

**THE DISTRICT COURT'S FAILURE TO REQUIRE PLAINTIFF
TO SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON
THE MERITS IS INCONSISTENT WITH THE PRINCIPLE OF
SEPARATION OF POWERS**

The fourth prong of Rule 65A requires an applicant to show that there “is a substantial likelihood that the applicant will prevail on the merits of the underlying claim.” Utah R. Civ. P. 65A(e)(4). That provision then curiously adds an alternative required showing: that “the case presents serious issues on the merits which should be the subject of further litigation.”¹

If read and applied literally, the “serious issues” requirement would make the “substantial likelihood” requirement meaningless. Why would an applicant bother trying to show a “substantial likelihood” of success on the merits when all the applicant needs to show is that the case presents “serious issues” that should be litigated? Many more cases will meet the “serious issues” threshold than the “substantial likelihood” of success threshold. Indeed, it is difficult to imagine any party arguing that the party’s claim does not present a “serious issue[] which should be the subject of further litigation.” *Id.* And many courts would likely agree.

The “serious issues” standard may or may not be an appropriate standard for a claim asserted by one private litigant against another. But whatever the “serious issues” test might mean in that context, when it comes to applying that test in the context of a request to suspend implementation of a law enacted through the Legislature’s exercise of its core lawmaking authority, that test must mean more. Due respect for a coordinate branch of government under the principle of separation of powers demands more. Merely showing that the “case presents serious issues on the merits” is not enough. When “the Legislature clearly articulates public policy, and the implications of that public policy are unmistakable, [courts] have the duty to honor those expressions of policy in [their] rulings.” *Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶ 10, 175 P.3d 560, 563.

This does not mean that courts are powerless to enjoin a legislative enactment in a proper case. The “substantial likelihood” test may still be applied with respect to legislative enactments without violating separation of powers

¹ This alternative required showing is not found in the court rules of any other state.

principles. Assume, for example, that the Legislature passed a law requiring an individual to have certain religious beliefs to qualify for public office. A plaintiff seeking a preliminary injunction against the enforcement of that law would very likely be able to show a substantial likelihood of prevailing on the merits. Article I, section 4 of the Utah Constitution explicitly states that “no religious test shall be required as a qualification for any office of public trust.” But an injunction against a law, like SB 174, that clearly is not contrary to any explicit provision of the Utah Constitution or Utah case law does not similarly give rise to a substantial likelihood of prevailing on the merits. Due respect for a coordinate branch of government under the principle of separation of powers requires the courts to decline to issue an injunction under those circumstances.

This approach is in harmony with the Court’s appropriate and consistent presumption of constitutionality for legislative enactments. *See, e.g., Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 30, 144 P.3d 1109, 1117 (“[W]hen confronted with a constitutional challenge to a statute, we presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality.”).

To show the due respect that the principle of separation of powers requires for a coordinate branch of government, the district court should have held plaintiff to at least a “substantial likelihood” of success on the merits standard. Applying that standard would have resulted in a denial of the preliminary injunction. The State’s brief demonstrates that plaintiff will not prevail on the merits, much less that there is a substantial likelihood of prevailing. Plaintiff has failed to carry its burden under the “substantial likelihood” prong of the Rule 65A test for the issuance of a preliminary injunction. This Court should reverse the preliminary injunction.