

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

**DECISION: THE ABILITY OF
RESPONDENT TO RAISE
CONSTITUTIONAL
CHALLENGES IN AN
ADMINISTRATIVE HEARING**
Inspection Nos. 11202410310040,
104202410310075,
109202410310019

**ROC IT OUT WELLNESS, LLC (CANANDAIGUA),
DBA KINGDOM WELLNESS & DISPENSARY;
ROC IT OUT WELLNESS, LLC (WEBSTER), DBA
KINGDOM WELLNESS & DISPENSARY; DBJ
WELLNESS, LLC, DBA KINGDOM WELLNESS
DISPENSARY.**

Respondents.

Respondents requested hearings in the above matters challenging the Orders to Seal and the issuance of the Notices of Violation served on them by Petitioner. The orders were all issued October 31, 2024.

Subsequently, a preliminary conference was held, on July 9, 2025. At this conference, Respondents asserted their intention to raise objections and present evidence that Petitioner violated the constitutional rights of Respondents.

Petitioner asserted that constitutional challenges must be brought via an Article 78 proceeding in Supreme Court. Respondents asserted that constitutional issues may properly be raised during an administrative hearing challenging an Order to Seal or Notice of Violation.

Respondents are represented by Joshua S. Bauchner, Esq.

The Office of Cannabis Management (hereinafter “OCM”) is represented by Anthony Pitnell, Esq.

Joshua Pennel, Esq. Administrative Law Judge (the Presiding Judge)

I. ISSUE

The issue raised during the hearing on July 9, 2025, and in subsequent submissions prepared by the parties is whether Respondents may raise constitutional challenges regarding OCM’s actions in issuing the Notices of Violations (hereinafter “NOV”) and Orders to Seal (hereinafter “OTS”). Respondent motioned to present evidence that OCM violated his constitutional rights. OCM countered the motion and requested that constitutional arguments be disallowed from the administrative hearing.

II. PARTIES POSITIONS

1. OCM argues that the constructive due process claim (regarding Respondents’ argument that OCM produced and disseminated unclear guidance regarding THCA) and Respondents’ challenges to the propriety of the raids should be deferred to Article 78. OCM relies on *Bell v. NYSLA*, 48 A.D.2d 83 (3d Dep’t 1975) and *Cannon v. Urlacher*, 155 A.D.2d 906 (4th Dep’t 1989), asserting that administrative hearings are not the proper venue for specific constitutional adjudication.

2. Respondents argue that constitutional objections are not venue-contingent and must be allowed in administrative hearings to preserve judicial review. Respondents rely on Finn’s Liquor, LaPenta, and a line of cases (e.g., *White v. Tax Appeals Trib.*, 196 A.D.3d 927 (3d Dep’t 2021)) holding that state agencies cannot rely on unconstitutional acts to impose penalties. Respondents also cite *Super Smoke N Save* and *North Fork Distribution*, recent trial-level cannabis enforcement cases highlighting OCM enforcement overreach and regulatory deficiencies.

III. FINDINGS OF FACT

1. On October 31, 2024, OCM inspected three stores owned by Respondents. Due to findings uncovered during the inspection, OCM issued three NOVs, which constituted orders to cease unlicensed activity, and sealed all three stores under an OTS.

2. Additional facts concerning the inspections, basis of the orders, and pertinent factual considerations are unknown as this question arises prior to any evidence being submitted.

3. Respondent asserts, however, that OCM violated his constitutional rights related to the issuing of these orders.

4. The Respondents' motion to raise constitutional objections should be granted in part and limited in scope.

IV. ANALYSIS AND CONCLUSIONS OF LAW

1. As-Applied Constitutional Claims are Permissible:

Respondents may present evidence and argument that the searches, seizures, and enforcement actions violated its Fourth Amendment and Due Process rights, including a request for the suppression of evidence allegedly obtained unlawfully.

This is consistent with *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647 (1969) and *LaPenta v. NYSLA*, 30 A.D.2d 1033 (4th Dep't 1968), which require administrative bodies to reject evidence obtained in violation of constitutional protections. In *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647 (1969): The Court of Appeals held that administrative agencies cannot rely on evidence obtained through unconstitutional searches and must enforce constitutional protections to prevent agencies from being "beyond the reach of the Constitution." In *Celestial Food Corp. v. N.Y. State Liq. Auth.*, 99 A.D.2d 25, 27 (2d Dept 1984), the court held that constitutional objections must be raised at the administrative level, or they are not available to attack the determination in subsequent judicial proceedings." The courts have ruled that constitutional challenges that "rests on factual issues" are "reviewable administratively" (*Siao-Pao v. Travis*, 23 A.D.3d 242, 243, 804 N.Y.S.2d 724, 724 (2005); see also *Matter of Schulz v. State of New York*, 86 N.Y.2d 225, 232 (1995); *Baywood, LLC v. Off. of Medicaid Inspector Gen.*, 188 A.D.3d 1193, 1195 (2020) quoting *Matter of Fichera v. City of New York*, 145 A.D.2d 482, 484 (1988)).

2. Constructive Due Process Claim (Preserved but Not Decided on the Merits):

Respondents may state and preserve its argument that OCM's December 2023 and November 2024 guidance on THCA products was deemed unconstitutionally vague. Respondents claim this vagueness deprived licensees of due process.

The Administrative Law Judge (hereinafter "ALJ") will not issue a ruling on the facial validity of OCM regulations or the broader constitutional sufficiency of its rulemaking authority.

This claim is preserved for the appeal process in an Article 78 review, consistent with the arguments in *Bell v. NYSLA*, 48 A.D.2d 83 (3d Dep't 1975) and *Cannon v. Urlacher*, 155 A.D.2d 906 (4th Dep't 1989).

Such preservation of appeal may be unnecessary in some instances and the Respondents may raise constitutional objections that challenge the constitutionality of the law, or a specific provision of the law, before the courts without having been heard administratively (see *Town of Oyster Bay v. Kirkland*, 81 A.D.3d 812, 816 (2011)).

3. Selective Enforcement / Discriminatory Enforcement Claims:

Respondents may state and preserve its argument on OCM's alleged Selective Enforcement/Discriminatory Enforcement Claims.

The ALJ will not issue a ruling on the Respondents' constitutional claim asserting selective/discriminatory enforcement. Respondents' arguments are noted for the record.

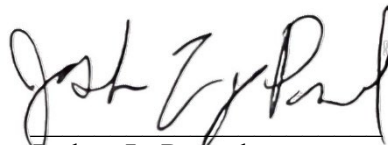
This claim is preserved for the appeal process in an Article 78 review, consistent with *Bell v. NYSLA*, 48 A.D.2d 83 (3d Dep't 1975) and *Cannon v. Urlacher*, 155 A.D.2d 906 (4th Dep't 1989). *Bell v. NYSLA*, 48 A.D.2d 83 (3d Dept 1975) and *Cannon v. Urlacher*, 155 A.D.2d 906 (4th Dept 1989) both involved equal protection claims requiring broad discovery and testimonial evidence outside the scope of the administrative record. They were dismissed not because constitutional claims are categorically excluded from hearings, but because the administrative forum lacked the capacity to support those evidentiary burdens.

4. **DECISION**

Respondents may assert constitutional violations and present evidence of such violations consistent with the above findings. Specifically, those arguments that require fact-specific analysis will be heard and a determination rendered in the course of an administrative proceeding.

This constitutes the final decision of the Office of Administrative Hearings. A copy of this decision shall be served upon the parties.

Dated: August 13, 2025


Joshua L. Pennel
Administrative Law Judge

This decision was sent via email on August 13, 2025, to the following:

Anthony Pitnell, Esq.

Joshua S. Bauchner, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev, Esq.