



No.02-1673

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In the Supreme Court of the United States

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CONCRETE WORKS OF COLORADO, INC.,

*Petitioner,*

v.

CITY AND COUNTY OF DENVER, COLORADO,

A MUNICIPAL CORPORATION,

*Respondent.*

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**On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The Tenth Circuit**

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**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether the Court of Appeals' holding that Denver's remedial outreach program for awarding construction and design contracts meets strict scrutiny comports with this Court's precedent?

2. Whether the Court of Appeals correctly held that Denver's enactment of a new remedial outreach program moots requests for injunctive relief regarding Denver's earlier, superseded programs?

3. Whether the Court of Appeals correctly ruled that, because petitioner Concrete Works of Colorado, Inc. ("CWC") waived its right to appeal the district court's 1993 ruling that Denver's outreach program was narrowly tailored to remedy race discrimination in the local construction industry, that ruling was law of the case?

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## FACTUAL BACKGROUND

Over the last 12 years, Denver has commissioned no fewer than six complex statistical disparity studies (see App. 20-34),<sup>1</sup> all of which documented that chronic, severe discrimination and its lingering effects pervade the Denver-area construction and design contracting market. The disparity studies showed that, absent a remedial program, Minority Business Enterprises devoted to construction and design work (MBEs) are consistently and significantly underrepresented in Denver-area contracting projects and on City-funded projects in proportion to their availability.<sup>2</sup> The studies showed that statistically significant disparities persisted even after controlling for the size and experience of firms.

Testimony before the Denver City Council, and subsequently at trial, confirmed that the underrepresentation was due to widespread discrimination. Witnesses testified that local majority prime contractors frequently refuse to hire qualified, lowest-bidding MBEs (App. 35; see also App. 160) and subject MBEs to more rigorous pre-qualification requirements than majority firms (App. 35, 71); MBEs are not infrequently driven from jobsites by brutal racial harassment (App. 36, 158-59); and prime contractors and City inspectors subject MBEs to higher standards of performance on the job than other subcontractors (App. 166, 158), to list but a few of the many discriminatory practices identified. The white senior vice-president of a large, majority-owned construction firm testified that majority-owned firms routinely refuse to hire MBEs based on stereotypes about their competence. App. 35.

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<sup>1</sup> “App.” refers to Petitioner’s Appendix. “CA” refers to the Appendix filed by Denver in the Court of Appeals.

<sup>2</sup> The evidence also showed overwhelming discrimination against Women-owned Business Enterprises (WBEs). See App. 19, 21-28, 32-34, 35-36. In its petition, CWC has abandoned its challenge to the WBE program, which the court of appeals upheld as constitutional (App. 82-83) and which is in all relevant respects identical to the MBE program; the questions presented in the petition address only racial preferences.

The evidence also showed that, absent a remedial program in City contracting, the representation of MBEs on City-funded projects plummets (App. 68-69, 71); and that many contracting firms that do work for Denver refuse to use MBEs when they are not compelled to do so even though they do not aver that the MBEs are less qualified than the majority subcontractors whom they select (App. 51). Further, lending discrimination studies substantiated anecdotal evidence that MBEs are discriminatorily denied access to capital based on race. App. 53, 61. Together, this evidence confirmed the conclusions of federal and local government reports (App. 16-18) that discrimination in the Denver construction industry was pervasive and warranted a remedy.

Over the years, Denver has adopted numerous race-neutral measures to counteract the discrimination and remedy its effects. Yet none has eliminated the problem. App. 261; CA 1750-59, 1762-64, 1768-70, 1775-77, 2049, 6254-68, 6942-52.

Denver accordingly passed a remedial outreach ordinance. The program requires that, when qualified MBEs are underrepresented on a particular City project in proportion to their actual availability to do that project, the City's prime contractors show that they have solicited subcontracting bids from qualified MBEs and have not rejected a **qualified, lowest-bidding** MBE. See App. 220-22. Unlike the race-conscious initiatives that have caused the most concern for reviewing courts, Denver's program does not impose quotas or set-asides; it allows all subcontractors to compete to be the lowest bidder on an **equal footing** for **every** contract; and it **never** obligates a prime contractor to engage a W/MBE unless that firm is both **qualified** to do the work **and the lowest bidder**. See App. 222. As Judge Finesilver found in reviewing the constitutionality of the program in 1993, the ordinance "read[s] like a how to manual on narrowly tailored aspirational goals ordinances" (App. 267), adhering exactly to the directions of this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

*Concrete Works of Colo., Inc. v. City of Denver (Concrete Works I)*, 823 F. Supp. 821 (D. Colo. 1993) (App. 231, 234-36, 246, 255-56, 258-61, 262, 265, 268-69).

Judge Finesilver found the program constitutional and granted summary judgment to Denver in 1993. App. 269. In 1994, Concrete Works of Colorado, Inc. (“CWC”) appealed only from the district court’s holding that Denver had adduced a “strong basis in evidence” to show the need for the program; CWC chose not to challenge the ruling that the program was narrowly tailored. See *Concrete Works of Colo., Inc. v. City of Denver (Concrete Works II)*, 36 F.3d 1513, 1531 n.24 (10th Cir. 1994) (App. 216). The Tenth Circuit reversed the grant of summary judgment, ruling that CWC had raised questions of fact concerning (1) whether differences in average firm size and experience might explain the disparities the studies had documented; and (2) the extent of Denver’s participation in the marketplace discrimination it had documented. See App. 208-09, 211.

On remand, the district court chose to revisit narrow tailoring even though the Tenth Circuit had held that CWC had waived the issue on appeal. On the strong basis question, the court accepted much of Denver’s evidence, finding, *inter alia*, that “women and minority groups are disadvantaged in trying to compete in the construction industry because of the prevalence of negative views about them.” See *Concrete Works of Colo., Inc. v. City of Denver (Concrete Works III)*, 86 F. Supp.2d 1042, 1074 (D. Colo. 2000) (App. 160). The district court also found that Denver was passively participating in marketplace discrimination, finding that “Denver has repeatedly and knowingly” “[paid] tax dollars to support firms that discriminate against other firms because of their race, ethnicity and gender.” App. 164. The district court nevertheless found Denver’s statistical and anecdotal evidence non-probative, and its program not narrowly tailored, by applying an unprecedented mode of scrutiny — summarized in a novel “six-question test” the court had invented — that is, contrary to

this Court's repeated admonition, inherently "fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

The Court of Appeals reversed in a thorough, 41-page opinion that faithfully applies the Court's decision in *Croson*, citing that decision no fewer than 35 times; carefully reviews the district court's manifold legal errors; and catalogues the overwhelming statistical and anecdotal evidence of discrimination Denver adduced at trial. See *Concrete Works of Colo., Inc. v. City of Denver (Concrete Works IV)*, 321 F.3d 950 (10th Cir. 2003) (App. 1). The Court of Appeals explained that the district court's newly-minted "six-question test" for ascertaining the constitutionality of affirmative action programs misstates the kind and quantum of evidence that this Court and the other circuits have held is required to create an inference of remediable discrimination. See App. 36-46. After reviewing an appellate record that the court characterized as "prodigious," including an "appellate appendix exceed[ing] ten thousand pages" (App. 6), the court concluded that Denver's disparity studies comprised a "strong basis in evidence" for inferring that discrimination pervades the local construction industry; anecdotal evidence buttressed this inference; and CWC had done nothing to rebut any of this evidence at trial. See App. 78-83. The Court of Appeals also held that the district court had erred in revisiting the issue of narrow tailoring because Judge Finesilver's unchallenged ruling on that issue was law of the case. See App. 83-86.

### SUMMARY OF ARGUMENT

If any remedial affirmative-action program in construction contracting can withstand strict scrutiny, Denver's program must. The case involves a straightforward application of *Croson*'s principles to overwhelming evidence of discrimination in Denver-area construction and design contracting. In *Croson*, the plurality held that a municipality may not adopt race-conscious remedies absent a persuasive statistical showing that MBEs qualified to do construction work

are underrepresented in construction contracting in comparison with their availability. 488 U.S. at 501-02. The Court also noted that such a showing may be buttressed with “direct evidence” — *i.e.*, anecdotal evidence — of discrimination. *Id.* at 480; see also *id.* at 510. In *Croson*, in stark contrast to this case, the city had adduced literally **no** evidence that MBEs were underrepresented in construction contracting in comparison with their availability: “the city ha[d] not ascertained how many minority enterprises are [even] present in the local construction market.” *Id.* at 510. The Court emphasized in *Croson* that a municipality *is* empowered to take steps to redress **private** discrimination in the local marketplace that its funds enable: a municipality “[has] a compelling interest in preventing its tax dollars from \* \* \* maintaining a racially segregated construction market.” *Id.* at 503. See *infra* pp. 19-20.

There is no confusion among the courts of appeals about what *Croson* meant. The decisions that CWC argues create no fewer than fifteen purported conflicts in fact simply struck down very different programs on the basis of very different evidence. In most cases, the governmental actor had failed to adduce **any** statistical evidence addressing whether MBEs were underrepresented in local construction contracting in comparison with their availability, relying instead on **no** evidence,<sup>3</sup> exclusively anecdotal evidence,<sup>4</sup> entirely

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<sup>3</sup> See, e.g., *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Associated Utility Contractors of Maryland, Inc. v. Mayor of Baltimore*, 83 F. Supp.2d 613, 621 (D. Md. 2000).

<sup>4</sup> See *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

irrelevant statistics,<sup>5</sup> or different statistics.<sup>6</sup> In other cases, the disparities suggesting underutilization of MBEs disappeared after controlling for firm size and experience, and the governmental actor failed to allege or prove either (1) that firm size or level of experience did not significantly affect qualification or availability, or (2) that differences in firm size and level of experience of MBEs were themselves products of discrimination.<sup>7</sup> In short, no decision has struck down a program on the basis of a record similar to Denver's.

Contrary to CWC's insinuation that the Tenth Circuit ignored the decisions of other courts (Pet. 28), the Tenth Circuit carefully considered the decisions of its sister circuits, expressly adopting the reasoning of some (App. 13, 41), distinguishing others (App. 47), and citing its own earlier decisions in *Concrete Works II* (App. 58, 67) and *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000) (App. 57), which discuss many others. Notably, many of the decisions CWC cites as purportedly conflicting with the decision below **actually cite to and rely upon** the Tenth Circuit's 1994 decision in *Concrete Works II*, which the decision below merely implements. See, e.g., *Builders Ass'n of Greater Chicago (BAGC) v. Cook County*, 256 F.3d 642, 645-46 (7th Cir. 2001); *W.H. Scott Constr. Co. v. City of*

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<sup>5</sup> See, e.g., *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (calculating disparities without knowing the number of MBEs that are even devoted to **construction contracting**, as opposed to different lines of work); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 425-26 (D.C. Cir. 1992) (lacking any evidence of the proportion of contracts awarded to minority-owned construction businesses).

<sup>6</sup> See, e.g., *Builders Ass'n of Greater Chicago (BAGC) v. Cook County*, 123 F. Supp.2d 1087, 1112-13 (N.D. Ill. 2000), *aff'd*, 256 F.3d 642 (7th Cir. 2001) (relying on a comparison of the percentage of MBEs solicited for bids on projects affected by affirmative action ("goals projects") versus projects not affected by affirmative action ("non-goals projects"), with no evidence comparing the utilization of MBEs with their availability in the market).

<sup>7</sup> See, e.g., *Engineering Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 921 (11th Cir. 1997). See *infra* n.12.

*Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Engineering Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 911, 914, 916, 926 (11th Cir. 1997); *Engineering Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1559, 1576-77 (S.D. Fla. 1996).

Ultimately, CWC’s argument reduces to a single proposition: the Tenth Circuit upheld an affirmative-action contracting program while other courts of appeals have struck down very different programs on very different records. See Pet. 28. However, the Court has repeatedly emphasized that strict scrutiny of affirmative-action programs must not be applied in a manner that is invariably fatal. See, e.g., *Adarand*, 515 U.S. at 237; *Grutter v. Bollinger*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2325, 2338 (2003).

As we next explain, CWC’s claims of conflict and error are premised upon bald distortions of the Tenth Circuit’s decision, Denver’s evidence, and the case law.

## ARGUMENT

### I. THERE ARE NO CONFLICTS AMONG THE CIRCUITS WARRANTING THE COURT’S ATTENTION.

#### A. The Court Of Appeals’ Holdings Regarding Proof Of Discrimination Accord With The Decisions Of Other Circuits.

##### 1. The Court of Appeals did not hold “that Denver need show no more than statistical disparities.”

Striving to suggest a significant conflict, CWC contends that the Tenth Circuit held that evidence of a discriminatory *impact* suffices to warrant an affirmative action remedy. Pet. 6. As evidence, CWC states that the Court of Appeals required Denver to “show no more than statistical disparities.” Pet. 4. But the Court of Appeals did not rule that Denver can meet its burden through introduction of “*statistical disparities’ alone*,”

as CWC states (Pet. 4); rather, it held “that Denver can meet its burden through the introduction of *statistical and anecdotal evidence alone*” (App. 40-41). This Court has consistently held that the combination of statistical disparities and anecdotal evidence is precisely how a pattern of *intentional* discrimination is usually proved. See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Croson*, 488 U.S. at 509. Here, Denver introduced overwhelming anecdotal evidence of intentional discrimination, much of which the district court credited. See *infra* Part I.A.5; App. 35-36, 77-78, 156-60. Indeed, CWC concedes in a later section of its petition (Pet. 11-12) that Denver’s case was buttressed by anecdotal evidence; CWC there asserts the polar opposite argument, *i.e.*, that Denver’s evidence fell short because it purportedly relied exclusively on anecdotal evidence. CWC’s attempt to divide the evidence and attack each component as insufficient because of the absence of the other is misguided.

Nor did the Court of Appeals hold, as CWC states, “that Denver need not provide evidence of ‘discriminatory motive or intent on the part of private construction firms.’” Pet. 4 (quoting App. 41). Instead, the Court of Appeals held that Denver need not provide “*additional* evidence,” beyond the “statistical and anecdotal evidence” Denver already had provided, “to show discriminatory motive or intent on the part of private construction firms.” App. 41 (emphasis added).<sup>8</sup>

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<sup>8</sup> CWC similarly takes out of context the Court of Appeals’ statement that Denver need not “demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities.” Pet. 4 (quoting App. 41). In so ruling, the Tenth Circuit was not declaring that evidence of discriminatory purpose was not required, but rather that it is not equivalent to an intent “to disadvantage women or minorities.” Denver had shown at trial that majority contracting firms excluded MBEs in part not because of their own racial animus, but because they knew their white male employees would harass minority subcontractors and thereby impede the successful completion of projects. Although the district court accepted this evidence (see App. 159), it deemed it inconsequential because it believed that Denver had to show that the discrimination that was excluding MBEs “result[ed]

Further, Denver simply did not, as CWC contends (Pet. 5), “alleg[e] that racially neutral barriers limit minority entry and participation in the construction industry”; nor did the Court of Appeals suggest any such conclusion in its opinion. Instead, the Court of Appeals found that “discriminatory  *motive* can be inferred from the \* \* \* disparity studies.” App. 54 (emphasis added). In short, absent CWC’s false gloss on the Court of Appeals’ text, the decision below cannot fairly be read to conflict with any of the decisions CWC cites (Pet. 6) on the question whether a municipality has the power to remedy a disparity caused by race-neutral conduct.

CWC also suggests that the Tenth Circuit should have required Denver to identify with greater specificity the policies and practices of prime contractors that resulted in the discriminatory exclusion of MBEs. Pet. 4-5. But, as the Court of Appeals’ decision documents (App. 35-36, 61, 71-72), Denver’s evidence did identify numerous specific intentionally discriminatory practices that contributed to the gross statistical disparities; we have listed several above at p. 1. CWC’s suggestion that Denver needed to do more to identify discriminatory practices — although what “more” could be done it does not suggest — bears no support in any of the case law CWC cites. Pet. 6.<sup>9</sup>

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from policies and practices intentionally used by business firms *for the purpose of disadvantaging [MBEs]* because of race [and] ethnicity” (App. 143 (emphasis added)). The Tenth Circuit correctly explained that this interpretation of the “discriminatory purpose” requirement was error. App. 40-41. A prime contractor who refuses to work with W/MBEs not “for the purpose of disadvantaging women and minorities” but rather because his workers will harass them and thereby impede project completion, is still guilty of intentional, redressible discrimination. See, e.g., *Lam v. Univ. of Hawai’i*, 40 F.3d 1551, 1560 & n.13 (9th Cir. 1994) (discrimination to appease third-party preferences is illegal); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530-31 (7th Cir. 1990) (Posner, J.) (same); *Garza v. Los Angeles County*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring) (same).

<sup>9</sup> Finally, CWC offers a grossly distorted “summary” of Denver’s evidence

**2. The Court of Appeals did not hold “that Denver need not control for ‘major variables.’”**

CWC next contends that the Court of Appeals “held that ‘statistical studies which compare utilization of [MBEs] to availability,’ *even without controls for major variables*, ‘support the inference that “local prime contractors” are engaged in racial \* \* \* discrimination.’” Pet. 7 (emphasis added). Again, that is false. The Court of Appeals made clear that Denver *had* controlled for all variables that the evidence suggested might affect the outcome — and observed that unrefuted evidence demonstrated that the other variables that CWC speculated might affect the outcome were either tainted by race or had no demonstrated relevance. See App. 57-62.

For example, the evidence showed that MBEs in Denver are, on average, smaller and slightly newer than majority firms. But, the Court of Appeals noted, a firm’s size has little effect on its qualification or ability to provide construction services. See App. 60. The district court had found that “‘most firms have few full-time permanent employees and must grow or shrink their performance capacity according to the volume of business they are doing’” (*id.* (quoting App. 138)); and no evidence showed that smaller firms are less able to expand (App. 60-61). Moreover, the Court of Appeals observed, Denver had presented unrefuted evidence, including three lending discrimination studies and three business formation studies (App. 52-57), showing that “M/WBEs are smaller and less experienced *because of marketplace and industry discrimination*” that prevents their entry into and expansion in the local construction market. App. 61 (emphasis added). It is well-established that a party attempting to create an inference of discrimination need not control for race-tainted variables.<sup>10</sup>

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(Pet. 5) with the apparent intent to show its insufficiency. The Court of Appeals accurately summarized the evidence at App. 16-36.

<sup>10</sup> 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.

Despite the fact that it thus was unnecessary to control for size and experience, the Court of Appeals noted, “the 1990 Study, the DGS Study, the 1995 Study, and the 1997 NERA Study *all controlled for size* and the 1995 Study *controlled for experience*” of MBEs; and yet all *still showed statistically significant disparities*. App. 61 (emphasis added).<sup>11</sup>

At trial, CWC’s expert speculated that, if a regression analysis “control[ed] for [more] things, you know, I’m sure we would find that those disparities would narrow.” CA 1085. Yet he confessed that he lacked any factual basis for that claim. CA 1111, 1118, 1126-27. Following the decisions of other courts of appeals, and in accord with this Court’s decisions in *Croson* and *Bazemore v. Friday*, 478 U.S. 385 (1986), the Tenth Circuit correctly held that such conjecture that some missing factor could explain utilization disparities cannot defeat the inference of discrimination they create. App. 56-57; accord, e.g., *Contractors Ass’n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); see *infra* pp. 12-13. None of the cases CWC cites supports a different treatment of variables.<sup>12</sup>

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1982).

<sup>11</sup> As for the other variables CWC speculated at trial might affect qualification and availability, CWC presented no evidence that MBEs were even *different* from majority firms in these respects — let alone that any such differences likely accounted for the disparities. See App. 57-65.

<sup>12</sup> Unlike in this case, in *Dade County*, “[a]fter regressing for firm size,” the data did not “contain[ ] any statistically significant unfavorable disparities” (122 F.3d at 921; accord *id.* at 918); and, unlike in this case, Dade County appears to have made no argument that, in any event, the smaller size of MBEs was a product of discrimination. In *O’Donnell*, the statistics did not control for size or experience and the court specifically noted that, although “[o]ne might of course suppose that minority firms lacked expertise or were small in size or numbers because of racial discrimination in the past,” no evidence was presented to support that explanation. 963 F.2d at 426-27. Moreover, in *O’Donnell*, the City’s data compared the income of 82 selected MBEs with the total construction spending in the City for a particular year; because the 82 MBEs did not represent the total number of MBEs in the

**3. The Court of Appeals did not “hold that Denver may shift the burden regarding ‘major variables.’”**

CWC also asserts that the Tenth Circuit “*requir[ed]* CWC to prepare ‘a study that controlled for’” the additional variables it speculated might change the outcome of Denver’s disparity studies. Pet. 9 (quoting App. 56-57) (emphasis added). But the Court of Appeals did *not* “requir[e]” CWC to prepare its own disparity study. Rather, it held only that CWC must do more to meet its burden to rebut Denver’s showing than merely “*hypothesize[ ]*” that controlling for more or different variables might conceivably affect the outcomes of Denver’s studies. App. 82 (emphasis in original). The court explained: “rebuttal evidence may consist of a neutral explanation for the statistical disparities”; “CWC can also rebut Denver’s statistical evidence ‘by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.’” App. 13 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991)). CWC failed to do any of these things.

In so ruling, the Tenth Circuit adhered to and relied upon the decisions of this Court and other circuits. See *id.* This Court has explained that, although a municipality bears the initial burden to produce evidence generating “[a]n inference of discrimination” — *i.e.*, evidence “approaching a prima facie case” of discrimination (*Croson*, 488 U.S. at 500) — the “[u]ltimate burden [of proof] remains with [the challenging plaintiff] to demonstrate the unconstitutionality of an affirmative-action program.” *Wygant*, 476 U.S. at 277-78 (plurality). In *Bazemore*, the Court indicated in the Title VII context that a party cannot rebut a statistical showing of discrimination by unsupported hypothesis. Specifically, the Court sharply criticized a party’s “strategy at trial” — identical

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City, this “comparison” obviously grossly undercounted total MBE revenues and was essentially meaningless. See *id.* at 425-26.

to that of CWC in the courts below — of brazenly “declar[ing] \* \* \* that many factors” *might* account for documented disparities while making “no attempt \* \* \* statistical or otherwise — to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.” 478 U.S. at 403 n.14. As the Third and D.C. Circuits have explained, “[i]mplicit in the *Bazemore* holding is the principle that a mere conjecture or assertion \* \* \* that some missing factor would explain the existing disparities \* \* \* generally cannot defeat the inference of discrimination created by \* \* \* statistics.” *City of Philadelphia*, 6 F.3d at 1007 (quoting *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987)); see also *id.* (citing other cases).

The courts of appeals that have addressed the question presented here thus have held, as did the Tenth Circuit (App. 82), that a plaintiff challenging a governmental affirmative action program must do more than merely speculate that controlling for more or different variables might affect the outcome. Indeed, the other courts of appeals have articulated the plaintiff’s burden of rebuttal in terms identical to those used by the Tenth Circuit. See, e.g., *City of Philadelphia*, 6 F.3d at 1007; *Coral Constr.*, 941 F.2d at 921; *Dade County*, 122 F.3d at 916. By contrast, none of the cases CWC cites remotely supports its position that, by requiring more than speculation to rebut Denver’s statistical showing, the Tenth Circuit erred.<sup>13</sup>

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<sup>13</sup> In *Drabik*, the Sixth Circuit addressed only whether the defendant State of Ohio had met its initial burden. Further, the government’s statistics in that case were far more general than those presented here: “Ohio’s most ‘compelling’ statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses” of all categories, not just those that actually do *construction contracting* work. 214 F.3d at 736. In *Monterey Mechanical*, the Ninth Circuit did not suggest, as CWC indicates (Pet. 9-10), that the government bears the ultimate burden of proof in an affirmative action case. Rather, it held only that the government always bears the *initial* burden of justifying a facially discriminatory classification; the question of the challenger’s burden of response did not arise because the government had “offered *no* evidence

**4. The Court of Appeals properly reviewed *de novo* the district court’s conclusion that Denver lacked a “strong basis in evidence” while reviewing underlying factual findings for clear error.**

CWC next contends (Pet. 10) that the Court of Appeals’ decision to review *de novo* the question whether Denver had demonstrated a strong basis in evidence conflicts with this Court’s decision in *Wygant*. But the Court never addressed in *Wygant* what standard of review a court of appeals should employ in assessing a district court’s conclusion that there was a “strong basis in evidence.” See 476 U.S. at 277-78. Indeed, in *Wygant*, the district court had reached *no* conclusion regarding whether there was a strong basis in evidence. See *id.*

Instead, the Court stated in *Wygant* only that “the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.” 476 U.S. at 277. The Court made that statement not to indicate the appropriate standard of review, but instead to explain why the absence of any evidence, and hence any findings by the district court, concerning whether there was prior discrimination precluded the Court from “determin[ing] whether the race-based action is justified as a remedy for prior discrimination.” *Id.* at 278.

Although the Court has never decided what standard of review a court of appeals should employ in reviewing a district court’s determination of whether the evidence comprises a “strong basis,” the courts of appeals are almost uniform in holding, as did the Tenth Circuit, that review should be *de novo*. See, e.g., *Cotter v. City of Boston*, 323 F.3d 160, 168 (1st Cir. 2002); *Rothe Dev. Corp. v. Dep’t of Defense*, 262 F.3d 1306, 1323 (Fed. Cir. 2001); *Majeske v. Chicago*, 218 F.3d

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whatsoever to justify the race and sex discrimination.” 125 F.3d at 713. (emphasis added). In fact, the Ninth Circuit had previously described the challenger’s burden in terms identical to those used by the Tenth Circuit. See *Coral Constr.*, 941 F.2d at 921 (quoted at App. 13-14).

816, 820 (7th Cir. 2000); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996). Each of these decisions post-dates *Wygant*.<sup>14</sup>

These holdings are plainly correct. Like a decision whether the record suffices to support summary judgment or judgment as a matter of law, the question whether the record comprises a “strong basis in evidence,” while based on factual findings, ultimately requires a determination of whether the evidence presented suffices to meet a legal standard. Cf. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (summary judgment is reviewed *de novo*). Indeed, the Court has analogized the question whether an affirmative-action defendant’s evidence of past discrimination comprises a “strong basis in evidence” to a question that indisputably is legal in nature — whether a discrimination plaintiff’s evidence comprises a “prima facie case.” See *Croson*, 488 U.S. at 500. Further, had this Court believed that the “strong basis” determination was reviewable only for clear error, as CWC contends, it surely would have mentioned the point in *Croson*, when it reversed the decision of the district court that there was a strong basis in evidence supporting the City of Richmond’s affirmative action program. *Id.* at 505. The fact that it did not — and that it appears to have reviewed the district court’s conclusion that there was a strong basis in evidence *de novo* — indicate that the Tenth Circuit’s conclusion that *de novo* review is appropriate is correct.

Ultimately, the standard used to review the “strong basis” determination in this case is irrelevant because, as the overwhelming evidence at trial and the district court’s own factual findings (see *infra* Part I.A.5) indicated, the district

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<sup>14</sup> The only holding even arguably to the contrary, that of the Eleventh Circuit in *Dade County*, 122 F.3d at 903, predated and is inconsistent with the great weight of authority on this issue. The Eleventh Circuit has not yet had an opportunity to reconsider its position in light of the authority calling its decision into question.

court's determination that Denver had failed to present a strong basis in evidence was clear error.<sup>15</sup>

**5. The Court of Appeals correctly held that Denver may use anecdotal evidence to buttress its statistical showing of discrimination.**

CWC criticizes the Tenth Circuit for holding “that Denver may use anecdotal evidence to show systemic discrimination.” Pet. 11. To the extent CWC is suggesting that the Court of Appeals held that anecdotal evidence *alone* sufficed, the short answer, once again, is that the Court of Appeals made no such holding. As explained above (*supra* pp. 7-8), the Court of Appeals held that “the anecdotal evidence provides persuasive, unrebutted *support for*” Denver’s overwhelming *statistical evidence* of systemic discrimination (App. 78) (emphasis added). The cases CWC cites, which held that anecdotal evidence *alone* could not establish industry-wide discrimination (*Coral Constr.*, 941 F.2d at 919) or compensate for statistics that, according to the governmental defendant’s own expert, “did not tend to prove discrimination” (*BAGC v. Cook County*, 123 F. Supp.2d 1087, 1114 (N.D. Ill. 2000)), are therefore inapposite. Any suggestion that anecdotal evidence is irrelevant even to *buttress* a statistical showing of underrepresentation is foreclosed by this Court’s precedent (see, e.g., *Teamsters*, 431 U.S. at 339), common sense, and the very cases CWC cites (see, e.g., *Coral Constr.*, 941 F.2d at 919 (“[T]he combination of convincing anecdotal and statistical evidence is potent.”); *Dade County*, 122 F.3d at 926 (same)).

CWC also states that the Tenth Circuit “reversed the District Court’s [factual] findings” concerning Denver’s anecdotal evidence. Pet. 11. Actually, the Court of Appeals

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<sup>15</sup> CWC falsely suggests (Pet. 10) that the Court of Appeals reviewed “the District Court’s factual findings” regarding credibility, among other things, *de novo*. To the contrary, the Court of Appeals reviewed all “[u]nderlying factual findings” for “clear error” (App. 13), specifically relying on the trial court’s assessments of much of the anecdotal evidence (see *infra* p. 17).

largely relied on them. See App. 78 (basing its conclusion that “the anecdotal evidence provides persuasive, un rebutted support for Denver’s initial burden” “on the district court’s findings regarding Denver’s anecdotal evidence,” as well as the Court’s own “review of the record”). Many of the district court’s factual findings indicated that discrimination pervades Denver’s construction industry. See *id.* The district court held otherwise primarily because it applied an erroneous legal framework. See *id.* For example, the Court of Appeals noted, the district court found that “the anecdotal evidence \* \* \* supported 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.*’” App. 42 (quoting App. 160 (emphasis added)). The district court also found that “Denver has repeatedly and knowingly” “[paid] tax dollars to support firms that discriminate against other firms because of their race, ethnicity and gender” (App. 164); “minority and woman owned firms have experienced discrimination on particular jobs by overzealous inspectors employed by Denver” (App. 166); and W/MBEs are unable “to do their work on a job-site shared by others” (App. 161-62) due to worksite harassment and “attitudes show[ing] outright hostility toward race and gender” which “reflect[ ] stereotypical views about W/MBEs” (App. 159). Given these findings and the abundant evidence in the record, the Court of Appeals’ conclusion that the anecdotal evidence supported Denver’s statistical showing of discriminatory exclusion was plainly correct, and none of the cases CWC cites suggests otherwise.

#### **6. Denver’s studies were not outdated.**

CWC complains that three of the dozens of pieces of evidence Denver introduced at trial, which fall into a category of evidence on which “Denver did not rely heavily” (App. 69), are “outdated” (Pet. 12). CWC ignores that this older evidence was introduced as part of a large package of evidence that established a *continuous history* of discrimination from 1972

through the date of trial, including studies and data dated literally every few years throughout that entire period. See App. 16-34.<sup>16</sup> Denver's introduction of this evidence to establish historical context was consistent with this Court's repeated holdings that a "history" of discrimination is probative of present discrimination. See, e.g., *Bazemore*, 478 U.S. at 395; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.15 (1977). Indeed, historical discrimination is probative of present discrimination even when the historical discrimination is not actionable. See, e.g., *id.*; *Bazemore*, 478 U.S. at 395. Neither of the decisions CWC cites suggests that such a use of historical data is improper; the paraphrased statements in both decisions questioned only a municipality's use of old data *unbuttressed* by recent information, a situation patently inapplicable here.<sup>17</sup>

**B. There Is No Conflict Regarding The Court Of Appeals' Decision As To Sources Of Discrimination.**

**1. The Court of Appeals did not "hold that Denver may utilize societal discrimination to demonstrate that it was a passive participant in racial discrimination."**

In Part I.B.2 of its petition,<sup>18</sup> CWC argues that the Court of Appeals' approval of Denver's use of marketplace data effectively permitted Denver to remedy "societal discrimination" in contravention of this Court's admonition in *Croson*. Pet. 14-15. CWC's position distorts both *Croson* and

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<sup>16</sup> Each of Denver's studies used the most recent available census data and then *supplemented* these data with contemporaneous surveys of thousands of construction and design firms. Together, the data demonstrated the need for the program throughout its operation. See App. 66.

<sup>17</sup> See *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1370 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); *Drabik*, 214 F.3d at 735 (citing *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993)).

<sup>18</sup> We address Parts I.B.1 and I.B.2 of CWC's petition in reverse order for the sake of clarity.

the decision below.<sup>19</sup> The plurality in *Croson* made clear that “the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,” whether “public or private.” *Croson*, 488 U.S. at 504.<sup>20</sup> The evidence “must identify that discrimination \* \* \* with some specificity” — invocation of congressional reports making “national findings that there has been societal discrimination” in a particular field does not suffice. *Id.*

At trial, Denver adduced a mass of evidence of discrimination in the Denver-area design and construction contracting market, including numerous disparity studies documenting consistent, significant underutilization of MBEs in comparison with their availability. Applying *Croson*’s holding that a municipality may use affirmative action when necessary to ensure that public tax dollars do not support private discrimination, the Court of Appeals required Denver to show a “linkage” between its public spending and this evidence of marketplace discrimination. App. 50; see also App. 211-12. As the district court found, Denver adduced convincing

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<sup>19</sup> The quote at Pet. 14 is taken out of context. The Court of Appeals’ statement that “any findings Congress has made as to the entire construction industry are relevant” is a quotation from *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000), where the federal government’s affirmative action program was at issue. See App. 49 (quoting *Adarand*, 288 F.3d at 1166-67). The Court of Appeals quoted this portion of *Adarand* not to suggest that Congress’ findings regarding the national construction industry bore any relevance to this case — no congressional findings were presented here — but rather to emphasize that Denver-area marketplace statistics, as distinct from statistics limited solely to Denver-funded contracting, buttressed Denver’s claims that it passively participates in private discrimination. See App. 49.

<sup>20</sup> See also *Croson*, 488 U.S. at 492 (“[I]f the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, \* \* \* the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity \* \* \* has a compelling government interest in assuring that public dollars \* \* \* do not serve to finance the evil of private prejudice.”).

evidence of just such a linkage. The district court explained: “Denver has repeatedly and knowingly” “pa[id] tax dollars to support firms that discriminate against other firms because of their race, ethnicity, and gender.”<sup>21</sup> App. 164; see also App. 51.

Not surprisingly, given the plurality’s mandate in *Croson*, none of the decisions CWC cites condemns such a use of marketplace data to show a municipality’s passive participation in private discrimination. To the contrary, two of the cases CWC cites explicitly support it. See *City of Philadelphia*, 91 F.3d at 596, 599 (cited by CWC at Pet. 15) (quoting *Croson*, 488 U.S. at 492) (accepting the theory that the City would have the power to remedy marketplace discrimination even absent a showing of “linkage” to public spending such as that required by the Tenth Circuit, based on *Croson*’s statement that a city can use affirmative action to “assur[e] that public dollars \* \* \* do not finance the evil of private prejudice”); *Dade County*, 122 F.3d at 907 (cited by CWC at Pet. 15) (marketplace data could contribute to a strong basis in evidence if they showed statistically significant disparities). The Ninth Circuit similarly has twice held that a municipality’s “infusion of tax dollars into a discriminatory industry,” even absent direct payments to the discriminators such as those Denver demonstrated in this case, perpetuates the effects of private discrimination and hence justifies remedial action. See *Coral Constr.*, 941 F.2d at 916; *Associated Gen. Contractors of Cal. (AGC) v. Coalition for Econ. Equality*, 950 F.2d 1401, 1413 (9th Cir. 1991). CWC has cited no case to the contrary.<sup>22</sup>

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<sup>21</sup> To the extent CWC suggests that, in *BAGC*, the Seventh Circuit required something more or different to establish passive participation (Pet. 15), that suggestion is belied by the fact that *BAGC* specifically cites the Tenth Circuit’s statement of the passive participation test in *Concrete Works II*, which the Tenth Circuit followed in the decision below. See *BAGC*, 256 F.3d at 645-46 (quoted by CWC at Pet. 15) (citing *Concrete Works II*, 36 F.3d at 1529-30).

<sup>22</sup> *Associated Utility Contractors*, 83 F. Supp.2d at 619 (cited by CWC at Pet. 15-16), is utterly inapposite. The court did not address whether, when there is evidence that MBEs are severely underrepresented in marketplace

## 2. Denver identified the sources of discrimination with specificity.

Relatedly, CWC argues that the marketplace data are flawed because they fail to “identify the source of the racial discrimination that [Denver] seeks to remedy.” Pet. 13. But neither the *Croson* plurality nor any of the cases CWC cites held that a municipality must identify the *particular* contracting firms that are discriminating in order to adopt a remedy.<sup>23</sup> In any event, the district court found that Denver did in fact carefully identify many discriminators who had received City funding, a factual finding CWC did not challenge. App. 51.

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contracting, a City may use affirmative action to ensure that tax dollars do not fund contractors who are discriminating. Notably, the court declined to uphold the plan at issue not because data showing discrimination was purportedly insufficient, but because it was literally non-existent. *Id.* at 621.

<sup>23</sup> The passage CWC quotes from *Fulton County* criticizing the county for failing “to identify majority contractors, lenders, bonding companies or others who discriminate against [MBEs]” appears in that case’s analysis of narrow tailoring, not its analysis of whether there was a strong basis in evidence. 51 F. Supp.2d at 1380. The court’s point, as it went on to explain, was that the program burdened nondiscriminators and benefitted nonvictims. *Id.* Putting aside that this Court has held that this feature of an affirmative action program does not prevent a finding of narrow tailoring (*Wygant*, 476 U.S. at 280-81 (plurality)), it is irrelevant to whether a municipality may use marketplace data to show a “strong basis in evidence.” On that point, the *Fulton County* court *agreed* with the Tenth Circuit and cited *Concrete Works II* in support. See 51 F. Supp.2d at 1369. The portion of *Dade County* CWC quotes is similarly inapposite. CWC’s quote (Pet. 14) comes from a portion of the opinion dealing with a study whose “objective \* \* \* was to estimate the participation of each MWBE group *in the County’s subcontracting business*”; it thus obviously was relevant “to achieving that objective” that “the denominator used in the calculation of the MWBE sales and receipts \* \* \* is based upon the total sales and receipts from all sources” rather than limited to County subcontracting. *Dade County*, 122 F.3d at 920 (emphasis added). As noted above at p.20, in the portion of *Dade County* addressing “Marketplace Data” like those at issue here, the Eleventh Circuit accepted the County’s theory that such data could be probative of remediable discrimination if they demonstrated statistically significant disparities. See *id.* at 920-21.

### **3. Questions of narrow tailoring are not presented here.**

CWC argues that the Tenth Circuit should have struck down the program on the ground that Denver failed to make sufficient race-neutral efforts to stop the discrimination. Pet. 16-18. CWC also disputes (*id.* at 16) the Court of Appeals' observation that the district court had erred in stating that a race-conscious program is impermissible unless it "change[s] the discriminatory policies and programs that taint the industry" (App. 37 (quoting App. 143); see also App. 44). Both of CWC's arguments indisputably go only to the question whether the program is narrowly tailored. The Court of Appeals explicitly declined to rule on that question because the finding of the district court in this case in 1993 that the program was narrowly tailored, which CWC did not appeal, is law of the case. See App. 83-86; see also *infra* Part III.<sup>24</sup> Because the Court of Appeals did not reach these issues, this Court should not grant certiorari to review them.

#### **C. There Is No Conflict Regarding The Court Of Appeals' Treatment Of The Disparity Studies.**

##### **1. There is no conflict regarding availability and qualification.**

CWC contends that the Court of Appeals '*assum[ed]* that all contractors are equally qualified, willing, and able to work on all Denver construction projects." Pet. 18 (emphasis added). To the contrary, the Court of Appeals carefully considered whether MBEs were less qualified or available than majority firms; but the evidence demonstrated that they were not. See App. 58-64; *supra* pp. 10-11.

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<sup>24</sup> The Court of Appeals' comment that it was illogical to require a municipality to prove that its affirmative action program eliminated all of the discrimination (App. 44) thus indisputably was *dicta*. The Court of Appeals made no comment at all about whether Denver's pre-enactment race-neutral efforts to eliminate discrimination sufficed.

CWC insists that Denver should have presented more evidence that MBEs were as qualified, willing, and available, on average, as the majority contractors with whom they were being compared. Pet. 18-19. At trial, CWC's expert opined that the only way to determine qualification, willingness, and availability would be to base disparity studies on bidding data for every project undertaken in the construction market, comparing the proportion of qualified MBEs who bid with the proportion who won contracts. See App. 64-65. As the Court of Appeals explained (App. 65), and as CWC's experts repeatedly testified (CA 1157-58, 1264-65, 1270-71, 1273; see also CA 1331-32), it would be impossible for *any* municipality to meet this standard of proof. This proposed standard thus would violate the Court's repeated holdings that, to justify an affirmative remedy, a governmental actor need create only an *inference* of discrimination; it need not prove it with certainty. See *Croson*, 488 U.S. at 509. It also would convert "strict scrutiny" into scrutiny that is "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (quotation marks omitted); see *City of Philadelphia*, 91 F.3d at 603 (rejecting as unnecessary the "highly impractical" task of determining the actual qualifications and capacities of each W/MBE).

*Croson* does not support CWC's position. In *Croson*, the plurality condemned Richmond for comparing the percentage of City contracts awarded to MBEs with the *percentage of minorities in the general population*. See 488 U.S. at 499, 501. The plurality observed that the City did not know how many MBEs were even qualified to do construction contracting. *Id.* at 502. The plurality did not purport to require, as CWC contends, that a municipality make a greater showing of qualification, willingness, and availability of each MBE for each contracting job than do Denver's statistics. To the contrary, the Court cited favorably the Sixth Circuit's decision in *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 171 (6th Cir. 1983), *abrogated by Drabik*, 214 F.3d at 735, 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. In *Keip*, the Court noted, 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. *Id.*; see also *id.* at 510 (chastising Richmond for not having “ascertained how many minority enterprises are *present* in the local construction market”) (emphasis added).

Interpreting *Croson*, the courts of appeals thus have held that data comparing utilization of MBEs to their presence in the market meet a City's initial burden absent evidence that MBEs likely differ from majority firms in qualification, availability, or willingness to contract. See, e.g., *City of Philadelphia*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the “percentage of [MBE] availability or composition in the ‘population’ of Philadelphia area construction firms”); *AGC*, 950 F.2d at 1414 (relying on such availability data to conclude that city had presented “detailed findings of prior discrimination”); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (statistical disparity between “the total percentage of minorities involved in construction and the work going to minorities” shows that “the racial classification in the County plan [was] necessary”). Neither of the cases CWC cites held otherwise.<sup>25</sup>

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<sup>25</sup> The data in *Drabik*, unlike Denver's data, “d[id] not distinguish minority construction contractors from minority businesses generally.” 214 F.3d at 736. The Sixth Circuit's speculation about whether, if the defendant *had* proffered data on “firms qualified, in some minimal sense, to perform the work in question [*i.e.*, firms that did construction work], [such data] would also fail to satisfy the Court's criteria” (*id.*), was *dicta*. And in *Dade County*, the Eleventh Circuit held that failure to control for qualification and availability did not “render[ ] the marketplace study meaningless”; rather, it was just a factor to be considered in assessing the weight to be given to the study. 122 F.3d at 920-21.

**2. There is no conflict regarding subcontracting statistics.**

CWC incorrectly contends that the Tenth Circuit “disregarded that Denver’s statistics aggregated prime contractor and subcontractor income.” Pet. 19. The very pages of the Court of Appeals’ opinion that CWC cites (Pet. 19) discuss a study that broke down prime contractor and subcontractor data and still showed substantial disparities. See App. 27-28. In any event, the distinction between “contractors” and “subcontractors” in the Denver contracting market is a false one because “prime contractors” in Denver — like CWC itself (see App. 6 n.1) — often act as subcontractors and vice versa. CA 548. Neither this Court in *Croson* nor the Fifth Circuit in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999), suggested that, under such circumstances, a study combining contractor and subcontractor statistics is invalid.

**3. There is no conflict regarding business formation studies.**

CWC contends that business formation studies are irrelevant to proving that there are discriminatory barriers to entry into an industry. Pet. 20-21. That conclusion lacks any support in the case law and the Tenth Circuit properly rejected it. App. 52-57.

Contrary to CWC’s assertion (Pet. 20-21), in *Croson* the Court did not address the probative value of studies showing the likelihood that individuals employed in the construction industry would form their own businesses — no such studies were presented. Richmond had relied instead on a comparison of the representation of MBEs in local contractors’ associations with the *representation of minorities in the population at large*. The plurality in *Croson* observed that such a comparison, “standing alone[,] \* \* \* is not probative of any discrimination” because minorities “may be disproportionately attracted to industries other than construction.” 488 U.S. at

503; see also *id.* at 507.<sup>26</sup> The business formation studies in this case, by contrast, compared the number of MBEs with the number of minorities who *already had been* “*attracted to*” the construction industry and were actively employed in it. The studies showed that minorities *in the construction industry* were significantly less likely than whites with similar levels of education, experience, access to capital, marital status, and numerous other characteristics, to form their own businesses. The Court of Appeals correctly concluded that such evidence substantiated Denver’s other evidence showing discriminatory barriers in the local construction market.

**D. The Court Of Appeals’ Focus On Marketplace Data Is Wholly Consistent With The Decisions Of This Court And Other Courts.**

Denver used marketplace data and evidence linking its spending practices to marketplace discrimination to show that (1) Denver’s tax dollars go to prime contractors who discriminate against MBEs and (2) but for the City’s remedial program, those same prime contractors would be discriminating against MBEs on publicly funded projects. CWC argues that Denver has no power to avoid such passive participation in marketplace discrimination because MBEs have been utilized on City-funded projects in comparatively higher percentages than their percentage actual availability. Pet. 21-22.<sup>27</sup> As noted above (pp. 20-21), there is no conflict among the circuits regarding a municipality’s power to remedy *marketplace*

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<sup>26</sup> In *Dade County*, the court of appeals similarly criticized business formation studies on the ground that they had calculated the rate at which minorities choose to “*enter the construction business.*” 122 F.3d at 921. Denver’s studies, by contrast, calculated the rate at which minorities *who are already in the construction business* establish their own firms. See App. 30-31, 55. Denver’s studies thus are not vulnerable to the same criticism that the disparities might be due to cultural preferences for particular fields of employment rather than to discriminatory barriers. Cf. 122 F.3d at 922.

<sup>27</sup> As the Court of Appeals explained, the evidence showed that this was due to the operation of the City’s affirmative-action efforts. See App. 68.

discrimination in which it is passively participating regardless of what is happening in the municipality's own contracting. Further, the relevant point for the strong-basis analysis,<sup>28</sup> as the Court of Appeals found, is that *absent* affirmative action, there is virtually no utilization of MBEs on publicly-funded projects.<sup>29</sup> App. 51, 68, 71 (DGS study). No decision CWC cites suggests a different conclusion.

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<sup>28</sup> Although CWC “[did] not argue that [purported over-utilization of MBEs] is relevant to the narrow tailoring analysis” (App. 68 n.18) — and narrow tailoring is not at issue here (see Part III, *infra*) — it is well-established that an affirmative remedy may set goals for MBE utilization higher than proportionate actual availability to redress prior discrimination. See, e.g., *United States v. Paradise*, 480 U.S. 149, 180-81 (1987) (plurality). Further, under the *current* program, the goals for each project are based on *actual* availability of specific MBEs to perform that particular project (see App. 354, DENVER, COLO. ORDINANCE NO. 304 § 28-56(a)(2) (1996)); and the annual target goal of 10% (App. 34, 403) is based on the 1997 Study data, which found after sophisticated analysis that MBE subcontractor availability is 10.11% (App. 31-32).

<sup>29</sup> Amici for CWC aver without evidence that “the excessive MBE overutilization on City projects created a lack of availability that was almost certainly the direct cause of MBE underutilization on private projects.” Br. Am. Cur. of Pac. Legal Found., *et al.* at 6. They contend that the Tenth Circuit’s rejection of this hypothesis conflicts with the Third Circuit’s decision in *City of Philadelphia*, 91 F.3d at 605. But the Third Circuit did not resolve this issue in plaintiff’s favor; it declined to resolve it at all. *Id.* More importantly, unlike in *City of Philadelphia*, record evidence in this case soundly refuted the theory that municipal goals projects significantly skewed marketplace availability figures. See App. 69 (citing “extensive evidence on industry elasticity” and evidence showing that City contracting accounted for “less than 4% of all MBE revenues”).

**II. THE COURTS OF APPEALS AGREE THAT REQUESTS FOR INJUNCTIVE RELIEF FROM SUPERSEDED ORDINANCES ARE MOOT ABSENT REASON TO BELIEVE THEY WILL BE REENACTED.**

The Tenth Circuit ruled that CWC's claims for prospective injunctive relief from the 1990 and 1996 Ordinances, which were no longer in effect due to the passage of the 1998 Ordinance, were moot. App. 4 n.1. The Tenth Circuit's decision accords with the precedent of this Court and the other courts of appeals. In *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), the Court held that the defendant's repeal of a challenged ordinance was not moot because there was "no mere risk that [the city] will repeat its allegedly wrongful conduct; it has already done so." *Id.* at 662.

The courts of appeals consistently hold that the "voluntary cessation" doctrine articulated in *Northeastern* and its predecessor, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 289 n.11 (1982), thus applies to the unique situation in which a defendant makes clear its intention to reenact the offending law if the judgment is vacated. See, e.g., *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) ("Based on our review of the post-*Mesquite* caselaw, \* \* \* we are convinced that *Mesquite* is generally limited to the circumstance, and like circumstances, in which a defendant openly announces its intention to reenact 'precisely the same provision' held unconstitutional below.") (quoting *Mesquite*, 455 U.S. at 289); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989), *overruled on other grounds*, *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

In this case, there is no reason to suspect that Denver will reenact the earlier versions of its ordinance.<sup>30</sup> There is thus no actual controversy regarding CWC's claim for prospective injunctive relief from those earlier ordinances.

**III. THERE IS NO CONFLICT REGARDING THE APPLICATION OF THE LAW OF THE CASE DOCTRINE TO A PARTY'S FAILURE TO RAISE AN ISSUE ON APPEAL.**

The Tenth Circuit held that because CWC waived its appeal to the district court's 1993 holding that Denver's ordinance was narrowly tailored, that holding became law of the case. In so ruling, the Court of Appeals applied well-settled law 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." App. 84 (quotation marks omitted); see also *Arizona v. California*, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").

CWC's assertion that the Tenth Circuit's decision created a conflict is baffling. The circuits routinely hold that the law of the case doctrine follows its usual course when an appellate court expressly finds that an appellant abandoned an issue on appeal. See, e.g., *Suel v. Sec'y of Health & Human Servs.*, 192 F.3d 981, 986 n.2 (Fed. Cir. 1999); *Eason v. Thaler*, 73 F.3d 1322, 1329 (5th Cir. 1996); see also 18B CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 4478.3 (2d ed.

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<sup>30</sup> The current ordinance, adopted in 1998, merely changed the goal percentages to account for the newer evidence in the 1997 NERA study concerning MBE availability and eliminated a requirement that permitted MBE prime contractors to "count" their own participation toward the MBE subcontractor goals. See App. 34.

2002) (“Nor may the district court be permitted to reconsider its own rulings made before appeal and not raised on appeal.”).

Struggling to suggest a conflict, CWC invokes three wholly inapposite opinions for the proposition that the effect of an unqualified reversal of a judgment is complete nullification — “as if [the judgment] never existed.” Pet. 26. However, in neither *Atlantic Coast Line Railroad Co. v. St. Joe Paper Co.*, 216 F.2d 832, 833-34 (5th Cir. 1954) (per curiam), nor *No East-West Highway Committee, Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985), were the courts even applying law of the case doctrine. And in *Johnson v. Board of Education*, 457 U.S. 52 (1982) (per curiam), law of the case doctrine was inapplicable because a significant subsequent development rendered the Court’s earlier analysis incomplete. See *id.* at 53.

CWC also contends that the law of the case doctrine should not apply because “strict scrutiny is a two-pronged test.” Pet. 25. But courts can and often do decide one component of the test while assuming the other, as effectively happened here. See, e.g., *City of Philadelphia*, 91 F.3d at 605 (deciding narrow tailoring but not strong basis); *Maryland Troopers Ass’n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) (deciding strong basis but not narrow tailoring). CWC resorts to arguing that, because the 1996 and 1998 Ordinances were not before the Court of Appeals in *Concrete Works II*, its ruling cannot apply to the 1996 and 1998 versions of the Ordinance. But it is indisputable that the minor amendments made by the 1996 and 1998 Ordinances tailored the program even more narrowly (see *supra* n.30), and CWC has never contended otherwise at any stage of the proceedings. See App. 86.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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