
No. 00-1145

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

CONCRETE WORKS OF COLORADO, INC.,
a Colorado corporation

Plaintiff-Appellee,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,
a Colorado municipal corporation

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
(The Honorable Richard P. Matsch
D.C. No. 92-M-91)

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vi
STATEMENT OF RELATED CASES	xiii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
History and Evidence of Discrimination	5
The Program	16
Previous Decisions	17
The Trial	19
SUMMARY OF ARGUMENT	22
STANDARDS OF REVIEW	26
ARGUMENT	26
I. THE DISTRICT COURT’S CONCLUSION THAT DENVER LACKED A STRONG BASIS IN EVIDENCE FOR BELIEVING THAT REDRESSIBLE DISCRIMINATION EXISTED WAS PREMISED ON NUMEROUS LEGAL ERRORS AND IS WRONG AS A MATTER OF LAW	26

Table of Contents - Continued

	Page
A. The District Court Wrongly Subjected Denver’s Evidence To A New Six-Question Test That Contravenes Well-Established Precedent	26
Question 1: “Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA?”	28
Question 2: “Does such discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women?”	31
Question 3: “Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender?”	33
Question 4: “Would Denver’s use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination?”	36
Question 5: “Is the compelled use of certified MBE’s and WBE’s in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry?”	37
Question 6: “Is the burden of compliance with Denver’s preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?”	38

Table of Contents - Continued

	Page
B. The District Court Erred In Holding That Identified Discrimination Was Not Redressible Because Discriminatory Impulses Are Shared By Society At Large	39
C. The District Court Erred In Deeming The Statistical Studies Documenting Severe Underutilization Non-Probative Because “They Say Nothing About Who Is Responsible For Such Discrimination”	42
D. The District Court Disregarded This Court’s Instructions Concerning The Issues Remanded For Trial	45
1. Non-Goals City Construction Contracting Data	45
2. Denver-MSA Construction Contracting Data	48
3. Size And Experience	51
a. Size	51
b. Experience	56
E. The District Court Misunderstood And Misapplied The Burden Of Proof	58
F. The District Court Erred In Demanding That Denver’s Statistical Evidence Conclusively Prove Discrimination By Eliminating Possible Explanations For The Disparities	61
A. “General Data” Create An Inference Of Discrimination	62

Table of Contents - Continued

	Page
2. Absent Persuasive Evidence That Controlling For A Particular Variable Or Rectifying An Alleged Data Flaw Will Eliminate Identified Disparities, The Inference Of Discrimination Persists	64
3. The District Court Did Not Find, And Plaintiff Did Not Show, That, If Omitted Variables Were Included, Or Purported Data Flaws Rectified, The Identified Disparities Would Disappear	66
4. The Result Was An Excessive, Indeed Impossible, Burden Of Proof	68
G. The District Court Erred In Demanding Evidence Of Sufficient Quantum And Quality To Support A Racial Quota	69
H. As A Matter Of Law, Denver Had A Strong Basis In Evidence For Believing That Discrimination Warranted Remedial Action	72
II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE PROGRAM IS NOT NARROWLY TAILORED	75
A. Concrete Works Waived Its Objection To Judge Finesilver’s Holding That The Program Is Narrowly Tailored	75
B. The Program Is Narrowly Tailored	76
1. Race-Neutral Alternatives	78
2. The Basis For The Percentage Goals	82
3. Flexibility And Waivers	82

Table of Contents - Continued

	Page
4. Geographic Limitations	83
5. Duration Of The Remedy	84
6. Effect On Innocent Third Parties	85
III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE GENDER-CONSCIOUS PROVISIONS OF THE PROGRAM DO NOT SURVIVE INTERMEDIATE SCRUTINY	87
IV. THE SCOPE OF RELIEF IS IMPERMISSIBLE	89
I. Concrete Works Lacked Standing To Challenge The 1998 Ordinance, And Thus To Obtain Injunctive Relief	89
B. The Injunction Sweeps Too Broadly	90
CONCLUSION	92

TABLE OF AUTHORITIES

	Page(s)
<u>Cases:</u>	
<i>Ad Hoc Comm. v. Greenburgh No. 11</i> , 873 F.2d 25 (2d Cir. 1989)	90
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995)	<i>passim</i>
<i>Adarand Constructors, Inc. v. Pena</i> , 965 F. Supp. 1556 (D. Colo. 1997), <i>vacated as moot</i> , 169 F.3d 1292 (10th Cir. 1999), <i>rev'd</i> , 120 S. Ct. 722 (2000)	43
<i>Allen v. Alabama State Bd. of Educ.</i> , 164 F.3d 1347 (11th Cir. 1999)	72
<i>Ashton v. City of Memphis</i> , 49 F. Supp. 2d 1051 (W.D. Tenn. 1999)	78
<i>Associated Gen. Contractors v. City & County of San Francisco</i> , 813 F.2d 922 (9th Cir. 1987)	84, 88
<i>Associated Gen. Contractors v. City & County of San Francisco</i> , 748 F. Supp. 1443 (N.D. Cal. 1990), <i>aff'd</i> , 950 F.2d 1401 (9th Cir. 1991)	84
<i>Associated Gen. Contractors v. Coalition for Economic Equity</i> , 950 F.2d 1401 (9th Cir. 1991)	<i>passim</i>
<i>Associated Gen. Contractors v. New Haven</i> , 791 F. Supp. 941 (D. Conn. 1992), <i>vacated as moot</i> , 41 F.3d 62 (2d Cir. 1994)	47, 48
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986)	62, 65, 66

Table of Authorities - Continued

	Page(s)
<i>Bellwood v. Dwivedi</i> , 895 F.2d 1521 (7th Cir. 1990)	33
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982)	91
<i>Bullington v. United Air Lines, Inc.</i> , 186 F.3d 1301 (10th Cir. 1999)	35, 65
<i>Cache Valley Elec. Co. v. Utah Dept. of Transp.</i> , 149 F.3d 1119 (10th Cir. 1998), <i>cert. denied</i> , 526 U.S. 1038 (1999)	89
<i>Capps v. Sullivan</i> , 13 F.3d 350 (10th Cir. 1993)	76
<i>Carvalho v. Raybestos-Manhattan, Inc.</i> , 794 F.2d 454 (9th Cir. 1986)	60
<i>Catlett v. Missouri Highway & Transp. Comm'n</i> , 828 F.2d 1260 (8th Cir. 1987)	65
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	<i>passim</i>
<i>Combined Counties Police Ass'n v. Evanston</i> , 1991 WL 104139 (N.D. Ill.), <i>aff'd</i> 962 F.2d 10 (7th Cir. 1992)	90
<i>Concrete Works of Colorado, Inc. v. City and County of Denver</i> , 823 F. Supp. 821 (D. Colo. 1993)	<i>passim</i>
<i>Concrete Works of Colorado, Inc. v. City and County of Denver</i> , 36 F.3d 1513 (10th Cir. 1994)	<i>passim</i>

Table of Authorities - Continued

	Page(s)
<i>Concrete Works of Colorado, Inc. v. City and County of Denver</i> , 86 F. Supp. 2d 1042 (D. Colo. 2000)	4
<i>Cone Corp. v. Hillsborough County</i> , 908 F.2d 908 (11th Cir. 1990)	83, 85
<i>Conner v. Schnuck Mkts., Inc.</i> , 121 F.3d 1390 (10th Cir. 1997)	59
<i>Contractors Ass’n v. City of Philadelphia</i> , 6 F.3d 990 (3d Cir. 1993)	<i>passim</i>
<i>Contractors Ass’n v. City of Philadelphia</i> , 91 F.3d 586 (3d Cir. 1996)	29, 58, 63, 75
<i>Coral Constr. Co. v. King County</i> , 941 F.2d 910 (9th Cir. 1991)	<i>passim</i>
<i>Duffy v. Wolle</i> , 123 F.3d 1026 (8th Cir. 1997)	72
<i>EEOC v. General Tel. Co.</i> , 885 F.2d 575 (9th Cir. 1989)	64, 67
<i>Engineering Contractors Ass’n v. Metropolitan Dade County</i> , 122 F.3d 895 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1004 (1998)	10
<i>Ensley Branch, NAACP v. Seibels</i> , 31 F.3d 1548 (11th Cir. 1994)	88
<i>Faragher v. Boca Raton</i> , 524 U.S. 775 (1998)	34, 44

Table of Authorities - Continued

	Page(s)
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	44, 86, 87
<i>Garza v. Los Angeles</i> , 918 F.2d 763 (9th Cir. 1990)	33
<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977)	42
<i>Honadle v. University of Vermont</i> , 56 F. Supp. 2d 419 (D. Vt. 1999)	72
<i>In re Blinder, Robinson & Co.</i> , 124 F.3d 1238 (10th Cir. 1997)	46
<i>In re Whitlock</i> , 547 F.2d 506 (10th Cir. 1976)	23
<i>International Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	74
<i>Josey v. John R. Hollingsworth Corp.</i> , 996 F.2d 632 (3d Cir. 1993)	35
<i>King v. Hillen</i> , 21 F.3d 1572 (Fed. Cir. 1994)	41
<i>Kromnick v. School Dist.</i> , 739 F.2d 894 (3d Cir. 1984)	84
<i>Lam v. University of Hawaii</i> , 40 F.3d 1551 (9th Cir. 1994)	33
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996)	2, 91

Table of Authorities - Continued

	Page(s)
<i>Local 28, Sheet Metal Workers v. EEOC</i> , 478 U.S. 421 (1986)	31
<i>Local No. 93 v. City of Cleveland</i> , 478 U.S. 501 (1986)	32
<i>Martinez v. Roscoe</i> , 100 F.3d 121 (10th Cir. 1996)	76
<i>Massey v. Helman</i> , 196 F.3d 727 (7th Cir. 1999), <i>petition for cert. filed</i> , 68 U.S.L.W. 3756 (U.S. Nov. 2, 1999) (No. 99-1918)	90
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	90
<i>Mississippi Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)	87, 88
<i>Monterey Mechanical Co. v. Wilson</i> , 125 F.3d 702 (9th Cir. 1997)	72, 85
<i>Mountain States Tel. & Tel. Co. v. OSHRC</i> , 623 F.2d 155 (10th Cir. 1980)	60
<i>Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville</i> , 508 U.S. 656 (1993)	89
<i>Ohio Contractors Assn. v. Keip</i> , 713 F.2d 167 (6th Cir. 1983)	63
<i>Oliver v. Woods</i> , 209 F.3d 1179 (10th Cir. 2000)	26, 75

Table of Authorities - Continued

	Page(s)
<i>Palmer v. Shultz</i> , 815 F.2d 84 (D.C. Cir. 1987)	65
<i>Shuford v. Alabama State Bd. of Educ.</i> , 897 F. Supp. 1535 (M.D. Ala. 1995)	92
<i>Sobel v. Yeshiva Univ.</i> , 839 F.2d 18 (2d Cir. 1988)	55-56
<i>State Ins. Fund v. Ace Transp., Inc.</i> , 195 F.3d 561 (10th Cir. 1999)	26
<i>Ste. Marie v. Eastern R.R. Ass’n</i> , 650 F.2d 395 (2d Cir. 1981)	25
<i>T&S Serv. Assoc., Inc. v. Crenson</i> , 666 F.2d 722 (1st Cir. 1981)	86
<i>Telum, Inc. v. E.F. Hutton Credit Corp.</i> , 859 F.2d 835 (10th Cir. 1988)	50
<i>Triton Coal Co. v. Husman, Inc.</i> , 846 P.2d 664 (Wyo. 1993)	76
<i>United States v. Bell</i> , 988 F.2d 247 (1st Cir. 1993)	23
<i>United States v. Paradise</i> , 480 U.S. 149 (1987)	38, 71, 78, 85, 86
<i>United States Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1983)	25, 61, 72
<i>Valentino v. U.S. Postal Serv.</i> , 674 F.2d 56 (D.C. Cir. 1982)	56

Table of Authorities - Continued

Page(s)

W. H. Scott Const. Co. v. Jackson,
199 F.3d 206 (5th Cir. 1999) 91

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) *passim*

Statutes and Rules:

Fed. R. Civ. P. 54(b) 1

Fed. R. Evid. 201 81

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1367 1

28 U.S.C. § 2201 1

28 U.S.C. § 2202 1

61 Fed. Reg. 26042 (1996) 44

Denver, Co., Rev. Mun. Code ch. 28, art. III *passim*

Miscellaneous:

Ian Ayres & Frederick E. Vars, *When Does Private Discrimination
Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998) 44

STATEMENT OF RELATED CASES

This case was previously appealed to this Court in 1993. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir. 1994) (No. 93-1095) (Judges Logan and Ebel, and Associate Justice (Ret.) White).

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action, which arises under the laws of the United States, pursuant to 28 U.S.C. §§ 1331, 1343, 1367, 2201 and 2202. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Although the district court reserved ruling on plaintiff's claim for damages, it entered final judgment pursuant to Fed. R. Civ. P. 54(b) on plaintiff's claims for declaratory and injunctive relief on March 7, 2000 (Op. 78^{1/}), and denied the City and County of Denver's post-trial motions on March 29, 2000 (App. 247-53; Attachment B). The notice of appeal was timely filed on April 6, 2000. App. 254-55.

STATEMENT OF THE ISSUES

This appeal presents the following issues for review: whether (1) the newly minted six-question test the district court invented for evaluating the constitutionality of a race- and gender-conscious remedial program was legally erroneous; (2) the district court misunderstood the concept of societal discrimination; (3) the district court misunderstood the concept of identified discrimination; (4) the district court disregarded this Court's clear instructions for evaluating three factual questions on remand; (5) the district court improperly shifted the burden of proof to Denver; (6) the district court held Denver's evidence to an erroneously and impossibly high standard;

^{1/} The district court opinion, attached hereto as Attachment A, is designated "Op." Appellant's Appendix is designated "App."

(7) the district court erroneously required Denver to produce evidence sufficient to support a quota or set-aside program; (8) there was a strong basis in evidence for adoption of Denver’s remedial program as a matter of law; (9) Concrete Works waived its right to challenge the finding that the remedial program is narrowly tailored; (10) the program is narrowly tailored as a matter of law; (11) the district court erred as a matter of law in concluding that the gender-conscious provisions of the program do not survive intermediate scrutiny; (12) Concrete Works lacked standing to challenge the current ordinance and to seek injunctive relief; and (13) the scope of the remedy is overbroad.^{2/}

STATEMENT OF THE CASE

This case arises out of the longstanding efforts of the City and County of Denver (“Denver” or “the City”) to overcome the effects of pervasive race and gender discrimination in public contracting and the local construction industry, in a manner

^{2/} Issues 1, 2, and 3 concern errors the district court injected into the case in its opinion, and therefore were not explicitly addressed by Denver below, though Denver advocated the correct legal standards in its Trial Brief and Closing Argument. Issues 4 and 9 were raised in Denver’s Motion for Clarification of Issues to Be Tried on Remand, Doc. 89, at 7-10. Issue 5 was raised at App. 3368, 3374 n.12; Issue 6 at App. 3364, 3540-45; Issue 7 at App. 3364; Issue 8 at App. 3374; Issue 10 at App. 3515-39; Issue 11 in Denver’s Trial Brief, Doc. 260, at 64-66; and Issue 13 at App. 238-39. Issue 12 was not challenged below, but concerns standing, which is jurisdictional and cannot be waived. See *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). The point in the record where each issue was ruled upon is noted below in the discussion of that issue.

that is effective, fair, and consistent with constitutional obligation. It involves a Fourteenth Amendment equal protection challenge to Denver's women and minority business enterprise ("W/MBE") contracting outreach and nondiscrimination program (the "program"). The program requires prime contractors working on City projects to make affirmative efforts to solicit subcontracting bids from minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs").

Unlike the race-conscious initiatives that have caused the most concern for reviewing courts, Denver's program does not impose quotas or set-asides for W/MBEs: it gives *all* firms the opportunity to compete on *equal* footing for *every* subcontract, and *never* obligates prime contractors to engage a W/MBE unless that firm is both *qualified* to do the work and the *lowest bidder*.

Plaintiff Concrete Works of Colorado, Inc. ("Concrete Works"), a majority-owned contracting firm, sued Denver for damages and an injunction, alleging that, by requiring it to solicit bids from W/MBEs and refrain from rejecting qualified lowest-bidding W/MBEs, Denver forces it to discriminate. Then-Chief Judge Finesilver granted summary judgment to Denver, holding that, as a matter of law, Denver had a strong basis in evidence for believing that discrimination and its effects persist in City contracting and the local construction industry, and Denver's program is a very

narrowly tailored response. *Concrete Works of Colorado, Inc. v. Denver*, 823 F. Supp. 821 (D. Colo. 1993) (“*Concrete Works I*”).

On appeal, this Court reversed summary judgment on the ground that, although Denver had met its initial burden by producing evidence that “gives rise to an inference that local prime contractors discriminated on the basis of race and gender,” Concrete Works had raised several issues of fact and accordingly should be given an opportunity to rebut that inference at trial. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir. 1994) (“*Concrete Works II*”).

On remand, the district court, Chief Judge Matsch, held that, because Denver failed to prove that it had committed discrimination and that the program was narrowly tailored, the program is unconstitutional. *Concrete Works of Colorado, Inc. v. Denver*, 86 F. Supp. 2d 1042 (D. Colo. 2000) (Attachment A). This appeal followed.

STATEMENT OF FACTS

In the last 10 years, no fewer than six complex statistical disparity studies and numerous federal and local government reports have confirmed that chronic, severe discrimination and its lingering effects against women and minorities pervade the Denver-area construction contracting market. Over the years, Denver has adopted numerous race- and gender-neutral measures to counteract the discrimination and

remedy its effects on W/MBEs. Yet none has eliminated the problem. Accordingly, based on the mountain of compiled evidence documenting the urgent need for governmental action to break the system of discriminatory exclusion, which Denver's own practices were exacerbating, Denver passed a moderate remedial outreach ordinance. Denver has continually adjusted the program to conform to the most recent data concerning the precise nature of the discrimination and the least intrusive effective means of remedying it.

Concrete Works has stipulated that the majority-white Denver City Council's purpose in adopting these ordinances was not discriminatory, but *remedial* — “to remedy alleged past and present discrimination * * * in which Denver allegedly participated as an active or passive participant.” App. 77.

History and Evidence of Discrimination. In the early 1970s, the exclusionary practices of majority prime contractors in Denver made it “nearly impossible” for minority contractors to participate in publicly funded contracting. App. 1658-59. To address that problem, Denver created an “Affirmative Action Office” (“AAO”) within its Department of Public Works (“DPW”), the agency responsible for most City construction contracting. Op. 4; App. 3567-72. Despite AAO's efforts to ensure nondiscrimination and equal opportunity (App. 1657), prime contractors continued to exclude W/MBEs from City contracting (App. 1688-92). Therefore, in 1977, the City

Council authorized a voluntary program to provide lists of minority subcontractors and suppliers to majority firms and to urge them to be more inclusive in their projects. Op. 4; App. 1670-71, 3579-83. Lacking an enforcement mechanism (App. 1670-71), however, the program proved of limited value. Complaints from W/MBEs persisted (App. 1682), and for good reason: W/MBEs in the Denver construction industry remained substantially underutilized in comparison with their actual availability in the 1970s and early 1980s. App. 570-72, 8804-05.

Federal agencies pressured Denver to remedy the problem. In 1977, the Department of Housing and Urban Development (“HUD”) warned Denver that, by failing to take reasonable actions to encourage MBE participation in a federal contracting program, it was violating federal law. Op. 4; App. 3584-87. The following year, the General Accounting Office (“GAO”) reported substantial underutilization of MBEs on federal construction projects in Denver. Op. 4-5; App. 3614, 1687. As this Court remarked, the GAO study, which “reflects the findings of an objective third party,” “shows that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants.” 36 F.3d at 1524.

Denver adopted measures to make it easier for small firms to participate in public contracting (Op. 4), including issuing an executive order encouraging

affirmative action (App. 3588-91). Yet from 1977-1980, MBE utilization on Denver's airport construction projects remained low (App. 3847), "support[ing] Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance[s]" (36 F.3d at 1525). In 1979, the Department of Transportation ("DOT") threatened to withdraw federal funding unless Denver increased MBE representation. Op. 5; App. 3719-22, 3728-30.

In 1980, Denver agreed to adopt an affirmative-action goals program for projects funded by DOT. Op. 5; App. 3731-50. Three years later, the AAO reported continuing low utilization of MBEs on City projects. App. 1724-25, 3847-50. Thus, Denver considered implementing a more generally applicable program. Majority and minority contractors alike testified at a public hearing that W/MBEs suffered systemic discrimination perpetrated by City personnel, majority prime contractors, and others in the construction industry in the Denver Metropolitan Statistical Area ("MSA"), an area consisting of six contiguous counties including and surrounding Denver. Op. 5; App. 3776-3846. Notably, the area's primary contracting organization, the local chapter of the Association of General Contractors ("AGC"), stipulated to the existence of this discrimination (App. 3835-36) and did so again during the pendency of this case (App. 6939-40). The City Council therefore enacted Ordinance No. 246 (1983)

(App. 3852-60), setting a goal for W/MBE participation in all City construction projects managed by DPW. Op. 5-6.

In 1988, DPW surveyed contractors (App. 3992-4995) and conducted extensive hearings concerning discrimination in local public and private construction contracting (App. 4996-5896). It reported that discrimination continued and the program remained essential. Op. 6; App. 6629-35, 1784, 6218-22, 320-22, 6164. See also App. 1732-33. Following further public hearings (Op. 6; App. 5897-6085), the City Council enacted Ordinance No. 424 (1988), modifying the existing goals program. Op. 6; App. 6086-110.

Even as Denver took these steps seeking to eliminate discrimination and to ensure opportunities for W/MBEs in city contracting, however, some City employees and private contractors working on public projects resisted. They avoided the goals program by (1) using change orders to existing contracts rather than putting new work out to bid, and (2) characterizing major construction projects as “minor remodeling” to divert them from DPW to the Department of General Services (“DGS”), which, until 1990, had no goals program. App. 6150, 6247, 8807, 334-35, 1834.

In 1989, Denver hired consultants — BBC and Harding & Ogborn — to assess the program in light of the Supreme Court’s decision in *City of Richmond v. J.A.*

Croson Co., 488 U.S. 469 (1989). Op. 7; App. 272. In 1990, BBC issued a final report (“1990 Study”). App. 6138-6406.

The 1990 Study consultants realized that data measuring the utilization of W/MBEs on DPW contracts were skewed by the “intended remedial effect on MBE and WBE utilization” of Denver’s existing affirmative-action program. 36 F.3d at 1526. Analysis of the DPW data therefore could not answer the question whether the program remained necessary, *i.e.*, what would the utilization of W/MBEs on City projects be *absent* the program? To get a true measure, the study would have to examine W/MBE utilization on City contracting not within the goals program. Op. 23-24. Given that the same local construction industry performed both goals and non-goals public contracts (App. 618), the data generated on non-goals City contracts offered the perfect control group.

All of the “non-goals” data reviewed unequivocally confirmed that discrimination in City contracting had persisted absent affirmative action. Out of \$77.9 million in contracts awarded on eight local bond projects from 1972 to 1976, drawing all assumptions in favor of greater utilization, the disparity indexes were only .63 for MBEs and .29 for WBEs. Op. 24; App. 8807, 6207, 559-67. A disparity index of .80 or less — reflecting 80% or less of expected WBE or MBE participation — is

statistically significant and probative of discrimination.^{3/} These “stark data” “showed strong evidence of underutilization of MBEs and WBEs.” *Concrete Works II*, 36 F.3d at 1525. On a \$14-million bond project for a 1985 renovation of the Museum of Natural History, MBEs and WBEs received a meager 1.1% and 1.7%, respectively, of the total contract dollars (Op. 24; App. 6226), yielding disparity indexes of .48 for MBEs and .40 for WBEs. App. 8807. Finally, on three City-initiated multi-million-dollar 1985 housing bond projects, disparity indexes were only .43 for MBEs and .09 for WBEs (*ibid.*), despite the City’s instructions to increase W/MBE utilization (App. 2331). Op. 24-25; App. 6231-32. Together, these non-goals data show that, without affirmative action, W/MBE utilization “significantly deteriorates.” *Concrete Works II*, 36 F.3d at 1527. They thus constitute “particularly telling” “evidence of underlying discrimination in the Denver construction market.” *Ibid.*

The researchers also examined W/MBE utilization in the Denver-MSA construction market as a whole — encompassing both public and private contracting — again to determine whether majority prime contractors would engage W/MBEs if not required by law to seek them out. Analysis of U.S. Census Bureau data showed significant underutilization of MBEs and WBEs in 1977, with disparity indexes of .44

^{3/} See *Engineering Contractors Ass’n v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997); see also *Concrete Works II*, 36 F.3d at 1523 n.10.

and 46, respectively. App. 8804. In 1982, MBEs and WBEs were even more severely underutilized, at disparity indexes of .26 and .30, respectively. *Ibid.*

To update the census data, the 1990 Study researchers conducted a thorough survey of the construction firms in the Denver-MSA. Op. 26; App. 6364-74. The survey documented disparity indexes for MBEs and WBEs of .43 and .42, respectively. App. 8806, 585. The 1990 Study also generated and reviewed volumes of testimony and statements by W/MBE owners recounting specific experiences of discrimination. Op. 28. The evidence indicated that majority prime contractors denied W/MBEs bidding opportunities, bid-shopped to avoid using lowest-bidding W/MBEs, and outright rejected lowest-bidding W/MBEs. App. 6233-43, 6205-06, 6375-92. Some majority prime contractors “state[d] * * * that they do not, and will not, use MBEs unless required to by an affirmative action plan.” App. 6246. Based on all of this evidence, the City Council enacted Ordinance No. 513 (1990). App. 6407-55.

The following year, BBC issued a report further quantifying discrimination on non-goals City contracts by measuring the utilization of W/MBEs on DGS construction remodeling projects in 1989 and 1990. App. 9646-9813. Those non-goals construction remodeling contracts reflected approximately one-third of all City construction expenditures. App. 6172-73, 8807. “The DGS data reveals extremely

low MBE and WBE utilization.” *Concrete Works II*, 36 F.3d at 1526. In 1989, MBEs and WBEs received only .9% and 5.7%, respectively, of the more than \$27 million in remodeling contracts, yielding disparity indexes of .14 and .47, respectively. App. 9694-95, 8808, 615-17. In 1990, MBEs received only 1.2% of the more than \$18 million in remodeling contracts, yielding a disparity index of .19. App. 9696, 8808, 617. Since most DGS construction projects were under \$10,000 (App. 707, 1296) — and hence available to all firms regardless of their capacity to undertake large projects — these stark disparities offer especially valuable proof that any alleged differences in size or capacity of W/MBEs did not cause the disparities.

Following this Court’s decision in 1994, Denver commissioned BBC to conduct yet another study (“1995 Study”). App. 6893-6973. Using census data, the 1995 Study confirmed that Black, Hispanic, Asian American, and Native American construction enterprises all remained significantly underutilized in the Denver-MSA. The disparity indexes were .50 for Black-owned firms, .53 for Hispanic-owned firms, and .21 for Asian- and Native American-owned firms. App. 6908. Examining only firms with paid employees, the indexes were .67 for Hispanic firms and .16 for Asian and Native American firms. *Ibid.*^{4/} Examining only firms with no paid employees,

^{4/} No data existed for Black-owned firms.

the indexes were .36 for Hispanic firms and .42 for Asian and Native American firms. *Ibid.*

Importantly, the 1995 Study controlled for firm size, yet disparities persisted: Hispanic, Asian, Native American, and Women-owned firms each reported lower revenues *per employee* than majority firms. App. 6910, 6912.

To supplement the census data, the researchers again conducted a survey of construction firms in the Denver-MSA. Op. 31. Again, the survey documented significant underutilization, yielding disparity indexes of .64 for MBEs and .70 for WBEs. App. 6917. The disparities remained when the studies looked only at firms that had three years or more of experience and had more than one employee. App. 6915.

The 1995 Study also compiled the results of W/MBE interviews, most of which related experiences of discrimination. Op. 33-34; App. 6933-39. The Study reported that contractors that used W/MBEs for public contracts with goals often failed to use them on private contracts, failed to alert W/MBEs to bidding opportunities, bid-shopped to prevent W/MBEs from being the lowest bidders, and rejected qualified lowest-bidding W/MBEs. App. 6933-39.

Additionally, the 1995 Study summarized two statistical studies commissioned by other government agencies, which provided still more evidence of chronic, severe

discrimination in Denver-area contracting: a 1993 disparity study for the Denver Housing Authority (“DHA”) (App. 8625-8802) and a 1992 disparity study for the Regional Transportation District (“RTD”) (App. 8404-8624). The 1993 DHA study documented underutilization of MBEs in DHA construction procurement despite DHA’s affirmative-action program. App. 6931, 8697. The 1992 RTD Study separately examined prime contracting and subcontracting in the Denver-MSA construction market. App. 8512-19, 8547-51. It found massive disparities for Black-, Asian-, Hispanic-, and women-owned business enterprises in all categories. The disparity indexes for subcontracting were stark indeed: .01 for Blacks, .12 for Hispanics, .05 for Asians, and .53 for women. App. 8549. The 1992 RTD Study also conducted a sizable mail survey and telephone interviews, and summarized 1992 RTD hearing evidence. Like each of the other studies, it concluded that “[t]he statistical under-utilization is consistent with anecdotal evidence that marketplace discrimination within the Denver-Boulder CMSA limits the opportunity for M/WBEs to obtain work.” App. 6941.

On the basis of all of this information, as well as a 1992 U.S. Commission on Civil Rights report finding persistent discrimination in the City’s own construction contracting (App. 6560-6628), and the conclusions of industry and community taskforces that the program remained necessary (App. 1943-47, 2040-54, 6862-92),

Denver enacted Ordinance No. 304 (1996) (App. 6974-7020), refining the 1990 Ordinance. Op. 15.

The next year, Denver commissioned National Economic Research Associates, Inc. (“NERA”), to perform yet another study (the “1997 Study”). App. 8833-8942. This study calculated even more precisely the availability of W/MBEs in the Denver-MSA to perform City construction work, customized to the City’s geographic and sub-specialty spending patterns. App. 8840-50. These calculations showed that, for City projects, MBE prime contractor availability was 9.51%, MBE subcontractor availability was 10.11%, WBE prime contractor availability was 10.45%, and WBE subcontractor availability was 9.97%. App. 8851.

NERA also conducted a marketplace disparity study, which, because no local data at the desired level of specificity concerning W/MBE availability in each construction industry subspecialty exist, was performed on statewide data. App. 776. Yet again, the disparity indexes were all statistically significant: .41 for African Americans; .40 for Hispanics; .14 for Asians and Native Americans, and .74 for Women. App. 8859.

The 1997 study also surveyed W/MBEs in the Denver-MSA construction industry. The surveys indicated that severe discrimination persisted. Op. 38-40; App. 8870-83. Notably, fully half of all respondents stated that private contractors with

whom they had worked on public projects seldom or never used them on projects that did not have W/MBE participation goals. App. 8877.

Based upon the information contained in the 1997 Study, Denver passed Ordinance No. 948 (1998) (App. 9625-45), reducing the annual goals to 10% for MBEs and 10% for WBEs. The 1998 Ordinance also eliminated the provision that had allowed W/MBE prime contractors to count their own work toward W/MBE project-goal requirements. Op. 15-16.

The Program. The program mandates solely that, if WBEs or MBEs are underrepresented on a particular public project proposal in comparison to their actual availability for that project, the prime contractor will be eligible for the contract only if it shows that it (1) solicited W/MBEs' participation, gave them adequate time to prepare bids, and considered structuring the contract in economically feasible units; and (2) refrained from rejecting a qualified lowest-bidding W/MBE — *i.e.*, from engaging in conduct that plaintiff's own expert conceded "defin[ed] * * * discrimination" (App. 1121). If a prime contractor submits a lowest bid that does not meet the project goals, it still receives the contract if it has taken these outreach and nondiscrimination steps. Op. 20-22; § 28-58.^{5/} Critically, a prime contractor need *never* use a W/MBE that did not submit the lowest bid or was not qualified to do that

^{5/} Statutory cites are to Denver, Co., Rev. Mun. Code ch. 28, art. III, Attachment C.

job. Op. 13-14; §§ 28-54(ee), 58(b)(6). A contractor's poor past experience with a W/MBE can be proof of lack of qualification. 823 F. Supp. at 844; App. 2247.

Although the program sets aspirational annual utilization goals, its real focus is individual projects. Committees composed of representatives of majority-owned firms and W/MBEs who are knowledgeable about marketplace conditions assist the Mayor's Office of Contract Compliance ("MOCC") in setting specific goals for each individual contract based on the actual availability and capacity of W/MBEs to do the work for that particular contract. Op. 10-11; App. 1913-14, 1988-89. While the MOCC aims to meet the annual goals, there is no presumption that individual project goals will mirror the annual goals. App. 1974. Indeed, not infrequently, individual project goals are set at zero. App. 1996, 2231-32, 2280-81, 2343-44, 7496-7571.

Previous Decisions. Entering summary judgment for Denver, Judge Finesilver found the program to be a veritable "how to manual on narrowly tailored aspirational goals ordinances." 823 F. Supp. at 843. Moreover, "[t]he evidence upon which it is based is an exhaustive compilation of federal studies, anecdotal evidence, independent analyses, city council hearings, census data, and statistical studies on which any city council could reasonably rely to infer the presence of discrimination." *Id.* at 824. If this ordinance were unconstitutional, the court observed, "we have grave doubts about

whether *any* ordinance could pass scrutiny under so exceptionally strict a test.” *Id.* at 844-45.

On appeal, this Court agreed that “Denver has compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. Standing in marked contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, Denver’s evidence of discrimination both in the award of public contracts and within the overall Denver MSA is particularized and geographically targeted.” 36 F.3d at 1530. Together, it “gives rise to an inference that local prime contractors discriminated on the basis of race and gender.” *Id.* at 1529.

Nonetheless, because Concrete Works had identified several “unresolved questions of material facts” about Denver’s data, the Court ruled that “summary judgment was inappropriate.” *Id.* at 1530. A remand was in order “to permit the challenger [Concrete Works] to rebut the municipality’s statistical evidence.” *Id.* at 1531. The Court identified three factual issues worthy of exploration at trial: (1) whether the non-goals data or the goals data more accurately reflected the continuing need for the program (*id.* at 1527-1528); (2) whether Denver had indirectly funded the private-market discrimination by awarding public contracts to majority-owned prime contractors who discriminated in their private work (*id.* at 1529); and (3) whether

Concrete Works could prove that W/MBEs' smaller size and experience were race-neutral factors that explained the statistically significant utilization disparities (*id.* at 1528). The Court specifically observed that Concrete Works had failed to “preserve * * * on appeal” any challenge to Judge Finesilver’s finding “that the Ordinance is narrowly tailored.” *Id.* at 1531 n.24.

The Trial. At trial on remand, Denver presented all of the above-described studies, their accompanying massive compilations of direct evidence of discrimination, and much more. Experts David Keen and Dr. David Evans explained that each study clearly generates an inference of discrimination in the construction market in the Denver-MSA. Several witnesses described, from extensive first-hand observation, the history of the race and gender discrimination that pervades the Denver-area construction industry. App. 1732-33, 1866-68, 1972, 2215-16.

Majority prime contractors admitted that their own firms had discriminated on the basis of race and gender and that such discrimination was prevalent in the local construction industry. App. 2021-34, 2056-65, 2313-17. W/MBE witnesses testified that prime contractors often required only W/MBEs to be “prequalified” as a condition of accepting their bids (Op. 62-63; App. 3422-27); rejected qualified lowest-bidding W/MBEs (*e.g.* App. 2449, 2624-25); paid W/MBEs more slowly (Op. 64; App. 3433-38); required W/MBEs “to do extra work that was not appropriately within the scope

of the subcontracts” (Op. 65; App. 3445-50); terminated W/MBEs in a manner inconsistent with industry standards (Op. 66; App. 3474-75); and solicited bids from and utilized W/MBEs only on City contracts that were subject to the program (Op. 67; App. 3475-81). In addition, W/MBE owners and employees testified that they routinely experienced severe race- and gender-motivated harassment on jobsites, “which had direct financial consequences such as the need to reassign employees, interruptions of work, and repairing damaged work and equipment.” Op. 66; App. 3454-70. These minorities and women were called “nigger” (App. 3065) and “dumb f---ing Mexican” (App. 2779-80), had their tires slashed (App. 2524-25), were physically assaulted and fondled (App. 3082-83, 2853), spat upon (App. 3069-70), and hammered with one-pound metal bolts thrown from a height of 80 feet (App. 3071-72).

In rebuttal, Concrete Works presented two experts, John Lunn and George La Noue, who opined, without evidence, that controlling for more variables and using different data might possibly explain away the utilization disparities documented by Denver’s studies. Neither expert conducted his own disparity study. Indeed, neither performed any statistical analyses, by regression or otherwise, to show that the disparities revealed by Denver’s studies were attributable, or even probably attributable, to factors other than discrimination. Nor could they have, since, in their

view, no data of the requisite precision exist. The two contented themselves with taking pot-shots at Denver's many studies, caviling that they "failed" to use the non-existent more precise data. Concrete Works' only other witnesses were its owner and one of its former employees, both of whom opined that discrimination was uncommon.

On March 7, 2000, the district court declared the program unconstitutional and enjoined Denver from enforcing it or even gathering data concerning W/MBE utilization (see Op. 78; Post-Tr. Order, Attachment B, at 3). In its opinion, the district court did not endeavor to answer the three factual questions that this Court had addressed to it, declaring the first two irrelevant as a matter of "law." Op. 60; *infra*, pp. 45-51. Instead, the district court promulgated a brand new, six-question test for evaluating the constitutionality of municipal affirmative-action programs, for which it cited no precedent. Op. 51-52. The court found Denver's statistical and anecdotal evidence lacking because, while that evidence may have been compelling, it did not answer each of the court's newly minted six questions. Op. 52, 61, 69. The court also faulted Denver's evidence because there is a "nearly infinite number of variables affecting the fate of firms" in the contracting industry (Op. 47), and, by failing to control for them, Denver's studies did not conclusively establish that the disparities between the availability and utilization of W/MBEs were the product of redressible

discrimination. Op. 61. The Court also found that the program is not narrowly tailored to address the problem of discrimination in public contracting, ignoring Judge Finesilver's contrary holding and Concrete Works' waiver of the issue on appeal. Op. 69-78.

SUMMARY OF ARGUMENT

The Supreme Court emphasized in *Croson* that municipalities unquestionably possess “legislative authority * * * [to] use [their] spending powers to remedy private discrimination” in their jurisdictions. 488 U.S. at 492. In *Adarand Constructors, Inc. v. Peña*, the Court reiterated that “government is not disqualified from” adopting race and gender-conscious measures “in response to” “the lingering effects of racial discrimination against minority groups.” 515 U.S. 200, 237 (1995). The Court admonished that “strict scrutiny” of municipal affirmative action programs therefore must *not* be applied in a manner that is “strict in theory, but fatal in fact.” *Ibid.* (citation omitted).

Yet the district court applied to Denver's evidence and ordinances an unprecedented mode of scrutiny that is inherently “fatal in fact.” The court arrived at its conclusion that Denver lacked a strong basis in evidence only by categorically redefining the kinds of discrimination that the Supreme Court has long held municipalities are empowered to remedy, and thereby grossly exaggerating the quality

and quantum of statistical and anecdotal evidence required to create an inference of remediable discrimination. Part I. The district court predicated its analysis upon a brand new, “six-question” test that the court had fashioned for ascertaining the constitutionality of municipalities’ affirmative-action programs and the sufficiency of their evidence (Part I.A), and upon incorrect articulations of the prohibition against race-conscious remedies for societal discrimination (Part I.B) and the requirement of “specifically identified” discrimination (Part I.C). Each of the court’s newly crafted legal standards violates well-established Supreme Court precedent.

The district court imposed these erroneous legal requirements in lieu of fulfilling the mission this Court assigned it in *Concrete Works II*. On remand, a district court “‘must implement both the letter and spirit of the previous mandate, taking into account the appellate court’s opinion and the circumstances it embraces.’” *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993) (citation omitted). Accord *In re Whitlock*, 547 F.2d 506, 509-10 (10th Cir. 1976). The district court implemented neither the letter nor the spirit of this Court’s decision in *Concrete Works II*.

This Court emphasized in *Concrete Works II* that, although Denver bore the initial burden of production, the “‘ultimate burden [of proof] remains with [the plaintiff].’” 36 F.3d at 1522. *Concrete Works* thus could prevail *only* by “‘persuading the court that [Denver’s initial] evidence did *not* support an inference of prior

discrimination.” *Ibid.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 293 (1986) (O’Connor, J., concurring)) (emphasis added). Yet, contrary to this Court’s explicit instruction, the district court shifted to *Denver* the burden to “negate all evidence of non-discrimination * * * [and] prove judicially that discrimination did exist.” *Id.* at 1530. Parts I.E, I.F, I.A.1. Also in violation of this Court’s direction, the district court further demanded the same “strong showing” (Op. 69) necessary to justify a rigid quota to support Denver’s mild affirmative outreach program. Part I.G.

The district court also wholly disregarded this Court’s clear directions concerning the three specific fact questions it had remanded. Part I.D. Most egregiously, the court ruled private-market disparities to be legally irrelevant, despite this Court’s clear holding to the contrary (36 F.3d at 1529) *and* its own explicit conclusion that Denver was indirectly funding private-market discrimination by “paying tax dollars to support firms that discriminate” in their private contracts (Op. 71). Part I.D.2. The court similarly dismissed non-goals utilization disparities as legally irrelevant despite uncontroverted evidence that they reflected what would have happened in City contracting but for the affirmative action program, and hence were “particularly telling” evidence of the need for the program. Part I.D.1. The court also erroneously declined to evaluate, and improperly excluded, evidence that utilization disparities persisted even controlling for differences in size and experience, and that,

in any event, W/MBEs' relatively smaller size and slightly less experience were not "race-neutral" factors, but rather the products of longstanding discrimination. Part I.D.3.

Application of the proper legal standards yields the inexorable conclusion that, as a matter of law, Denver's voluminous evidence more than "approach[es] a prima facie case of discrimination" (*Croson*, 488 U.S. at 500) and thus warranted remedial action. Part I.H. Indeed, the district court's own factual findings — analyzed under the correct legal principles — unequivocally compel that result. Parts I.A, I.D, I.H. The Court should thus reverse. At minimum, the district court's numerous blatant legal errors compel a remand for evaluation of the evidence under the correct legal standards. See, e.g., *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983); *St. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 403 (2d Cir. 1981).

Further, the district court erred in concluding that the overwhelming evidence of discrimination against WBEs was insufficient to sustain the WBE program even under intermediate scrutiny. Part III.

The district court erred in addressing the narrow tailoring issue at all. By failing to appeal Judge Finesilver's ruling that the program is a model of narrow tailoring, Concrete Works waived any challenge to it. Part II.A. Regardless, Judge Finesilver's conclusion that the program could not be more narrowly tailored without

becoming utterly ineffective is plainly correct; and only the district court's legal errors led it to conclude otherwise. Part II.B. Finally, Concrete Works lacked standing to challenge the current ordinance (Part IV.A) and the injunction is wildly overbroad (Part IV.B).

STANDARDS OF REVIEW

This Court reviews the district court's legal conclusions, including its assessment whether there was a strong basis in evidence for Denver's conclusion that remedial action was warranted (36 F.3d at 1522), de novo. *Oliver v. Woods*, 209 F.3d 1179, 1185 (10th Cir. 2000). To the limited extent that this appeal challenges the accuracy of specific factual findings, those findings are reviewed for clear error. *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 564 (10th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT DENVER LACKED A STRONG BASIS IN EVIDENCE FOR BELIEVING THAT REDRESSIBLE DISCRIMINATION EXISTED WAS PREMISED ON NUMEROUS LEGAL ERRORS AND IS WRONG AS A MATTER OF LAW

A. The District Court Wrongly Subjected Denver's Evidence To A New Six-Question Test That Contravenes Well-Established Precedent

The district court created a brand-new, six-question test for evaluating the sufficiency of evidence of discrimination to support a race- or gender-conscious remedy. Op. 51-52. Taken together, the court's new test would proscribe a

municipality from remedying all but proven, current discrimination, undertaken pursuant to identified policies, for which the City itself is liable, and only where the affirmative-action program will succeed in eliminating, rather than merely remedying, the discrimination, and burden only the discriminators themselves. In so dramatically restricting municipalities' remedial powers, the court violated several decades of Supreme Court precedent, as we explain below.

It is indisputable that these legal errors infected the district court's evaluation of the evidence: it said so. The court repeatedly declared that, although it found Denver's evidence to suggest discrimination, it was ruling for Concrete Works because Denver's statistical and anecdotal evidence failed adequately to answer its new questions. For example, the court deemed "the statistical studies in evidence in this case" flawed explicitly because "the methodology was not designed to answer the [six] relevant questions." Op. 61. Indeed, the court discounted all of Denver's statistical studies on the remarkable ground that, by endeavoring to answer questions other than "the court's suggested questions" — which it had just created — the studies evinced a "litigation bias [that] affected their methodology and the results." Op. 56. Similarly, the court acknowledged that Denver's anecdotal evidence "do[es] give support to the conclusion that women and minority groups are disadvantaged in trying to compete in the construction industry because of the prevalence of negative views

about them.” Op. 67; accord Op. 69. But it deemed this evidence insufficient as a matter of law only because, “taken as a whole, [it] does not answer the six questions considered in the court’s evaluation of the statistical evidence.” *Ibid.* As discussed below in Parts I.G and III, the court also employed the legally erroneous six questions in concluding that the program was not narrowly tailored.

Although the six-question test formed the foundation of its decision, the court cited no authority in support of it. None exists. The six questions, cut from whole cloth, violate clear and binding precedent in numerous important ways.

Question 1: “Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA?”

This question erroneously required Denver to *prove* the existence of discrimination. Op. 52 (asking whether there “*is * * * pervasive * * * discrimination,*” rather than whether such discrimination may fairly be inferred from a strong basis in evidence). Question 6 similarly asks explicitly whether the burden of compliance was placed on those who were “accountable for the *proven* discrimination.” *Ibid.* (emphasis added); see also *infra*, p. 62. These questions thus adopt Concrete Works’ grossly erroneous position at trial that Denver “actually has the *burden of establishing by a preponderance that* not only were there inferences of discrimination, but in fact

that the *inferences were correct.*” App. 3214 n.34 (emphasis added). See also, *e.g.*, App. 1361 (La Noue: “proof of discrimination is what I think is required here”).

This question violated binding Supreme Court and Tenth Circuit precedent. The correct question is not whether there in fact “is,” or was, discrimination; the question is simply whether there was a “strong basis in evidence” for *inferring* it. *Croson*, 488 U.S. at 510. “[T]he Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination.” *Concrete Works II*, 34 F.3d at 1522 (citing *Wygant*, 476 U.S. at 292 (O’Connor, J., concurring)). Indeed, in remanding this case, this Court “emphasize[d]”: “nor is it Denver’s burden to *prove* judicially that discrimination did exist.” *Id.* at 1530. “[T]he municipality [need not] convince the court of the accuracy of its conclusions.” *Contractors Ass’n v. Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996); *Associated Gen. Contractors (“AGC”) v. Coalition for Econ. Equality*, 950 F.2d 1401, 1416-17 (9th Cir. 1991).

In reliance on its mistaken belief that discrimination must be “proven” to be redressible, the district court erroneously required Denver’s statistical evidence to rise to the level of conclusive proof of discrimination, as explained below, Part I.F.

By asking whether there “is” pervasive discrimination, this question also erroneously requires a showing of *current* discrimination in the Denver-MSA. In fact,

the law is clear that a municipality may use race- and gender-conscious remedies not only to counteract current discrimination, but also to remedy the “*lingering effects*” of *past* discrimination. *Adarand*, 515 U.S. at 237 (emphasis added); see also *Croson*, 488 U.S. at 504 (governments may remedy “a pattern of prior discrimination”); *Concrete Works II*, 36 F.3d at 1522 (same).

The district court’s conclusion that Denver’s evidence did not support an inference of discrimination was largely predicated on this glaring legal error. To cite but one example, the court attributed the demonstrated underutilization of W/MBEs in part to the tendency of majority prime “contractors * * * to do repeat business with those [subcontractors] with whom they have had previous success” — a tendency the court said resulted from “risk aversion” rather than current intentional discrimination, and accordingly dismissed as nonprobative. Op. 49. But the district court failed to analyze *why* majority primes had not had past experiences working with W/MBEs. To the extent that it was because they or their colleagues previously had discriminatorily refused to work with those subcontractors or because discrimination had kept them out of the market, as the evidence demonstrated (see pp. 19-20, 58), their conduct perpetuated the effects of past discrimination and is explicitly remediable under *Croson* and *Adarand*. The district court’s assumption that prime contractors’ maintenance of an Old-Boy Network (App. 515, 3094-95) did not

constitute remediable discrimination, based upon its erroneous belief that Denver was powerless to redress the lingering effects of past discrimination, was error.

Question 2: “Does such discrimination equally effect all of the racial and ethnic groups designated for preference by Denver and all women?”

In reliance on this question, the court criticized Denver’s program, stating that “the aggregation of [the various racial groups] as equally victimized by discrimination and equally entitled to the preferential remedies is particularly problematic for Fourteenth Amendment equality analysis.” Op. 56-57; see also Op. 74. But there is no legal support for the proposition that discrimination must “equally [a]ffect” all those protected by the ordinance. While Denver needed to (and did) produce evidence of discrimination against each minority group protected by the program (*Croson*, 488 U.S. at 506), even the district court acknowledged that “no case has ever enunciated * * * a requirement” that a municipality either set different goal percentages for each minority group or prove that all groups were affected “equally” by the discrimination. Op. 74. In fact, courts often remedy discrimination by imposing joint goals for various minority groups. See, e.g., *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 440-441 (1986). Nor would such a requirement make any sense. It would burden prime contractors, forcing them to solicit bids from each minority group

separately and to meet five different participation goals on every project. App. 355-56.

Even more incorrect was the court's requirement that the discrimination "equally [a]ffect * * * all women." This requirement erroneously demands that an affirmative-action program be victim-specific: limited to individual victims and tailored to remedy the discrimination each actually experienced. Thus, the district court faulted the program because "the presumption [of discrimination] applies *equally* to all those who identify themselves as being within the protected groups" and the City does not routinely verify that each W/MBE is in fact a victim of discrimination. Op. 74 (emphasis added). That is not, of course, the law.

Rather, it is "clear that the voluntary action * * * may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Local No. 93 v. Cleveland*, 478 U.S. 501, 516 (1986). Courts have squarely rejected the "argument that * * * to pass constitutional muster any remedy adopted must provide redress only to specific individuals who have been identified as victims of discrimination." *AGC*, 950 F.2d at 1417 n.12. After all, "an iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy superfluous," "thwart[ing] the Supreme Court's directive in *Croson*." *Ibid.* (citation omitted); see also *Wygant*, 476 U.S. at 287 (O'Connor J., concurring); *Coral Constr. Co v. King*

County, 941 F.2d 910, 925 (9th Cir. 1991) (the municipality is not required to make a “finding of specific instances of discriminatory exclusion for each MBE” since, “[i]f systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination”).

Question 3: “Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender?”

This question contravenes well-established law. First, there is no requirement that discrimination be “for the purpose of disadvantaging” minorities. A prime contractor who refuses to work with W/MBEs not because he affirmatively wants to “disadvantag[e]” them, but simply because his workers do not like to be around minorities and women, is still guilty of intentional, redressible discrimination. See *Lam v. University of Hawai’i*, 40 F.3d 1551, 1560 & n.13 (9th Cir. 1994) (discrimination to appease third-party preferences is illegal); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990) (Posner, J.) (“refus[al] to hire black workers * * * because * * * customers do not like blacks” is unlawful intentional discrimination); *Garza v. Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring).

Yet the district court suggested that prime contractors’ refusals to work with W/MBEs because they knew that their employees would harass them, and thereby

impede the successful completion of the projects, did *not* constitute redressible discrimination. After cataloguing and accepting Denver’s evidence that the employees of prime contractors brutally racially and sexually harass the employees of W/MBEs on jobsites, the district court declared that “the [in]ability of the subcontractors to do their work on a job-site shared by others” is a “factor[] militat[ing] against * * * W/MBE firms.” Op. 66, 68.

That was error. Giving one’s employees a “heckler’s veto” is straightforward discrimination. *Faragher v. Boca Raton*, 524 U.S. 775, 798 (1998); see cases cited *supra*, p. 33. The requirement that Denver’s statistical and anecdotal evidence demonstrate not merely intentional discrimination, but a subjective purpose to disadvantage, was thus clear and prejudicial error.

Second, this question erroneously requires that the discrimination result from specific “policies and practices.” The court explicitly rejected Denver’s evidence based on this question, reasoning that “[w]e do not know * * * whether the [racial inequalities in the Denver construction industry] result from discriminatory policies and practices of business firms.” Op. 69; accord Op. 61 (rejecting evidence of discrimination because “[i]t cannot be determined whether [it was] fairly attributable to employers as a matter of business policy”).

No such requirement exists in the law. “[G]ross statistical disparities * * * alone * * * may constitute prima facie proof of a pattern or practice of discrimination” (*Croson*, 488 U.S. at 501) absent any further identification of the specific discriminatory policies and practices that are causing those disparities. Thus, the Ninth Circuit has rejected precisely this argument, *i.e.*, that a race-conscious “[o]rdinance must be struck down because it fails to identify specific bid practices that caused the racial imbalance,” explaining: “This proposition has never been sanctioned either explicitly or implicitly in the equal protection context by the Supreme Court or this court. To do so would appear to violate the Supreme Court’s statement in *Croson* that statistical disparities alone would be sufficient to support a showing of discrimination sufficient to institute a race-conscious remedial plan.” *AGC*, 950 F.2d at 1416 n.11.

By its contrary holding, the district court required Denver to adduce *more* proof to justify affirmative action than is required even to establish a prima facie case of a pattern and practice of disparate treatment, in violation of *Croson*, 488 U.S. at 500-01. Identification of specific discriminatory practices is required to prove only disparate impact cases, not disparate treatment cases. See generally *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 642 (3d Cir. 1993); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1312 (10th Cir. 1999).

Question 4: “Would Denver’s use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination?”

This question violates the Supreme Court’s explicit holding in *Croson*, and this Court’s explicit holding in *Concrete Works II*, that a municipality is empowered to take affirmative action even if it is *not* itself “guilty of prohibited discrimination.” Rather, the municipality need only be a “passive participant” in the discrimination of others. *Croson*, 488 U.S. at 492; see also *id.* at 519 (Kennedy, J., concurring). As this Court explained, “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” 36 F.3d at 1529 (emphasis added).

There is no doubt that, despite its lip service to the proposition that a City may remedy discrimination in which it is a passive participant (Op. 71), the district court analyzed the evidence based on its incorrect belief that a City may remedy only discrimination for which it would otherwise be “guilty” (Question 4). Specifically, it deemed Denver’s evidence of its own funding of private-market discrimination — “what happens in the market” outside “the operation of [the City’s] program” — irrelevant as a matter of “law” (Op. 60), despite its explicit finding that Denver was funding the discrimination in that private market (Op. 71). This serious error is explained further in Part I.D.2, below.

Question 5: “Is the compelled use of certified MBE’s and WBE’s in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry?”

At trial, Concrete Works insisted that Denver’s ordinance “must be limited to such ‘discrimination’ that it can, by implementation of race-based preferences, *eliminate*.” Pltf. Tr. Brf., Doc. 259 at 7 (emphasis added). The district court agreed, requiring Denver to show that its program was “likely to *change* the discriminatory policies.” Question 5; see also Op. 69. It thus dismissed Denver’s “anecdotally identified discrimination” because “[c]ompulsory contracting with MBEs and WBEs does little to *change* such opinions. This is clearly demonstrated by the persistence of this behavior despite all of the years in which the City’s preference program has been in effect.” Op. 75 (emphasis added).

Although it would obviously be desirable if a municipality’s ordinance could actually “change [the] opinions” of discriminators and stamp out discrimination in the Denver construction industry, as Question 5 demands, there is certainly no requirement that it do so. A program must be narrowly tailored to “*remedy*” discrimination; it is not expected actually to *eliminate* it. So long as the effects of discrimination persist, Denver has a compelling interest in remedying them, regardless whether the program actually persuades individuals to cease their discriminatory behavior. Cf. *Croson*, 488 U.S. at 492; *Concrete Works II*, 36 F.3d at 1529. To hold

otherwise would have the ironic effect of precluding affirmative action in the very circumstance in which it is most needed: where discrimination is most deeply entrenched.^{6/}

Question 6: “Is the burden of compliance with Denver’s preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?”

There is no rule of law that the burden of compliance with an affirmative-action program may only be placed on persons who are themselves responsible for the discrimination. Quite the contrary: “As part of this Nation’s dedication to eradicating racial discrimination, innocent persons *may* be called upon to bear some of the burden of the remedy. * * * [S]uch a ‘sharing of the burden’ by innocent parties is not impermissible.” *Wygant*, 476 U.S. at 280-81 (plurality opinion) (emphasis added). The correct constitutional inquiry is whether the program “impose[s] an *unacceptable* burden on innocent third parties.” *United States v. Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion) (emphasis added). As explained below (Parts I.G, II), this program imposes virtually *no* burden on *anyone*.

^{6/} Moreover, Denver’s program *does eliminate* some discrimination in City contracting, by precluding rejection of qualified, lowest-bidding W/MBEs when they are underrepresented on a particular project.

B. The District Court Erred In Holding That Identified Discrimination Was Not Redressible Because Discriminatory Impulses Are Shared By Society At Large

Over and over, throughout its opinion, the district court rendered factual findings that W/MBEs had suffered identified discrimination in the Denver construction industry. Yet it deemed this discrimination to be irremediable, solely because “[i]t cannot be determined whether these [discriminatory practices] are manifestations of societal prejudices” (Op. 66), “reflecting attitudes and beliefs that are not unique to those who do construction work” (Op. 75).

The district court’s refusal to acknowledge the significance of its own factual findings, which we list below, was predicated upon a gross misunderstanding of the concept of “societal discrimination.” It is an established principle in affirmative-action jurisprudence that “societal discrimination” — “amorphous,” nonspecific discrimination attenuated from the realm of the affirmative-action program — is “an inadequate basis for race-conscious classifications.” *Croson*, 488 U.S. at 497. Thus, for example, a City may not adopt affirmative action in construction contracting to remedy “the sorry history of * * * discrimination in this country,” absent evidence of specifically identified discrimination in the construction industry itself. *Id.* at 499.

Yet the district court mistook these admonitions to mean that a municipality is powerless to ameliorate the effects of identified discrimination by adopting

affirmative action in the very industry in which the discrimination is occurring, whenever that discrimination results from “societal” prejudices. Of course, racial and gender discrimination *always* result from “societal” prejudices; yet that hardly disempowers municipalities or courts to remedy it.

Examples of this serious error abound. The district court found, for instance, that many “witnesses described incidents” of discrimination by prime contractors “which *do* give support to the conclusion that *women and minority groups are disadvantaged in trying to compete in the construction industry because of negative views about them.*” Op. 67 (emphasis added). Yet it dismissed this discrimination as irremediable because “[t]here is nothing to suggest that the presence of these attitudes among * * * prime contractors is different from any societal views.” *Ibid.* The court similarly noted that Denver’s

witnesses gave graphic examples of racial and gender slurs and * * * the sabotage of equipment and vehicles and dangers of physical harm from conduct fairly attributable to resentment of their presence at the work site. Some of these incidents had direct financial consequences such as the need to reassign employees, interruptions of work and repairing damaged work and equipment. Some minority employees refused to work on some jobs because of these conditions. * * * The attitudes showed outright hostility toward race and gender and reflected stereotypical views about W/MBEs.

Op. 66. The court accepted this testimony, yet again deemed the discrimination irredressible because “[i]t cannot be determined whether these [incidents] are [simply] manifestations of societal prejudices.” *Ibid.* See also Op. 62 (“Some witnesses gave

vivid descriptions of racial and gender hostility toward them while working on City projects. The reasons for such hostility are not known. Some may be societal * * *.”).

In short, as the district court explained, it rejected Denver’s “anecdotally identified discrimination” because it “reflect[s] attitudes and beliefs that are not unique to those who do construction work” (Op. 75); and it rejected Denver’s statistical studies because they “do not generate a fair inference that there are discriminatory barriers to participation in the construction industry that are different from societal discrimination” (Op. 61).

The district court’s belief that, so long as discriminatory conduct or impulses occur in society at large, there is nothing that the City can do about identified discriminatory conduct in a specific industry — a belief that explicitly infected its evaluation of both the anecdotal and statistical evidence (see *supra*) — was very wrong. A municipality most certainly *is* empowered to remedy discrimination in the construction industry in which it is an active or passive participant, especially discrimination by prime contractors, even if, sadly, society at large shares the same discriminatory views. See, e.g., *Croson*, 488 U.S. at 492; cf. *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

C. The District Court Erred In Deeming The Statistical Studies Documenting Severe Underutilization Non-Probative Because “They Say Nothing About Who Is Responsible For Such Discrimination”

The district court rejected Denver’s statistical studies because, “[w]hile statistical studies may suggest that some showings of disparity may create an inference of discrimination, they say nothing about who is responsible for such discrimination. Is it fair to assume that male Caucasian contractors will only do business with other male Caucasians even where that is contrary to their economic interest?” Op. 60.

The Supreme Court has held that, when statistical studies show ““gross statistical disparities”” (*Croson*, 488 U.S. at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 (1977))) between the utilization and availability of W/MBEs, it is “fair to assume” that some majority contractors have chosen “only [to] do business with other male Caucasians,” whether that is “contrary to their economic interest” or not. As this Court explained, “general data” (36 F.3d at 1528) comparing utilization and availability of W/MBES in the marketplace *do* “give[] rise to an inference that *local prime contractors* discriminated on the basis of race and gender” (*id.* at 1529) (emphasis added); see also *infra*, pp. 62-63.

That inference is buttressed by the fact that W/MBE underutilization on City projects dissipated when the City forbade prime contractors from rejecting *qualified*

lowest-bidding W/MBEs. See *supra*, p. 10; *infra*, pp. 45-48; see also 36 F.3d at 1527. If the underutilization were attributable primarily to discrimination by *other* actors in the industry — not prime contractors — that prohibition likely would have done little to eliminate the disparities. Voluminous testimony, including admissions by majority prime contractors that discrimination against W/MBEs was the common practice (see *supra*, pp. 19-20), confirmed discrimination by prime contractors.

To be sure, the record also identified some discrimination by other actors in the construction industry, such as lenders and suppliers. Such discrimination is, of course, redressible through a program like this one, since the evidence showed that the City’s “spending practices were exacerbating” the discrimination through payments to the responsible actors. *Croson*, 488 U.S. at 504. See, *e.g.*, App. 3397-3404, 3438-45, 3514-15, 8879, 9332-73, 3450-54, 2383-85, 2406, 2696-97. Moreover, as this Court suggested in *Concrete Works II*, 36 F.3d at 1529, and the Ninth Circuit has twice held, a municipality’s “infusion of tax dollars into a discriminatory industry,” even absent direct payments to the discriminators, perpetuates the effects of discrimination, and hence authorizes remedial action. *Coral Constr.*, 941 F.2d at 916; *AGC*, 950 F.2d at 1413; see also *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1576 (D. Colo. 1997) (holding that evidence of discrimination by multiple actors in the construction and related industries contributed to a strong basis in evidence to enact the federal

DBE program), *vacated as moot*, 169 F.3d 1292 (10th Cir. 1999), *rev'd*, 120 S. Ct. 722 (2000); cf. 61 Fed. Reg. 26042 (1996) (invoking such evidence as support for federal DBE program); *Fullilove v. Klutznick*, 448 U.S. 448, 467 (1980) (plurality), *overruled in part on other grounds, Adarand*, 515 U.S. at 235; Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 Colum. L. Rev. 1577, 1610-14 & n.129 (1998).

Ironically, the district court invoked its new rule that prime contractors may not be presumed to be discriminators to absolve them of discrimination for which they were unquestionably legally responsible. The district court held discrimination by prime contractors' own employees to be irredressible, reasoning that "[i]t cannot be determined whether these [incidents of discrimination] are * * * fairly attributable to employers as business policy." Op. 66. But employers are liable for harassment perpetrated by their managers and supervisors (*Faragher*, 524 U.S. at 807), as well as their employees' job-site harassment, of which they knew or should have known (*id.* at 799-800). Their liability is not limited, as the district court suggested (Op. 62, 64), to situations in which they "instructed" their employees to engage in discrimination or adopted a formal "business policy" endorsing it. *Ibid.* In any event, regardless whether the prime contractors were liable for their employees' discrimination, Denver had the power to remedy that discrimination because Denver

directly (though unwillingly) funded such conduct when it occurred on city contract jobsites; and indirectly funded it by awarding public contracts to the very prime contractors on whose private-contract job-sites it occurred (36 F.3d at 1529), as explained below at pages 48-51.

D. The District Court Disregarded This Court’s Instructions Concerning The Issues Remanded For Trial

While the district court created new legal standards that lacked any basis in law, it ruled irrelevant as a matter of law or ignored each of the three factual questions this Court specifically directed it to address.

1. Non-Goals City Construction Contracting Data

Observing that data measuring W/MBE utilization on non-goals City contracts document dramatic disparities and “clearly constitute[] a prima facie case of discrimination indicating that the racial classifications in the [City] plan were necessary’ under *Croson*” (36 F.3d at 1526 (citation omitted)), but that data on City contracts subject to goals did not reflect such underutilization (*id.* at 1527-28), this Court remanded to the district court to resolve this issue of fact: Was Denver correct in contending that the data from the goals program “reflects the intended remedial effect on MBE and WBE utilization” of “pre-existing affirmative action goals programs” and “was therefore ‘tainted’ and distorted by these”? *Id.* at 1526. If so, then “the utilization of MBEs and WBEs on non-goals projects is the better test of

whether there has been discrimination historically in Denver contracting practices,” and indeed “particularly telling” evidence of the need for affirmative action. *Ibid.*; accord *id.* at 1528.

Remarkably, the district court made *no* effort whatsoever to answer that question. Instead, it summarily declared that, as a matter of “law,” the non-goals data were irrelevant:

The designers of the 1995 Study and the later study decided that the data used should be free from the effects of the Denver’s [sic] preferential ordinances. The stated rationale for that exclusion is that the need for a program cannot be determined from data influenced by the operation of that program. The question, they say, is what happens in the market without it. That may be consistent with scientific methodology but it does not square with the applicable law.

Op. 60.

The district court’s conclusion that use of data untainted by Denver’s program “does not square with the applicable law” directly contravenes this Court’s ruling that, as a matter of law, data that “speaks solely to the utilization levels for city-funded projects on which no MBE and WBE goals were imposed” *can* be highly “persuasive evidence of underlying discrimination in the Denver construction market.” 36 F.3d at 1527.^{7/} In fact, as other courts have held, non-goals contracting data are the very

^{7/} This Court did not, of course, remand for the district court to make a legal determination about the relevance of the non-goals data. See, *e.g.*, *In re Blinder*, 124 F.3d 1238, 1242 (10th Cir. 1997) (the Court will not remand pure legal issues).

best means of showing what would happen in public contracting *absent goals* — and hence for ascertaining whether there was a need for the program. See, *e.g.*, *AGC v. New Haven*, 791 F. Supp. 941, 946-47 (D. Conn. 1992), *vacated as moot*, 41 F.3d 62 (2d Cir. 1994).

Had the district court considered this question, rather than declaring it irrelevant, it could not have helped but conclude that the differences in utilization rates were, in fact, due to the operation of the program, and the non-goals data therefore more accurately indicated how much discrimination would occur absent the program. It was undisputed that the non-goals projects on which there were significant disparities were of the *same general character* and drew many of the *same contractors* as the goals projects (36 F.3d at 1526; App. 363, 618); indeed, for a significant period, City employees who opposed the affirmative-action program were diverting projects from the goals to the non-goals program (App. 333-35, 6150, 6247, 8807).

Moreover, the evidence at trial confirmed that many prime contractors who work on city projects provide opportunities to W/MBEs only when affirmative action forces them to. See, *e.g.*, App. 312-13 (“the most pervasive pattern * * * was that where there wasn’t a government requirement for involvement, [W/MBEs] were not invited to participate”); App. 808-09; 2107, 3475-81. Whenever Denver failed to

impose goals, “lo and behold” there would be no W/MBE participation, despite W/MBE availability. App. 1999.

2. Denver-MSA Construction Contracting Data

This Court also instructed the district court to consider any evidence that might be presented at trial concerning a second, related issue: “whether there is any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination.” 36 F.3d at 1529.

The Court specifically found that Denver’s “evidence of the overall Denver MSA construction market — *i.e.* combined public- and private-sector utilization of MBEs and WBEs — gives rise to an inference that local prime contractors discriminated on the basis of race and gender.” *Ibid.* Such local, industry-wide evidence is probative of discrimination redressible by Denver for at least two independent reasons. First, evidence of what happens in the local marketplace — like evidence of what happens on non-goals City projects — demonstrates what *would be happening in City contracting* absent affirmative action. See *AGC v. New Haven*, 791 F. Supp. at 746-47. It thus supports affirmative action *to prevent discrimination in City contracting*. Second, to the extent that privately discriminating local contractors do business with Denver, Denver passively participates in their private discrimination by contributing to their coffers; and hence, under *Croson*, the City has the power to

use affirmative action *to remedy that private-market discrimination*. As this Court explained, under *Croson*, “a municipality has a compelling interest in taking affirmative steps to remedy *both public and private* discrimination” (36 F.3d at 1529 (citing 488 U.S. at 492) (emphasis added)), especially, but not necessarily exclusively, where the City is directly funding the very same firms that are discriminating in their private work (*ibid.*).

Thus, although this Court did “*not* read *Croson* as *requiring* an exact linkage between its award of public contracts and private discrimination” (*ibid.* (emphasis added)); accord *Coral Constr.*, 941 F.2d at 916; *supra*, pp. 43-44), it ruled that “such evidence would at least *enhance* the municipality’s factual predicate for a race- and gender-conscious program” (36 F.3d at 1529). Accordingly, it directed the district court to determine

whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was [instead] practiced by firms who did not receive any public contracts.

Ibid.

Once again, the district court was asked to answer a specific factual question: does Denver award contracts to firms that discriminate in their private work? And once again, the district court declined to do so. Instead, as noted above, page 46, the

district court simply dismissed Denver’s private-market data categorically, declaring that, “scientific methodology” aside, “what happens in the market without [the program]” is irrelevant as a matter of “law.” Op. 60.^{8/}

Although the district court made no organized effort to answer the question it was charged with resolving, it concluded as a factual matter that Denver did indeed “award public contracts to firms that in turn discriminated against [W/MBEs] in other private portions of their business.” 36 F.3d at 1529. Discussing another issue, it found:

The City does not want to *pay tax dollars to support firms that discriminate* against other firms because of their race, ethnicity and gender. Yet, the anecdotal evidence shows that *Denver has repeatedly and knowingly done just that*. During the taking of testimony about the experiences of minority and woman-owned firms in dealing with other contractors on projects not involving Denver, the City’s lawyers carefully demonstrated that those same contractors often do business with the City.

Op. 71 (emphasis added). Thus, the court made a factual finding — consistent with the mountain of uncontradicted evidence put forth by Denver (see, *e.g.*, App. 3509-14,

^{8/} Indeed, the district court so misunderstood its charge to resolve this question that it actually rejected as “not probative of anything” (App. 2295-96) an analysis of W/MBE utilization on various large City construction projects that showed that *the very same majority prime contractors who grudgingly use W/MBEs on City goals projects make much less substantial (or no) use of W/MBEs on private projects (and non-goals public projects)*. App. 2288-96 (refusing to admit Ex. E-25 (App. 7191-7230)). This evidence was extremely probative on the very factual issue on which this Court remanded. The district court’s failure to admit it, premised upon its legal error, was a gross abuse of discretion. See, *e.g.*, *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838-39 (10th Cir. 1988).

3475-81) — that Denver “has repeatedly” “pa[id] tax dollars to support firms that discriminate” in their private-market contracts. Since that is the very finding that this Court identified in *Concrete Works II* as the missing link that would make the evidence of local marketplace underutilization unquestionably sufficient to support the program, the Court should reverse outright on this ground alone.

3. Size And Experience

The final unresolved issue of fact this Court identified was “whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstates ‘the ability of MBEs or WBEs to conduct business relative to the industry as a whole because W/MBEs tend to be smaller and less experienced than nonminority-owned firms.’” 36 F.3d at 1528 (citation omitted).

a. Size

The district court’s treatment of the size issue was fatally poisoned by its erroneous understanding of the showings required of each party. This Court made clear in *Concrete Works II* that Denver’s “general data reflecting the number of MBEs and WBEs in the marketplace” satisfied its initial burden of production, even without controlling for size. *Ibid.*; see *infra*, p. 59. If *Concrete Works* was to prevail at trial, it needed to prove, and the district court needed to find, that the disparities were more likely than not due to size differences instead of discrimination, and that size was a

“race-neutral” factor. See *infra*, pp. 55-56, 64-65. But the district court never made such a finding. Rather, the court found for Concrete Works for the sole reason that, in the court’s opinion, “[a]ggregating all of the MBEs and WBEs in estimating availability without regard for the size of the businesses * * * is a serious flaw in the methodology and impairs the value of the results” of Denver’s studies. Op. 55. In other words, rather than requiring Concrete Works to show that the disparities actually were due to size, the district court erroneously required *Denver* to prove that they were not, and it found for the plaintiff because it concluded that Denver had not met its burden. That error alone necessitates, at minimum, a remand. See *infra*, p. 60.

What is more, the court’s factual finding that the studies did not control for size was indisputably wrong, and must be reversed for clear error. Although Denver did not bear the burden to do so, three of its studies *did*, in fact, control for size differences between W/MBEs and majority firms. The 1995 study calculated “average revenues received *per employee*” and demonstrated that, even when size is removed from the equation, significant disparities persist. App. 6909 (emphasis added). “[U]tilization of Asian/Native American-owned construction firms was less than one-half the rate of white-owned construction firms of the *same employment size*. For Hispanic-owned firms, utilization per employee was 14 percent less than the average for [same-sized] white-owned construction firms.” *Ibid.* (emphasis added).

“Disparities in the utilization of women-owned construction firms were also evident from data on average revenues *per employee*.” App. 6912 (emphasis added). The 1995 Study also examined firms with no paid employees — which, by definition, are all the same size (App. 631) — and, again, found disparities for both MBEs and WBEs. App. 6908-11.

The 1990 Study similarly controlled for size and confirmed that “revenues *per employee* for construction MBEs and WBEs were only 63% and 59%, respectively, of revenues per employee for all firms,” which “suggests that even among firms of the *same employment size*, industry utilization of MBEs and WBEs was lower than that of non-minority male owned firms.” App. 8805 (emphasis added). See App. 6371.

The 1991 DGS Study similarly found that, “[e]ven controlling for employment size, MBE/WBE revenues are lower than their competitors.” App. 9689. See *Concrete Works I*, 823 F. Supp. at 835.

Thus, legal errors aside, the district court’s conclusion that “[a]ggregating all of the MBEs and WBEs in estimating availability without regard for the size of the businesses * * * is a serious flaw in the methodology and impairs the value of the results” was simply false. Op. 55.

If the district court *had* reached the issue whether size differences explained away the disparities, which it did not, it could not have helped but conclude that they

did *not*, given the above-described statistical evidence. That is especially true since Denver buttressed those statistical studies with abundant evidence that, except at the extremes, differences in size do not affect availability, and hence do not affect utilization. As the district court itself observed, “[t]here really isn’t any dispute about the ability of a small firm to do a big contract.” App. 736-37. The district court explained that the Denver-area construction industry is extremely elastic: “most firms have few full-time permanent employees and most grow or shrink their performance capacity according to the volume of the work they are doing.” Op. 47. Firms with only one or two employees thus can, and often do, receive multi-million dollar projects, at which point they promptly staff-up and rent equipment to do the job. *E.g.*, App. 299-300, 548-49, 731-37, 1793-94, 2034-35, 3502-05. Indeed, the construction industry is dominated by small firms: the median number of employees of *all* firms is only three. App. 6177.

The district court did not find that, because of their smaller average size, W/MBEs are significantly less elastic than majority firms. Indeed, it concluded exactly the opposite: that a firm’s elasticity (*i.e.*, its “access to increased resources, including workers with the needed skills, equipment, material and operating capital”) depends, not on size, but instead “on the expanding firm’s access to information, its reputation in the community and the skills of its managers.” Op. 47-48. But the

plaintiff failed to present evidence that the average W/MBE's "reputation in the community" (at least its reputation uninfluenced by racial prejudice) and "skills" are any worse than those of the average majority firm. And, absent compelling evidence, any *assumption* that W/MBEs have worse skills and non-race/gender-related reputations than majority-owned firms is manifestly improper.

In fact, Concrete Works *conceded* that "majority firms have elasticity similar to that of women and minority firms." App. 3269; accord App. 1260 (plaintiff's expert). And even if Concrete Works had proven, and the court had found, that W/MBEs were less elastic than majority firms, it did not show, and the court did not find, that such differences in elasticity accounted for the significant utilization disparities.

Finally, even if the district court *had* found that the disparities were due to size — despite its contrary observation that "[t]here really isn't any dispute about the ability of a small firm to do a big contract" (App. 736-37) — it still would have erred in not requiring Concrete Works to prove, and not finding, that size is a *race-neutral* factor, *i.e.*, that the size differences themselves were attributable to factors other than discrimination. It is well-established that it is the burden of the party challenging a statistical study to show that the variables that it alleges account for the disparities were not themselves tainted with discrimination. See, *e.g.*, *Sobel v. Yeshiva Univ.*,

839 F.2d 18, 35 (2d Cir. 1988); *Valentino v. United States Postal Serv.*, 674 F.2d 56, 73 n.30 (D.C. Cir. 1982); *infra*, pp. 64-65. In fact, Denver presented substantial evidence that the size differences *were* due to past and present discrimination in the industry: discrimination resulted in reduced revenues, which resulted in the inability to hire as many full-time employees. App. 303, 579, 737. In addition, race- and gender-motivated harassment by the employees of the majority primes caused many employees of W/MBEs to quit, further reducing the size of W/MBE firms. App. 3096, 3065. Indeed, Concrete Works' own expert actually *admitted* that the disparities in size might well be the product of discrimination. App. 1035, 1121. Thus, the evidence showed that, rather than a race-neutral explanation for the disparities, size differences are themselves the "lingering effects of racial discrimination" that the City is, of course, empowered to remedy. *Adarand*, 515 U.S. at 237.

b. Experience

This Court also directed the district court to explore at trial Concrete Works' contention that the disparities might be due to the fact that W/MBEs are, on average, slightly "less experienced than nonminority-owned firms." 36 F.3d at 1528 (citation omitted). Yet again, the district court made no effort to explore the issue. Nowhere did the court find that the plaintiff had met its burden of showing that, when

experience differences are accounted for, the statistically significant disparities disappear.

Nor could it have reached such a conclusion, since the evidence at trial showed that differences in experience did *not* cause the disparities. The 1995 Study *controlled for experience* and found that, even when the comparison was limited to firms with at least three years of experience, “[s]tatistically significant disparities were found for both MBEs and WBEs.” App. 6915, 637.

Denver would have presented even more evidence that the fact that W/MBEs are slightly less experienced does not account for the disparities, had the district court not erroneously excluded it. Denver’s expert, David Keen, proffered testimony that, even when the data were limited to firms with at least *12* years of experience, they *still* showed statistically significant disparities. Yet again, the district court so misunderstood whose burden it was to prove that particular variables might explain the disparities that it actually excluded that evidence on the ground that Denver should have presented it in its *initial* case rather than in rebuttal. App. 1299-1301. Because it was up to the plaintiff, Concrete Works, to prove that experience differences, rather than race and gender, caused the disparities that Denver had shown, it was perfectly acceptable for Denver to refute that contention in rebuttal.

Finally, even if the district court had found that the substantial disparities were caused by differences in experience, Concrete Works did not show, and the court did not find, that W/MBEs' comparative lack of experience was attributable to anything other than industry discrimination. In fact, Denver presented powerful evidence that any disparities in experience *were* the product of discrimination. The 1990, 1995, and the 1997 studies all conducted complex statistical regression analyses showing that discriminatory barriers have impeded the ability of women and minorities who were already working in the construction industry to form their own construction businesses in Denver, thus delaying their entry into the marketplace. See, *e.g.*, App. 6217, 586, 6922-27, 639-44, 8861-63, 791-95.

E. The District Court Misunderstood And Misapplied The Burden Of Proof

In *Concrete Works II*, this Court explained that, although a municipality bears the initial burden to produce evidence generating “[a]n inference of discrimination” — *i.e.*, “approaching a prima facie case” of discrimination, *Croson*, 488 U.S. at 500 — the “[u]ltimate burden [of proof] remains with [the plaintiff].” 36 F.3d at 1522 (citation omitted). The plaintiff can prevail only by “persuading the court that [the City’s initial] evidence did *not* support an inference of prior discrimination.” *Id.* at 1523 (quoting *Wygant*, 476 U.S. at 293 (O’Connor, J., concurring)) (emphasis added); accord *Contractors Ass’n*, 91 F.3d at 597.

This Court further held that, as a matter of law, Denver *already had met its initial burden of production*. Specifically, the court held that the “general data” Denver submitted, “comparing the number of MBEs and WBEs in the marketplace” to their utilization, as a matter of law create an inference of redressible discrimination. 36 F.3d at 1528; see also *id.* at 1529. Such data are sufficient “to defeat [a] challenger’s summary judgment motion” (*ibid.*), which means, of course, that they must give rise to an inference of discrimination. Cf. *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1397 & n.6 (10th Cir. 1997).

“[O]nce Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it *became incumbent upon Concrete Works* either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn.” 36 F.3d at 1523 (emphasis added).

But the district court did not require Concrete Works to make such a showing, as this Court had instructed. To the contrary, although the district court noted that the plaintiff bears the ultimate burden of proving the unconstitutionality of the program, it declared at the outset that “[i]t is *the City’s* responsibility to show a ‘strong basis in evidence’” and it found for the plaintiff because it concluded, after reviewing the

evidence, that “*the City* has failed to make the strong showing necessary to support the race- and gender-based [program].” Op. 3, 69 (emphasis added).

There are only two possible explanations for the district court’s actions. The first, and most likely, is that the court ignored the law altogether and placed the ultimate burden of proof on Denver. The first question of the district court’s six-question test in fact compels precisely that result, by requiring that discrimination be *proved* as a predicate to affirmative action. See *supra*, pp. 28-29. Concrete Works had vigorously urged this position at trial, insisting that “Denver[] * * * has the burden of proof” (App. 101) and that “Denver * * * always bore the ultimate burden of establishing at trial the existence of a pattern of deliberate exclusion” (App. 3221; accord App. 3198, 3354). If the court did yield to Concrete Works’ oft-repeated exhortation to misallocate the burden of proof, Denver is entitled to a remand as a matter of law. See, e.g., *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980); *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986).

The only alternative explanation is that the court believed that, at the end of the day, Denver failed even to meet its *initial* burden of production. That explanation is every bit as lawless as the first, for three reasons. First, once a case has been “fully tried on the merits,” it is improper to focus on whether a party met its initial burden:

the focus must instead be on whether the party that bears the *ultimate* burden of proof (here, Concrete Works) has met its burden, in light of all the evidence presented by both parties. *Aikens*, 460 U.S. at 713-715. Second, this Court already clearly had held that Denver's data *did* create an initial "inference of discrimination." See *supra*, p. 59. Third, this Court's holding that Denver had met its initial burden was indisputably correct. See *infra*, pp. 62-63, 72-75.

F. The District Court Erred In Demanding That Denver's Statistical Evidence Conclusively Prove Discrimination By Eliminating Possible Explanations For The Disparities

Disregarding this Court's "emphasi[s] that Denver need *not* negate all evidence of non-discrimination" (36 F.3d at 1530 (emphasis added)), the district court ruled for Concrete Works because Denver had not negated each of the explanations that Concrete Works hypothesized might account for the utilization disparities. Op. 61. The court criticized the City's studies for allegedly failing to control for the theoretical possibilities that, for example, (1) "the actual qualifications" (Op. 50) and "willing[ness]" (Op. 49) of the average W/MBE might differ significantly from those of the average majority firm and (2) W/MBEs, or discrimination against W/MBEs, might be clumped within particular construction sub-specialties, distorting the aggregate disparity numbers (Op. 55).

The court's demand that Denver prove an *absence* of these alternative explanations for the utilization disparities was doubly flawed. First, it erroneously required Denver to present statistical evidence that would create not merely an inference of discrimination, as required under *Croson* and *Concrete Works II*, or even a preponderance of evidence, as would be required of a plaintiff in a Title VII case, but rather *conclusive proof* that intentional discrimination was the only explanation for the disparities. Cf. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (even “[a] plaintiff in a Title VII case need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence”). See *supra*, pp. 28-29. Second, the court effectively shifted the burden of proof to *Denver*, requiring Denver to prove that hypothetical variables did not negate the inference of discrimination its data had created, rather than requiring *Concrete Works* to show that they did.

1. “General Data” Create An Inference Of Discrimination

This Court unequivocally held in *Concrete Works II* that “general data” “that uses raw numbers of MBEs and WBEs compared to numbers of total firms in the market” suffice to generate an inference of discrimination. 36 F.2d at 1522 (citing *Croson*, 488 U.S. at 509); accord *id.* at 1528, 1529; see *supra*, p. 59.

These initial “general data” may assume that the average W/MBE working in the construction industry is equally as available, qualified, and willing to do construction contracting work as the average majority-owned firm. 36 F.3d at 1528; cf. *Contractors Ass’n*, 91 F.3d at 603 (rejecting as unnecessary the “highly impractical” task of determining the “actual qualifications and capacities” of each W/MBE). *Croson* confirmed that no greater precision concerning qualification or availability is required, by citing *Ohio Contractors Assn. v. Keip*, 713 F.2d 167, 171 (6th Cir. 1983), as an example of a case in which the city had properly determined “how many MBE’s in the relevant market are *qualified* to undertake prime or subcontracting work in public construction projects.” 488 U.S. at 501 (emphasis added). In *Keip*, the government “rel[ie]d on [the] percentage of minority [contracting] businesses in the [relevant jurisdiction]” as the measure of availability, with no greater measure of qualification and availability than presence in the market. *Ibid.* (emphasis omitted); accord *id.* at 510 (chastising Richmond for not having “ascertained how many minority enterprises are *present* in the local construction market”) (emphasis added). As this Court noted, numerous federal courts of appeals have reached the same conclusion. *Concrete Works II*, 36 F.3d at 1528 (citing cases).

2. Absent Persuasive Evidence That Controlling For A Particular Variable Or Rectifying An Alleged Data Flaw Will Eliminate Identified Disparities, The Inference Of Discrimination Persists

Once Denver’s data established an initial inference of discrimination, it “*became incumbent upon*” *Concrete Works* to establish that the “evidence did not constitute strong evidence of such discrimination.” *Id.* at 1523 (emphasis added). *Concrete Works* could do that ““by either [1] proving a “neutral explanation” for the disparity, [2] “showing the statistics are flawed, * * * [3] demonstrating that the disparities shown by the statistics are not significant or actionable, * * * or [4] presenting contrasting statistical data.””” *Id.* at 1531 (quoting *Contractors Ass’n v. Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993)); accord *Coral Constr.*, 941 F.2d at 921.

Concrete Works’ burden was heavy. To prevail, the challenger must “do more than simply point out possible flaws in the proponent’s statistical analysis” that *might* possibly explain the disparities. *EEOC v. General Tel. Co.*, 885 F.2d 575, 579 (9th Cir. 1989). Rather, the plaintiff must present persuasive evidence “*that correcting for any alleged flaws would have resulted in no [significant] disparities.*” 823 F. Supp. at 839 (emphasis added). In other words, the plaintiff must ““demonstrate that when [the] factors [that it alleges were missing from or mishandled in the municipality’s studies] were properly organized and accounted for there was no significant

disparity.” *Contractors Ass’n*, 6 F.3d at 1007 (quoting *Bazemore*, 478 U.S. at 403 n.14); accord *Catlett v. Missouri Highway & Transp. Comm’n*, 828 F.2d 1260, 1266 (8th Cir. 1987); *Sobel*, 839 F.2d at 34. “[A] mere conjecture or assertion that some missing factor would explain the existing disparities generally cannot defeat the inference of discrimination created by statistics.” *Contractors Ass’n*, 6 F.3d at 1007 (quoting *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)).^{9/}

^{9/} Even under Title VII, so long as the statistical analyses are not “so incomplete as to be irrelevant” (and hence, unlike Denver’s data, “insufficient to defeat summary judgment”), a prima facie case of discrimination can be established with “fault[y]” data that “fails to account for * * * potentially non-discriminatory explanation[s]” for the disparities. *Bullington*, 186 F.3d at 1314-15 & n.9. To prevail, the party contesting the existence of discrimination must rebut the statistics, with more than “speculat[ion] about the actual impact” of the alleged flaws or deficiencies. *Id.* at 1315.

If unsupported speculation will not defeat an inference of discrimination in the Title VII context, where the party contesting the existence of discrimination (the defendant) does *not* bear the burden of proof, it assuredly will not suffice in the affirmative action context, where the party contesting the existence of discrimination (the plaintiff) *does* bear the burden of proof. Cf. *Contractors Ass’n*, 6 F.3d at 1007. That is especially true since, in an affirmative action case and unlike under Title VII, at the end of the day, only an *inference* — not even proof by a preponderance of evidence — of discrimination must remain to support remedial action. To eliminate even the mere *inference* of discrimination created by “general data,” the affirmative-action challenger’s proof that controlling for data “flaws” or including omitted variables would change the result must be especially powerful.

3. The District Court Did Not Find, And Plaintiff Did Not Show, That, If Omitted Variables Were Included, Or Purported Data Flaws Rectified, The Identified Disparities Would Disappear

Yet “conjecture [and] assertion” are all Concrete Works proffered. *Ibid.* Concrete Works did not show, and the district court certainly did *not* find that, had Denver’s studies accounted for additional variables or used different data, they would not have (or even *probably* would not have) indicated significant disparities. Though Concrete Works criticized Denver’s studies — they allegedly used too broad a measure of availability, failed to control for various alleged indicia of “qualification,” used imperfect methodology — it never ““demonstrate[d] that when [these] factors were properly organized and accounted for there was no significant disparity.”” *Contractors Ass’n*, 6 F.3d at 1007 (quoting *Bazemore*, 478 U.S. at 404 n.14).

To cite but one example, Lunn theorized that Denver’s studies might contain “aggregation bias.” But he performed *no* analysis to determine whether that was true. Rather, using concededly “made-up data” (App. 1118-19), he showed that it was conceptually *possible* that such bias *might* exist in a study, and *might* result in overstatement of disparities. But he readily conceded that it was *equally possible* that bias had caused *understatement* of Denver’s disparities, or, alternatively, that the studies contained no bias at all! App. 1112-15, 1118-19. Lunn offered a similar surmise that, if a regression analysis “control[led] for [more] things, you know, I’m

sure we would find that those disparities would narrow” (App. 1085); yet confessed he lacked any factual basis for that claim (App. 1111, 1118, 1126-27). Such naked “conjecture and assertion[s] that some missing factor would explain the existing disparities” simply “cannot defeat the inference of discrimination created by statistics.” *Contractors Ass’n*, 6 F.3d at 1007.

Rather than meeting its burden of proving that other factors caused the disparities, Concrete Works insisted that “*Denver must eliminate[] other possible causes*” “of the perceived disparities.” Pltf. Tr. Br., Doc. 259 at 20 (emphasis added); accord App. 3257, 1035. The district court uncritically accepted that misstatement of Concrete Works’ burden, explicitly rejecting Denver’s statistical evidence because “important variables were not accounted for in the analyses and the conclusions were based on unreasonable assumptions.” Op. 61. That error alone requires a remand. See *General Tel. Co.*, 885 F.2d at 582-84.

But there is more. Refusing to accept this Court’s holding that it could prevail only by “persuading the court that [Denver’s initial] evidence did *not* support an inference of discrimination” (36 F.3d at 1523 (emphasis added)), Concrete Works actually *conceded* that Denver’s studies were “*consistent with * * * racial or gender discrimination.*” App. 3257 (emphasis added). As Lunn explained: “There can be a variety of reasons for [the results yielded by Denver’s studies]. Certainly

discrimination can be one.” App. 1035. La Noue concurred. App. 1213. In short, Concrete Works conceded that it had failed to meet its burden of proof, and Denver is thus entitled to judgment.

4. The Result Was An Excessive, Indeed Impossible, Burden Of Proof

That the standard of proof the district court demanded Denver meet was too high can scarcely be debated: Concrete Works’ experts conceded that it would be *impossible* for *any* municipality to meet. App. 1157-58, 1264-65, 1270-71, 1273; see also App. 1331-32, 8944. Both testified that *no data exist* to conduct a disparity study controlling for qualification and availability with sufficient precision to satisfy their exacting standards. App. 1053, 1157, 1251. While Lunn theorized that perhaps extensive surveys could generate the data (App. 1053-54), La Noue vehemently disagreed (App. 1251), arguing that the only way for a municipality to justify affirmative action would be to pass a law requiring contractors to submit detailed data over many years and then compile a statistical analysis (App. 1251, 1373-74). See also App. 3256 n.78.

Until then, on Concrete Works’ theory and under the district court’s standard, every municipality in the United States is utterly powerless to take race- or gender-conscious remedial action in the teeth of discrimination, no matter how severe, pervasive, or blatant. Further, a municipality would have to suspend the program

every few years for fresh data-gathering concerning W/MBE utilization by the municipality, untainted by the program, since, according to the district court (and in defiance of this Court's explicit ruling in *Concrete Works II*, 36 F.3d at 1529), non-goals data and private data can *never* establish the continuing need for affirmative action in public contracting. See *supra*, pp. 46-47, 49-50.

The concededly unattainable standard of proof that the district court adopted thus eviscerates the Supreme Court's admonition that "strict scrutiny" must *not* be "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237. As Judge Finesilver explained, "[i]t appears from *Concrete Works*' critiques of Denver's interpretation of the statistics and anecdotal evidence that *Concrete Works* would require a municipality affirmatively to *prove* discrimination with such a degree of statistical certainty that no statistician could disagree. We do not believe that *Croson* requires such an onerous, perhaps impossible, burden of proof." *Concrete Works I*, 823 F. Supp. at 840. The district court erred in adopting it.

G. The District Court Erred In Demanding Evidence Of Sufficient Quantum And Quality To Support A Racial Quota

This Court held in *Concrete Works II* that "the adequacy of a municipality's showing of discrimination must be evaluated *in the context of the breadth of the remedial program* advanced." 36 F.3d at 1522 (emphasis added). Less evidence is required to justify Denver's flexible affirmative outreach and nondiscrimination

program than would be required to justify a rigid quota or set-aside. See *id.*; cf. *Croson*, 488 U.S. at 499.

Yet the district court characterized and treated the program as though it were a rigid quota or set-aside. The court castigated Denver for adopting a “mandatory goals program” (Op. 75) that purportedly “categorically denies certain of its citizens the opportunity to compete for a fixed percentage of its contracts based solely on their race or gender” (Op. 77); declared that, under the program, “prescribed percentages [of contracts] * * * *must* go to City-certified MBEs and WBEs” and that, “[n]ecessarily, all other firms are *excluded* from those levels of participation * * * because of their race, ethnicity and gender” (Op. 70 (emphasis added)); and disparaged the purportedly “*compelled* use of certified MBE’s and WBE’s *in the prescribed percentages*” (Op. 52 (emphasis added)).

All of these statements were simply false. As this Court explained, under the program, a “prime contractor is *not* required to hire MBE or WBE subcontractors who are not the lowest bidders or who are unqualified. In other words, the project goals do *not* impose unyielding numerical quotas.” 36 F.3d at 1517 (emphasis added). “Far from establishing quotas or set-asides, the [program] establishes, at most, nonbinding, good-faith aspirational goals to encourage participation of minority subcontractors * * *.” *Concrete Works I*, 823 F. Supp. at 824; see also § 28-52(b)(2).

Rather than a “fixed percentage” (Op. 77), the goals are set project-by-project based on WBEs’ and MBEs’ *actual* availability for *that* project. See *supra*, p. 17. Even then, they are hardly “fixed”: all primes need do to avoid them is show that they (1) alerted W/MBEs to bidding opportunities and (2) *refrained* from rejecting a *lowest-bidding qualified* W/MBE, *i.e.*, refrained from engaging in conduct that is presumptively discriminatory. See pp. 16-17, 85-86.

Nor is a majority subcontractor *ever* “denied * * * the opportunity to compete” (Op. 70) for *any* contract: if a majority subcontractor submits the lowest bid, the prime contractor is *never* under *any* obligation instead to engage a W/MBE. § 28-58; App. 1879-80, 2006, 2246. Rather, “[q]ualified white candidates simply have to compete against qualified black candidates” (*Paradise*, 480 U.S. at 183) to submit the lowest bid. And it is equally untrue to say that the program requires a prime contractor “to discriminate in its selection of subcontractors.” Op. 16 n.6. Instead, by requiring prime contractors to engage W/MBEs only when they are, in fact, the lowest qualified bidders, it has just the opposite effect; it *precludes* prime contractors from discriminating in favor of higher-bidding majority-owned firms. See *infra*, pp. 85-86. In sum, as Judge Finesilver explained, the program “is not a racial preference, quota, or even a variable set-aside; it is merely a vehicle to encourage nondiscrimination in the awarding of contracts.” 823 F. Supp. at 829.

The district court’s misunderstanding of the character of the ordinance is deeply significant. Since the program here is so non-invasive, the district court erred in requiring Denver to make the same “strong showing” in evidence necessary to justify an “exclu[sionary]” quota or set-aside. Op. 69. See 36 F.3d at 1522; cf. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) (striking down a similar, though more invasive, program, but only because the defendant offered “no evidence whatsoever” in justification).^{10/}

H. As A Matter of Law, Denver Had A Strong Basis In Evidence For Believing That Discrimination Warranted Remedial Action

Because the court’s myriad legal errors concerning what constitutes remediable discrimination and a strong basis in evidence profoundly influenced its evaluation of Denver’s evidence, at minimum, a remand is required. See, e.g., *Aikens*, 460 U.S. at 717. However, “whether a strong basis in evidence of past or present discrimination

^{10/} Indeed, this program is so narrowly tailored that Judge Finesilver would have subjected it only to rational-basis review, but for the self-performance provision (*supra*, p. 16), which has now been deleted. Numerous courts have held that similar affirmative-marketing programs do not trigger strict scrutiny. As one court explained, *Adarand* “supports a distinction between ‘inclusive’ forms of affirmative action, such as recruitment and other forms of outreach, and ‘exclusive’ forms of affirmative action, such as quotas, set asides and layoffs.” Because “inclusive * * * forms of affirmative action serve to broaden a pool of qualified applicants and to encourage equal opportunity, not to subject persons to unequal treatment,” they are subject only to rational-basis review. *Honadle v. University of Vermont*, 56 F. Supp. 2d 419, 427-28 (D. Vt. 1999). Accord, e.g., *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999); *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997).

exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, is a question of law.” *Concrete Works II*, 36 F.3d at 1522.

Application of the correct legal standards compels the conclusion that, as a matter of law, Denver had a strong basis in evidence for believing that remediable discrimination existed. This Court found that the evidence Denver presented at the summary judgment stage was sufficient to generate an inference of discrimination, and Denver *substantially* bolstered that already impressive showing at trial. Denver’s evidence included *six* sophisticated statistical disparity studies — the 1990 BBC Study, the 1991 DGS Study, the 1992 RTD Study, the 1993 DHA Study, the 1995 BBC Study, and the 1997 NERA Study — meticulously documenting, on the basis of census data and extensive market-survey data, significant statistical disparities between the availability and utilization of W/MBEs in the Denver-area market and in non-goals City contracting. These studies additionally reported countless first-hand accounts of discrimination. Denver also proffered numerous reports by federal agencies — including DOT, GAO, HUD, and the Commission on Civil Rights — AAO, industry groups, and taskforces, all documenting intractable and pervasive discrimination in Denver’s public and private-market construction contracting.

Moreover, the 1990, 1991, and 1995 Studies explicitly controlled for firm size, and the 1995 Study also controlled for experience, even though overwhelming

evidence at trial established that W/MBEs' smaller average size and slightly lesser experience were the products of "lingering * * * discrimination" (*Adarand*, 515 U.S. at 236), and hence could not provide a race- and gender-neutral explanation for the disparities. Yet, even controlling for these factors, the disparities remained.

In addition, overwhelming anecdotal evidence, described above at pp. 19-20, 39-41, persuaded the district court that "women and minority groups *are disadvantaged in trying to compete* in the construction industry because of the prevalence of negative views about them." Op. 67 (emphasis added); accord Op. 69.

Further, this Court held in *Concrete Works II* that Denver's industry-wide evidence of combined public-and-private sector utilization of W/MBEs "gives rise to an inference that local prime contractors discriminated on the basis of race and gender." 36 F.3d at 1529. Because the district court found that Denver has "repeatedly" "pa[id] tax dollars to support [those] firms that discriminate" in their private-market contracts (Op. 71), that evidence now unquestionably establishes the constitutionality of remedial action. 36 F.3d at 1529.

In response, *Concrete Works* failed to present virtually *any* contradictory evidence. It merely speculated that "fine tuning of the statistics" might have eliminated the gross disparities. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

In light of all of this evidence, and Concrete Works' failure to present evidence negating the inference to which it gave rise, it cannot possibly be said that Denver's "particularized and geographically targeted" "evidence of discrimination both in the award of public contracts and within the overall Denver MSA" (36 F.3d at 1530) did not even "approach[] a prima facie case" of discrimination (*Croson*, 488 U.S. at 500). Put differently, it is simply inconceivable that a Title VII plaintiff coming to court with all of the evidence in this case would be turned away at the courthouse steps on the ground that she lacked even a "prima facie case"!

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE PROGRAM IS NOT NARROWLY TAILORED

Whether a remedial program is narrowly tailored is a question of law (*Contractors Ass'n*, 91 F.3d at 596), subject to de novo review (*Oliver*, 209 F.3d at 1185). Concrete Works bore the burden "to establish * * * that the remedial statute was not narrowly drawn." 36 F.3d at 1523.

A. Concrete Works Waived Its Objection To Judge Finesilver's Holding That The Program Is Narrowly Tailored

The district court erred (Order, Feb. 12, 1997, Doc. 100) in addressing this issue at all: because Concrete Works failed to appeal Judge Finesilver's holding that the program is narrowly tailored, that holding is now binding. In *Concrete Works I*, Judge Finesilver held, after exhaustive examination, that the program is narrowly tailored

to address the problem of discrimination in city contracting. 823 F. Supp. at 841-45. This Court specifically held that Concrete Works failed “to preserve this issue on appeal.” *Concrete Works II*, 36 F.3d at 1531 n.24.

It is well-established in this Circuit that “a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.” *Martinez v. Roscoe*, 100 F.3d 121, 123 (10th Cir. 1996) (quoting *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993)). See *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 667-69 (Wyo. 1993) (explaining doctrine). Thus, by failing to appeal Judge Finesilver’s decision that the program is narrowly tailored, Concrete Works “waived [its] right to challenge that decision” on remand. *Martinez*, 100 F.3d at 123.

B. The Program Is Narrowly Tailored

In any event, the program is narrowly tailored as a matter of law. As Judge Finesilver observed, the program “read[s] like a how to manual on narrowly tailored aspirational goals ordinances.” 823 F. Supp. at 844. The program is merely an affirmative outreach mandate and discrimination prohibition that (1) ensures that City contractors give W/MBEs opportunities to compete and (2) forbids prime contractors from engaging in presumptively discriminatory conduct — rejecting a qualified

lowest-bidding W/MBE — only when W/MBEs are underrepresented in comparison with their actual availability for a particular project. It never affords a quota or set-aside. It applies only to groups that were shown to have suffered from discrimination in the local construction industry, and only to individual W/MBEs that either personally experienced such discrimination or were operating during the time for which Denver’s compiled evidence documented significant discrimination. Op. 13; § 28-73(c)(4). It is difficult to get any more narrowly tailored than that.

The district court apparently found otherwise only because it misunderstood the program to function as a rigid quota or set-aside (see *supra*, pp. 69-72); and because it erroneously believed that a remedial program must “appl[y] equally to all those who identify themselves as being within the protected groups” (Op. 74; see *supra*, pp. 31-33).

Here again, the district court failed to articulate or apply the proper legal test. Courts have identified a number of factors that are relevant to the narrow tailoring inquiry:

- (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance.

Contractors Ass’n, 6 F.3d at 1008 (citing *Croson*, 488 U.S. at 507-08). See also *AGC*, 950 F.2d at 1416. “[T]he planned duration of the remedy,” and “the effect of the remedy upon innocent third parties” are also relevant. *Paradise*, 480 U.S. at 187 (Powell, J., concurring). These factors are not a “checklist,” “such that if any one ‘factor’ is determined to be in plaintiffs’ favor, the court would have to find for plaintiffs on the narrowly tailored issue.” *Ashton v. Memphis*, 49 F. Supp. 2d 1051, 1056 (W.D. Tenn. 1999). Rather, they are merely factors to be weighed and considered in reaching the ultimate issue. *Ibid.* Here, all factors point inexorably to the conclusion that Judge Finesilver was correct in holding that the program is narrowly tailored.

1. Race-Neutral Alternatives

The district court found that “Denver has failed to pursue race-neutral programs for encouraging or assisting the entry of new businesses into the construction market.” Op. 75. That finding not only is clearly erroneous, it is unfathomable. In fact, massive evidence showed that “Denver enacted the Ordinance after or in conjunction with race-neutral means of increasing W/MBE participation in public contracting.” *Concrete Works I*, 823 F. Supp. at 841. Denver worked with contractor organizations (App. 1750), developed a mentor program to bring large and small firms together (App. 1750-51), conducted outreach forums (App. 1750, 1754), held a bonding

information program (App. 1750), opened plan rooms to make it easy for small firms to review plans (App. 1752), broke projects into smaller parts to facilitate small-business participation (App. 1750, 1755-58), implemented a bond-guarantee program (App. 1775), adjusted prequalification standards (App. 1762), and enacted a prompt-payment ordinance (App. 1764, 1768-70). Denver also began to advertise its projects in more available media. App. 1688. All of these efforts were helpful, but they proved insufficient to eradicate discrimination and its effects. App. 1755, 1759, 1763, 1770, 1776-77, 2049, 6942-52.

Denver considered still more alternatives, such as a small-business goals program, but ultimately concluded that “in and of themselves, [such alternatives] would not be sufficient to remedy the effects of past discrimination.” App. 6254-68. After all, small business programs “simply are not designed to overcome the racist and sexist attitudes that MBEs and WBEs encounter.” App. 6265. Indeed, given that Denver’s construction industry is dominated by small W/MBE firms — the median firm size is only three employees (App. 6177) — a small business program would be a program for “most everybody” (App. 344) and would do nothing to protect small firms from discrimination on the basis of race and gender. See also App. 338-48, 589-92, 598-99, 2049.

The City [also] determined that some race-neutral measures were not available to it: payment and performance bonds were required by state law to be maintained on a majority of City construction contracts; under Denver’s charter construction contracts must be awarded to the lowest responsive bidder; and all contractors must pay the prevailing wage.

823 F. Supp. at 841. Of course, a municipality may decline to adopt race-neutral alternatives that are legally foreclosed. See, e.g., *Coral Constr.*, 941 F.2d at 923; *AGC v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

Although “strict scrutiny requires serious, good faith consideration of race-neutral alternatives,” it “does not require exhaustion of every possible such alternative.” *Coral Const.*, 941 F.2d at 923. Rather, it suffices that the “City considered, but rejected as not viable, specific race-neutral alternatives” (*AGC*, 950 F.2d at 1417; see also *Croson*, 488 U.S. at 507) — and, as discussed above, there can be no doubt that Denver did.

Yet the district court criticized Denver for allegedly failing to pursue still two more purported alternatives. First, it suggested that Denver should more vigorously investigate and prosecute specific claims of discrimination, and make discriminators ineligible to bid on City contracts. Op. 71. But this “remedy” would do nothing to address the “lingering effects” of past discrimination; rather, it could only prohibit discrimination in the future. Moreover, unrefuted evidence established that it would *not* stop the discrimination, because W/MBEs generally are exceedingly reluctant to

name specific perpetrators for fear that they will be blacklisted. App. 308-09, 341-43, 485, 1261. Indeed, such fears of retaliation for reporting specific discrimination were well-grounded: majority contractors blackballed and labeled as “sue happy” W/MBEs who dared to complain. App. 3018-21, 3042, 3064.

Second, the district court faulted Denver for failing to take adequate action to discipline discriminatory conduct by its own employees. Op. 72. But Denver *has* taken action to prevent and discipline discrimination in its ranks, adopting a rule proscribing and penalizing such conduct. App. 3557-66.^{11/} Moreover, the uncontested evidence showed that, like the court’s first “alternative,” this alternative is infeasible because W/MBEs generally will not identify discriminators for fear of blackballing or a loss of work. Most important, the evidence of discrimination by City employees was slight in comparison with the massive evidence of discrimination by prime contractors. Thus, heightened monitoring of City employees would not obviate the need for a further remedy.

^{11/} The district court refused to consider this rule because, although the City appended a copy to its written closing argument in response to an inquiry by the court at the end of trial (App. 3186-89), it did not introduce the rule at trial. Op. 72-73. The district court erred in declining to consider it; a municipality’s personnel policies are judicially noticeable under Fed. R. Evid. 201.

2. The Basis For The Percentage Goals

The district court criticized the ordinance for mandating only a single MBE goal (in addition to the WBE goal), rather than separate percentage goals for each category of minority. Op. 74. As explained above, pages 31-32, however, there is no authority for such a requirement in the law.

Leaving that red herring aside, there can be no suggestion that the W/MBE goals are invalid. The current annual goals for the program— 10% for MBEs and 10% for WBEs — accord nearly perfectly with the 1997 Study data, which found after sophisticated analysis that MBE subcontractor availability is 10.11% and WBE subcontractor availability is 9.97%. Op. 36-37. The court did not criticize the size of these goals, or of any of the goals established by any of the ordinances.

3. Flexibility And Waivers

Judge Finesilver cogently explained how Denver’s modest program easily avoids any of *Croson*’s concern regarding unyielding quotas:

Examples of waiver and alternative routes of compliance in the Ordinance read like a how-to manual on narrowly tailored aspirational goals ordinances. Prime contractors need only award a bid to a W/MBE if the W/MBE is the lowest qualified bidder, § 28-58[(b)(6)], where “qualified” means that the W/MBE has “the financial ability, skill, experience and access to the necessary staff, facilities and equipment” to perform the work. § 28-54. * * * The prime contractor is allowed to show why a W/MBE should not be awarded a contract despite being the lowest bidder, and may consider nonmonetary factors such as the prime’s past experience with a certain subcontractor. Goals are set only where there are qualified MBEs available. Good faith efforts to secure minority

participation provide a waiver to meeting the goals. * * * The Ordinance allows prime contractors to resubmit information or to clarify their original good faith efforts, § 28-[60], and to make administrative appeals of the City’s decisions, § 28-[81].

823 F. Supp. at 843-44 (citations omitted). Goals are set on a project-by-project basis with input from all sectors of the construction industry. App. 1913-14, 1988-89, 2349-50. See *Coral Constr.*, 941 F.2d at 924 (this is a strong “indicator of a program’s narrow tailoring”). In short, “Denver’s aspirational goals ordinance is even more modest than the ‘modest’ bid preferences approved by other courts.” *Concrete Works I*, 823 F. Supp. at 844. See, e.g., *AGC*, 950 F.2d at 1416-18 (approving less modest program); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916-17 (11th Cir. 1990) (same). If this aspirational, non-invasive program is insufficiently flexible to withstand constitutional scrutiny, then no program ever could be.

4. Geographic Limitations

The Denver ordinance plainly satisfies the fourth factor, that “the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance.” A W/MBE that seeks to be certified must demonstrate that it has experienced discrimination *in the City* or that it operated or attempted to operate *in the City* before March 31, 1996. § 28-73. What is more, goals must be set by reference to the “availability of types of MBEs and WBEs doing business *in the city* with

respect to the substantive work requirements of each individual contract.” § 28-56(e) (emphasis added). See 823 F. Supp. at 844; cf. *Contractors Ass’n*, 6 F.3d at 1009.

5. Duration Of The Remedy

An affirmative-action program should “not last longer than the discriminatory effects it is designed to eliminate.” *Adarand*, 515 U.S. at 238 (citation and internal quotations omitted). This program will not. See 823 F. Supp. at 844. The program provides for an annual review of its availability and utilization calculations and the level of its goals. § 28-55. In addition, as its repeated amendments of the ordinance exemplify, Denver continually fine-tunes the program as more information becomes available, and has often reconsidered its decision to have a program at all. See, e.g., *Kromnick v. School Dist.*, 739 F.2d 894, 908 (3d Cir. 1984) (reconsidering the need for the policy is evidence of narrow tailoring). The program will expire of its own accord on April 30, 2001. § 28-84. See *AGC v. City and County of San Francisco*, 748 F. Supp. 1443, 1454 (N.D. Cal. 1990) (limited duration of ordinance evinces narrow tailoring), *aff’d*, 950 F.2d 1401 (9th Cir. 1991).

Remarkably, the district court was of the view that the program’s “graduation” provision, pursuant to which W/MBEs are no longer entitled to the benefits of the program when they reach a certain size, evinces a *lack* of narrow tailoring. Op. 70. The court got it exactly backwards. A presumption that firms attaining over a certain

level of gross receipts have overcome at least some of the effects of discrimination is a powerful indicator of a narrowly tailored program. See *Concrete Works I*, 823 F. Supp. at 844; *AGC*, 950 F.2d at 1417 (“since the Ordinance confines the preference to those who [continue to be] economically disadvantaged, MBEs are prevented from using the preferences to obtain windfalls”); *Cone Corp.*, 908 F.2d at 917.

6. Effect On Innocent Third Parties

As noted above, page 38, it is incontrovertible that “innocent persons may be called upon to bear some of the burden of the remedy,” *Wygant*, 476 U.S. at 281 (plurality opinion), so long as that burden is not “unacceptabl[y]” substantial, *Paradise*, 480 U.S. at 182 (plurality). Clearly, the “burden” on contractors of complying with an aspirational affirmative outreach and nondiscrimination program is hardly “unacceptable.” As the Ninth Circuit has explained, “[i]t does not seem much to ask of a bidder that it get the names of firms in the designated classes, advertise to them, and consider their bids.” *Monterey*, 125 F.3d at 711. Nor is it much to ask that the bidder refrain from rejecting qualified W/MBEs that submit the lowest bids.

A prime contractor rarely has a legitimate reason for refusing to engage a qualified lowest-bidding W/MBE. Indeed, such conduct is presumptively discriminatory: in an individual discrimination suit, a plaintiff can establish a prima

facie case (*i.e.*, a presumption) of discrimination by showing that he or she was the qualified lowest bidder and did not receive the contract. See, *e.g.*, *T&S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981). Plaintiff's expert conceded that rejection of a lowest bid by a qualified W/MBE epitomized discrimination. App. 1121. Thus, the program imposes almost no "burden" on prime contractors beyond a mandate to engage in affirmative outreach — which many courts have held does not even warrant strict scrutiny, see *supra*, page 72, note 10 — and to stop discriminating.

The purported "burden" on majority subcontractors is equally slight. Majority firms are always free to bid on equal footing on every contract, and the prime contractor need never reject a majority subcontractor that was the low bidder. Moreover, "[t]he actual 'burden' shouldered by nonminority firms is * * * light * * * when we consider the scope of this public works program as compared with overall construction contracting opportunities" (*Fullilove*, 448 U.S. at 484 (plurality)): public contracts subject to the program comprise only 2 - 3 % of the Denver construction-contracting market. App. 6184, 284. See also *Paradise*, 480 U.S. at 182-83 (explaining that foreclosing some opportunities when others remain available in the marketplace is the least intrusive and most permissible form of burden); *AGC*, 950 F.2d at 1417-18.

Finally, this slight burden is imposed upon majority-owned subcontractors that have, for the most part, “reaped competitive benefit over the years from the virtual exclusion of minority firms from * * * contracting opportunities.” *Fullilove*, 448 U.S. at 485.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE GENDER-CONSCIOUS PROVISIONS OF THE PROGRAM DO NOT SURVIVE INTERMEDIATE SCRUTINY

While the MBE provisions of the program are subject to strict judicial scrutiny (*Croson*, 488 U.S. at 493-98), the WBE provisions need only meet “intermediate scrutiny.” Thus, the law need only “be substantially related to an important government objective.” *Concrete Works II*, 36 F.3d at 1519 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 & n.9 (1982)). Since, as explained above, the program survives strict scrutiny, it more than satisfies the less rigorous standard.

Even if the Court were inclined to affirm the district court’s strict-scrutiny analysis (or remand for further proceedings), however, it is simply inconceivable that the WBE program does not survive intermediate scrutiny. Cf. *Fullilove*, 448 U.S. at 479-92 (upholding a more invasive program under a similar or higher level of scrutiny). As this Court has stated, although “it is unclear whether statistical evidence * * * is [even] required to * * * satisfy intermediate scrutiny” (36 F.3d at 1526 n.19 (quoting *Contractors Ass’n*, 6 F.3d at 1009-11)), it is clear that “Denver’s

data indicates significant WBE underutilization such that the Ordinance's gender classification arises from 'reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.'" *Ibid.* (quoting *Hogan*, 145 U.S. at 726). Those data were further buttressed at trial by strong statistical and anecdotal evidence showing that remedial action to redress discrimination against WBEs is not only important, but imperative.

Further, unlike strict scrutiny, "intermediate scrutiny does not require any showing of [any] governmental involvement, active or passive, in the discrimination it seeks to remedy." *Coral Constr.*, 941 F.2d at 931; accord *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994). Thus, the private-market utilization disparities of WBEs, which "give[] rise to an inference that local prime contractors discriminated on the basis of * * * gender" (36 F.3d at 1529), alone warrant remedial action for WBEs, *regardless* whether Denver awards public funds to private-market discriminators.

Accordingly, the Court should reverse the judgment for Concrete Works on the unconstitutionality of the WBE provisions of the program, which are explicitly severable from the rest of the program. See § 28-82; *AGC*, 813 F.2d at 944 (upholding gender preference under intermediate scrutiny while striking down racial preference under strict scrutiny); *Coral Constr.*, 941 F.2d at 932-33 (same).

IV. THE SCOPE OF RELIEF IS IMPERMISSIBLE

A. Concrete Works Lacked Standing To Challenge The 1998 Ordinance, And Thus To Obtain Injunctive Relief

The Supreme Court has held that it is the denial of the chance to “compete on equal footing” that supplies the “injury in fact” necessary to challenge and obtain injunction of an affirmative-action program. *Adarand*, 515 U.S. at 211 (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993)); accord *Cache Valley Elec. Co. v. Utah Dept. of Transp.*, 149 F.3d 1119, 1122 (10th Cir. 1998). Thus, in *Concrete Works II*, this Court sustained Concrete Works’ standing to challenge the 1990 Ordinance because the provision of the program that allowed W/MBE prime contractors to count their own performance toward W/MBE project goals potentially “ma[de] it more difficult for [majority prime contractors] to obtain [construction contracts] than it is for [W/MBE prime contractors].” 36 F.3d at 1519 n.6.

But Denver repealed that provision in 1998. App. 9625-45 (amending § 28-61). Thus, Concrete Works now stands on precisely the same “footing” as every other firm — majority and W/MBE — competing for prime contracts. See Op. 16. Importantly, Concrete Works disavowed any intent to claim standing as a *subcontractor* (App. 3122) and hence can claim no competitive disadvantage from the prohibition against rejection of a qualified lowest-bidding W/MBE subcontractor.

Concrete Works nonetheless insists that it has standing because the program deprives it of a purported constitutional “right” not to be an “involuntary participant in a discriminatory scheme.” App. 3235. No such constitutional right — to avoid “participating” in a regime that allegedly violates someone *else’s* constitutional rights — exists. Numerous courts have ruled that such claims do not amount to actionable constitutional injury. See, e.g., *Combined Counties Police Ass’n v. Evanston*, 1991 WL 104139 (N.D. Ill.) (police officers lack standing to challenge constitutionality of policy they would implement), *aff’d*, 962 F. 2d 10 (7th Cir. 1992); *Massey v. Helman*, 196 F.3d 727, 739 (7th Cir. 1999) (prison doctor may not challenge constitutional adequacy of health care); *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961) (store owner has no right to be free from complicity in State’s alleged abridgment of customers’ Free Exercise of religion); *Ad Hoc Comm. v. Greenburgh No. 11*, 873 F.2d 25 (2d Cir. 1989). Thus, Concrete Works lacks standing to challenge the constitutionality of the program as it now exists or to obtain injunctive relief.

B. The Injunction Sweeps Too Broadly

Even if involvement in an unconstitutional scheme did somehow constitute a redressible injury, the district court’s injunction swept far more broadly than necessary to remedy it. Rather than limit relief to that which might benefit the plaintiff, the district court enjoined Denver’s ordinances in their entirety — including not only the

construction provisions, but also the separate and severable (§ 28-82) *professional design* provisions, which concededly did not affect Concrete Works. The court reasoned that, because the City had presented evidence supporting the whole program, the relief ordered could be equally encompassing. Attachment B at 3. That explanation was wrong as a matter of fact — the City expressly declined to present evidence buttressing affirmative-action in the professional design industry, Def. Tr. Br., Doc. 260 at 2 n.2 — and even more gravely misguided as a matter of law. A federal court’s remedial order may not be based on the scope of a party’s evidence — or even on the court’s judgment that policies that do not affect the plaintiff suffer from the same constitutional vice as those that do. See *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). Rather, it must be strictly limited to the *scope of the violation of constitutional rights found to be suffered by the party before the court*. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 357-58 & n.6 (1996). Two courts of appeals have therefore expressly held that a *construction* contractor, like Concrete Works, lacks standing to enjoin an affirmative-action ordinance as applied to a non-construction industry. See *Contractors Ass’n*, 6 F.3d at 996-97; *W.H. Scott Const. Co. v. Jackson*, 199 F.3d 206, 212-13 (5th Cir. 1999). The same result must obtain here.

Even more egregiously, the district court enjoined the severable provisions of the program that empower the City to collect data regarding the availability and

utilization of W/MBEs (§§ 28-71(b) & 28-80), and even the existence of the MOCC itself. See Attachment B at 3. Data collection — essential for the City to perform its duty to monitor for discrimination — causes Concrete Works no imaginable “harm,” let alone constitutional injury. Cf. *Shuford v. Alabama State Bd of Educ.*, 897 F. Supp. 1535, 1552 (M.D. Ala. 1995). Ironically, the district court has forbidden Denver to gather the very data that it ruled (erroneously) are required to buttress an affirmative-action program, thus assuring that its peculiar brand of strict scrutiny will be “fatal in fact” in perpetuity. Cf. App. 1226.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed, or, at the very least, vacated and remanded for a new trial to be conducted under the proper legal standards. The ruling regarding the unconstitutionality of the 1998 ordinance should be reversed and the injunction vacated.

ORAL ARGUMENT STATEMENT

Oral argument is requested. This is an important case involving the constitutionality of three ordinances enacted by a popularly-elected legislative body in an effort to eradicate the effects of race-and gender-based discrimination in public construction contracting and to prevent the City and County of Denver from passively participating in the discrimination of others. The stakes in the litigation thus are large and the legal issues exceedingly important. We respectfully suggest that the Court would benefit from oral presentation of counsel on these issues.

Respectfully submitted,

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