percent (Gallup 2021)

Views on the right to abortion have remained relatively fixed since 1975, when 54 percent of Americans said abortion should be legal under certain circumstances.. Today, 50 percent of Americans say the same thing. (Gallup 2021)

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Happy Pride.
Keep fighting.