

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

METROPOLIS OF CONNECTICUT LLC :
D/B/A “MARDI GRAS” :
Plaintiff :
 :
v. : Civil Action No. 3:01 CV 670 (CFD)
 :
JAMES T. FLEMING ET AL, :
Defendants :

RULING ON MOTION TO DISMISS

The plaintiff brings this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief with regard to the enforcement of Conn. Agencies Regs. § 30-6-A24(c), a regulation of the State of Connecticut Department of Consumer Protection, Liquor Control Division (the “Department”), governing conduct occurring on the premises of establishments possessing liquor permits. The defendants, administrative officers of the Department, have filed a motion to dismiss the plaintiff’s complaint [Doc. #12].¹

I. Facts²

The plaintiff operates an establishment in East Windsor, Connecticut, known as the “Mardi Gras,” and is the holder of a restaurant liquor permit issued by the Department. The restaurant offers live entertainment, including ““exotic dancers’ who perform sexually expressive dance routines.” Am. Compl. ¶ 12. The restaurant has one stage where the entertainers perform for the patrons. Wishing to add additional “pedestal stages” for entertainers to perform their

¹The plaintiff’s initial request for a preliminary injunction was denied, by agreement of the parties, without prejudice to renewal following the Court’s ruling on the motion to dismiss.

²The facts are taken from the plaintiff’s amended complaint.

dance routines, the plaintiff sought from the Department a waiver of Conn. Agencies Regs. § 30-6-A24(e), which prohibited entertainers performing in more than one location and “mingling” with the patrons. The Department refused to grant the waiver, and in a letter dated February 16, 2001, informed the plaintiff that its request was denied because the Department did not find it “desirable [o]r necessary” for entertainers at the plaintiff’s establishment to “mingle” with the patrons of the plaintiff’s establishment. The plaintiff then brought this suit under 42 U.S.C. § 1983, claiming a violation of the First Amendment to the U.S. Constitution. As noted above, the defendants have moved to dismiss on the basis that (1) the complaint fails to state a claim upon which relief can be granted and (2) the plaintiff has not been irreparably harmed.³

II. Motion to Dismiss Standard

When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). “The issue on a motion to dismiss is not whether the plaintiff will

³In their motion to dismiss, the defendants state that the motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). However, the defendants do not indicate in their motion, or in the memorandum filed in support of that motion, the grounds for a 12(b)(1) lack of subject matter jurisdiction dismissal. In a supplemental memorandum filed on June 6, 2002 (in response to the plaintiff’s amended complaint), however, the defendants dispute whether the plaintiff has met the standing requirement, which could be a basis for a 12(b)(1) challenge. The Court addresses standing later in the opinion.

prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims.” United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, the Court may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

When considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), “a district court must look to the way the complaint is drawn to see if it claims a right to recover under the laws of the United States.” IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1055 (2d Cir. 1993) (quoting Goldman v. Gallant Secs. Inc., 878 F.2d 71, 73 (2d Cir. 1989)), cert. denied, 513 U.S. 822 (1994). In doing so, the allegations of the complaint are construed in the plaintiff’s favor. See Connell v. Signoracci, 153 F.3d 74 (2d Cir. 1998); Atlantic Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd., 968 F.2d 196, 198 (2d Cir. 1992). A district court, however, need not confine its evaluation of subject matter jurisdiction to the face of the pleadings and may consider affidavits and other evidence submitted by the parties. See Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947); Exchange Nat’l Bank v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); Matos v. United States Dep’t of Hous. & Urban Dev., 995 F. Supp. 48, 49 (D. Conn. 1997). Once the question of subject matter jurisdiction has been raised, the burden of establishing subject matter jurisdiction rests on the party asserting

jurisdiction. See Thomas v. Gaskill, 315 U.S. 442, 446 (1942).

III. Discussion

A. The Challenged Regulation

As noted above, the plaintiff sought, and was rejected, a waiver of § 30-6-A24(e) of the Regulations of the Department of Consumer Protection, Liquor Control Division, to maintain additional “pedestal stages” for entertainers at the Mardi Gras to perform their dance routines. The application for the waiver attached a drawing of the proposed configuration of the pedestal stages. That drawing displayed four platforms (or “pedestal stages”) with one to three individual seats near each platform.⁴ At the time the waiver application was made and when the complaint in this case was filed, § 30-6-A24 provided, in relevant part:

Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the department upon written request indicating the desirability and necessity for entertainers to mingle with the patrons.

Conn. Agencies Regs. § 30-6-A24(e) (2000) [hereinafter “the original regulation”]. The regulation was amended in October 2001 and now provides:

Entertainers shall perform only in fixed locations approved by the department. Entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the department upon written request indicating the desirability and necessity for entertainers to mingle with the patrons.

Conn. Agencies Regs. § 30-6-A24(c) (2001) [hereinafter “the 2001 regulation”]. Accordingly, the 2001 regulation allows entertainers to perform in more than one location, but requires that all locations be fixed and approved in advance by the Department. The 2001 regulation continues to

⁴The “pedestal stages” appear large enough to permit only one dancer and are elevated only slightly above ground level.

provide that entertainers may not “mingle” with the patrons, absent a waiver by the Department.

The plaintiff has amended its complaint to challenge the 2001 regulation and focuses its challenge on the regulation’s staging restriction, not its separate “mingling” restriction. As noted above, the 2001 regulation sets forth the staging and “mingling” restrictions in two separate provisions (and sentences) and replaces the previous prohibition against multiple staging with a requirement that all entertainment locations be fixed and pre-approved by the Department. The defendants maintain that the Court should focus on the “mingling” restriction, found in both the original and the 2001 regulation, rather than the 2001 regulation’s staging approval requirement, because the Department’s denial of the plaintiff’s application was based on its belief that the plaintiff’s additional staging caused “mingling.”⁵ However, because the plaintiff does not challenge either regulation’s “mingling” prohibition, but rather, the 2001 regulation’s staging approval requirement, the Court declines to address the issue of the constitutional validity of the “mingling” prohibition in the regulation.⁶

⁵The defendants also raise standing issues based on the fact that the plaintiff has not applied for approval of its staging under the 2001 regulation, which the Court will address later in the opinion.

⁶The Court notes that the original regulation, including its “mingling” prohibition, was deemed constitutional by the Appellate Court of Connecticut. See Dydyn v. Dept. of Liquor Control, 531 A.2d 170 (Conn. App. 1987) (upholding Conn. Agencies Reg. § 30-60-A24(e) under California v. LaRue, 409 U.S. 109 (1972)), cert. denied, 532 A.2d 586 (Conn. 1987), cert. denied, 485 U.S. 977 (1988); see also Winer v. Healy, Civ. No. H-79-267, slip. op. at 8-13 (D. Conn. Aug. 24, 1979) (same). However, there is now a considerable question whether the support for it under the Twenty-first Amendment is tenable. See 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996), and discussion in part II.C. infra. The Court also notes that several courts have upheld “mingling” prohibitions or “buffer zones” between exotic dancers and patrons under the test set forth in United States v. O'Brien, 391 U.S. 367, 376-77 (1968), which provides that regulations addressing the “secondary effects” of speech, rather than suppressing the content of speech, must: (1) be within the constitutional power of the government; (2) further an important or substantial governmental interest; (3) provide an asserted governmental interest unrelated to

The plaintiff's amended complaint alleges that the 2001 regulation's requirement of prior approval by the State of Connecticut through its Liquor Control Division of the Department of Consumer Protection of the location of entertainment violates the First Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment.⁷ Specifically, the plaintiff maintains that the regulation acts as an improper licensing of First Amendment activity as it fails to provide sufficient guidelines as to the approval or denial of a license. As such, argues the plaintiff, the regulation allows for arbitrary and discriminatory enforcement and leaves the licensee without sufficient guidance to know what conduct may be permitted or prohibited. Additionally, the plaintiff maintains that the regulation fails to provide for prompt judicial review of a rejection of a license application, fails to provide that approval or rejection of an application must be made in a specific period of time, fails to provide that the applicant may seek court review in the event of a denial, and fails to provide for a stay pending such review. As a result, argues the plaintiff, the regulation on its face and as applied is an unlawful prior restraint in

the suppression of free expression; and (4) ensure that any incidental restrictions on alleged First Amendment freedoms is no greater than essential. See Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979) (upholding "mingling" restriction similar to one contained in the original § 30-6-A24 regulation); DLS, Inc. v. City of Chatanooga, 107 F.3d 403, 412 (6th Cir. 1997) (finding six-foot buffer and eighteen-inch stage requirement to be constitutional); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (ten-foot buffer and two-foot stage requirement); BSA, Inc. v. King County, 804 F.2d 1104, 1111 (9th Cir. 1986) (six-foot buffer and eighteen-inch stage requirement).

⁷The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V.

violation of the U.S. Constitution.

B. Standing

A threshold question is whether the plaintiff has presented a justiciable “case or controversy” under Article III of the U.S. Constitution. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975). The plaintiff’s application to the Department, and its subsequent denial, were under the original regulation. Here, the plaintiff challenges the 2001 regulation, which, as noted above, sets forth materially different language concerning pre-approval of entertainment staging. The plaintiff has not applied for approval of its entertainment staging under the 2001 regulation. The Court finds, however, that the plaintiff has standing to bring its facial challenge to the 2001 regulation.⁸ First, the Supreme Court has “long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.” City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1988). There is no dispute whether the plaintiff’s activities render it subject to the licensing scheme at issue. Indeed, not only is it an establishment licensed to serve liquor at which entertainment is being provided, but also its application under the original regulation indicates it has a specific interest to present staging that would require prior approval under the 2001 regulation, and it has made considerable, concrete efforts to present such staging. Thus, the

⁸With regard to the plaintiff’s “as applied” challenge, the Court notes that generally, “to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.” Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir.1997). However, “[t]his threshold requirement for standing may be excused ... where a plaintiff makes a substantial showing that application for the benefit ... would have been futile.” Id. As the Court finds that the plaintiff has standing to bring its facial challenge, it need not presently reach the issue of whether the plaintiff has standing to bring its “as applied” challenge.

Court finds that the plaintiff has standing to bring a facial challenge to the 2001 regulation.⁹

C. **Validity of 2001 Regulation Under First Amendment**

The defendants argue that the Court's examination of the constitutional validity of § 30-6-A24(c) should involve either "rational basis" scrutiny, or the time, place, manner restrictions analysis set forth in United States v. O'Brien, 391 U.S. 367, 376-77 (1968), because it is a liquor control regulation promulgated pursuant to the State's police power and the speech at issue in plaintiff's establishment is "adult" entertainment. However, the Court finds that the broad scope of the regulation, and its function as a "prior restraint," require application of principles set forth by the Supreme Court in Freedman v. Maryland, 380 U.S. 51, 57 (1965), and applied by several courts in subsequent cases on prior restraints, rather than either "rational basis" or O'Brien scrutiny.

The defendants first assert that California v. LaRue, 409 U.S. 109 (1972), and 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996), mandate the application of the "rational relation" test because the regulation at issue is a liquor control regulation and involves an exotic dancing establishment. While the defendants recognize that the Supreme Court in 44 Liquormart rejected that part of LaRue which stated that the Twenty-first Amendment presumptively renders constitutional all restrictions upon entertainment offered in conjunction with the sale of alcoholic beverages, the defendants assert that the Supreme Court in 44 Liquormart specifically

⁹The Court also finds that the plaintiff's claim appears to be ripe. Though the plaintiff has not applied for approval of its "pedestal stages" under the 2001 regulation, it is clear that the 2001 regulation is applicable to it, and the State's position on the staging request is indicated by the prior denial. Moreover, "traditional ripeness analysis has been relaxed somewhat in cases involving facial challenges based on First Amendment grounds." See Nutritional Health Alliance v. Shalala, 144 F.3d 220, 226 (2d Cir. 1998) (citing Sanger v. Reno, 966 F. Supp. 151, 161 (E.D.N.Y. 1997) (collecting cases)), cert. denied, 525 U.S. 1040 (1998).

acknowledged the state’s police power to regulate exotic dancing in a liquor establishment, apart from the State’s Twenty-first Amendment power. See 44 Liquormart, 517 U.S. at 515 (“We are now persuaded that the Court’s analysis in LaRue would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. . . . [T]he Court has recognized the States’ inherent police powers to provide ample authority to restrict the kind of ‘bacchanalian revelries’ described in the LaRue opinion regardless of whether alcoholic beverages are involved.”). Because the State’s police power provides the authority to promulgate liquor regulations restricting exotic dancing in establishments serving liquor, argue the defendants, such regulations are subject to rational basis review.

However, the regulation at issue applies to and restrains of all types of entertainment, and thus raises a much broader and more substantial threat to First Amendment rights. The regulation is not directed solely at “adult” entertainment of the kind offered at Mardi Gras, but is broad enough to cover any entertainment activity conducted in an establishment licensed to serve liquor. Indeed, the regulation makes no distinction with regard to the kind of entertainment that is being performed, but rather requires that all “[e]ntertainers shall perform only in fixed locations approved by the department.” Conn. Agencies Regs. § 30-6-A24(c). Section 30-6-A24(c) would apply to the performance of musical, theatrical, comedic, or political¹⁰ entertainment. See Schad

¹⁰ “[A] theatrical skit parodying government officials or a gathering to watch televised election returns, when that activity is conducted in an establishment licensed to sell alcohol” may also be covered by the regulation. See Jersey’s All-American Sports Bar, Inc. v. Washington State Liquor Control Bd., 55 F. Supp. 2d 1131, 1136 (W.D. Wash. 1999).

v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”). Indeed, productions of “Oklahoma!” or performances by the Hartford Symphony Orchestra in a theater holding a liquor license would need State approval of their staging before the performances could take place, even if they were to be performed on only one stage. Consequently, § 30-6-A24(c)’s requirement of State approval before such entertainment may take place implicates a broad range of First Amendment activity.¹¹

Additionally, the portion of the 2001 regulation the plaintiff challenges involves the discretionary licensing of speech, not a blanket prohibition on speech. Compare City of Erie v. Pap’s A.M., 529 U.S. 277 (2000) (finding city’s public indecency ordinance which proscribed nudity in public places constitutional), and Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1062 (9th Cir. 1986) (finding statute’s ten-foot buffer and two-foot stage height requirement constitutional), with Jersey’s All-American Sports Bar, Inc. v. Washington State Liquor Control Bd., 55 F. Supp. 2d 1131, 1137-38, 1139 n.5 (W.D. Wash. 1999) (finding requirement of state permission prior to providing entertainment at liquor establishment an unconstitutional prior restraint). The requirement of pre-approval of the location of entertainment is not a restriction on the place and manner of speech, but is a qualification on whether speech can take place at all. Before an

¹¹Accordingly, while defense counsel has requested that the Court construe the challenged portion of the 2001 regulation as applying only to exotic dancing and not other forms of entertainment, such a construction is not permitted by its text or by limitations imposed by Connecticut state courts. See Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 131 (1992) and MacDonald v. Safir, 206 F.3d 183, 191 (2d Cir. 2000). There is also no record of administrative construction of the regulation along these lines which might provide a basis for a more narrow construction. See MacDonald, 206 F.3d at 191.

individual can engage in the expressive activity covered by the regulation, approval from the State is required. Indeed, while the defendants claim that Conn. Gen. Stat. § 30-6a(c)(2) prohibits the Department from promulgating a regulation that “requir[es] prior approval for live entertainment,” that is precisely what the regulation does.¹² In that regard, it is similar to an ordinance requiring government pre-approval for holding a parade. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (finding that an ordinance requiring permit to participate in a parade on city street “fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional”); MacDonald v. Safir, 206 F.3d 183, 194 (2d Cir. 2000) (“The district court correctly found that [New York Administrative Code] § 10-110 is a prior restraint on speech, for, under § 10-110, one must get a permit from the Commissioner before staging a parade in New York City.”). Thus, notwithstanding that the defendants claim the regulation should be examined as a content-neutral time, place, and manner restriction, § 30-6-A24(c) must meet the constitutional requirements for a prior restraint because it empowers the State to issue or to deny “licenses” to engage in First Amendment protected activity. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (“Because we conclude that the city’s licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the

¹²Section 30-6a(c) provides, in relevant part:

The department shall not adopt any regulation: (1) Requiring prior approval of alterations or changes in the interior or exterior of permit premises; (2) requiring prior approval for live entertainment or the installation of amusement devices or games

Conn. Gen. Stat. § 30-6a(c).

Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented business.”).

As noted above, the requirement of governmental permission to engage in specified expressive activity, in contrast to sanctioning the activity after it has taken place, is termed a “prior restraint.” See Alexander v. United States, 509 U.S. 544, 550 (1993); Freedman, 380 U.S. at 57; Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). The Supreme Court has characterized such restraints, which give public officials the power to deny the use of a forum in advance of actual expression, as “the most serious and the least tolerable infringement on First Amendment rights.” Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). The restraints carry “a heavy presumption against [their] constitutional validity.” Bantam Books, 372 U.S. at 70, and must include rigorous procedural safeguards against improper censorship. See Freedman, 380 U.S. at 58-60.

As the Supreme Court stated in FW/PBS, Inc. v. City of Dallas:

[o]ur cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion.

493 U.S. at 225-26 (internal quotation marks and citations omitted). The latter evil is addressed by two procedural safeguards: “the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there

must be the possibility of prompt judicial review in the event the license is erroneously denied.” Id. at 228 (citing Freedman, 380 U.S. at 51).¹³ Accordingly, Freedman provides that a licensing scheme may not grant officials the unlimited discretion to deny a permit to speak, must include definite and reasonable limits on the time within which the license will be issued or denied, and must provide for prompt judicial review.

In order to avoid a finding that the regulation grants such discretion to the State, the defendants must show that the regulation contains narrow, objective, and definite standards for the granting or denial of the license, such that the Court may conduct a meaningful review of the decision and readily determine whether or not a denial was based on legitimate grounds. See Shuttlesworth, 394 U.S. at 151; City of Lakewood, 486 U.S. at 758. The deadline and judicial review requirements are also aimed at avoiding unreviewable state censorship and prohibit the state from unreasonably or indefinitely postponing the issuance a license. See FW/PBS, 493 U.S. at 228 (“[U]ndue delay results in the unconstitutional suppression of protected speech.”).

Section 30-6-A24(c) on its face does not satisfy these procedural requirements. The regulation includes no standards by which the Department may approve or deny a request that an entertainer perform in particular locations. See Jersey’s All-American, 55 F. Supp. 2d at 1138; 3570 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268, 1274-74 (C.D. Cal. 1996); Venuti v. Riordan, 521 F. Supp. 1027, 1031 (D. Mass. 1981) (finding prior restraint

¹³The majority in FW/PBS stated that a third requirement, that the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court, see Freedman, 380 U.S. at 58-60, is not applicable in a case where the regulation does not “pass judgment on the content of any protected speech.” 493 U.S. at 229; but see id. at 612 (Brennan, J., concurring) (stating that Riley v. National Fed’n of Blind of N.C., Inc., 487 U.S. 781 (1988) mandates application of all three of the Freedman factors).

unconstitutional where statute “delegates complete discretion to licensing authorities and contains no standards whatsoever”); see also Tribe, *American Constitutional Law* (1st ed.), § 12:35 (stating that prior restraints without adequate procedural safeguards grant “officials the power to discriminate to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly”). Nor does the regulation provide for a time frame for a decision on the application. See Jersey’s All-American, 55 F. Supp. 2d at 1138; 3570 East Foothill Blvd, 912 F. Supp. at 1275-78. As to judicial review, the defendants concede that “[n]either the statutes nor the regulations of the agency require a hearing on [requests for approval of staging], and no administrative appeal for judicial review is available under the Connecticut Uniform Administrative Procedure Act.” Defs. Mem. Supp. Mot. Dismiss at 3; see Deja Vu of Kentucky, Inc. v. Lexington-Fayette Urban County Gov’t, No. CIV.A. 01-51-KSF, 2002 WL 649364, at *8 (E.D. Ky. April 17, 2002) (finding the regulation unconstitutional as it “fails to guarantee judicial review of licensing decisions within any particular time, let alone within five months”).

In sum, the broad language of the regulation and its delegation of complete discretion to a licensing authority without any standards and without judicial review allow the State to achieve indirectly through the prior approval process and selective enforcement the censorship of communicative content that would likely be unconstitutional if achieved directly.¹⁴ Accordingly, the regulation fails to meet the constitutional requirements for a prior restraint.

D. Irreparable Harm

¹⁴Defense counsel’s representation that the principal reason for the regulation was to address nude dancing indicates that such selective review and enforcement may have in fact been contemplated.

The defendants also argue that the plaintiff's complaint should be dismissed because no facts showing irreparable harm have been alleged in the plaintiff's amended complaint. The Court recognizes, however, that "violations of First Amendment rights are presumed irreparable." See Tunick v. Safir, 228 F.3d 135, 139 (2d Cir. 2000) (Calabresi, J. concurring) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")). "Accordingly, 'the very nature of [the plaintiff's] allegations' satisfies the requirement that he show irreparable injury." Tunick, 228 F.3d at 139. Accordingly, the Court declines to dismiss the plaintiff's complaint on this basis.

IV. Conclusion

The 2001 regulation reaches too far in requiring all types of entertainment to receive prior staging approval from the state. Although staging for the type of entertainment proposed by the Mardi Gras in its application could be subject to greater control through appropriate regulations, the method here employed by the State is too broad in its scope to withstand First Amendment scrutiny.

For the foregoing reasons, the defendants' motion to dismiss [Doc.# 12] is DENIED.

SO ORDERED this ____ day of June 2002, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE