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DECEIVED BY DISPARITY STUDIES: WHY THE TENTH CIRCUIT FAILED TO APPLY *CROSON*'S STRICT SCRUTINY STANDARD IN *CONCRETE WORKS OF COLORADO*

INTRODUCTION

Many state and local governments across the country, including the City and County of Denver, utilize affirmative action programs that strive to increase Minority Business Enterprise ("MBE") participation in government construction and professional design projects. In *City of Richmond v. J.A. Croson Co.*,[1] the Supreme Court held that such race-based programs must pass strict scrutiny analysis.[2] The Court found that the City of Richmond's MBE program did not withstand strict scrutiny, and, thus, invalidated the program as violating the Equal Protection clause of the Fourteenth Amendment.[3]

In light of the *Croson* decision, many local governments eliminated or modified their MBE programs because of constitutional concerns.[4] In an effort to defend their MBE programs, some governments commenced statistical studies to help pass *Croson*'s strict scrutiny analysis.[5] This reaction is based on language in *Croson* stating: "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[6]

Governments also look to anecdotal evidence to supplement the statistical evidence in disparity studies.[7] In *Croson*, the Court reasoned that anecdotal evidence, "if supported by appropriate statistical proof," can support a government's contention that broad remedial relief is necessary.[8] Anecdotal evidence can show that discrimination is the underlying cause of disparate statistics, rather than some other race-neutral cause.[9]

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1. 488 U.S. 469 (1989).
2. *Croson*, 488 U.S. at 494-95. Strict scrutiny requirements are discussed *infra* notes 31-56 and accompanying text.
3. *Id.* at 511.
4. Jeffrey M. Hanson, *Hanging by Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 CORNELL L. REV. 1433, 1444 (2003).
5. *Id.* at 1444-45.
6. *Id.* at 1444 (quoting *Croson*, 488 U.S. at 509).
7. *Id.* at 1447-48.
8. *Id.* at 1448 (quoting *Croson*, 488 U.S. at 509).
9. *Id.* at 1448-49.

Reacting to *Croson*, the City and County of Denver ("Denver") conducted in-depth statistical studies to support its MBE program.[10] Concrete Works of Colorado ("CWC") challenged Denver's affirmative action ordinance, claiming that it violated the Equal Protection Clause of the Fourteenth Amendment.[11]

This Survey discusses affirmative action programs as applied to public contracting, and the requirements promulgated by the Supreme Court to pass strict scrutiny analysis. Part I explains the emergence of judicial strict scrutiny as the standard for government race-conscious programs. Part I also discusses the Tenth Circuit's decision in *Concrete Works* and the facts supporting its decision. In Part II, this survey discusses the Third and Eleventh Circuit's application of strict scrutiny. Part III examines Justice Scalia's reaction to the Supreme Court's denial of certiorari for *Concrete Works*. Part IV analyzes the strict scrutiny standard promulgated by the Supreme Court in *Croson*, and assesses whether or not the Tenth Circuit adhered to that standard. Additionally, Part IV addresses Justice Scalia's criticisms of the Tenth Circuit, as well as the Third and Eleventh Circuit's application of strict scrutiny.

I. STRICT SCRUTINY: THE TEST FOR GOVERNMENT AFFIRMATIVE ACTION PROGRAMS

A. J.A. Croson Co. v. City of Richmond[12]

Croson stands as the seminal case establishing strict scrutiny as the test for racial classifications benefiting minorities.[13] Prior to 1989, when *Croson* was decided, no binding jurisprudence existed regarding the level of scrutiny for government affirmative action programs.[14]

1. Facts

In *Croson*, the Richmond City Council ("the City Council") adopted the Minority Business Utilization Plan ("the Plan"), which required prime contractors to subcontract at least 30% of their contract amount to one or more MBEs.[15] An MBE was defined as a "business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members."[16] The Plan defined "minority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[17] The City Council declared the Plan to be remedial

10. *See* Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950, 962-69 (10th Cir. 2003).
11. *Concrete Works*, 321 F.3d at 957.
12. 488 U.S. 469 (1989)
13. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 706 (2d ed. 2002).
14. *See id.*
15. *Croson*, 488 U.S at 477.
16. *Id.* at 478.
17. *Id.*

in nature with the purpose of "promoting wider participation by minority business enterprises in the construction of public projects."[18]

Additionally, the Plan authorized waivers to contractors who made "every feasible attempt" to comply with the 30% set-aside requirement but could not.[19] The waivers could only be granted in exceptional circumstances and contractors were required to demonstrate that "qualified Minority Business Enterprises . . . [were] unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal."[20]

The City Council adopted the Plan after holding a public hearing.[21] Plan proponents relied upon a study indicating that, while Blacks constituted 50% of Richmond's general population, the city awarded only 0.67% of prime construction contracts to MBEs during a five year period.[22] The City Council also relied upon oral statements made at the public hearing claiming that discrimination existed in the construction industry both nationally and locally.[23] Notwithstanding the study and anecdotal statements, the city failed to present any direct evidence indicating it had participated in race discrimination, or that prime contractors had discriminated against MBEs.[24]

After the Plan's adoption, Richmond issued an invitation to bid on the installation of plumbing fixtures for the city jail, and J.A. Croson Company ("Croson"), a prime contractor, received the project bid forms.[25] Despite Croson's efforts to procure bids from MBEs, no MBE expressed an interest in the project until the day the bid was due, when Croson secured an MBE for the project.[26]

However, the MBE was unable to obtain credit and, therefore, submitted a bid to Croson that would have caused the entire project to exceed the proposed budget.[27] As a result, Croson applied for a waiver.[28] Richmond denied Croson's request for a waiver and decided to re-bid the project.[29] Consequently, Croson brought an action against Richmond under 42 U.S.C. § 1983, claiming the Plan was unconstitutional on its face, and in its application, for violating the Equal Protection Clause of the Fourteenth Amendment.[30]

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18. *Id.*
19. *Id.*
20. *Id.* at 478-79.
21. *Id.* at 479.
22. *Id.* at 479-80.
23. *Id.* at 480.
24. *Id.*
25. *Id.* at 481.
26. *Id.* at 482.
27. *Id.* at 482-83.
28. *Id.* at 482.
29. *Id.* at 483.
30. *Id.*

2. Decision

The Court in *Croson* established the constitutional standards to which affirmative action programs are subject. Specifically, the Court held that a government must present a "strong basis in evidence"[31] that a program is "narrowly tailored"[32] to serve a "compelling interest."[33]

The Plan failed the compelling governmental interest prong of strict scrutiny analysis.[34] The Court reasoned that Richmond could satisfy the compelling governmental interest requirement if it demonstrated that it was a "passive participant" in a system of racial discrimination.[35] A government is a passive participant in racial discrimination when it uses public dollars to employ private firms that engage in discriminatory conduct.[36] The Court reasoned that all state and federal governments have a compelling interest to ensure that public tax dollars, which are drawn from all citizens, do not finance groups that participate in discriminatory conduct.[37]

However, no direct evidence existed that showed Richmond or prime contractors had discriminated against MBEs.[38] The Court held that a state must identify "discrimination, public or private, with some specificity before [it] may use race-conscious relief."[39] Richmond's attempt to use past societal discrimination as the basis for its affirmative action program would "open the door to competing claims for 'remedial relief' for every disadvantaged group."[40]

Furthermore, the Court determined that the statistics comparing Richmond's minority population to the percentage of prime contracts awarded to MBEs "had little or no probative value in establishing prior discrimination" in the construction industry.[41] The fact that Blacks constituted 50% of the city's general population, but only received 0.67% of the city's prime construction contracts, was nothing more than a "general population statistic."[42] The Court held that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the neces-

31. *Id.* at 500.
32. *Id.* at 506-07.
33. *Id.* at 505. This survey refers to the Court's two-part strict scrutiny test as composed of "two prongs": the first being compelling interest and the second narrow tailoring.
34. *Id.*
35. *Id.* 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, we think it clear that the city could take affirmative steps to dismantle such a system.").
36. *See id.* at 492-93.
37. *Id.*
38. *Id.* at 480.
39. *Id.* at 504.
40. *Id.* at 505.
41. *Id.* at 485 (citing J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358-59 (4th Cir. 1987) (*Croson II*)).
42. *Croson II*, 822 F.2d at 1358-59.

sary qualifications) may have little probative value,"[43] and such comparisons actually suggest the Plan was "more of a political than a remedial basis for the racial preference."[44]

The Plan also failed the narrow tailoring prong of strict scrutiny analysis.[45] A fatal flaw of the Plan was its over-inclusiveness,[46] as there was no evidence of "discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons" in the local construction industry.[47] The Court reasoned that the "random inclusion" of additional racial groups indicated the Plan was not remedial in nature.[48] The Plan could not possibly serve a remedial purpose if a person of Aleut or Eskimo descent had never resided in Richmond.[49] In addition, the City Council chose the 30% set-aside figure arbitrarily, failing to show any relevance to the actual number of MBEs in Richmond, or to any other pertinent statistic.[50]

In the absence of evidence of specific instances of discrimination, the Court required Richmond to consider race-neutral alternatives before utilizing a race-based plan.[51] However, Richmond failed to consider the use of race-neutral means to increase MBE participation in city contracts.[52] The Court proffered an array of race-neutral means by which Richmond could increase MBE participation, including simplifying the bidding process, relaxing the bonding requirements, training, and offering financial assistance.[53]

The Plan in *Croson* was fatally flawed and did not withstand strict scrutiny. Richmond failed to produce valid statistical evidence concerning discrimination.[54] Thus, Richmond could not meet the compelling governmental interest requirement. Additionally, the arbitrary 30% requirement and the inclusion of extraneous racial groups demonstrated that the Plan was not narrowly tailored.[55] Significantly, the test set forth

43. *Croson*, 488 U.S. at 485 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 n.13 (1977)).

44. *Id.* at 485 (citing *Croson II*, 822 F.2d at 1359). The appeals court in *Croson II* explained that general population statistics failed to address the statistical disparity between the percentage of qualified minority business contractors doing business in the city and the percentage of bid funds awarded to those businesses. *Id.*

45. *Croson*, 488 U.S. at 507.

46. *Id.* at 506.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 499.

51. *Id.* at 509.

52. *Id.* at 507.

53. *Id.* at 509-10.

54. *Id.* at 505.

55. *Id.* at 507.

by the Court in *Croson* established that racial classifications benefiting minorities must withstand strict scrutiny analysis.[56]

B. *Tenth Circuit: Deciphering* Croson *in* Concrete Works of Colorado v. City and County of Denver[57]

1. Facts

In 1990, the City and County of Denver adopted an affirmative action program, codified as Ordinance No. 513 ("Ordinance").[58] The Ordinance applied to all city contracts in which a bid was required to receive a construction project.[59] The Ordinance required the utilization of MBEs and Women Business Enterprises ("WBEs") on construction projects with Denver.[60] The Ordinance defined MBEs as businesses: "(1) at least 51% owned by one or more eligible minorities and (2) with daily business operations controlled by one or more eligible minorities."[61] The Ordinance defined minorities as "persons of Black, Hispanic, Asian-American, or American Indian descent."[62] The Ordinance required that 16% of the annual dollar amount spent by Denver on construction contracts must be awarded to MBEs.[63]

Contractors and subcontractors who placed bids on Denver contracts were also required to comply with the Ordinance's criteria.[64] Contractors could comply with the Ordinance either by meeting the project participation goals or by demonstrating good faith efforts to meet the participation goals.[65] Under the Ordinance, contractors could meet the good faith exemption if they attempted to subcontract with MBEs but were unsuccessful.[66] A contractor could also demonstrate good faith efforts if he rejected an MBE because the MBE failed to submit the lowest bid or was unqualified.[67] If a contractor failed to meet the participation goals or the good faith requirement, Denver would consider the contractor's bid "not responsive."[68]

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56. *Id.* at 509.
57. 321 F.3d 950 (10th Cir. 2003).
58. *Concrete Works*, 321 F.3d at 956.
59. *Id.*
60. *Id.* For the purposes of this Survey, only MBE, and not WBE, programs are discussed. Race-based programs are subject to strict scrutiny, which is the focus of this Survey.
61. *Id.*
62. *Id.*
63. *Id.* The Ordinance was subsequently amended in 1996 and again in 1998. *Id.* The 1996 Ordinance expanded the scope of contracts that were covered by the 1999 Ordinance. *Id.* The 1998 Ordinance reduced the MBE participation goal from 16% to 10%. *Id.* at 956-57. For the purposes of this Survey, the 1996 and 1998 amendments have no effect on the strict scrutiny analysis. As such, this Survey's discussion is limited to the 1990 Ordinance.
64. *Id.* at 956.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

Concrete Works of Colorado ("CWC"), a construction firm owned by a non-minority male, lost three contracts with Denver when it failed to comply with the MBE participation goals or meet the good faith requirements set forth in the Ordinance.[69] Consequently, CWC filed a complaint against Denver seeking damages and injunctive relief, claiming that the Ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[70] After the district court ruled that the Ordinance violated the Equal Protection Clause, Denver appealed.[71]

2. Decision

a. Burden of Proof

The Tenth Circuit assessed the burden of proof Denver had to meet in order to uphold the constitutionality of the Ordinance.[72] According to the Tenth Circuit, Denver could satisfy its burden "without conclusively proving the existence of past or present racial discrimination."[73] Thus, Denver could proffer statistical and anecdotal evidence to demonstrate a disparity between the number of qualified minority contractors and the number of such contractors actually utilized by local prime contractors.[74] Moreover, Denver could meet its burden by "presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination."[75]

Once Denver met its initial burden, CWC was required to "introduce 'credible, particularized evidence to rebut [Denver's] initial showing of . . . a compelling interest.'"[76] CWC could rebut Denver's statistical evidence "by (1) showing that the statistics [were] flawed; (2) demonstrating that the disparities shown by the statistics [were] not significant or actionable; or (3) presenting contrasting statistical data."[77] The court held that the burden of proof at all times remained with CWC to prove the unconstitutionality of the Ordinance.[78]

b. Statistical Evidence

The Tenth Circuit held that Denver demonstrated a compelling governmental interest by producing detailed statistical evidence.[79] Denver hired several independent research firms to conduct disparity studies in

69. *Id.* at 957.
70. *Id.*
71. *Id.*
72. *Id.* at 957-58.
73. *Id.* at 958.
74. *Id.*
75. *Id.*
76. *Id.* at 959 (quoting Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1175 (10th Cir. 2000) (alteration in original)).
77. *Id.* (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 921 (9th Cir. 1991)).
78. *Id.*
79. *Id.* at 990.

an effort to justify the Ordinance.[80] The studies created a disparity index by dividing the percentage of MBE participation in city contracts by the percentage of MBEs in the local construction population.[81] A disparity index of "one" indicated full MBE utilization, whereas an index closer to zero indicated underutilization of MBEs.[82] Such disparity indices showed a statistical underutilization of MBEs on Denver projects.[83]

The court further reasoned that an inference of discriminatory conduct could be drawn from statistical disparities.[84] Furthermore, Denver was not required to show that discriminatory conduct in the construction industry differed from societal discrimination.[85] The court determined that it was irrelevant for constitutional purposes whether industry discrimination was a result of societal discrimination or whether such discrimination was "the product of policies, practices, and attitudes unique to the industry."[86] Thus, the Tenth Circuit criticized the district court for erroneously requiring Denver to show that the existence of discriminatory conduct was more than a reflection of general societal discrimination.[87] Instead, Denver was only required to demonstrate a strong basis in evidence of discrimination, not *prove* discrimination.[88]

The court included additional reasons supporting its finding that Denver's statistical evidence was sufficient to satisfy the compelling governmental interest requirement. First, Denver's statistical evidence did not suffer from the same flaws as the evidence presented in *Croson*.[89] In *Croson*, Richmond's MBE program included racial groups that may never have experienced discrimination.[90] In *Concrete Works*, by contrast, Denver presented evidence of discrimination against each racial group included in the Ordinance.[91] However, Denver was not required to prove that each racial group experienced discrimination equally.[92] Secondly, the court relied on studies indicating that MBEs experienced difficulties obtaining financing and forming businesses.[93]

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80. *Id.* at 962.
81. *Id.*
82. *Id.*
83. *See id.* at 990-91. Denver hired numerous independent research firms to conduct multiple disparity studies. The disparity indices for MBEs varied, but were always less than one. *See id.* at 962-69.
84. *Id.* at 971.
85. *Id.* at 972.
86. *Id.*
87. *Id.* at 973.
88. *Id.* at 971. "Denver was under no burden to identify any specific practice or policy that resulted in discrimination." *Id.* at 972. Nor was Denver "required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities." *Id.* Such a burden would be equivalent to "requiring direct proof." *Id.*
89. *Id.* at 971.
90. *Croson*, 488 U.S at 506.
91. *Concrete Works*, 321 F.3d at 971.
92. *See id.*
93. *Id.* at 979.

In challenging the statistical evidence presented by Denver, CWC highlighted one study in particular that failed to control for firm size and experience.[94] CWC asserted that the disparities shown in the studies could be attributable to firm size and lack of experience, rather than discrimination.[95] Thus, CWC argued, the disparities were inflated because the studies did not reflect MBEs that were actually "qualified, willing, and able to work on City projects."[96] The court rejected CWC's arguments that failure to control for firm size and experience invalidated Denver's statistical evidence.[97] The court reasoned that statistical evidence indicated that MBEs experienced lending discrimination and faced difficulties forming businesses.[98] Consequently, such discrimination *caused* MBEs to be smaller and less experienced.[99] Moreover, CWC did not conduct its own disparity study to rebut Denver's statistical findings.[100] Therefore, the court held that CWC did not meet its burden to discredit the evidence Denver presented.[101]

c. Anecdotal Evidence

Denver produced considerable anecdotal evidence that supported the claim that racial discrimination existed in the construction industry.[102] The evidence included testimony of an executive of a large non-minority owned construction firm, who stated that "he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms."[103] The executive also stated that he witnessed racial-based graffiti on job sites in the local area.[104] MBEs testified that they had difficulty in pre-qualifying for private sector projects and that their bids were rejected even when they were the lowest bidder.[105]

One study indicated that some Denver employees and private contractors attempted to circumvent the Ordinance goals.[106] Denver employees would create a "change order" to an existing contract, rather than create a new bid for work.[107] Employees also characterized some projects as "remodeling" instead of a construction project because remodels were not subject to the participation goals.[108] Finally, anecdotal evidence indi-

94. *Id.* at 980.
95. *Id.*
96. *Id.*
97. *Id.* at 981.
98. *Id.*
99. *Id.*
100. *Id.* at 982.
101. *Id.*
102. *Id.* at 969.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 963.
107. *Id.*
108. *Id.*

cated that contractors would call WBEs that were out of business in an attempt to meet the good faith requirements.[109]

The court found that Denver's anecdotal evidence included "several incidents involving profoundly disturbing behavior," and that it revealed "behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm."[110] The court concluded that the anecdotal evidence provided "persuasive, unrebutted support for Denver's initial burden."[111]

When the Tenth Circuit weighed both the statistical and anecdotal evidence, it held that Denver had a compelling governmental interest in remedying racial discrimination in the construction industry.[112] In addition, CWC failed to rebut Denver's evidentiary showing. Thus, the court held that the Ordinance was constitutional and did not violate the Equal Protection Clause of the Fourteenth Amendment.[113]

II. HOW OTHER CIRCUITS HAVE APPLIED *CROSON'S* STRICT SCRUTINY STANDARD

A. *Third Circuit:* Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia[114]

1. Facts

The City of Philadelphia implemented an affirmative action program that sought to increase participation of "disadvantaged business enterprises" (DBEs) in city construction contracts.[115] DBEs were defined as businesses "at least 51% owned by 'socially and economically disadvantaged' persons."[116] Racial minorities were included in the DBE cate-

109. *Id.* No anecdotal evidence was introduced that the same conduct took place with MBEs: the evidence indicated that only out-of-business WBEs were called in attempt to meet the good faith requirements. *Id.*

110. *Id.* at 989.

111. *Id.* at 990.

112. *Id.* at 992.

113. *See id.* at 994. The Tenth Circuit did not discuss the second prong of strict scrutiny: narrow tailoring. Shortly after CWC brought suit in 1992, Denver moved for summary judgment. *Id.* at 992. The United States District Court for the District of Colorado granted Denver's motion for summary judgment. *Id.* The court concluded that Denver established a compelling interest and that Denver's program was narrowly tailored. *Id.* The Tenth Circuit reversed the grant of summary judgment on the compelling interest issue and concluded that CWC had waived any challenge to the narrow tailoring decision reached by the district court. *Id.* Because CWC did not challenge the district court's conclusion with respect to narrow tailoring, the Tenth Circuit did not address the issue. *Id.*

114. 91 F.3d 586 (3d Cir. 1996).

115. *Contractors Ass'n*, 91 F.3d at 591.

116. *Id.*

gory and participation goals for MBEs were set at 15% of the total dollar amount spent by Philadelphia on construction-related projects.[117]

At trial, Philadelphia presented disparity indices that calculated the utilization of black construction firms.[118] Philadelphia's expert, Dr. Andrew F. Brimmer, calculated the "participation rate" by dividing the number of prime contracts awarded to MBEs by the total number of public contracts awarded.[119] Brimmer then calculated the "availability rate" by dividing the number of black construction firms in the Philadelphia metro area by the total number of black construction firms in the Philadelphia metro area.[120] Based on Brimmer's calculations, the disparity index of 22.5 indicated racial discrimination in the construction industry.[121]

In addition to the statistical analysis, Philadelphia produced a report from a former Philadelphia employee concerning the participation of MBEs on public works projects.[122] The employee, John Macklin, testified that he reviewed 25 to 30 percent of the project engineer logs, which tracked firm names that had participated in city projects.[123] Macklin relied on his personal memory to determine whether a firm in the log was an MBE.[124] When questioned whether it was possible that MBEs had participated in city construction projects, Macklin responded, "it is a very good possibility."[125]

Another witness introduced by Philadelphia testified that, in his opinion, black contractors were subject to racial discrimination in the construction industry.[126] However, the witness was unable to identify a specific instance of discriminatory conduct.[127]

2. Decision

The district court found that Brimmer's analysis, coupled with the anecdotal evidence, failed to demonstrate a compelling governmental interest.[128] Philadelphia demonstrated nothing more than a "generalized assertion" that discrimination in the construction industry occurred.[129]

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117. *Id.* at 591-92. The Third Circuit declared that portions of the program which required set-asides for women and non-black minority contractors were unconstitutional. *Id.* at 593-94. Thus, the focus of this case is on the constitutionality of the program as applied to black contractors. *Id.* at 594.

118. *Id.*

119. *Id.* at 595 n.9.

120. *Id.*

121. *Id.* at 594-95.

122. *Id.* at 600.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 600-01.

128. *Id.* at 601-02.

129. *Id.* at 609 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).

Moreover, Philadelphia failed to provide an evidentiary basis on which to infer that a program was required to redress racial discrimination.[130]

Brimmer's study did not take into account whether black construction firms were "qualified and willing" to perform city construction projects.[131] Additionally, the statistics in the study were derived from varying sources, and the study did not account for a neutral explanation for low utilization of MBEs.[132]

The court reasoned that, when a strong evidentiary basis is lacking, racial classifications are a form of racial politics. [133] Ultimately, however, the court said that the question of whether a strong basis in evidence existed was "a close call" and did not rule on the issue.[134] Instead, the court decided that the program did not satisfy the narrow tailoring prong and, thus, invalidated Philadelphia's race-based preference program for violating the Equal Protection clause of the Fourteenth Amendment.[135]

B. *Eleventh Circuit:* Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County[136]

1. Facts

The Eleventh Circuit used disparity studies to determine the constitutionality of Dade County's ("County") MBE program.[137] The program established set-aside requirements and participation goals for MBEs.[138] At trial, the County presented statistical studies that compared (1) the percentage of bidders that were MBEs; (2) the percentage of awardees that were MBEs; and (3) the proportion of County contract dollars that were awarded to MBEs.[139] The disparity index indicated an underutilization of MBEs in County construction contracts.[140] However, when the study controlled for firm size, most of the disparities were insignificant.[141] In other words, the disparities were explained by small firm size rather than by discriminatory conduct.[142]

In addition to insignificant disparities, the methodology used to calculate MBE participation was seriously flawed.[143] The County calculated MBE participation rates by dividing the dollar amount received by

130. *Id.*
131. *Id.* at 602-03.
132. *Id.* at 603.
133. *Id.* at 610.
134. *Id.* at 605.
135. *Id.* at 602.
136. 122 F.3d 895 (11th Cir. 1997).
137. *Eng'g Contractors Ass'n*, 122 F.3d at 911-24.
138. *Id.* at 901.
139. *Id.* at 912.
140. *Id.* at 916.
141. *Id.* at 917.
142. *Id.* at 918.
143. *Id.* at 920.

MBEs, by the total dollar amount received by construction companies, regardless of where the work occurred.[144] This calculation method would substantially decrease MBE participation rates.[145]

The County commissioned another study that "(1) compared construction business ownership rates of [MBEs] to those of [non-MBEs] and (2) analyzed disparities in personal income between [MBE and non-MBE] business owners."[146] The study found that minorities are less likely to own their own businesses than white males, and that MBEs in the construction industry earned less money than non-MBEs.[147] The study concluded that current and past discrimination caused disparities in construction business entry rates and caused the differential in income.[148] Despite the study's results, the court rejected the study's validity, citing the rationale in *Croson* that a disproportionate entrance of minorities to the construction industry does not conclusively mean that discrimination exists.[149] Furthermore, the study failed to consider firm size, which discredited the results.[150]

In addition to statistical evidence, the County introduced significant anecdotal evidence that revealed discrimination in County construction projects.[151] County employees testified concerning incidents that required MBEs to complete lengthy punch lists (lists that required work to be redone), when non-MBEs were not required to complete punch lists.[152] The employees also testified that MBEs had difficulty obtaining bonding and financing.[153] Additionally, MBEs testified regarding numerous incidents of discrimination while bidding for jobs and when dealing with project foremen.[154] Other MBEs that responded to a survey claimed that they faced countless instances of discrimination including difficulty obtaining financing and unfair performance evaluations.[155]

2. Decision

The court found that the anecdotal evidence painted a grim picture of racial discrimination in the construction industry.[156] However, anecdotal evidence is only persuasive if it is "combined with and reinforced by sufficiently probative statistical evidence."[157] The court conceded that

144. *Id.* at 919-20.
145. *Id.*
146. *Id.* at 921.
147. *Id.*
148. *Id.* at 922.
149. *Id.*
150. *Id.* at 923.
151. *Id.* at 924.
152. *Id.*
153. *Id.*
154. *Id.* at 925.
155. *Id.*
156. *Id.*
157. *Id.*

anecdotal evidence can show the perception of discrimination and can bolster statistical evidence.[158] The court further acknowledged that it could support a local government's determination that remedial relief in the form of a race-based program is warranted.[159] However, "[w]ithout the requisite statistical foundation for the anecdotal evidence to reinforce, supplement, support, and bolster . . ." no firm evidentiary basis existed to justify an MBE program.[160] Because the County's statistical foundation failed to show a strong basis in evidence, the anecdotal evidence was insufficient to meet the compelling governmental interest requirement.[161] Thus, the County's MBE program was unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment.[162]

III. JUSTICE SCALIA RESPONDS TO *CONCRETE WORKS* AND CLARIFIES THE STRICT SCRUTINY TEST

The Supreme Court denied the Tenth Circuit's petition for writ of certiorari.[163] Justice Scalia dissented from the denial of certiorari and attacked the Tenth Circuit's decision without constraint.[164] Scalia's arguments that criticize the Tenth Circuit are first, that the Tenth Circuit incorrectly allocated the burden of proof, and second, the statistics presented by Denver do not meet *Croson*'s strong basis in evidence standard.[165]

A. Burden of Proof

Scalia argues that the Tenth Circuit erroneously applied *Croson*'s burden of proof standard: "a proper plaintiff challenging governmental use of [affirmative action programs] can state a prima facie case simply by pointing to this practice and showing that he or she was treated unequally because of his or her race."[166] The burden of defending an affirmative action program then falls to the government, which must establish that it is remedying "identified discrimination" and that it "had a strong basis in evidence" to take remedial action.[167] However, the Tenth Circuit only required Denver to demonstrate "strong evidence from which an inference of past or present discrimination *could* be drawn."[168] The court then required CWC to "introduce credible, particularized evi-

158. *Id.* at 925-26.
159. *Id.* at 925.
160. *Id.* at 926.
161. *Id.*
162. *Id.* at 929. Although the County failed to demonstrate a compelling governmental interest, the court proceeded with a narrow tailoring discussion in an effort to complete the analysis of strict scrutiny. *Id.* at 926-29. The court found that the County's MBE program was not narrowly tailored and, thus, confirmed the district court's decision in finding the program unconstitutional. *Id.* at 929.
163. Concrete Works of Colo. v. City & County of Denver, 124 S. Ct. 556, 556 (2003).
164. *Concrete Works*, 124 S. Ct. at 556.
165. *Id.* at 557.
166. *Id.* (internal citations and quotation marks omitted).
167. *Id.* (internal citations and quotation marks omitted).
168. *Id.* at 558 (internal citations and quotation marks omitted).

dence to rebut Denver's initial showing of the existence of a compelling interest."[169] Scalia argues that Denver's burden was easily met, while CWC faced a "daunting task."[170] According to Scalia, "the Tenth Circuit got it exactly backwards."[171] When a contractor establishes that a government uses racial preferences, the government's conduct is presumed unconstitutional.[172] Thus, the *government* bears the burden to prove that "it is acting on the basis of a compelling interest in remedying racial discrimination."[173] Consequently, according to Scalia, the Tenth Circuit's erroneous burden of proof allocation had an outcome-determinative effect on *Concrete Works*.[174]

B. Statistical Evidence

Croson states that a government must show a "significant statistical disparity" between the number of contractors hired and "the number of *qualified* minority contractors *willing* and *able* to perform a particular service . . . ."[175] Scalia contends that Denver's statistical studies were inadequate because they failed to use actual bidding data.[176] In addition, the studies did not control for MBE qualifications, willingness, and availability.[177] Rather, Denver assumed that MBEs were as qualified, willing, and able as non-MBEs.[178] Scalia argues that Denver's studies incorrectly compared *all* MBEs, instead of *actual* MBEs who were "qualified, willing, and able."[179] Furthermore, Scalia argues that *Croson*'s standards should be fatal to affirmative action programs when a government's statistical evidence, such as Denver's, does not support its claim that the program is remedial in nature.[180]

Another significant flaw to Denver's statistical studies was the failure to control for firm size. Even if it was correct to assume that all MBEs were qualified, willing, and able, it was not proper to assume that all MBEs had an equal opportunity in obtaining city contracts as non-MBEs.[181] Scalia asserts that large construction firms posses a clear advantage over smaller firms in obtaining projects.[182] The evidence presented by Denver revealed that MBEs were, on average, smaller and less

169. *Id.* (internal citations and quotation marks omitted).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *See id.* at 558 ("Since Denver had to establish nothing more than the possibility of prior discrimination . . . the injured contractor was required to rebut the *possibility* of discrimination in the Denver construction industry.").
175. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (emphasis added).
176. *Concrete Works*, 124 S. Ct. at 558-59.
177. *Id.*
178. *Id.* at 559.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

experienced than non-MBEs.[183] However, the Tenth Circuit concluded that MBEs were generally smaller and less experienced *because* of discrimination.[184] According to Scalia, "[t]he argument fails because it rests on nothing but speculation."[185] Denver's studies did not control for critical variables that would have provided a neutral explanation for underutilization of MBEs.[186]

Moreover, Denver introduced studies that showed disparities in MBE business formation rates and in access to capital.[187] Scalia asserts that disparities in these generalized areas would permit racial preferences in virtually every field of enterprise.[188] According to *Croson*, reliance upon such general societal discrimination "has no logical stopping point."[189] Race-neutral alternatives exist to combat lending and business formation barriers such as "prohibiting discrimination in the provision of credit . . . by local suppliers and banks."[190] Such lending discrimination does not give rise to a compelling state interest in remedying racial discrimination in the construction industry.

Scalia concluded his dissent by stating:

> If the evidence relied upon by governmental units . . . can be as inconclusive as Denver's evidence in this case, our former insistence upon a 'strong basis in evidence' has been abandoned, to be replaced by what amounts to an 'apparent-good-faith' requirement - that is, in the words of the Tenth Circuit, the existence of 'evidence from which an inference of past or present discrimination *could* be drawn.'[191]

"[T]he Court's decision to let this plain disregard of *Croson* stand invites speculation that that case has effectively been overruled."[192]

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183. Concrete Works of Colo. v. City & County of Denver, 321 F.3d 950, 981 (10th Cir. 2003).

184. *Concrete Works*, 321 F.3d at 981.

185. *Concrete Works*, 124 S. Ct. at 559.

186. *See id.* (discussing how the study did not address the relationship between minority ownership and size-and-experience).

187. *Id.*

188. *Id.*

189. *Croson*, 488 U.S. at 498 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S 267, 275 (1986)).

190. *Concrete Works*, 124 S. Ct. at 560 (quoting *Croson*, 488 U.S. at 510).

191. *Id.* at 560-61.

192. *Id.* at 556. Scalia's statement that Croson has "effectively been overruled" is derived from the Court's denial of certiorari in *Concrete Works*, and the Court's recent decision in *Grutter v. Bollinger*, 123 S. Ct 2325 (2003). In *Grutter*, the Court gave much deference to the University of Michigan's educational judgment that "diversity is essential to its educational mission." *Grutter*, 123 S. Ct. at 2339. Scalia criticized the Court's willingness to rely upon good faith when it stated in *Grutter* that "[w]e take the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable." *Id.* at 2346 (internal quotation marks omitted).

IV. ANALYSIS

As set forth in *Croson*, government affirmative action programs are subject to strict scrutiny analysis.[193] A strong basis in evidence must exist for a government to show that its program is narrowly tailored to serve a compelling governmental interest.[194] Justice Scalia criticized the Tenth Circuit for allocating the burden of proof to the opponent of an affirmative action program. Scalia's other criticisms included the quality of Denver's statistical evidence and Denver's failure to consider race-neutral alternatives before implementing the Ordinance.[195] This analysis section will discuss Justice Scalia's criticisms of the Tenth Circuit's decision. In addition, this section will discuss the quality of statistics required to show a strong basis in evidence, and the role anecdotal evidence plays in supplementing statistical evidence.

A. Burden of Proof

Although *Croson* held that accurate statistics could create an inference of discrimination, the Court in *Croson* did not give specific guidance on issues such as which party bears the ultimate burden of proof under strict scrutiny analysis.[196] As such, courts are free to interpret *Croson*'s burden of proof requirement.[197]

In *Concrete Works*,[198] the Tenth Circuit discussed the burden of proof that each party was required to meet. The court stated that Denver could "meet its burden without conclusively proving the existence of past or present racial discrimination."[199] An ultimate judicial finding of discrimination was not required before Denver implemented its affirmative action program.[200] Thus, Denver was only required to present strong evidence from which an inference of past or present discrimination could be drawn.[201] The court defined strong evidence as that which "'approach[es] a prima facie case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination"[202] Once Denver met its burden, CWC was required to introduce "credible, particularized evidence to rebut Denver's initial showing of the existence of a compelling interest."[203] The court held "that the burden of proof at all times remain[ed]

193. *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
194. *Croson*, 488 U.S. at 500, 505-06.
195. See *supra* notes 163-192 at 20-23 and accompanying text.
196. Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After* City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39, 43 (2000) (discussing the burden of proof in strict scrutiny cases).
197. *Id.* at 43, 91.
198. Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003).
199. *Concrete Works*, 321 F.3d at 958.
200. *Id.* at 971.
201. *Id.*
202. *Id.* (quoting *Croson* 488 U.S. at 500).
203. *Concrete Works*, 321 F.3d at 959.

with CWC to demonstrate the unconstitutionality of the ordinances."[204] Because CWC did not sufficiently rebut Denver's statistical evidence, the court held that Denver met its burden in defending the constitutionality of its affirmative action program.[205]

Like the court in *Concrete Works*, the Third Circuit in *Contractors Ass'n*[206] held that the burden of proof rests with an opponent of an affirmative action program.[207] The court stated that "plaintiffs challenging [a] program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred."[208] Additionally, the Third Circuit held that when a government produces facts that justify its affirmative action program, the plaintiff has the burden to show that the government's facts are inaccurate.[209]

Ordinarily, a government bears the burden of proof to show that its race-conscious program is necessary to achieve a compelling purpose.[210] Justice Scalia supports this proposition in his dissent by stating that it is "the *government's* burden to prove that it is acting on the basis of a compelling interest in remedying racial discrimination."[211] The distinction in Justice Scalia's interpretation and the Tenth and Third Circuit's interpretation of burden of proof lies in which party bears the *initial*, versus the *ultimate*, burden. The Tenth and Third Circuit allocated the initial burden of proof on the government and allocated the ultimate burden of proof on the challenging party.[212] Scalia argues that the ultimate burden of proof always rests with the government.[213] Scalia's arguments have merit, yet it is evident from *Croson* that a government at least bears the initial burden. In *Croson*, Justice O'Connor stated that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[214] Justice O'Connor's statement implies that a court must ensure that a government is using race-based programs in a legitimate manner. Thus, the Court is suggesting that a *government* has the burden of proof to show a strong basis in evidence.

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204. *Id.*
205. *Id.* at 991-92.
206. Contractors Ass'n of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996).
207. *Contractors Ass'n*, 91 F.3d at 597-98.
208. *Id.* at 597.
209. *Id.* at 598.
210. *See* CHEMERINSKY, *supra* note 13, at 520 (citing Miller v. Johnson, 515 U.S. 900, 919-21 (1995); Burson v. Freeman, 504 U.S. 191, 198 (1992)). Under rational basis review, the plaintiff has the burden of proving a program's unconstitutionality. *Id.* at 530.
211. Concrete Works of Colo., Inc. v. City & County of Denver, 124 S. Ct. 556, 558 (2003).
212. *Concrete Works*, 321 F.3d at 959; *Contractors Ass'n*, 91 F.3d at 598.
213. *Concrete Works*, 124 S. Ct. at 558.
214. *Croson*, 488 U.S. at 493.

B. What Constitutes a "Strong Basis in Evidence?"

Providing that a government bears the burden of proof to show a strong basis in evidence that an affirmative action program is necessary, uncertainty exists regarding the adequacy of evidence required to meet such a burden. *Croson* held that "where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[215] Accordingly, one could interpret *Croson* as requiring a government to produce prima facie evidence, or evidence that raises an inference of discrimination as sufficient to meet the burden of proof requirement. In contrast, Justice Scalia asserted that a government must "*prove* that it is acting on the basis of a compelling interest in remedying racial discrimination."[216] Scalia cites *Croson* when he states that a government must identify discrimination "with some specificity before [it] may use race-conscious relief."[217] Scalia equates "some specificity" with absolute proof and contends that an inference of discrimination is inadequate.[218] Although Scalia's arguments have merit, *Croson* did not expressly hold that a government must provide conclusive proof of discrimination.[219] Rather, the *Croson* Court stated that prima facie proof was sufficient to show a strong basis in evidence.[220]

In *Concrete Works*, Denver conducted in depth disparity studies in an effort to show a strong basis in evidence and support its affirmative action program.[221] However, its statistics were flawed, glossing over variables such as firm availability and firm size that would have invalidated the Ordinance.[222] A variable such as firm availability is crucial to a good disparity study.[223] "If availability is miscalculated, then all subsequent interpretations of statistics, including disparity ratios, will be in error."[224] In effect, an erroneous "availability analysis can make a Croson disparity study worthless."[225] Denver's studies calculated a disparity index by dividing the number of MBEs that participated in city projects by

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215. *Id.* at 501. Such statistical disparity, however, would be of no probative value if it compared the number of contracts awarded to MBEs to the general minority population. *See id.* Instead, a study must compare the number of contracts awarded to MBEs to a smaller group of MBEs that possess special qualifications to perform the jobs. *See id.* at 501-02.

216. *Concrete Works*, 124 S. Ct. at 558 (emphasis added).

217. *Id.* (quoting *Croson*, 488 U.S. at 504).

218. *Concrete Works*, 124 S. Ct. at 558.

219. *Croson*, 488 U.S. at 500.

220. *See id.* at 500-01. "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 501. (quoting Hazelwood Sch. Dist. v. U.S., 433 U.S. 299, 307-08 (1977)).

221. *Concrete Works*, 321 F.3d at 962-69.

222. *Id.* at 962, 980-82.

223. George R. LaNoue, *Standards for the Second Generation of Croson-Inspired Disparity Studies*, 26 URB. LAW. 485, 490 (1994). George LaNoue holds a Ph.D. and M.A from Yale University and is the Director of Policy Sciences at the University of Maryland Graduate School.

224. *Id.*

225. George R. LaNoue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After* Croson, 21 HARV. J.L & PUB. POL'Y 793, 799 (1998).

the total number of MBEs in the local construction market.[226] Such a "headcount approach" overstated the availability of MBEs because the studies did not control for MBEs that were "qualified, willing, and able" to work on city projects.[227] MBEs are generally smaller and less experienced than non-MBEs.[228] As a result, MBE participation rates on city projects would be less than non-MBE participation because they are typically less qualified and less able to undertake city construction projects.[229]

The Tenth Circuit assumed that MBEs were "smaller and less experienced *because* of industry discrimination."[230] However, the court did not support this statement with any statistical evidence. The court asserted that small firm size and experience were not race-neutral factors, as CWC attempted to argue.[231] As discussed *supra*, an accurate statistical study "requires careful measurement of appropriate variables."[232] The Tenth Circuit's assumptions, without underlying statistical support, scarcely qualify as a careful measurement.[233]

Denver relied on additional studies showing that MBEs faced discrimination when they sought to obtain credit and financing.[234] Denver argued that lending discrimination caused MBEs to experience barriers to business formation from the outset.[235] Thus, the studies indicated that Denver was a passive participant by employing firms that discriminated against MBEs.[236]

Provided that MBEs actually faced lending discrimination as Denver suggested, *Croson* expressly held that a government must consider race-neutral means before it may implement an affirmative action program.[237] The *Croson* Court offered numerous race-neutral means by which a government could combat financial discrimination, such as relaxed bonding requirements, increased training, and financial assistance.[238] The Tenth Circuit assumed that only MBEs faced barriers to business formation. As stated in *Croson*, "[m]any of the formal barriers to new entrants may be the product of bureaucratic inertia."[239] Thus, it

226. *Concrete Works*, 321 F.3d at 962.
227. LaNoue, *supra* note 223, at 799-800.
228. *Id.*
229. *Id.*
230. *Concrete Works*, 321 F.3d at 981.
231. *Id.*
232. LaNoue, *supra* note 223, at 795.
233. *Id.*
234. *Concrete Works*, 321 F.3d at 977-78.
235. *Id.* at 977.
236. *Id.*
237. *Croson*, 488 U.S. at 507.
238. *Id.* at 509-10. The Court suggested that the city of Richmond should attempt to increase city contracting opportunities to small businesses of all races by simplifying bidding procedures and prohibiting discrimination by local banks in their provision of credit and bonding. *Id.*
239. *Id.* at 510.

does not follow that barriers to business formation required Denver to implement an affirmative action program. Many new businesses, regardless of their racial composition, face a multitude of obstacles. As such, an affirmative action program is unwarranted when barriers to business formation are experienced by MBEs and non-MBEs alike. Despite the flaws in Denver's statistical studies, the Tenth Circuit held that Denver met its initial burden of showing a strong basis in evidence that discrimination existed in the Denver construction industry.[240]

In contrast, the Third Circuit in *Contractors Ass'n* held that Philadelphia's evidence failed to meet the strong basis in evidence requirement.[241] Philadelphia's studies did not take into account whether MBEs were qualified and willing to perform city construction projects.[242] In addition, the studies did not account for any neutral explanations of low MBE utilization.[243] Accordingly, the court held that there was no strong basis in evidence to support Philadelphia's affirmative action program.[244] The Third Circuit correctly invalidated Philadelphia's affirmative action program because *Croson* required that a disparity study should take into account only firms that were qualified, willing, and able to perform a particular service.[245]

Similarly, in *Engineering Contractors*,[246] the Eleventh Circuit invalidated Dade County's MBE program because a strong basis in evidence did not exist.[247] Unlike in *Concrete Works*, Dade County accounted for MBE size.[248] When the study controlled for this variable, the results indicated that low MBE utilization could be attributed to size, rather than to discrimination.[249] In addition, studies indicating that minorities formed businesses at a lesser rate than non-MBEs did not conclusively prove that discrimination existed. The Third Circuit correctly concluded that Dade County's evidence was insufficient to justify an affirmative action program.[250]

The Tenth Circuit relied on statistics that failed to live up to *Croson*'s strong basis in evidence requirement. Denver's studies were seriously flawed because they: (1) failed to control for firm size and experience; (2) overestimated MBE participation rates by including all MBEs,

240. *Concrete Works*, 321 F.3d at 991.
241. *Contractors Ass'n*, 91 F.3d at 601.
242. *Id.* at 602-03.
243. *Id.* at 603.
244. *Id.* at 609-10.
245. *Croson*, 488 U.S. at 509.
246. Eng'g Contractors Ass'n of S. Florida Inc. v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997).
247. *Eng'g Contractors*, 122 F.3d at 926.
248. *Id.* at 917.
249. *Id.*
250. *Id.* at 926.

not just those that were qualified, willing, and able; and (3) made assumptions regarding discrimination in the lending industry.[251]

The Third and Eleventh Circuits differed in their outcomes because they required accurate, reliable statistics to show a strong basis in evidence. Unlike the Tenth Circuit, they did not dismiss variables such as firm size and experience, simply because such variables would have invalidated the governments' programs. The Third and Eleventh Circuits correctly applied *Croson*'s strong basis in evidence requirement to show a compelling governmental interest. Despite flaws in Denver's statistics for failing to control for firm size and availability, the Tenth Circuit found that a strong basis in evidence existed. As Justice Scalia argued, "[i]f the evidence relied upon by governmental units to justify their use of racial classifications can be as inconclusive as Denver's evidence in this case, our former insistence upon a strong basis in evidence has been abandoned."[252]

C. *The Role of Anecdotal Evidence in Finding a Strong Basis in Evidence*

The Tenth Circuit, in addition to the Third and Eleventh Circuits, weighed anecdotal evidence when determining whether a strong basis in evidence existed. Although the anecdotal evidence presented in *Engineering Contractors* was disconcerting, the Eleventh Circuit reasoned that such evidence was persuasive only if combined with sufficiently probative statistical evidence.[253] In contrast, the Tenth Circuit found that Denver's anecdotal evidence provided "persuasive, unrebutted support for [its] initial burden."[254] According to *Croson*, a proper statistical foundation is crucial in meeting the strong basis in evidence requirement.[255] Thus, without an accurate statistical foundation, anecdotal evidence is ineffective to support a firm evidentiary basis on which to justify an MBE program.[256] Because it is difficult to verify whether anecdotal evidence is "remembered, perceived, or reported accurately," such evidence should be treated cautiously and must be supported by reliable statistics.[257] In *Concrete Works*, Denver's statistical studies were flawed and did not provide a strong basis in evidence.[258] Therefore, a statistical foundation was lacking in *Concrete Works*, yet the Tenth Circuit gave Denver's anecdotal evidence a great deal of deference in concluding that

251. *Concrete Works*, 321 F.3d at 962, 977, 982; *see also* LaNoue, *supra* note 223, at 799 (stating that "a defective availability analysis can make a Croson disparity study worthless").

252. *Concrete Works*, 124 S. Ct. 556, 560-61.

253. *Eng'g Contractors*, 122 F.3d at 925.

254. *Concrete Works*, 321 F.3d at 990.

255. *Croson*, 488 U.S. at 501.

256. *Eng'g Contractors*, 122 F.3d at 926. ("Without the requisite statistical foundation for the anecdotal evidence to reinforce, supplement, support, and bolster," no firm evidentiary basis exists to justify an MBE program).

257. LaNoue, *supra* note 223, at 525.

258. *See Concrete Works*, 321 F.3d at 962, 977, 982.

Denver had met its burden.[259] Because Denver's statistical studies did not meet *Croson's* rigid standards, the Tenth Circuit's treatment of anecdotal evidence was unwarranted.

V. CONCLUSION

Government affirmative action programs are subject to strict scrutiny analysis, which is the most intensive type of judicial review.[260] Strict scrutiny requires that a government provide a strong basis in evidence to show that a program is narrowly tailored to serve a compelling governmental interest. To uphold *Croson*'s rigid standards, courts must require governments to conduct statistical studies that accurately control for firm size, experience, and other variables that may provide a race-neutral explanation for disparate statistics. Without such reliable statistical studies, a government should not be able to satisfy the strong basis in evidence standard.

The Tenth Circuit attempted to apply *Croson*'s strict scrutiny analysis, but fell short. Denver's statistics were seriously flawed and, thus, were insufficient to establish a strong basis in evidence. If Denver's studies controlled for variables such as firm size and experience, its statistics would have been more convincing. Other circuits, such as the Third and Eleventh, are upholding the Supreme Court's strict scrutiny standards by requiring governments to produce accurate, thorough statistics that show a strong basis in evidence. If strict scrutiny provides a means to "smoke out" illegitimate uses of racial classifications, decisions such as the Tenth Circuit's in Concrete Works will hinder the determination of "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."261 The Tenth Circuit buried strict scrutiny analysis in substandard statistical studies, and the search for its appropriate application will be extremely problematic if such statistics are the basis of future affirmative action programs.

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259. *Id.* at 989-90.
260. CHEMERINSKY, *supra* note 13, at 519.
261. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

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