

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, Colorado 80202</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>PLAINTIFFS: Anthony Lobato, <i>et al.</i></p> <p>and</p> <p>PLAINTIFFS-INTERVENORS: Armandina Ortega, <i>et al.</i></p> <p>v.</p> <p>DEFENDANTS: The State of Colorado, <i>et al.</i></p>	
<p>Attorneys for Defendants: JOHN W. SUTHERS, Attorney General NANCY J. WAHL, 31890* First Assistant Attorney General E-mail: nancy.wahl@state.co.us ANTONY B. DYL, 15968* Senior Assistant Attorney General E-mail: tony.dyl@state.co.us CAREY TAYLOR MARKEL, 32987* Senior Assistant Attorney General E-mail: carey.markel@state.co.us NICHOLAS P. HEINKE, 38738* Assistant Attorney General E-mail: nicholas.heinke@state.co.us JONATHAN P. FERRO, 35754* Assistant Attorney General E-mail: jon.ferro@state.co.us ERICA WESTON 35581* Assistant Attorney General E-mail: erica.weston@state.co.us Office of the Colorado Attorney General 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-2383 Fax: (303) 866-5671 * Counsel of Record</p>	<p>Case Number: 2005 CV 4794</p> <p>Div: 9</p>
<p align="center">DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE IN CONSIDERATION OF DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS AND PLAINTIFF- INTERVENORS' MOTIONS TO STRIKE AFFIRMATIVE DEFENSES</p>	

C.R.C.P. 121 § 1-15 ¶ 8 Certification:

Defendants' counsel Jonathan P. Fero has conferred in good faith with respective counsel for Plaintiffs and Plaintiff-Intervenors Terry R. Miller and David G. Hinojosa. Plaintiffs state they oppose this motion because, unlike the first resolution, Plaintiffs are unable to address the second resolution in their Motion to Strike Affirmative Defensives or supporting brief, and nothing prevented the Douglas County School Board of Education from making the statements contained in the second resolution at the time the first resolution was passed. Plaintiff-Intervenors state they object to this motion on the grounds of timeliness and substance.

Defendants respond that this motion is both timely and appropriate. The Douglas County School District RE-1 Board passed the resolution at issue just 11 days ago, and this Court has not yet ruled on the viability of Defendant's affirmative defenses. Plaintiffs have no basis to make assumptions about the governance duties or priorities of the Douglas County School District RE-1 Board, which is not a party to this lawsuit and is not bound by any court- or rule-imposed filing deadline. If Plaintiffs or Plaintiff-Intervenors feel prejudiced because the affirmative defenses briefing is complete, then their remedy is to move to amend their reply briefs—not summarily object to Defendants' request for judicial notice that complies with applicable authority.

For the reasons stated below, and in support of Defendants' Combined Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses, filed on November 2, 2010, Defendants request that this Court take judicial notice of the fact that on January 18, 2011, the Douglas County School District RE-1 Board resolved it "strongly supports the efforts of the State of Colorado in its defense of the *Lobato v. State of Colorado* case, because a dismissal of the case will best serve the needs of the students, families, and taxpayers of the Douglas County School District." (Defs.' Attach. A.)

1. On October 4, 2010, Plaintiffs and Plaintiff-Intervenors separately moved to strike several of Defendants' affirmative defenses, including the failure to join all necessary parties. These motions argue the nearly 150 Colorado school districts that are not parties to the case need not be joined because they share the interests of the named districts, parents, and students. (Pls.' Mot. to Strike at 9 ("[T]he absentee school districts share Plaintiffs' interest in obtaining a system of public schools that complies with the Constitution."); Pl.-Intervenors' Mot. to Strike at 8 ("Should Plaintiff-Intervenors prevail on their claims, such a decision will only benefit, not harm, other Colorado public school children."))

2. In response to these motions, Defendants contend joinder is required because, among other reasons, absent districts, parents, and students have disparate interests that may be adversely affected by a judgment in Plaintiffs or Plaintiff-Intervenors' favor. (Defs.' Combined Resp. at 7–8.)

3. On November 16, 2010, the Douglas County School District RE-1 Board of Education confirmed Defendants' joinder argument, resolving its interests were not represented by

Plaintiffs. On November 30, 2010, this Court granted Defendants' unopposed motion to take judicial notice of this resolution.

4. On January 18, 2011, the Douglas County School District RE-1 Board of Education unanimously approved another resolution regarding this case. Specifically, the Board resolved "a dismissal of th[is] case will best serve the needs of the students, families, and taxpayers of the Douglas County School District."

5. In ruling on a motion to strike affirmative defenses, which is governed by the same standard of review as C.R.C.P. 12(b)(5) motions, *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 308 (Colo. App. 2007), a court may consider judicially noticeable facts without converting the motion into one of summary judgment, *Gen. Steel Domestic Sales v. Hogan & Hartson, LLP*, 230 P.3d 1275, 1279 (Colo. App. 2010) (citing *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006)).

6. CRE 201 requires a court to take judicial notice of certain adjudicative facts when requested by a party and supplied with the necessary information. *Durbin v. Bonanza Corp.*, 716 P.2d 1124, 1129 (Colo. App. 1986). Judicially noticeable facts are those not subject to reasonable dispute in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," such as in public records. CRE 201(b); *People v. Stanley*, 170 P.3d 782, 794 (Colo. App. 2007) (citing cases); *Walker*, 148 P.3d at 397–98 (citing cases); *see also St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("The scope and reach of the doctrine of judicial notice has been enlarged over the years until today it includes those matters that are verifiable with certainty.").

7. School board resolutions are public records whose accuracy cannot reasonably be questioned. *See* § 24-72-202(6)(a)(I), C.R.S. (2010) (defining "public records"); CRE 201(b); *Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974) (recognizing school districts are political subdivisions of state); *Stanley*, 170 P.3d at 794; *Walker*, 148 P.3d at 397–98; *cf. Gardner v. Miami-Yoder Sch. Dist. JT-60*, No. 10-cv-11530, 2010 WL 4537951, at *1 (D. Colo. Nov. 3, 2010) (concluding school board policies are judicially noticeable public records that may be considered on defendant's Rule 12(b)(6) motion without converting it into motion for summary judgment).

Accordingly, the attached January 18, 2011 resolution of the Douglas County School District RE-1 Board of Education indisputably establishes that the Board has resolved it "strongly supports the efforts of the State of Colorado in its defense of the *Lobato v. State of Colorado* case, because a dismissal of the case will best serve the needs of the students, families, and taxpayers of the Douglas County School District (Defs.' Attach. A.) This Court, therefore, should also consider the Board's resolution in ruling on Plaintiffs and Plaintiff-Intervenors' Motions to Strike Defendants' Affirmative Defenses.

Dated: January 28, 2011

JOHN W. SUTHERS
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s/ Jonathan P. Fero
(Original signature on file)

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DEFENDANTS'

ATTACHMENT "A"

RESOLUTION OF THE BOARD OF EDUCATION
OF
DOUGLAS COUNTY SCHOOL DISTRICT, RE-1
IN SUPPORT OF THE STATE OF COLORADO IN THE CASE OF
LOBATO v STATE OF COLORADO

WHEREAS, the Board of Education unanimously adopted a resolution on November 16, 2010 declaring that the individual and 21 named school district Plaintiffs in the *Lobato v. State of Colorado* case currently pending in the Denver County District Court do not represent the interests of the students, families, and taxpayers of the Douglas County School District, and

WHEREAS, the Board of Education has, since the unanimous adoption of its November 16 resolution, continued to follow developments in the *Lobato* case with great interest and utmost concern about the potential impact of the case on the students, families, and taxpayers of the Douglas County School District; and

WHEREAS, if the Plaintiffs prevail in their lawsuit, the Denver County District Court will declare that the current educational funding system violates the Colorado Constitution, and

WHEREAS, if the Plaintiffs prevail in their lawsuit, the Colorado courts will likely enter remedial orders and injunctions that will have the effect of supplanting the unique role of local Boards of Education in overseeing the establishment, funding and maintenance of public schools and the public school finance system; and

WHEREAS, despite claims to the contrary by the Plaintiffs, a court-ordered and supervised system of public schools and school finance as demanded by the Plaintiffs would subvert the principle of local control embodied in Article IX, Section 15 of the Colorado Constitution, and

WHEREAS, a court-ordered and supervised system of public schools and school finance as demanded by the Plaintiffs would subvert the separation of powers doctrine embodied in Article III of the Colorado Constitution, and

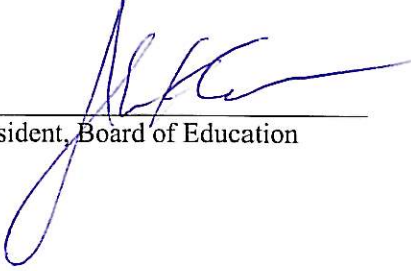
WHEREAS, the Board of Education, in advocating for the interests of, and in carrying out its responsibilities to, the students, families, and taxpayers of the Douglas County School District, believes that local Boards of Education and, and to a lesser extent, the General Assembly are the most appropriate forums for addressing the complex, specific and unique needs of the local school districts, and

WHEREAS, if the Defendants, the State of Colorado, *et al.*, prevail in dismissing the lawsuit, decisions as to the establishment, maintenance and funding systems of the public schools will properly remain in the hands of the elected state and local representatives of the people.

NOW THEREFORE, IT IS RESOLVED that the Board of Education strongly supports the efforts of the State of Colorado in its defense of the *Lobato v. State of Colorado* case, because a dismissal of the case will best serve the needs of the students, families, and taxpayers of the Douglas County School District.

APPROVED this 18th day of January, 2011, by a vote of 7-0

ATTEST: 


President, Board of Education

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE IN CONSIDERATION OF DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENORS' MOTIONS TO STRIKE AFFIRMATIVE DEFENSES** upon all parties herein electronically through LexisNexis File & Serve or United States mail this 28th day of January, 2011, addressed as follows:

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