



ADCOLOR

STATE OF THE WORKPLACE STUDY: SCOTUS AFFIRMATIVE ACTION BRIEF

It's been one year since the Supreme Court struck down affirmative action in higher education admissions.

Here's what to know about the ruling and its broader effect on diversity, equity, and inclusion.

INTRODUCTION

The Supreme Court of the United States (SCOTUS) effectively repealed affirmative action for college universities in the summer of 2023. This landmark decision, while not directly impacting civil rights laws in private employment, nevertheless has created ripples across every aspect of American economic, educational, and social life. This includes hiring decisions; promotion decisions; and diversity, equity, and inclusion (DEI) programs.¹

In the months following the ruling, advertising and related industries (ARI) (like creative, marketing communications, media, ad tech, public relations, communications) notably stayed mostly quiet in the press about how the decision might impact those industries. Public relations trade media were the early exception, reporting that the decision was “being downplayed within the advertising industry,” despite its potential to “plague agency DEI efforts long-term.”²

Since then, among an onslaught of broader corporate DEI attacks, ARI companies struggle to maintain the footing they achieved only a few short years ago.³ Marketing chiefs rank DEI near the bottom of their priority lists, even amid concern that their brands will be “called out” by their own employees for failing to prioritize DEI. Only 18% of marketing executives rank DEI as a top priority.⁴

Through a series of confidential, in-depth interviews, focus groups, and a member survey⁵ in fall 2023, the ADCOLOR community expressed uncertainty, apprehension, concern, and fear for how this decision will impact their respective industries.

These predominantly white industries in which the ADCOLOR community works reached a DEI “fever pitch” after a period of American racial reckoning in 2020 but have largely “taken a step back” since that phase of ambitious pledges and hiring. This context and the “looming threat” of the SCOTUS ruling’s impact color far-reaching implications, from the psychological safety of the individual employee to the lawfulness of DEI programs in the company.

³ Siu 2024, Digiday

⁴ Klara 2024, Adweek

⁵ n=143

ADCOLOR's resolve, however, is undeterred. While the landscape is changing, the benefits of having diverse perspectives in the workforce are as vital as ever.

Read on to get a brief summary of the ruling, perspectives from the ADCOLOR community, and a starter checklist of things to consider from experts and other ADCOLOR community members.⁶

“We experienced a year where progress, interest, and investment in DEI waned. There’s been a declining focus on DEI paired with a shaky economy that has impacted a variety of jobs and investments. On top of that, we’ve lost years of progress due to harmful legislation passed throughout the country. These variables make it extremely hard for those who are trying to move the needle and ensure that DEI is not placed on the back burner yet again.”
-Tiffany R. Warren, President and Founder of ADCOLOR

⁶ NOTE: This material is provided for informational purposes only. It is not intended to constitute legal advice. Recipients should consult with counsel before taking any actions based on the information contained within this document.

THE RULING

On June 29, 2023, The Supreme Court of the United States struck down affirmative action in the college admissions processes of two of the oldest institutions of higher learning – Harvard College and the University of North Carolina (UNC). The decision reverses cases reaching back 45 years and effectively ends race-conscious admissions across the nation.⁷ Harvard, in particular, historically was considered the model for affirmative action programs with a system that had been reaffirmed twice by the Supreme Court.

Students for Fair Admissions (SFFA) is the group that brought the Harvard and UNC cases to the high court. Prior to the 2023 ruling, it was permissible (with strict judicial scrutiny) to allow consideration of race as one factor because of the benefits of a diverse student body.

The Supreme Court's six-justice conservative supermajority, led by longtime affirmative action program critic Chief Justice John Roberts, wrote that American colleges and universities must be colorblind in their admissions. Justice Clarence Thomas, the court's second Black justice, who has long called for an end to affirmative action, wrote that the ruling "sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes... Those policies fly in the face of our colorblind Constitution." The decision doesn't prevent universities from considering an applicant's discussion of how race has affected their life, but Justice Sotomayor chided the heavily caveated approach, likening it to putting "lipstick on a pig."⁸

"Eliminating racial discrimination means eliminating all of it."

-Chief Justice John Roberts

"The student must be treated based on his or her experiences as an individual – not on the basis of race."

-Chief Justice John Roberts

“The devastating impact of this decision cannot be overstated.”

-Justice Sonia Sotomayor

“Deeming race irrelevant in law does not make it so in life.”

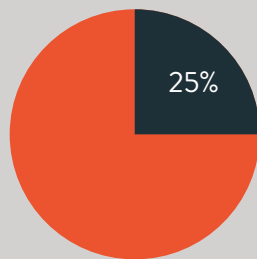
-Justice Ketanji Brown Jackson

The ruling forces both public and private higher education institutions to make dramatic changes in how they select their students and to seek new ways to diversify their student bodies. For businesses, the ruling has altered the human resources outlook for companies that hire university graduates with higher education and training. But experts warn us not to mistake politics for law. As of now, the decisions in the SFFA cases do not alter the body of federal civil rights law in other areas like employment. Private employment falls under Title VII and is enforced by the Equal Employment Opportunity Commission (EEOC), which has emphasized that the decision has no bearing on its work. As EEOC Chair Charlotte Burrows stated in November 2023, the legal landscape for workplace DEI programs has not changed, but the level of scrutiny those programs face has increased.⁹

PERSPECTIVES FROM THE ADCOLOR COMMUNITY

Concerned outlooks

ADCOLOR community members were either unfamiliar with the details or concerned with the SCOTUS ruling on affirmative action. In a survey in fall 2023, a quarter of ADCOLOR members said they weren't familiar with the Supreme Court ruling. Those who were aware of the ruling had generally negative predictions about the impact the decision would have on DEI efforts both in the U.S. overall and in their respective industries. Through a series of anonymous personal interviews, observations, and focus groups with ADCOLOR members in fall 2023, the observed mood, sentiment, and climate of this research were characterized by melancholy, apprehension, fear, and fatigue.



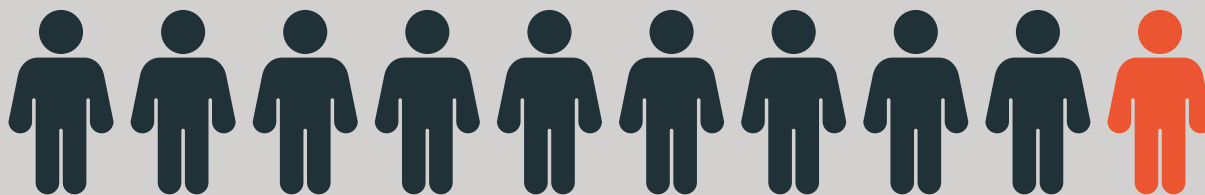
A quarter of ADCOLOR members said they weren't aware of the ruling in fall 2023

Regression of pledges and promises

More than nine in 10 ADCOLOR community members acknowledged that their respective industry currently suffers problems with DEI. Roughly 80% said companies have not lived up to previous pledges and promises, acknowledging that the groundswell of DEI activity in 2020 was more box-checking, public spectacle, and performative behavior than actionable commitments.

Furthermore, the majority of ADCOLOR members perceived the decision as a regression and potential threat to DEI progress and historical advancements that have been made thus far, leading to deep and irrevocable setbacks. Comments about the loss of momentum for DEI initiatives were colored by words describing negative impact, like “step back,” “cease,” “lack,” “harder,” and “lower.”

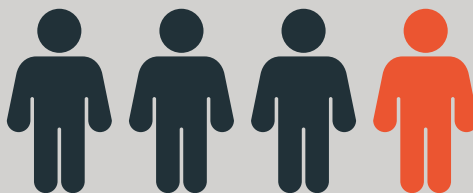
Only one in four ADCOLOR respondents projected improvements in DEI in 2024. The majority believe that corporate support for DEI is on the decline (74%) and agreed that employees whose jobs are tied to DEI may face unemployment in the near future (61%).



More than nine in 10 ADCOLOR members agreed that their industry currently suffers with DEI problems

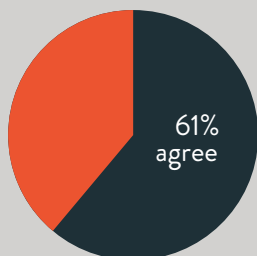
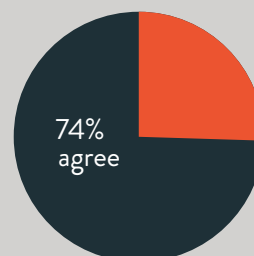


80% said companies have not lived up to pledges and promises



Only one in four ADCOLOR members projected DEI improvements in 2024

“I believe corporate support for DEI is on the decline.”



“DEI employees may face unemployment in the near future.”

Impact on the higher education talent pathway

ADCOLOR respondents who directly addressed the effects of the SCOTUS ruling on colleges and universities focused on perceived erosion of opportunity for historically excluded groups of students, the likelihood that fewer diverse graduates would be available for hire in certain specializations, and the overall importance of higher education pathways of diverse job candidates to companies in their industry. The community expressed concern that, because diverse talent will be harder to find, employers will revert to old recruitment methods that produce a more homogenous workforce.

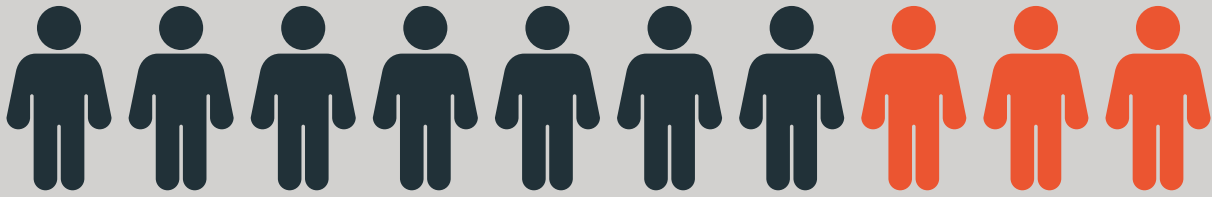
Ripple effects

The majority of ADCOLOR respondents predicted that the SCOTUS decision will impede the implementation of successful DEI programs (69%).

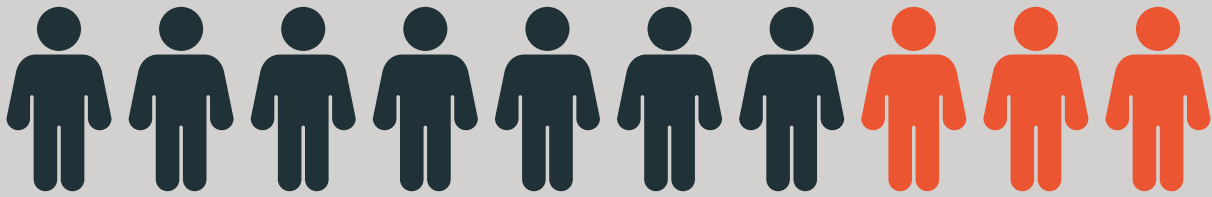
Most agreed that they anticipate backlash from special interest groups related to DEI against companies in their industry (69%). They expressed concern that the SCOTUS decision would be used as an excuse by companies looking to rationalize more cautious approaches to DEI. The ensuing “trickle down” effect could spread from academia to industry, where companies would “no longer feel the need” to support DEI or would do “the bare minimum” because they would realize DEI is “easy to avoid.”

ADCOLOR interviewees also voiced concerns about safety, particularly for historically excluded individuals who may feel vulnerable in an environment with diminished diversity initiatives. The majority of respondents predicted that the SCOTUS decision will have a negative effect on psychological safety of employees (82%). Worries about the work environment becoming “homogeneous” and “less inclusive” and the potential for tokenism were prominent, with participants expressing concerns about being perceived as “the only one” or facing pressures as “the perfect one.”

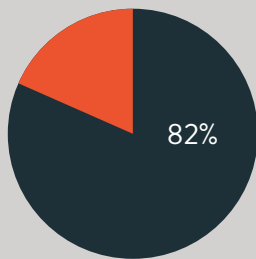
There were concerns about the impact on the quality of work product, with fears that creative work may become more cold, insensitive, and homogeneous due to less diverse teams. Participants expressed strong concerns about the industries’ ability to compete, innovate, and retain creative excellence with a less diverse talent pool. Turnover and the potential loss of talent were cited as significant concerns, further exacerbated by fears of attracting and retaining talent in an environment perceived as less inclusive.



69% of ADCOLOR members predicted that the decision would have a negative impact on DEI programs



69% anticipated DEI-related backlash from special interest groups against companies in the industry



82% of ADCOLOR employees predicted the decision will have a negative effect on workplace psychological safety

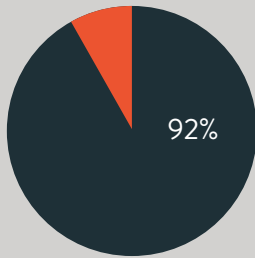
Need for more guidance and leadership

ADCOLOR community members overwhelmingly expressed a desire for additional information about lawful DEI practices, with 89% saying they feel they would benefit from such information and 94% saying they “would welcome” it. Community interviews emphasized a sense of urgency to create answers that address issues promptly, proactively, and effectively.

Only one in three ADCOLOR members has a good sense of their local and state regulations related to DEI, despite the fact that 43% think many employees in their industry are concerned about legal issues around DEI.

A theme of political influence emerged in the majority of ADCOLOR interviews, emphasizing the desire for advertising and related industries to be proactively involved in influencing policy and shaping language. Participants felt that if their industry would “be proactive, not reactive” through participating in the legislative process, ARI could contribute to the formulation of policies that foster a favorable environment and address concerns, rather than simply responding to issues.

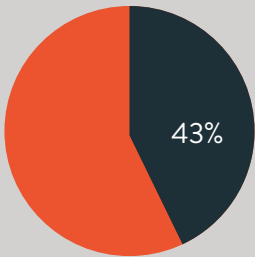
ADCOLOR interviewees expressed the need for more leaders with cultural competence and inclusive communication skills. Participants desire honest, committed action from diverse leaders with “lived experience” who are “in touch.” Another crucial theme centered on the call for allies to transform into active accomplices in the pursuit of diversity and inclusion. Interviews also highlighted the necessity of framing issues related to race as universal human issues, emphasizing that everyone, regardless of race or ethnicity, should be invested in addressing these concerns. There was a clear call for the distribution of responsibilities, advocating for a collective effort where the burden of fostering DEI is not placed solely on selective groups but shared by everyone within their respective industries.



92% of ADCOLOR members would “welcome” information about lawful DEI practices



Only one in three ADCOLOR members feels they have a good sense of their local and state DEI regulations



43% believe employees in their industry are concerned around DEI legal issues

ONE YEAR LATER: DEI PROGRAMS UNDER LEGAL AND POLITICAL THREAT

The Supreme Court ruling in 2023 kicked off efforts from conservative activists, investors, and state attorneys general to dismantle race-conscious policies in domains like DEI programs.

On the academic front, there's been a dismantling of DEI programs in the face of conservative attacks, including hidden cameras meant to expose non-compliant university staffers in Texas.¹⁰ On the corporate side, state attorneys general issued both threats and protection to *Fortune* 100 corporations like Apple, Microsoft, and Amazon in the wake of the Supreme Court decision.

Edward Blum, the conservative activist behind Students for Fair Admissions, the organization that sued Harvard College and UNC, has been challenging DEI fellowships and grants in “reverse discrimination” claims. In the year since the Supreme Court decision, Blum’s American Alliance for Equal Rights has reached settlements in about a half-dozen cases regarding scholarships, fellowships, and grant programs for historically excluded individuals. All organizations agreed to drop racial criteria to resolve claims of discrimination.¹¹

¹⁰ Rodrigues 2024, The Dallas Morning News

¹¹ Mark 2024, The Washington Post

In another high-profile case with significant legal firepower and a swarm of amicus briefs, Blum challenged an organization called Fearless Fund that makes early-stage investments in businesses run by women of color.^{12 13}

America First Legal (AFL), a far-right organization headed by former Trump advisor Stephen Miller, claims “all DEI programs” are now “illegal”¹⁴ and has filed more than 30 DEI complaints to the EEOC. Miller’s AFL filed petitions to investigate NASCAR for the organization’s DEI efforts like its “diversity driver development program,”¹⁵ Shake Shack for its “5-Year Diversity Targets,” and the NFL for its “Rooney Rule,”¹⁶ among many others. AFL has also sued Hello Alice, an online platform providing grants to Black small-business owners. The EEOC has filed an amicus brief in support of Hello Alice. Both Fearless Fund and Hello Alice report massive layoffs and financial loss due to costly litigation and subsequent loss of partners.¹⁷

In more than 30 states, over 100 bills have been introduced or passed designed to restrict or regulate DEI initiatives. Meanwhile, the Supreme Court recently widened the aperture for more discrimination claims, even if the employee’s pay or rank stays the same.¹⁸ While this is generally considered a win for workers, it’s also being held up by Miller and other conservative activists as additional firepower in their efforts to quash workplace DEI programs. Civil rights groups like the American Civil Liberties Union say these interpretations

¹² Francis & Weber 2023, The Wall Street Journal

¹³ Mark 2024, The Washington Post

¹⁴ Totenberg 2023, NPR

¹⁵ Walker 2024, The Guardian

¹⁶ America First Legal 2024

¹⁷ Morse 2024, Inc.

¹⁸ Wolfe & Bravin 2024, The Wall Street Journal

are “fearmongering,” “scare tactics [to] chill employers’ commitment and investment in expanding workplace opportunity.”¹⁹

To decrease legal risk, companies are pulling back from explicit mentions of race and racial quotas in public diversity disclosures. Diversity goals and language are disappearing from dozens of companies’ annual reports (like Salesforce, Workday, Best Buy, and Nordstrom) and earnings calls, despite the fact that 93% of companies say they aren’t cutting back on programs or goals.²⁰ About 70% of companies say they plan to expand their DEI initiatives, while only 2% report plans to cut back.²¹

“Companies are being sued for even having goals, and that is totally scaring some organizations. They’re thinking twice about what they’re doing. Then there are companies whose general counsel is like, ‘Bring it on. I would love to have that conversation. They are preparing to withstand any legal challenge to ensure that they’re well-positioned for the future rather than abandon diversity, equity, and inclusion.”
-Anonymous agency leader²²

¹⁹ Mark 2024, The Washington Post

²⁰ Glickman 2024, The Wall Street Journal

²¹ Setty 2023, Bloomberg Law

²² Daniels 2024, PR Week

In advertising and related industries, the diversity of our workforce (especially leadership) has not meaningfully improved since the swell of promises in 2020. In 2024, the Association of National Advertisers found that diversity within the marketing industry dropped for the first time in several years.²³

A narrower legal definition of DEI means it will be more difficult to improve these statistics in coming years. This could hamper these industries' ability to authentically serve historically excluded communities by failing to account for the "fundamental, tectonic shifts that are happening in the composition of our society."²⁴

MOVING FORWARD: WHAT TO CONSIDER

In the immediate months post-ruling, most corporate HR professionals took a “wait and see” stance to “assess the situation” before making decisions.²⁵ But since then, organizations have been quietly reconsidering their DEI communications, practices, and resources.

The ADCOLOR community and legal experts have weighed in with perspectives on how ARI companies can evaluate the legal risk of their DEI efforts without diminishing progress toward building a diverse and inclusive workplace. This checklist is not intended to be a complete inventory of everything to examine, but rather discussion points amassed from fellow ADCOLOR community members and key professionals. The following considerations do not constitute legal advice.

Realign

Understand your organization’s tolerance for legal risk²⁶

Reevaluate riskier programs with hard quotas, tiebreaker decision-making, and group-specific internships²⁷

²⁵ Gonzales 2023, Society for Human Resource Management

²⁶ Foxman 2024, Bloomberg Law

²⁷ Yoshino & Glasgow 2024, Harvard Business Review

Use your organization's core values as a "North Star" for managing and balancing risks²⁸

Partner with attorneys and legal experts early on to design and communicate about legal and effective DEI programs²⁹

Make sure teams like corporate communications, investor relations, public affairs, government affairs, C-suite leadership, HR, and political experts all have a seat at the decision-making table³⁰

Review DEI communications for anything that could be considered a potential violation of law³¹

Define how you talk about DEI both internally and externally, including whether to exercise the corporate social voice on DEI initiatives³²

Reaffirm

Rollback efforts and fear-driven abandonment are NOT solutions

Know that many ARI employees are calling for more proactive behaviors

Refute the prevailing concern among ARI employees that corporate support for DEI is eroding with a commitment and "investment in our success"

²⁸ Gonzales 2023, Society for Human Resource Management

²⁹ Zheng 2023, Harvard Business Review

³⁰ Spain 2023, PR Week

³¹ Bovée et al. 2023, Jackson Lewis

³² Peregrine 2023, Forbes

Embrace the complexity and uncertainty in this transitional period in the law

Focus on broader, ambient diversity programs that advance workforce diversity overall, including employee resources groups that are open to all who support the mission of the group³³

Carefully follow guidance related to voluntary, formal, temporary affirmative action programs, including identifying a remedial manifest imbalance that does not harm non-beneficiaries³⁴

Collect a broad spectrum of aggregated data beyond race, gender, and protected categories to avoid stereotyping³⁵

Focus on inclusion, psychological safety, and wellness,³⁶ including fruitful programs like mentorship and sponsorship programs

Seek to ensure accessible workplaces for all types of ability³⁷

Redouble

Don't wait to take action ("sitting ducks" no longer)

Put "people first" with protections and secured resources

³³ Williams 2023, Harvard Business Review

³⁴ Smith 2023, Society for Human Resource Management

³⁵ O'Brien 2023, Husch Blackwell

³⁶ Bovée et al. 2023, Jackson Lewis

³⁷ Alemany & Vermeulen 2023, Harvard Business Review

“Be human” with transparent and sensitive dialogue that demonstrates understanding of the needs of diverse intersectional audiences

Don’t just “check the box” with performative acts, but “do the hard things” that will truly make an impact

Counteract a demographic shift in the higher education pathway with long-term investments in the talent pipeline, like youth career shadowing, and middle or high school student mentorship programs focused on career and industry³⁸

Provide information to ARI professionals about current local and state regulations

Train talent acquisition teams on lawful, non-discriminatory decision-making

Anticipate a continuing uptick in reverse discrimination and reverse racism claims³⁹

Don’t make assumptions about employee readiness for DEI education, especially about younger employees coming from educational institutions that ban DEI discourse⁴⁰

³⁸ Thelen et al. 2023, Littler

³⁹ Bovée et al. 2023, Jackson Lewis

⁴⁰ Opie & Washington 2023, Harvard Business Review

Cast as wide a net as feasible to achieve a diverse talent pool through non-traditional talent pathways, including reevaluating the requirement for a college degree for some roles and recruiting at historically underrepresented institutions⁴¹

Consider documenting the reasons for final selections to avoid impermissible stereotyping⁴²

Continue investigating to achieve deeper understanding of the Supreme Court decision's impact on historically excluded groups

“There’s no doubt that the playing field needs leveling up. If the courts aren’t going to encourage this, it’s even more important for the private sector to help.”
-John Birnsteeel, Chief Executive Officer of Doe-Anderson

FINAL THOUGHTS

In this hyper-partisan environment where corporate diversity, equity, and inclusion efforts designed to do good are being challenged politically for their lawfulness, it's easy to feel fatigue and a loss of hope, progress, and safety. However, most corporations say they aren't backing off of their DEI programs, but rather quietly rebranding their efforts to avoid legal scrutiny. While some aren't bothered by these branding changes as long as the work continues, to others, changing the words represents a retreat.⁴³ Regardless, this is "the next evolution of DEI in a longer fight for greater diversity, equity, and inclusion at work."⁴⁴ The work must continue, shaping institutions so that everyone feels they belong. "That work remains essential and, crucially, legal, even under this activist Supreme Court."⁴⁵

"I always remain optimistic about the potential for real progress because I see how each generation carries the torch from the previous generation. Each one faces hurdles, but that doesn't put the flame out."

-Tiffany R. Warren, President and Founder of ADCOLOR

⁴³ Kessler 2024, The New York Times

⁴⁴ Zheng 2023, Harvard Business Review

⁴⁵ Yoshino & Glasgow 2023, Harvard Business Review

ABOUT ADCOLOR

ADCOLOR is the premier organization that celebrates and advocates diversity in the creative and technology industries. Our process is twofold. First, we help individuals and organizations RISE UP, letting their accomplishments and ideas shine. Then we teach these new leaders, would-be-mentors, and allies how to REACH BACK and find others who deserve to be noticed and promoted. Our goal is to create a community of diverse professionals and allies who are here to support and celebrate one another.

For more information about the contents of this report, or to submit feedback, please email info@adcolor.org.

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