

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR SAFE ACCESS, *et al.*,)
)
 Petitioners,)
) No. 11-1265
 v.)
)
 DRUG ENFORCEMENT ADMINISTRATION,)
)
 Respondent.)

RESPONDENT'S OPPOSITION TO
PETITIONERS' REQUEST FOR JUDICIAL NOTICE

The Drug Enforcement Administration (DEA), respondent in this case, by its undersigned attorney, hereby opposes the Petitioners' Request for Judicial Notice (ECF No. 1355026). The petitioners request judicial notice with respect to two documents: (1) U.S. Patent No. 6,630,507 (filed October 7, 2003) ("Cannabinoids as antioxidants and neuroprotectants") and (2) an abstract of *Association Between Marijuana Exposure and Pulmonary Function Over 20 Years*, 307 *JAMA* 173 (2012). The petitioners essentially seek to expand the administrative record in a manner that is inconsistent with Fed. R. App. P. 16(a) and 28 U.S.C. § 2112(b).¹ Because the materials submitted do not meet the requirements of Fed. R. Evid. 201 and other relevant requirements, this Court should deny the request and decline to take judicial notice. In support of its opposition, the respondent says:

¹ Fed. R. App. P. 16(a) provides: "The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency." That standard is consistent with the governing statute, 28 U.S.C. § 2112(b), which provides that "[t]he record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned * * *."

Pursuant to Fed. R. Evid. 201, this Court has the discretion to take judicial notice of an “adjudicative fact” in the following circumstances:

The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b); *see also Melong v. Micronesian Claims Commission*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) (“[The] rule is designed to permit judicial recognition of material such as scientific data or historical fact that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof.”).

The petitioners assert that the patent will “elucidate the agencies’ decisionmaking; in particular, their failure to consider the federal government’s own patent for cannabinoids” and failure “to consider ‘all relevant factors.’” Request at 2. As an initial matter, the patent was filed approximately one year after the filing of the petition with the agency, but the petitioners never brought the patent and their theory of its significance to the agency’s attention during the time that their petition was pending. This case presents no reason to supplement the record for belated inclusion of this document because it does not contain information necessary to this Court’s understanding of the issues before the agency or the issues on review. *Cf. Beach Communications, Inc. v. Federal Communications Commission*, 959 F.2d 975, 987 (D.C. Cir. 1992) (noting this Court’s “discretion to supplement an administrative record” when it “needs more evidence to enable it to understand the issues clearly”).²

² The petitioners’ reliance on precedent involving allegations of an agency’s consideration of materials outside the record, insufficient explanation of the basis for the agency’s decision, or a technically complex record, is misplaced. See Request at 2 (citing *Animal Defense Counsel v. Hodel*, 867 F.2d 1432, 1436-37 (9th Cir. 1988), *as modified*, 867 F.2d 1244 (1989); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)). The petitioners here assert merely that the Administrator should have considered additional material.

The petitioners would argue specifically that, when applying for the patent, the Department of Health and Human Services “emphasized marijuana’s lack of toxicity” and that the DEA failed to consider that fact when declining to initiate rulemaking proceedings. Petitioners’ Opening Brief at 1-2, 41. The patent, however, does not contain an assertion about marijuana’s lack of toxicity. It mentions marijuana only twice – once when defining natural and synthetic “cannabinoid” substances (including THC),” Exhibit 1 at 12, and once in a discussion of laboratory animal studies involving one “non-psychotropic marijuana constituent,” *id.* at 18. Moreover, it identifies THC as “the psychoactive principle (sic) of cannabis,” *ibid.*, and its abstract states that “nonpsychoactive cannabinoids * * * avoid toxicity that is encountered with psychoactive cannabinoids” in the circumstances discussed. *Id.* at 1 (emphasis added). The document thus does not establish that the government has stated that marijuana lacks toxicity.

With respect to the *JAMA* abstract, the petitioners contend that the DEA failed to consider “pertinent scientific studies published since [filing of the] rescheduling petition,” Request at 2, and that the study cited “flatly reject[s]” the DEA’s conclusions as to the respiratory effects of smoked marijuana, Petitioners’ Opening Brief at 52. Respondent does not concede that the petitioners’ characterization of the article abstract or the underlying study is correct. More significantly, however, it is plain from the petitioners’ pleading, Request at 1 (citation) and Exhibit 2, that this document was published in 2012, well after the agency’s decision not to initiate rulemaking proceedings. “Where the agency decides not to proceed with rulemaking, the record for purposes of review need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency’s explanation of its decision to reject the petition.” *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

In this case, the petitioners ask this Court to evaluate the voluminous administrative record and the agency's decision in light of one document that could have been proffered to the agency, although it does not support the proposition for which they offer it, and another document that was published well after the agency's decision. Neither document is appropriate for judicial notice under Fed. R. Evid. 201 and this Court's case law.

Conclusion

Wherefore, for the foregoing reasons, the respondent asks this Court to deny the Petitioners' Request for Judicial Notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lena Watkins, hereby certify that I electronically filed the foregoing Respondent's Opposition to the Petitioners' Request for Judicial Notice with the Clerk of this Court, by using the appellate CM/ECF system, on February 9, 2012. I certify further that Counsel for the Petitioners and the Intervenor, who is proceeding pro se, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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