

**IN THE COUNTY COURT
IN AND FOR MONROE COUNTY, FLORIDA**

THE STATE OF FLORIDA,
Plaintiff,

CRIMES DIVISION
CASE NO.: 07-MM-149-PA (Simpson) and
07-MM-149-PB (Mirto)
JUDGE: Ptomey

vs.

ERNEST SIMPSON, and
ANTHONY MIRTO,
Defendants.

_____ /

**DEFENDANTS' SWORN JOINT MOTION TO DISMISS THE AMENDED
INFORMATION, STATEMENT OF UNDISPUTED MATERIAL FACTS, AND
MEMORANDUM OF LAW IN SUPPORT**

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MOTION TO DISMISS THE AMENDED INFORMATION

Why is the State of Florida so intent on prosecuting two members of the Gideons for peacefully handing out Bibles on a public sidewalk? Does the State now believe that its citizens will be safer if “protected” from Bibles? In a country founded on religious freedom, the actions of the State are a disgrace. The State could not make its first charges stick, so now it is grasping at other laws in a desperate attempt to punish the Defendants for what it is plainly their constitutional right to do. The State’s game of prosecutorial Russian-roulette is outrageous, and its application of its laws to the Defendants’ peaceful First Amendment activities is blatantly unconstitutional.

The State’s Amended Information is inexplicable. The same facts that justified the dismissal of the charges contained in the initial Information (and which compelled the State to “no action” those charges) also justify the dismissal of the charges in the Amended Information. Under F.S.A. § 810.0975(2)(b), the State still must prove that the Defendants’ Bible distribution did not constitute “legitimate business,” or that they did not have other authorization, license, or invitation to distribute Bibles to make out a prima facie violation,¹ which it simply cannot do under the undisputed facts.

¹ The idea that one must have “authorization, license, or invitation” to engage in protected expression on a public sidewalk is, of course, anathema to First Amendment law. One does not need permission to engage in expressive activities on a public sidewalk. As the Supreme Court has long recognized, by history and tradition public sidewalks are archetypal fora for such activities: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496 (1939).

Similarly, the idea that engaging in protected First Amendment expression on a public sidewalk is “illegitimate business,” as the State views the Defendants’ activities in this case, is also wildly contradictory to First Amendment law. This is true even when the sidewalk is adjacent to a public school. As the Supreme Court put it in *Grayned v. City of Rockford*,

[W]e think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. . . .

The undisputed material facts have not changed. They demonstrate that the Defendants' Bible distribution did constitute "legitimate business," and that they had authorization to conduct their Bible distribution, regardless of whether they are charged under § 810.097(1) or under § 810.0975(2)(b). As a matter of law, engaging in protected speech activities in a traditional public forum constitutes "legitimate business" pursuant to the First Amendment, and is "authorized" by the Constitution. As a matter of fact, the openness of the school's campus and surrounding area to nearly all activities clearly proves that Defendants were engaging in "legitimate business."

Indeed, although ignored by the State, the Constitution "authorizes" the Gideons to hand out Bibles from the public sidewalk. The Gideons need no permission from any state official to do what the Constitution permits. The State does not have the right to override the Constitution and prohibit free speech in a traditional public forum.

In addition to constitutional authorization, the Monroe County Sheriff's Office and two School officials, including the Principal, also authorized the Defendants' activities. Principal Martinson states in her sworn statement that she told the Defendants to remain on the public sidewalk while distributing Bibles, which is precisely what they did. Incredibly, the State arrested and is now prosecuting the Defendants for standing precisely where Principal Martinson authorized

....
Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize [a person's views] to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students.

408 U.S. at 118-19. Put another way, engaging in expressive activities on a public sidewalk is per se "legitimate" under the First Amendment. Any law that treats expressive activities on a public sidewalk as illegitimate and unlawful, like the Statute at issue here does, clearly runs afoul of the First Amendment.

them to stand!

Further, just one month prior to their distribution at Key Largo School, the Defendants and other Gideons distributed Bibles in front of Coral Shores Highschool on the same public bike path/sidewalk that runs in front of Key Largo School. Monroe County Sheriff's Office Deputies were present at the Coral Shores distribution, and did not disrupt or interfere with the Defendants' activities in any way. Is a Bible distribution "legitimate" in one School Safety Zone, but "illegitimate" in another? Of course not.

Finally, the virtually limitless activities occurring on the Key Largo School campus and within 500 feet of the School demonstrate that the Defendants' Bible distribution constituted "legitimate business." The School routinely opens its campus to members of the community during the time § 810.0975(2)(b) is in effect. Further, § 810.0975(2)(b) applies to every entrance into a School Safety Zone. Thus, under the State's interpretation of the Statute, joggers, bikers, and walkers using the public bike path/sidewalk in front of Key Largo School have "legitimate business," people transacting business at the numerous businesses located within the School's Safety Zone have "legitimate business," people driving their cars on US 1 in front of the School have "legitimate business," and people visiting one of the innumerable homes located within 500 feet of the School have "legitimate business." If all this conduct constitutes "legitimate business," then so must constitutionally protected expression.

The Amended Information must be dismissed because the State cannot prove a prima facie violation of § 810.0975(2)(b) under these facts; the Defendants did have "legitimate business" in the School Safety Zone, and they had authorization to distribute Bibles.

The only difference between § 810.097(1) and § 810.0975(2)(b) is that the State must prove

that the Defendants entered or remained in a School Safety Zone, rather than on School property. This fact is not in dispute. The Defendants' statement of undisputed facts, *infra*, demonstrate that they engaged in a peaceful, nondisruptive Bible distribution while standing on the public bike path/sidewalk adjacent to Key Largo School. The problem for the State is that this puts it in the untenable position of trying to justify the punishment of fundamental First Amendment activities in a quintessential traditional public forum. Under Supreme Court law that spans nearly a century, the State's application of § 810.0975(2)(b) to the Defendants' First Amendment activities is a blatant violation of their constitutional rights.

Indeed, the State's application of F.S.A. § 810.0975(2)(b) to prohibit Mr. Simpson's and Mr. Mirto's peaceful, nondisruptive distribution of Bibles from a public bike path/sidewalk violates clearly-established constitutional protections of free speech, due process, equal protection, and free exercise. The literature distribution and evangelical activities Mr. Simpson and Mr. Mirto were engaging in are the epitome of First Amendment expression, and took place on the quintessential traditional public forum, a public sidewalk. Moreover, the unbridled discretion exercised by the School official and police officers who enforced the Statute has been repeatedly condemned by the Supreme Court as violative of fundamental liberties. Therefore, application of F.S.A. § 810.0975(2)(b) to Mr. Simpson's and Mr. Mirto's activities is clearly unconstitutional.

In addition to nearly 100 years of legal support, the particular facts of this case also demonstrate the egregiousness of the State's application of F.S.A. § 810.0975(2)(b) to the Defendants' activities. Plainly, under the undisputed facts and well-settled law, Officer Perez had no right to order Mr. Simpson and Mr. Mirto to leave the public sidewalks, nor did he have a right to order them to remove themselves 500 feet from school property. Officer Perez's illegal and

physically abusive arrest was not based on any violation of any law, including the School Safety Zone statute. The Defendants were merely peacefully handing out Bibles on a public way. There was no call for Officer Perez's angry demeanor, his inappropriate handling of the situation, his abusive treatment of the Gideons, his stopping and arresting them while they were in the process of leaving, his unnecessary towing of the car (parked where many other cars were parked), his handcuffing the men behind their backs, his leaving them cramped in a hot car for nearly an hour (which should never be done to animals, never mind to human beings), nor his mocking the Gideons' religious beliefs stating "now you can pray to Jesus all the way to jail."

Moreover, the State claims that the Statute at issue serves the purpose of protecting school children from dangerous or harmful persons, like drug dealers, gang members, and pedophiles, which the Defendants clearly are not. Rather, the Defendants are long-time residents of Key Largo. Both own and operate businesses that serve members of the Key Largo community. Mr. Simpson's children attended Key Largo School, and Mr. Mirto has two children who currently attend the School. Mr. Mirto knows School Principal Annette Martinson and interacts with her on a routine basis because his children currently attend the School. And the Gideons notified both the police and the school prior to the Bible distribution. The State's interest in protecting children from harmful persons is not served in any way whatsoever when it arrests and prosecutes two parents who had or have children who attend Key Largo School, are well-known and respectable members of the Key Largo community, and at least one of whom is known to the Principal of the School, just because they were handing out free Bibles from a public sidewalk.

Given the above facts and the well-settled law, there is no conceivable explanation for the State persisting in its prosecution of these two men. Nonetheless, the State persists. Therefore,

pursuant to Florida Rule of Criminal Procedure 3.190, Defendants Ernest Simpson and Anthony Mirto move this Court to dismiss the charge of Trespass in a School Safety Zone brought against them under Fla. Stat. Ann. § 810.0975(2)(b). The Defendants rely on two separate grounds in making this motion: 1) the undisputed facts do not establish a prima facie case of guilt against the Defendants; and 2) the undisputed facts provide Mr. Simpson and Mr. Mirto with a valid defense under the free speech, free exercise of religion, due process, and equal protection provisions of the United States Constitution, and under Florida's Religious Freedom Restoration Act. The Amended Information must be dismissed.

STATEMENT OF MATERIAL UNDISPUTED FACTS

The Defendants hereby state the following material and undisputed facts in support of their motion to dismiss:

1. Ernest Simpson and Anthony Mirto are long-time residents of Key Largo, and each own businesses that serve the Key Largo Community. (Ex. 1, ¶ 2; Ex. 2, ¶ 2.)
2. Mr. Simpson has two children who attended Key Largo Elementary School in the past. (Ex. 1, ¶ 3.)
3. Mr. Mirto has two children who currently attend Key Largo School. (Ex. 2, ¶ 3.)
4. Mr. Mirto knows Key Largo School Principal Annette Martinson, and has interacted with her on numerous occasions at the School. (Ex. 2, ¶ 4.)
5. Mr. Simpson and Mr. Mirto are members of the Gideons International. (Ex. 1, ¶ 4; Ex. 2, ¶ 7.)
6. The purpose of the Gideons is to spread the Christian religion, which it achieves through, among other things, the distribution of Bibles. (Ex. 1, ¶ 6; Ex. 2, ¶ 9.)

7. Mr. Simpson and Mr. Mirto sincerely believe that they have a religious obligation to share their Christian faith with others, and they fulfill this obligation in part by distributing Bibles to public school students from the public bike path/sidewalk that abut schools in Key Largo. (Ex. 1, ¶ 7; Ex. 2, ¶ 10.)
8. In December 2006, six members of the Gideons Key Largo Camp, including Mr. Simpson and Mr. Mirto, distributed Bibles at Coral Shores Highschool. (Ex. 1, ¶¶ 12-13; Ex. 2, ¶¶ 11, 14; Ex. 3, ¶ 12.)
9. Key Largo School and Coral Shores School are both adjacent to the County-maintained public bike path/sidewalk. (Ex. 3, ¶ 14.)
10. Approximately two weeks prior to the distribution at Coral Shores, Thomas Gray (vice president of the Gideons Key Largo Camp) called Deputy Ralph Williams at the Monroe County Sheriff's Office to inform him of the planned distribution. (Ex. 3, ¶ 15.)
11. Deputy Williams indicated that the distribution was permissible and that he would be at Coral Shores on the day of the distribution. (Ex. 3, ¶ 16.)
12. On the day of the planned Bible distribution at Coral Shores, Deputy Williams and several other police officers showed the Gideons present where to stand on the public bike path/sidewalk. (Ex. 3, ¶ 18.)
13. The Gideons distributed Bibles to students while standing on the public bike path/sidewalk next to the entrances and exits to the School. (Ex. 3, ¶ 19; Ex. 1, ¶ 13; Ex. 2, ¶ 14.)
14. The Gideons encountered no problems during the Bible distribution at Coral Shores. (Ex. 3, ¶ 20; Ex. 1, ¶ 14; Ex. 2, ¶¶ 15-16.)
15. No one complained or objected to the Bible distribution at Coral Shores. (Ex. 3, ¶ 20; Ex.

- 1, ¶ 13; Ex. 2, ¶ 15.)
16. On January 19, 2007, five Gideons—Mr. Simpson, Mr. Mirto, Mitchell Avnaim, Thomas Gray, and Martin Haymond—distributed Bibles from the public bike path/sidewalk in front of Key Largo School. (Ex. 1, ¶¶ 15, 21, 23; Ex. 2, ¶¶ 17, 24.)
 17. Thomas Gray, vice president of the Gideons Key Largo Camp, called the Monroe County Sheriff's Office two weeks prior to the January 19, 2007 distribution and obtained approval of the planned Bible distribution at Key Largo School from Deputy Ralph Williams. (Ex. 3, ¶ 22-24.)
 18. On the day of the distribution, Mr. Mirto and Mr. Simpson arrived at the School in Mr. Mirto's truck around 2:30 p.m. (Ex. 1, ¶¶ 16-17; Ex. 2, ¶ 18.)
 19. Mr. Mirto parked his truck on a grassy area in front of the School. (Ex. 1, ¶ 17; Ex. 2, ¶ 18.)
 20. This grassy area is not located on School grounds, and is regularly used as a parking area by parents picking up their children from the School. (Ex. 1, ¶ 17; Ex. 2, ¶ 18.)
 21. At the time Mr. Mirto parked on the grassy area, approximately 8 other cars were also parked on it. (Ex. 2, ¶ 18.)
 22. Mr. Mirto and Mr. Simpson met with the two other Gideons present on the public bike path/sidewalk and prayed together. (Ex. 1, ¶ 19; Ex. 2, ¶ 22; Ex. 3, ¶ 26.)
 23. Mr. Gray and another Gideon went into the School approximately 10-15 minutes prior to the distribution beginning to notify the School of their plans. (Ex. 1, ¶ 20; Ex. 2, ¶ 23; Ex. 3, ¶ 27.)
 24. Once inside the School's administrative office, Mr. Gray asked the secretary if he could speak with the Principal. (Ex. 3, ¶ 28.)

25. The secretary told Mr. Gray that the Principal was busy, but asked if she could help. (Ex. 3, ¶ 29.)
26. Mr. Gray told the secretary that several Gideons would be on the public bike path/sidewalk in front of the School distributing Bibles after School was dismissed. (Ex. 3, ¶ 30.)
27. The secretary told Mr. Gray that the Bible distribution was okay and that they could go forward with it. (Ex. 3, ¶ 31.)
28. After the School approved the Bible distribution, Mr. Simpson and Mr. Mirto stood on the public bike path/sidewalk at the School's north exit to hand out Bibles. (Ex. 1, ¶¶ 21, 23; Ex. 2, ¶ 24; Exs. 6-8 (pictures depicting where Defendants stood on public bike path/sidewalk).)
29. Shortly after taking their positions, State Florida Patrol Officer Gretchen Glenn drove up to where Mr. Simpson and Mr. Mirto were standing on the public bike path/sidewalk. (Ex. 1, ¶ 32; Ex. 2, ¶ 27.)
30. Officer Glenn gave no indication that Mr. Simpson and Mr. Mirto could not distribute Bibles from the public bike path/sidewalk. (Ex. 1, ¶ 32; Ex. 2, ¶ 27.)
31. Key Largo School Principal Annette Martinson received parental complaints about Mr. Simpson's and Mr. Mirto's Bible distribution. (Ex. 20.)
32. After receiving these complaints, Principal Martinson went outside to observe Mr. Simpson and Mr. Mirto. (Ex. 20.)
33. Principal Martinson saw where Mr. Simpson and Mr. Mirto were standing on the public bike path/sidewalk, and approved of their positions. (Ex. 1, ¶¶ 33-34; Ex. 2, ¶¶ 28-30.)
34. Even though Mr. Simpson and Mr. Mirto were standing on the public bike path/sidewalk,

- Principal Martinson asked Mr. Simpson and Mr. Mirto to move back a little bit. (Ex. 2, ¶ 29.)
35. Principal Martinson also motioned with her hand for each of them to move back. (Ex. 1, ¶ 34; Ex. 2, ¶¶ 29-31.)
36. Mr. Simpson and Mr. Mirto politely complied by stepping to the western edge of the public bike path/sidewalk. (Ex. 1, ¶ 34; Ex. 2, ¶¶ 29-30.)
37. Principal Martinson gave Mr. Simpson and Mr. Mirto an okay symbol with her hand after they moved to the western edge of the public bike path/sidewalk, indicating her approval of their position. (Ex. 1, ¶ 34; Ex. 2, ¶¶ 29-30.)
38. The entire time Mr. Simpson and Mr. Mirto distributed Bibles outside Key Largo School, they were standing on the public bike path/sidewalk. (Ex. 1, ¶ 26; Ex. 2, ¶ 38.)
39. At no time did Mr. Simpson or Mr. Mirto step onto School property while distributing Bibles. (Ex. 1, ¶ 26; Ex. 2, ¶ 38.)
40. The public bike path/sidewalk crosses over the School's north exit driveway, where Mr. Simpson and Mr. Mirto were located to distribute Bibles. (Ex. 1, ¶ 24; Ex. 2, ¶ 36.)
41. The boundary of the public bike path/sidewalk is clearly marked as it crosses over the School's north exit by a white painted line. (Ex. 1, ¶ 24; Ex. 2, ¶ 36; Ex. 8 (picture depicting white line painted on School's north driveway).)
42. This portion of the School's north exit driveway is part of the public bike path/right of way, and is not School property. (Ex. 1, ¶ 25; Ex. 2, ¶ 37.)
43. Mr. Simpson and Mr. Mirto did step onto the public bike path/sidewalk where it crosses over the School's north exit driveway when handing Bibles to people in vehicles who were

- stopped and who indicated they wanted to receive Bibles. (Ex. 1, ¶ 25; Ex. 2, ¶ 37.)
44. At no time while they were distributing Bibles did Mr. Simpson or Mr. Mirto step off of the portion of the School's north exit driveway that is part of the public bike path/sidewalk. (Ex. 1, ¶ 25; Ex. 2, ¶ 37.)
45. Principal Martinson states in her sworn statement that she observed Mr. Simpson and Mr. Mirto "going onto the School driveway to hand out Bibles" after she had walked to the School's southern entrance to check for other people distributing Bibles. (Ex. 20.)
46. The only portion of the School's north driveway that can be seen from the School's southern entrance is the portion the public bike path/sidewalk crosses over. (Ex. 1, ¶¶ 71-74; Ex. 2, ¶¶ 81-84; Exs. 13-14 (pictures depicting view of School's north exit from School's south entrance).)
47. Principal Martinson's above testimony does not conflict with Mr. Mirto's and Mr. Simpson's testimony that they remained on the public bike path/sidewalk the entire time they distributed Bibles because the portion of the driveway Principal Martinson saw the Defendants on is part of the public bike path/sidewalk, and is not School property. (Ex. 1, ¶¶ 24-26, 71-74; Ex. 2, ¶¶ 36-37, 81-84.)
48. During the time Mr. Simpson and Mr. Mirto distributed Bibles, approximately 10 people walked past them on the public bike path/sidewalk. (Ex. 2, ¶ 47.)
49. Mr. Simpson and Mr. Mirto gave Bibles to approximately 5 of these people. (Ex. 2, ¶ 47.)
50. Mr. Simpson and Mr. Mirto did not force Bibles on any passersby. (Ex. 2, ¶ 49.)
51. They would politely ask an approaching person if they wanted a free Bible. (Ex. 2, ¶ 48.)
52. If the person responded in the affirmative, they would hand the person a Bible. (Ex. 2, ¶ 48.)

53. If the person responded in the negative, they would simply leave the person alone. (Ex. 2, ¶ 48.)
54. During the time Mr. Simpson and Mr. Mirto distributed Bibles, approximately 8-10 vehicles drove past them on the School's north exit. (Ex. 2, ¶ 43.)
55. Mr. Simpson and Mr. Mirto gave Bibles to people in approximately 3 of these vehicles. (Ex. 2, ¶ 43.)
56. When a car drove up and stopped at the north exit, Mr. Simpson or Mr. Mirto would offer a Bible to a driver with his or her window up by standing on the public bike path/sidewalk and holding the Bible out for the driver to see. (Ex. 2, ¶ 44.)
57. If the driver indicated a desire to receive a Bible, Mr. Simpson or Mr. Mirto would approach the window of the car and hand the driver the amount of Bibles requested. (Ex. 2, ¶ 44.)
58. The process for distributing Bibles to people inside vehicles, from offering the Bible to approaching the vehicle and handing the person Bibles, took about 5 seconds. (Ex. 2, ¶ 44.)
59. Mr. Simpson's and Mr. Mirto's distribution of Bibles from the public bike path/sidewalk did not disrupt or impede traffic in any way. (Ex. 2, ¶ 46.)
60. No School official told Mr. Simpson and Mr. Mirto to leave during the time they distributed Bibles at the School's north exit. (Ex. 2, ¶ 34.)
61. No School official told Mr. Simpson and Mr. Mirto that they had stepped onto School property while distributing Bibles. (Ex. 2, ¶ 34.)
62. A parent, Mr. Miguel Diaz, requested several Bibles from Mr. Mirto. (Ex. 2, ¶ 41.)
63. After being handed four Bibles, Mr. Diaz went onto school property near the Administration building and sat at the picnic tables awaiting his children to be dismissed. (Ex. 2, ¶ 41.)

64. Approximately 15 minutes after their Bible distribution activities began, Officer John Perez drove up in his patrol car behind Mr. Simpson. (Ex. 1, ¶ 37; Ex. 2, ¶ 50.)
65. When he arrived at the scene, Officer Perez observed that Mr. Simpson, Mr. Mirto, and Mitchell Avnaim (another Gideons member distributing Bibles at the School's north exit) were "standing on the east side of the bike path at the north end exit of the School parking/pick up lot." (Ex. 18; Ex. 19.)
66. Officer Perez got out of the police car and asked if he could help Mr. Simpson, Mr. Mirto, and Mr. Avnaim. (Ex. 1, ¶ 37; Ex. 2, ¶ 51.)
67. Mr. Simpson explained to Officer Perez that they were members of the Gideons who were there to hand out Bibles. (Ex. 1, ¶ 39; Ex. 2, ¶ 52.)
68. Officer Perez told Mr. Simpson that someone at the School had complained and that the three men had to leave. (Ex. 1, ¶ 40.)
69. Mr. Simpson asked Officer Perez where they could set up to distribute Bibles, and he stated that they must be 500 feet from the School. (Ex. 1, ¶ 41; Ex. 2, ¶ 53.)
70. Mr. Simpson was not certain where he needed to stand to be 500 feet from the School, so he asked Officer Perez if he could show the men exactly where they could distribute Bibles from without getting into trouble. (Ex. 1, ¶ 42.)
71. Officer Perez responded that the men had to be ½ mile from the School. (Ex. 1, ¶ 42.)
72. Mr. Simpson again asked Officer Perez for clarification on where the men were permitted to stand to hand out Bibles. (Ex. 1, ¶ 43.)
73. Officer Perez then threatened the men with arrest if they did not leave. (Ex. 1, ¶ 43; Ex. 2, ¶ 55.)

74. Mr. Simpson tried to read Officer Perez's badge to figure out what his name was. (Ex. 1, ¶ 44.)
75. Officer Perez again threatened the men with jail if they did not start moving. (Ex. 1, ¶ 44.)
76. Mr. Simpson and Mr. Mirto collected their Bibles and started walking to Mr. Mirto's truck. (Ex. 1, ¶ 45; Ex. 2, ¶ 56.)
77. Mr. Avnaim had driven separately, and at this point walked to his own car to leave. (Ex. 1, ¶ 46; Ex. 2, ¶ 56.)
78. While walking to Mr. Mirto's truck, Mr. Simpson tried to read the license plate number of Officer Perez's car so he could later identify the Officer. (Ex. 1, ¶ 45.)
79. Officer Perez jumped out of his car angrily and approached Mr. Simpson in a threatening manner, yelling "What are you looking at?" (Ex. 1, ¶ 47; Ex. 2, ¶ 58.)
80. Mr. Simpson told Mr. Perez that he was looking at the license plate of his car so he could identify him. (Ex. 1, ¶ 48.)
81. Officer Perez told Mr. Simpson that if he wanted a business card, he could just ask for one. (Ex. 1, ¶ 48; Ex. 2, ¶ 60.)
82. Mr. Simpson requested a card and Officer Perez gave him one. (Ex. 1, ¶ 48.)
83. Officer Perez again threatened Mr. Simpson with jail if he did not leave. (Ex. 1, ¶ 48.)
84. Mr. Simpson and Mr. Mirto continued walking to Mr. Mirto's truck. (Ex. 1, ¶ 49.)
85. Before he got into Mr. Mirto's truck, Mr. Simpson called the Monroe County Sheriff's Office to speak with Officer Perez's supervisor. (Ex. 1, ¶ 49.)
86. Mr. Simpson believed there was a simple misunderstanding that could be cleared up with a phone call to the Sheriff's Office, since the Gideons had received permission to distribute

- Bibles from the public bike path/sidewalk. (Ex. 1, ¶ 49.)
87. A representative of the Sheriff's Office took down Mr. Simpson's name and number and told him he would be called back. (Ex. 1, ¶ 49.)
88. Mr. Simpson arrived at Mr. Mirto's truck after he got off the phone with the Sheriff's Office and got in. (Ex. 1, ¶ 50.)
89. Mr. Mirto was on his cell phone at the time trying to call the Gideons Key Largo Camp President to inform him what was happening. (Ex. 1, ¶ 50; Ex. 2, ¶ 62.)
90. While Mr. Mirto was trying to contact the Gideons President, Mr. Simpson called Mr. Gray to inform him of what was happening. (Ex. 1, ¶ 50.)
91. As soon as Mr. Mirto got into his truck, he started the truck and put it into gear. (Ex. 2, ¶ 61.)
92. Mr. Mirto tried to pull onto US 1 while he was attempting to call the Gideons Camp President, but he could not pull out immediately. (Ex. 2, ¶ 63.)
93. As Mr. Mirto was creeping out onto US 1 to leave, three police cars blocked him from pulling out. (Ex. 2, ¶ 64.)
94. Monroe County Sheriff Officers came to the driver and passenger side windows and asked Mr. Simpson and Mr. Mirto to get out. (Ex. 1, ¶ 52; Ex. 2, ¶ 65.)
95. Officer Perez asked Mr. Simpson, "Didn't I say to leave?" (Ex. 1, ¶ 53.)
96. Before Mr. Simpson could respond, Officer Perez pointed south and asked Mr. Simpson, "Who is that man down there?" (Ex. 1, ¶ 53.)
97. There were several people located in the direction Officer Perez was pointing, and Mr. Simpson did not know who Officer Perez was referring to. (Ex. 1, ¶ 54.)

98. Mr. Simpson asked Officer Perez to clarify, but Officer Perez angrily repeated the same question. (Ex. 1, ¶ 54.)
99. Mr. Simpson again replied that he did not know who Officer Perez was referring to. (Ex. 1, ¶ 54.)
100. Officer Perez then forced Mr. Simpson to turn around and placed him in handcuffs behind his back. (Ex. 1, ¶ 55.)
101. Officer Perez then instructed the Officer by Mr. Mirto (Officer Gaete) to handcuff Mr. Mirto as well. (Ex. 1, ¶ 55; Ex. 2, ¶ 70.)
102. Mr. Mirto told Officer Gaete that he had children who attended Key Largo School. (Ex. 2, ¶ 71.)
103. Officer Gaete asked if Mr. Mirto was there to pick them up. (Ex. 2, ¶ 71.)
104. Mr. Mirto responded that the picking up of his children was already taken care of. (Ex. 2, ¶ 71.)
105. Officer Gaete then accused Mr. Mirto of lying that he had children who attended the School. (Ex. 2, ¶ 71.)
106. Officer Perez pushed Mr. Simpson to the back door of his patrol car. (Ex. 1, ¶ 56.)
107. When Officer Perez opened the car door, Mr. Simpson started to get in. (Ex. 1, ¶ 56.)
108. Officer Perez yelled at Mr. Simpson “Did I tell you to move! You only move when I say!” (Ex. 1, ¶ 56.)
109. Mr. Simpson stopped moving. (Ex. 1, ¶ 56.)
110. Officer Perez then pushed Mr. Simpson to the door on the other side of the car and pushed him into the backseat. (Ex. 1, ¶ 56.)

111. As Officer Perez pushed Mr. Simpson into the backseat, he said “Now you can pray to Jesus all the way to jail.” (Ex. 1, ¶ 56; Ex. 2, ¶ 72.)
112. Mr. Simpson and Mr. Mirto were in a crouched position in the backseat of the patrol car, because the front seat was pushed all the way back. (Ex. 1, ¶ 57.)
113. It was extremely hot in the police car, because it was around 90 degrees outside and Officer Perez closed the doors, shut the windows, and turned off the air conditioning. (Ex. 1, ¶ 57; Ex. 2, ¶ 73.)
114. Mr. Mirto’s and Mr. Simpson’s handcuffs were very tight and painful, and were behind their backs. (Ex. 1, ¶ 57; Ex. 2, ¶ 73.)
115. The men were in these circumstances for approximately 45 minutes to an hour. (Ex. 1, ¶ 58; Ex. 2, ¶ 73.)
116. Mr. Mirto’s cuffs were so tight that his hands went numb. (Ex. 2, ¶ 73.)
117. Mr. Mirto’s hands are still numb and tingling to this day from the tightness of the handcuffs. (Ex. 2, ¶ 75.)
118. Mr. Mirto went to a neurological center a few days after the arrest and was told that he had compressed nerves in both wrists due to the tightness of the handcuffs. (Ex. 2, ¶ 76.)
119. On the way to jail, Officer Perez told Mr. Simpson and Mr. Mirto that they would be released within an hour and a half. (Ex. 2, ¶ 77.)
120. The men were not released from jail until four hours after they arrived. (Ex. 2, ¶ 77.)
121. While Mr. Simpson and Mr. Mirto were in the police car, Mr. Gray came to the School’s north exit to speak with the officers. (Ex. 3, ¶¶ 45-48.)
122. As Mr. Gray approached the scene, he noted that there were around 5-6 officers present. (Ex.

- 3, ¶ 46.)
123. Mr. Gray ascertained that Officer Perez was in charge and went to speak with him. (Ex. 3, ¶ 47.)
124. Mr. Gray asked Officer Perez what Mr. Simpson and Mr. Mirto had been charged with. (Ex. 3, ¶ 49.)
125. Officer Perez angrily responded to Mr. Gray that he would find out when the report came out. (Ex. 3, ¶ 49.)
126. Mr. Gray also asked what statute the men had violated, and Officer Perez responded that the men had to be 500 feet from the School. (Ex. 3, ¶ 50.)
127. Mr. Gray observed that Officer Perez was irate and uncooperative, and decided to call Deputy Ralph Williams about the situation since he had given approval for the distribution. (Ex. 3, ¶ 51.)
128. Deputy Williams told Mr. Gray that he would email Officer Perez, and that Officer Perez could read the email in his patrol car. (Ex. 3, ¶ 52.)
129. Mr. Gray told Officer Perez that there was an email in his car from another officer telling him that the Gideons had a right to distribute bibles from the public bike path/sidewalk. (Ex. 3, ¶ 53.)
130. Officer Perez told Mr. Gray that he did not care what anyone else had to say. (Ex. 3, ¶ 55.)
131. Mr. Gray pleaded with Officer Perez to allow him to drive Mr. Mirto's truck home, but Officer Perez refused and had the truck towed. (Ex. 3, ¶ 57.)
132. The entire time between when Officer Perez arrived at the School and when he arrested Mr. Simpson and Mr. Mirto, they were on the public bike path/sidewalk or other non-School

property. (Ex. 1, ¶ 61, Ex. 2, ¶ 78.)

MEMORANDUM OF LAW

The Amended Information against Mr. Simpson and Mr. Mirto must be dismissed for two reasons. First, the Defendants' activities do not constitute a violation of F.S.A. § 810.0975(2)(b) because their Bible distribution constituted "legitimate business," and because the Constitution, School officials and police officers authorized them to distribute Bibles.

Second, subjecting Mr. Simpson and Mr. Mirto to criminal prosecution for exercising their First Amendment rights to distribute religious literature in a traditional public forum is a constitutional violation as a matter of law. Therefore, the Amended Information against Mr. Simpson and Mr. Mirto must be dismissed.

I. DISMISSAL OF THE AMENDED INFORMATION IS REQUIRED PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.190(c)(4).

A defendant may move for dismissal of an information pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). A motion to dismiss under this rule is evaluated according to the following test:

Initially, the defendant in his sworn motion must allege that the material facts of the case are undisputed, describe what the undisputed facts are, and demonstrate that the undisputed facts fail to establish a prima facie case or that they establish a valid defense (either an affirmative defense or negation of an essential element of the charge).

Ellis v. State, 346 So.2d 1044, 1045 (Fla. 1st DCA 1977); *State v. Rutledge*, 611 So.2d 1263, 1264 (Fla. 2d DCA 1992). The purpose of Rule 3.190(c)(4) is to "test the legal sufficiency of the underlying case, i.e. whether there is a dispute of material fact (not just a dispute of unsupported conclusory allegations) or whether there exists a legal defense that would summarily decide the

case.” *State v. Nunez*, 881 So. 2d 658, 660 (Fla. 3d DCA 2004).

Once the defendant has satisfied the requirements of the test set forth in *Ellis*, the burden shifts to the State to “place a material issue of fact in dispute or establish that the undisputed facts do establish a prima facie case.” *Ellis*, 346 So.2d at 1046. The State cannot survive a sworn motion to dismiss by merely disputing the allegations of fact contained in it; “more than a did not, did so swearing match” is required. *Nunez*, 881 So. 2d at 661. Rather, the “State is required to *specifically* dispute the material facts alleged by defendant or *add additional material facts* that meet the minimal requirements of a prima facie case of guilt.” *Id.* (emphasis in original). Thus, in responding to a sworn motion to dismiss, the duty on the State is to include facts that conflict with the Defendants’ statement of undisputed materials facts. It is not enough for the State to merely state that the facts in Defendants’ motion to dismiss are not true. The State must prove a prima facie case exists, or the Information must be dismissed.

A. THERE ARE NO MATERIAL ISSUES OF FACT IN DISPUTE.

For the purposes of this Motion, the Defendants maintain that there are no material facts in dispute. The undisputed material facts Defendants rely on in support of this Motion are stated in the numbered paragraphs above. The State’s facts (contained within the Arrest Reports (Exs. 18-19) and Key Largo School Principal Annette Martinson’s Sworn Statement (Ex. 20)) are consistent with the Defendants’ Statement of Undisputed Material Facts (“DSUMF”). Indeed, the State’s facts confirm the primary material facts that justify the dismissal of the Amended Information: 1) the Defendants’ Bible distribution constituted “legitimate business”; and 2) Defendants were authorized to conduct their Bible distribution. The State’s facts also confirm that the Defendants remained on the public bike path/sidewalk the entire time they distributed Bibles.

The facts are clear and undisputed. The only question that must be answered by this Court is whether Defendants can be held criminally liable for handing out Bibles on a public sidewalk.

B. THE UNDISPUTED MATERIAL FACTS DO NOT CONSTITUTE A VIOLATION OF § 810.0975(2)(b).

In order to violate § 810.0975(2)(b), Mr. Simpson and Mr. Mirto had to enter or remain upon a School Safety Zone without legitimate business, or without authorization, license, or invitation.

The statute in relevant part states:

During the period from 1 hour prior to the start of a school session until 1 hour after the conclusion of a school session, it is unlawful for any person to enter the premises or trespass within a school safety zone or to remain on such premises or within such school safety zone when that person does not have legitimate business in the school safety zone or any other authorization, license, or invitation to enter or remain in the school safety zone. Any person who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

F.S.A. § 810.0975(2)(b).

The Defendants engaged in their First Amendment activities while standing on the public bike path/sidewalk in front of Key Largo School, and so were within a School Safety Zone as defined by the Statute (i.e., within 500 feet of School property). They also engaged in these activities within one hour after School was dismissed. However, the State cannot make out a prima facie case because the undisputed material facts show Defendants had legitimate business and obtained authorization for their Bible distribution.

1. The Defendants' Bible distribution constituted "legitimate business" under the Statute.

The undisputed material facts demonstrate that the Defendants' Bible distribution constituted "legitimate business" under § 810.0975(2)(b). The Defendants received permission from the Monroe County Sheriff's Office to conduct the Bible distribution in front of Key Largo School two weeks

prior to the distribution date. (DSUMF ¶ 17.) The Bible distribution was also approved by two School officials: the School secretary acting as Principal Martinson’s designee (DSUMF ¶¶ 23-27), and Principal Martinson (DSUMF ¶¶ 32-37.) Principal Martinson states in her sworn statement that she informed the Defendants to “stay on the bike path or west of it” while distributing Bibles. (Ex. 20.) The undisputed facts demonstrate that this is precisely what the Defendants did. Why are they now being prosecuted by the State for conducting their Bible distribution from exactly the position the Principal indicated was permissible? In addition to demonstrating that the Defendants’ activities qualify as “legitimate business,” these facts also show the egregiousness of the State’s persistence in this litigation.

In addition, just one month prior to their distribution at Key Largo School, the Defendants and other Gideons distributed Bibles in front of Coral Shores Highschool under nearly identical circumstances. (DSUMF ¶¶ 8-15.) At Coral Shores, the Defendants handed out Bibles while standing on the same public bike path/sidewalk that runs in front of Key Largo School. (DSUMF ¶13.) Monroe County Sheriff’s Office Deputies were present at the Coral Shores distribution, and permitted it to occur. (DSUMF ¶ 12, 14-15.) Both Bible distributions occurred within a School Safety Zone. At Coral Shores, the distribution obviously constituted “legitimate business” because the police present permitted the distribution to go forward with no interruption. The same is true of the distribution at Key Largo School, which, like the distribution at Coral Shores, was conducted on the public bike path/sidewalk adjacent to the School and within the School Safety Zone.

Further, in light of the many community uses permitted on School property, both with and without specific permission, it is clear that distributing Bibles should be considered “legitimate business.” *See infra* § III.B. Indeed, Key Largo School policies open the School facilities to broad

use by the community. School policy permits use of the School for “literary, scientific, religious, educational, recreational, political, economic, artistic, character building and welfare nature” uses. (Ex. 12.) The School even permits the use of School facilities “during the hours school is in session” (*id.*), which is during the time frame § 810.0975(2)(b) applies. In practice, Key Largo School is used by a wide array of community groups and individuals for a broad range of activities both during and after School hours. The cub scouts, local churches, a community band, a theatrical group, local youth recreational sports leagues, a Tae Kwon Do instructor, and many more use the School’s facilities. The Defendants’ Bible distribution on the public sidewalk in front of Key Largo School clearly constituted “legitimate business” given the openness of the School’s campus.

Moreover, reading the plain wording of the Statute, any entrance within the 500 foot zone is a violation. That would include every car driving by the School on US 1, every person walking, jogging or biking on the bike path in front of the School, every person visiting a business located within 500 feet of the School, every person visiting a residence located within 500 feet of the School, every person engaging in protected speech in that zone, and much more. (Ex. 2, ¶¶ 87-102, Exs. 23-34 (pictures and maps showing the homes, businesses, and other uses located within the school safety zones around Key Largo School and Coral Shores High School). So how can the State reconcile the fact that it permits the cars, joggers, bikers, and many others within the zone, but not the speech? It can only do so by either considering these activities to be “legitimate business” or claiming that they have authorization. But it is unconstitutional for the State to consider certain activities or conduct as permissible while not extending the same to protected speech. The State turns the Constitution on its head.

2. The Defendants obtained authorization, invitation, or license to conduct their Bible distribution.

The undisputed material facts also demonstrate that the Defendants obtained “authorization, license, or invitation” to distribute Bibles in front of the Key Largo School. It must be kept in mind that the Constitution authorizes the Gideons to engage in protected religious speech on the public sidewalks. The State can only infringe on this right if they do so via a content neutral regulation, based on a compelling interest, and in a narrowly tailored manner. As discussed *infra*, they have failed to meet these requirements here.

In addition to the legal authorization, two weeks prior to the Bible distribution planned for January 19, 2007 at Key Largo School, Monroe County Sheriff’s Office Deputy Ralph Williams approved the distribution. (DSUMF ¶ 17). On the day of the distribution, Thomas Gray went into the School office to inform the School of the Bible distribution. (*Id.* ¶ 23.) Mr. Gray requested to speak with the Principal. (*Id.* ¶ 24.) The School secretary told Mr. Gray that the Principal was busy, but that she could help him. (*Id.* ¶ 25.) Mr. Gray informed the secretary of the Gideons planned Bible distribution and she approved the distribution on behalf of the Principal as her designee. (*Id.* ¶¶ 26-27.) Shortly after Mr. Simpson and Mr. Mirto took their positions on the public bike path/sidewalk near the School’s north exit, Principal Annette Martinson observed where they were standing and approved of their position. (*Id.* ¶¶ 32-37.)

Principal Martinson’s sworn statement is consistent with this testimony. In her statement, Principal Martinson states that she told the Defendants that they “must stay on the bike path or west of it” while distributing Bibles. (Ex. 20.) Principal Martinson indicated her approval of their positions by giving each of them the “okay” symbol with her hand. (DSUMF ¶ 37.) These facts

clearly demonstrate that the Defendants had authorization from two School officials and the Monroe County Sheriff's Office to distribute Bibles. Therefore, § 810.0975(2)(b) does not apply to their activities and the charges should be dismissed.

The undisputed facts demonstrate that the State cannot make out a prima facie violation of § 810.0975(2)(b). The fact that the Defendants' Bible distribution constituted "legitimate business," and that they obtained authorization from School and police officials to distribute Bibles, shows that they cannot be charged or convicted under its plain language. Incredibly, the State is prosecuting the Defendants for conducting their Bible distribution from the exact location the Principal told them to conduct it from. Given the undisputed facts, the State's recharging of the Defendants with a violation of § 810.0975(2)(b) is inexplicable. The facts simply do not support a prima facie case, and the Amended Information must be dismissed.

II. THE DEFENDANTS HAVE VALID FEDERAL CONSTITUTIONAL AND STATE STATUTORY DEFENSES TO THE CHARGES AGAINST THEM.

In addition to not being able to make out a prima facie case against the Defendants under the undisputed material facts, the State's misapplication of the Statute to the Defendants' peaceful, non-disruptive distribution of Bibles on a public right of way is an egregious violation of Mr. Simpson's and Mr. Mirto's fundamental constitutional rights of Free Speech, Due Process, Free Exercise of Religion, and Equal Protection.

A. THE STATUTE VIOLATES THE RIGHT TO FREEDOM OF SPEECH AS APPLIED TO THE DEFENDANTS.

Before addressing the Defendants' free speech defenses specifically, it is important to note that one federal court has already addressed the question of whether the Gideons may be prohibited from distributing Bibles from a sidewalk adjacent to a public school, and answered that question

with a resounding “No.”

In *Bacon v. Bradley-Bourbonnais High School Dist. No. 307*, 707 F. Supp. 1005, 1008 (C.D. Ill. 1989), a public school prohibited a Gideon from distributing Bibles from a public sidewalk adjacent to the school. The federal district court held that the sidewalk at issue (even though owned by the school and located on school property) was a traditional public forum. *Id.* at 1008. The School in *Bacon* proffered the same interests as the State does here to justify their prohibition on Gideon Bible distributions: protecting students from dangerous people like gang members and drug dealers. *Id.* at 1009 (superintendent had seen gang members contacting students as they left the school). The Court flatly rejected this justification, and issued an injunction enjoining the School from “preventing or forbidding the plaintiff’s distribution of printed materials, specifically but not limited to Gideon Bibles, to persons passing on the sidewalk in front of the high school.” *Id.* at 1010.

Bacon shows that this is not a difficult case. The First Amendment Free Speech Clause protects the right of Gideons to distribute free Bibles to public school students and their parents on sidewalks adjacent to those schools. As the discussion below demonstrates, the conclusion in *Bacon* controls here: the State violates the Defendants’ free speech rights by arresting and prosecuting them for peacefully distributing Bibles on the public bike path/sidewalk in front of Key Largo School.

1. Distributing religious literature is protected speech.

There can be no doubt that Mr. Simson’s and Mr. Mirto’s communication of their religious beliefs, by peacefully distributing Bibles in a public forum, merits the highest First Amendment protections. Literature distribution of this type has been recognized as a fundamental freedom since the birth of our nation. The Supreme Court noted the historical pedigree of literature distribution

in *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Lovell involved an ordinance in Griffin, Georgia, which required anyone wishing to distribute “literature of any kind” to first obtain written permission from the City Manager. A Jehovah’s Witness had been charged under the ordinance after she attempted to distribute religious literature without a permit. The Supreme Court struck down the ordinance as facially unconstitutional, holding that its broad sweep subjected Free Speech and Freedom of the Press rights to the very type of censorship which the First Amendment was designed to prevent. In so holding, the Court noted the vital historical role of such literature:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

303 U.S. at 452. The Defendants’ case confronts the same basic freedoms that were at stake in *Lovell*. Their distribution in a public place of free literature conveying their religious opinions is the epitome of First Amendment expression, and the unbridled discretion wielded by those enforcing the Statute at issue here is tantamount to the permit scheme struck down in *Lovell*.

The fact that the Defendants’ literature was religious, and its distribution was compelled by their religious beliefs (DSUMF ¶ 7), adds another important dimension to their actions. The Supreme Court has extolled the virtue of religious literature distribution and has frequently described the breadth of protection extended to such expressive activities:

The hand distribution of religious tracts is an age-old form of missionary evangelism--as old as the history of printing presses. It has been a potent force in various religious movements down through the years This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as

the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

Murdock v. Pennsylvania, 319 U.S. 105, 108-109 (1943)(footnotes omitted). *Murdock* involved Jehovah's Witnesses who were arrested in the City of Jeanette, Pennsylvania, for selling their religious pamphlets without purchasing a license from the City, as a City ordinance required. The Ordinance prescribed the following license fees: "For one day, \$1.50, for one week seven dollars (\$7.00), for three weeks twenty dollars (\$20.00)." *Id.* at 106 (quoting the Jeanette City Ordinance).

The Supreme Court struck down the license ordinance, deeming the distribution of religious literature to be a basic aspect of freedom of speech and of the press. The Court further held that government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* at 113.

Mr. Simpson's and Mr. Mirto's Bible distribution is nearly identical to the activities in *Murdock*, except that their distribution was purer speech in that they gave away the Bibles at no charge and solicited no monies of any kind. Yet, the State has threatened even greater harm to Mr. Simpson's and Mr. Mirto's exercise of their First Amendment freedoms than the license fee at issue in *Murdock*. Whereas the City of Jeanette license cost, at its highest rate, \$1.50 per day, § 810.0975(2)(b) states that a person found guilty under it is guilty of a misdemeanor of the second degree, which subjects the Defendants to up to 60 days in jail, F.S.A. § 775.082, or up to a 500 dollar fine, F.S.A. § 775.083. The impact of such a fine or imprisonment on Mr. Simpson and Mr. Mirto would be devastating. The pressure on the Defendants not to exercise their First Amendment freedoms far exceeds the pressure repudiated by the Supreme Court in *Murdock*.

Both *Murdock* and *Lovell* show that, not only is Mr. Simpson's and Mr. Mirto's right to

distribute religious literature held in the highest esteem under the First Amendment, but the State's attempt to make them pay for the exercise of that right via a fine or imprisonment is clearly unconstitutional.

2. The public bike path/sidewalk at issue here is a traditional public forum.

Another reason Mr. Simpson's and Mr. Mirto's activities merit the highest form of First Amendment protection is that they occurred in a traditional public forum. The Supreme Court has consistently recognized three types of speech fora:

- **Traditional public fora** (e.g., streets and sidewalks, *United States v. Grace*, 461 U.S. 171, 177 (1983)).
- **Public fora created by government designation** (e.g., public university meeting rooms, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981)).
- **Nonpublic fora** (e.g., jails, *Adderley v. Florida*, 385 U.S. 39, 41 (1966)).

Under *Grace*, the public sidewalk where Mr. Simpson and Mr. Mirto were distributing literature is clearly a public forum for their First Amendment activities. In *Grace*, the Supreme Court overturned the convictions of two peaceful protesters, one of whom was holding a sign and the other of whom was distributing leaflets, on the sidewalks surrounding the Supreme Court building. In overturning the convictions, the Court held, "'Public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Id.* at 177 (citation omitted). In so holding, the Court noted a long line of cases deeming streets, parks, and sidewalks to be public forums, including *Hague v. CIO*, 307 U.S. 496 (1939) which memorably stated:

Wherever the title of streets and parks may rest, they have immemorially been held

in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515. Because the sidewalks surrounding the Supreme Court were “indistinguishable from any other sidewalks in Washington, D.C.” the *Grace* Court held that they must be treated as public fora.

Grace, 461 U.S. at 182.

Likewise, the public bike path/sidewalk at issue in this case is just like any other public sidewalk which has traditionally served as a venue for expressive activities. The public bike path/sidewalk where Mr. Simpson and Mr. Mirto were distributing Bibles is maintained by Monroe County, Florida. (Ex. 1, ¶ 10.) The bike path/sidewalk is open and accessible to the public and is frequently used by members of the public for walking, biking, jogging, and other activities. *Id.* As with the sidewalk at issue in *Grace*, “There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.” *Id.* at 180. *Grace* is controlling here, and mandates that the sidewalk on which Mr. Simpson and Mr. Mirto were standing be considered a traditional public forum.

Importantly, the Supreme Court has held that the fact that a sidewalk is located adjacent to a public school, like the public bike path/sidewalk involved here, does not change its status as a traditional public forum. *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). As the Court in *Grayned* bluntly put it, “[W]e think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public.” *Id.* Following *Grayned*, the federal court held in *Bacon*, 707 F. Supp. at 1008, that a sidewalk that ran in front of a school

was a traditional public forum. The sidewalk at issue in *Bacon* was owned by the School, was located on the school's property, and abutted a public street adjacent to the school. Here, the public bike path/sidewalk where the Defendants handed out Bibles is owned and maintained by Monroe County (not the School), is not located on School property, and runs adjacent to the School's property and a public street. Obviously, the public bike path/sidewalk at issue here is a traditional public forum.

Because the public bike path/sidewalk where Mr. Simpson and Mr. Mirto were distributing Bibles is a traditional public forum, the State's ability to regulate speech in that forum is very limited. In fact, "[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). Strict scrutiny is the most stringent form of analysis applied by the courts, and a regulation will only be upheld if it is "narrowly drawn to achieve a compelling interest." *Grace*, 461 U.S. at 177.

3. F.S.A. § 810.0975 as applied to Mr. Simpson and Mr. Mirto fails Strict Scrutiny.

As demonstrated below, the application of § 810.0975(2)(b) to Mr. Simpson and Mr. Mirto is not "narrowly drawn to achieve a compelling interest," and the charge must therefore be dismissed. In fact, the application of § 810.0975(2)(b) to the Defendants cannot even satisfy the lesser standard for a reasonable time, place, and manner restriction, because the Statute was not applied in a content-neutral manner, because the Statute is not narrowly tailored to achieve a significant government interest, and because it shuts down all alternative channels for communication.

a. The Statute is content-based as applied to the Defendants.

Regulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). “Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Supreme Court has instructed:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

A restriction is content-based if it is premised on the likes or dislikes of the audience. “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (emphasis added). A regulation that precludes or restricts speech based on the reaction of the audience is referred to as a “heckler’s veto.”

The Statute at issue here was applied to Mr. Simpson and Mr. Mirto based on reactions to their speech. The Defendants received approval for their Bible distribution activities from the Monroe County Sheriff’s Office, the Key Largo School secretary acting on behalf of Principal Martinson, and Principal Martinson herself. Tellingly, not until the School received “complaints” about the Defendants’ Bible distribution from other parents did Principal Martinson take any action to restrict their peaceful distribution of Bibles. (DSUMF ¶¶ 31-32; Ex. 20.) This is a classic

heckler's veto and cannot be tolerated under the First Amendment.

Indeed, "it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (internal citation omitted). Pursuant to this well-settled principle, the Supreme Court has routinely struck down regulations that operate as heckler's vetoes. In *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) for instance, the Supreme Court held that a Cincinnati ordinance that made it a criminal offense for three or more people to assemble on the sidewalk and conduct themselves in such a manner as to annoy passers-by, was unconstitutional. The Court stated that "[o]ur decisions establish that mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms." *Id.* at 615.

Similarly, in *Bachellar*, the Supreme Court examined the petitioners' conviction under a Maryland public disturbance statute, which prohibited "acting in a disorderly manner." *Bachellar*, 397 U.S. at 564. The Supreme Court noted that the signs held by the petitioners did not constitute fighting words and could not justify the petitioners' convictions. *Id.* at 567. In dismissing the convictions, the Court held that the petitioners likely were found guilty of violating the statute "simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions." *Id.* at 570. Because § 810.0975(2)(b) was applied to the Defendants based on the reaction of others to their speech, the Amended Information in this case must be dismissed. The First Amendment knows no heckler's veto.

b. The Statute is not narrowly tailored to a compelling governmental interest as applied to the Defendants.

Florida courts construing § 810.0975(2)(b) have stated that it serves the interest of “protect[ing] school children from harmful or negative persons such as drug dealers, gang members, or pedophiles.” *J.L.S. v. State*, 947 So. 2d 641, 647 (Fla. 3d DCA 2007) (emphasis added).² Even assuming that this interest is compelling, Defendants assert that its application to their peaceful distribution of Bibles on the public bike path/sidewalk in front of Key Largo School is not narrowly tailored to serve this interest, or any other interest the State may offer.

“A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Shultz*, 487 U.S. 474, 485 (1988). In other words, the State must show that “each activity within the prescription’s scope is an appropriately targeted evil.” *Id.*; *See also Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 168 (2002) (interest in preventing fraud did not support application of Ordinance to religious organizations, political campaigns, or to enlisting support for unpopular causes). Put in terms of the present case, the State must show that applying § 810.0975(2)(b) to prohibit the Defendants from distributing Bibles on the public bike path/sidewalk in front of Key Largo School is narrowly tailored to serve the interests the Statute was enacted to serve.

The Statute is not narrowly tailored as applied to Mr. Simpson and Mr. Mirto because it prohibits their speech even though it is not part of the harmful conduct the State seeks to prohibit via § 810.0975(2)(b). Mr. Simpson and Mr. Mirto are not the types of nefarious persons at which

² The Court in *J.L.S.* did not reach the question of whether the statute in question was unconstitutionally vague and stated that any unconstitutional application can be challenged through “as-applied” litigation, 947 So. 2d at 646, which is precisely the challenge brought here.

the Statute aims. Indeed, both men are long-time residents of Key Largo. (DSUMF ¶ 1.) Both men own and operate businesses that serve people within the Key Largo community. (*Id.*) Mr. Simpson's children attended Key Largo School in the past, and Mr. Mirto has two children who currently attend there. (*Id.* ¶¶ 2-3.) Mr. Mirto knows and interacts with Principal Martinson because his children have attended Key Largo School for the past eight years. (*Id.* ¶ 4.) And Defendants notified both the Sheriff's office and the School prior to beginning their distribution. (*Id.* ¶¶ 17, 23-27). F.S.A. § 810.0975(2)(b)'s purposes are not served when it is applied to arrest and prosecute parents who had or have children who attend Key Largo School, who contacted the Sheriff's office and School beforehand, who are well-known and respectable members of the Key Largo community, and at least one of whom is known to the Principal of the School.

It is insulting to compare the members of a venerable organization like the Gideons International to drug pushers, gang bangers, and pedophiles. Ill-defined laws, like the Statute at issue here, that permit government officials to punish people for peacefully exercising fundamental freedoms run afoul of the First Amendment. As the Supreme Court has held, "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The State's application of § 810.0975(2)(b) to the Defendants is clearly not narrowly tailored to further the interest the Statute was adopted to serve.

The Supreme Court found the same flaw in the law at issue in *United States v. Grace*, 461 U.S. 171 (1983). The *Grace* Court struck down a ban on the display of any "flag, banner, or device" on the Supreme Court grounds and surrounding public sidewalks because it did not substantially serve the purposes asserted by the government. *Id.* at 183-84. The purpose of the Act was to

“provide for the protection of the building and grounds and the persons and property therein, as well as the maintenance of proper order and decorum.” *Id.* at 182. The *Grace* Court noted that there was no suggestion that “appellees’ activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds.” *Id.* The Court concluded that the statute had an “insufficient nexus with any of the public interests that may be thought to undergird [the statute].” *Id.* at 181.

Similarly, in this case, the application of § 810.0975(2)(b) to Defendants’ speech has an “insufficient nexus with any of the public interests” the Statute was enacted to further. *Id.* There is no nexus whatsoever. The State’s interest in protecting children from harmful and dangerous persons is laudable, but that interest is not served in any way by arresting and prosecuting two parents—one of whom has children who currently attend the School—for handing out free Bibles on a public sidewalk in front of the School. As the Supreme Court recognized in *Grayned*,

[W]e think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. . . .

. . . .

Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize [a person’s views] to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students.

408 U.S. at 118-19. Incredibly, here the State treats religious speech as not being “legitimate business” under § 810.0975(2)(b). And if religious speech is not legitimate, then neither is any other speech. That being so, the State has created a “speech-free zone” around schools, something the Supreme Court clearly will not tolerate.

The Supreme Court has admonished government officials that they “may not unduly suppress

free communication of views, religious or other, under the guise of conserving desirable conditions.” *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The government may only “prevent or punish” speech due to a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order.” *Id.* Here, Mr. Simpson’s and Mr. Mirto’s peaceful distribution of free Bibles (let alone all other expressive activities prohibited under the State’s interpretation of § 810.0975(2)(b)) did not result in a “clear and present danger” of any of these possibilities occurring. Therefore, § 810.0975(2)(b) is not narrowly tailored to serve a compelling governmental interest as applied to the Defendants.

c. The Statute is not narrowly tailored because it is both overinclusive and underinclusive in light of the State’s interests.

An additional reason why the Statute fails strict scrutiny is that it is both underinclusive and overinclusive in relation to the interests it seeks to further. A law is underinclusive when it fails to prohibit activities that result in the problem the law was purportedly adopted to address. For instance, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a city adopted several ordinances concerning animal slaughter and carcass disposal. One of the ordinances prohibited the slaughter of animals outside of areas zoned for slaughterhouses. *Id.* at 545. The city adopted the ordinance to prevent cruelty to animals. *Id.* However, the ordinance contained an exemption for “any person, group, or organization” that slaughtered a small number of animals for the purpose of sale. *Id.* The Court held that the ordinance was unconstitutional because the city could not explain why “commercial operations that slaughter ‘small numbers’ of hogs and cattle do not implicate its professed desire to prevent cruelty to animals.” *Id.* The ordinance was underinclusive, and thus lacked the requisite narrow tailoring, because it permitted persons and

organizations to engage in the very activities it was adopted to prohibit. *Id.* See also *id.* at 578 (“[T]he fact that allegedly harmful conduct falls outside the statute’s scope belies a governmental assertion that it has genuinely pursued an interest ‘of the highest order.’”) (Blackmun, J., concurring).

The same is true here. Like the ordinance in *Lukumi*, § 810.0975(2)(b) is subject to an exemption that renders it underinclusive. § 810.0975(3) states: “This section does not apply to residents or persons engaged in the operation of a licensed commercial business within the school safety zone.” This exemption permits any activity to occur within a school safety zone, even those activities that are the aim of the Statute, so long as they take place in conjunction with a residence or commercial business. The State asserts that § 810.0975(2)(b) was adopted to prevent students from being exposed to gang members, drug dealers, or pedophiles. But under a plain reading of the Statute, gang members could hang out and use drugs so long as they live within 500 feet of the School. The Statute is obviously underinclusive.

A law also fails the narrow tailoring requirement of strict scrutiny if it is overinclusive. A law is overinclusive if its “broad scope . . . is unnecessary to serve the interest” it was adopted to further. *Lukumi*, 508 U.S. at 578 (Blackman, J, concurring). Significantly, the Fifth Circuit Court of Appeals recently struck down a school safety ordinance similar to the one at issue here because it was overinclusive and thus not narrowly tailored. *Knowles v. City of Waco*, 462 F.3d 430 (5th Cir. 2006). The ordinance in *Knowles* prohibited “street activities and parades” and applied only when school speed zone limits were in effect or when warning lights were flashing. *Id.* at 432. The ordinance was adopted to “prohibit activities that could ‘distract’ drivers during the times that school zones are active.” *Id.* at 434. The constitutional flaw of the ordinance was that its terms were so

broad that it “potentially criminalize[d] . . . a broad range of expressive and legitimate conduct” and thus was “hardly tailored at all, much less narrowly tailored to prevent distraction of motorists when school zone rules are in effect.” *Id.* at 435. As the Court observed, the law could be “violated by the core constitutional acts of peaceful expressive activity or peaceable assembly alone.” *Id.* This is precisely what has happened here. The Defendants’ peaceful expressive activities have been swept into the prohibition of § 810.0975(2)(b) because it is not narrowly tailored to achieve its purpose: protecting school children from dangerous persons like gang members, drug dealers, or pedophiles.

Similarly, in *Lukumi*, the Supreme Court held an ordinance impermissibly overinclusive because it prohibited constitutionally protected activities where those activities “did not threaten the city’s interests.” *Id.* at 538-39. This same vice exists in the Statute at issue here. § 810.0975(2)(b)’s broad scope prohibits peaceful, constitutionally protected speech activities (like Defendants’ Bible distribution) when those activities pose none of the threats the Statute was enacted to curtail. Worse, under the State’s interpretation of the Statute, all speech within a school safety zone is prohibited, while all conduct is permitted (like jogging, biking, walking, driving, operating a business, etc) and, because of the exemption in § 810.0975(3), even some of the very conduct that the Statute was passed to curtail is permissible within a school safety zone so long as it takes place in connection with a residence or commercial business. The Statute is underinclusive and overinclusive, and for this reason too fails the narrow tailoring requirement of strict scrutiny.

4. The Statute as applied to the Defendants cannot even satisfy the valid time, place, and manner test.

F.S.A. § 810.0975(2)(b) not only fails the strict scrutiny test, but also fails as a valid time, place, and manner restriction as applied to the Defendants’ speech. A restriction on speech in a

traditional public forum is constitutional only if it is (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) allows for ample alternative channels for the expression. *Ward*, 491 U.S. at 791.

a. The Statute is not content neutral as applied to the Defendants.

As discussed above in the context of strict scrutiny, § 810.0975(2)(b) is not content neutral as applied to the Defendants' speech. *See* § II.A.3.a, *supra*. The Statute was applied to the Defendants' speech based on the reactions of others to their speech. Under well-established law, regulating speech based on audience reaction is content-based discrimination. *Forsyth County*, 505 U.S. at 130.

b. The Statute is not narrowly tailored to serve a significant governmental interest as applied to the Defendants.

As explained above, the application of § 810.0975(2)(b) to Mr. Simpson and Mr. Mirto lacks the requisite fit between means and ends to satisfy the First Amendment, and is overinclusive and underinclusive in relation to the interests it was adopted to serve. The States' interest in protecting school children from dangerous and harmful persons such as drug dealers, gang members, and pedophiles is not furthered by arresting and prosecuting two men who were peacefully handing out Bibles on the public bike path/sidewalk in front of Key Largo School, especially where those men gave advance notice, are long-time residents of Key Largo, own businesses that serve the Key Largo community, are parents who had or have children who attend the School, and one of whom is known to the School Principal. Such an application of the Statute is wildly inconsistent with the interests it was adopted to protect.

It bears repeating that the State may suppress protected speech in a public forum only when

there is a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order.” *Cantwell*, 310 U.S. at 308. Mr. Simpson and Mr. Mirto’s speech did not result in a clear and present danger of any of these possibilities occurring. They were merely handing out Bibles to passers-by on a public sidewalk, and the only problem the State appears to have had with their activity is that they did not leave as quickly as Officer Perez thought they should.

The Supreme Court has refused to let States punish persons based on the unconstitutional orders of police officers: “Obviously . . . one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution Thus petitioners could not constitutionally be convicted for refusing to obey the officers.” *Wright v. Georgia*, 373 U.S. 284 (1963) (overturning convictions of black youths who refused to leave a whites-only park). As with its failure to meet strict scrutiny, the State’s application of § 810.0975(2)(b) to Mr. Simpson’s and Mr. Mirto’s protected speech is not narrowly tailored to further a significant governmental interest.

c. The Statute does not allow for ample alternative channels for expression as applied to the Defendants.

Prohibiting Mr. Simpson and Mr. Mirto from distributing literature within 500 feet of Key Largo School property, including the public bike path/sidewalk in front of the School, does not leave open ample alternative channels for communication of their protected speech. The requirement that “alternative channels of communication” exist is not satisfied by the availability of other areas where an individual can exercise his or her constitutional rights: “It goes without saying that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”” *Grayned*, 408 U.S. at 119 n.40 (citation omitted) (emphasis

added).

Here, the Defendants are compelled by their religious beliefs to distribute Bibles to public school students and their parents from the public bike path/sidewalk adjacent to public schools in Key Largo. (DSUMF ¶ 7.) The Defendants had a clear right to conduct their First Amendment activities from the public bike path/sidewalk in front of the School, because it is a traditional public forum. The State’s application of § 810.0975(2)(b) leaves open no alternative channels—much less ample ones—because it gives police officers unbridled discretion to arrest the Defendants whenever they seek to engage in protected expression while standing on the public sidewalks in front of Key Largo public schools, or within 500 feet of the schools. The Defendants’ desired expression—distributing Bibles to public school students from the public bike path/sidewalk in front of those schools—is entirely foreclosed by the State’s application of § 810.0975(2)(b), and there are no other practical alternatives by which they may communicate their message. This lack of ample alternative channels is yet another unconstitutional aspect of the State’s application of the Statute.

5. The Statute is an unconstitutional prior restraint as applied to the Defendants.

Prior restraints are government regulations that give “public officials the power to deny use of a forum in advance of actual expression.” *Ward*, 491 U.S. at 795 n.5 (internal quotation marks and citation omitted). Prior restraints carry a “heavy presumption against [their] constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotes omitted). A regulation that grants broad discretion to a government official entrusted to enforce the regulation is presumptively unconstitutional: “It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted . . . by use of a statute

providing a system of broad discretionary licensing power, or . . . the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.” *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). As applied to the Defendants, F.S.A. § 810.0975 is just such a broad prohibitory statute.

F.S.A. § 810.0975 operates as a prior restraint as applied to the Defendants’ speech because it requires them to obtain permission before they can engage in their desired expression, and because it grants government officials unfettered discretion to selectively enforce it. The Statute requires the Defendants to obtain permission before engaging in First Amendment activities by requiring them to have “authorization, license, or invitation” to speak. F.S.A. § 810.0975(2)(b). The Statute places unfettered discretion in those charged with enforcing it by granting them the authority to determine what constitutes “legitimate business.” *Id.*

Federal and state courts have routinely held that laws allowing enforcement officials to determine what constitutes “legitimate business,” a “lawful purpose,” or the like, permit those officials to wield unfettered discretion. For instance, in a recent case, *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Supreme Court struck down an anti-loitering ordinance which allowed police officers to order the dispersal of any persons they “reasonably believed” to be members of criminal street gangs, who were loitering with other persons “with no apparent purpose.” *Id.* at 47 (emphasis added). The ordinance struck down in *Morales* served a similar purpose to the Statute here: to protect people from nefarious and dangerous gang members. Nevertheless, the Court held the ordinance to be unconstitutionally vague because the term “apparent purpose” was so standardless that it provided absolute discretion to police officers to determine what activities constituted loitering. *Id.* at 56-57; *see id.* at 56 (“It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an ‘apparent

purpose”).

Similarly, in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), a vagrancy ordinance was at issue which criminalized idle persons, including those “wandering or strolling around from place to place without any lawful purpose or object.” *Id.* at 158 (emphasis added). Some of the defendants in *Papachristou* were arrested simply for driving late at night near a used-car lot which had been burglarized several times. Two other defendants were charged after waiting for a friend to give them a ride. Under these facts, the Court held that the ordinance was unconstitutional because its prohibition was so ill-defined that it “encourage[d] arbitrary and erratic arrests and convictions.” *Id.* at 162. *See also Kirkwood v. Loeb*, 323 F. Supp. 611 (W.D. Tenn. 1971) (“Legislation embodying such terms as ‘without any legitimate business or purpose,’ . . . fall short of adequately establishing criteria which can be interpreted consistently and uniformly); *K.L.J. v. State*, 581 So. 2d 920, 922 (Fla. 1st DCA 1991) (Ordinance stricken because the term “legitimate business” could “be applied in a manner which would infringe on the basis [sic] rights guaranteed by the United States and Florida Constitutions”). The danger posed to First Amendment freedoms by criminal laws that require persons to have “legitimate business” has been established for decades.

The unfettered discretion School officials and police officers wielded pursuant to § 810.0975(2)(b) to restrict the Defendants’ speech is indistinguishable from the unfettered discretion the Supreme Court found unconstitutional in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). In *Shuttlesworth*, a black minister had led a peaceful civil rights march through Birmingham. Like Mr Simpson’s and Mr. Mirto’s careful adherence to the law, the Court noted that the marchers “stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed.” *Id.* at 149. One

of the organizers of the march was convicted under a city ordinance for not having a permit for the march, which was required for “any parade or procession or other public demonstration on the streets or other public ways of the city.” *Id.*

In overturning the conviction, the Court noted that the authorities in charge of issuing permits “were to be guided only by their own ideas of ‘public welfare, peace, safety, health, decency, good order, morals, or convenience.’” *Id.* at 150. The Court held that such a scheme, which made the peaceful enjoyment of constitutional freedoms contingent on “the uncontrolled will of an official,” was clearly unconstitutional. *Id.* at 151.

The same infirmity plagues the Statute at issue here. The arresting officer in this case had nothing more than the repeatedly condemned “legitimate business” standard of § 810.0975(2)(b) to guide his decision regarding whether Mr. Simpson and Mr. Mirto were permitted to distribute Bibles on the public bike path in front of Key Largo School. This “standard” provides no guidance at all, and thus can be applied based on the whim of a police officer, which is precisely how it was applied in this case. Indeed, the unfettered discretion § 810.0975(2)(b) grants enforcement officials is highlighted by the facts of this case. The Defendants received permission to conduct their Bible distribution from the Monroe County Sheriff’s Office prior to January 19, 2007. (DSUMF ¶ 17.) On the day of their distribution, two School officials, including the Principal, approved of their Bible distribution. (DSUMF ¶¶ 23-27, 32-37.) In addition, a Florida State Police Officer who stopped by the Defendants position on the day of the distribution did not find their activities problematic. (DSUMF ¶¶ 29-30.) Nonetheless, they were arrested pursuant to § 810.0975(2)(b).

This is precisely the application of § 810.0975(2)(b) that Florida’s Third District Court of Appeal warned would violate the First Amendment. In *J.L.S.*, 947 So. 2d at 645, the Third District

rejected a plaintiff's overbreadth challenge to the Statute because it assumed that "persons seeking to engage in constitutionally protected speech or assembly rights within the school safety zone" would be authorized to do so. Obviously, this is not the case, since the State is prosecuting the Defendants for engaging in constitutionally protected speech activities in a school safety zone pursuant to § 810.0975(2)(b). The *J.L.S.* Court stated that "any application of Section 810.0975(2)(b) which violates the First Amendment can be remedied through as-applied litigation." 947 So. 2d at 646. Here, the Defendants' as-applied challenge demonstrates the unfettered discretion School administrators and police officers exercised under the Statute to silence their protected expression. The Amended Information must be dismissed.

B. THE STATUTE VIOLATES THE RIGHT TO DUE PROCESS AS APPLIED TO THE DEFENDANTS.

Related to the vice of unbridled discretion, the vagueness doctrine is based on due process principles of fair notice and warning. It requires that a governmental restriction be sufficiently specific to avoid arbitrary and discriminatory enforcement by government officials. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A restriction is vague if "men of common intelligence must guess at its meaning and differ as to its application." *Id.* Strict scrutiny applies to a vague restriction that chills protected speech, *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 620 (1976), and narrow tailoring is necessary to give First Amendment freedoms "breathing space to survive." *Button*, 371 U.S. at 433.

The Supreme Court has established two bases for vagueness challenges to criminal laws:

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

Morales, 527 U.S. at 56 (opinion of Stevens, J.). As applied to the Defendants’ expressive activities in this case, § 810.0975(2)(b) is vague on both of these grounds.

1. The Statute fails to provide the required notice to the Defendants.

Failure of a law to provide reasonable notice of what conduct is prohibited is the first evidence that the law is vague. Laws requiring persons to have “legitimate business” or “lawful purposes,” like the law at issue in this case, are routinely stricken by courts as unconstitutionally vague. In *Papachristou*, 405 U.S. at 162, the Supreme Court held that “[a] regulation is impermissibly vague if, by its terms, it fails to provide adequate notice of its scope, and sufficient guidance for its application.” There, the vagrancy ordinance at issue criminalized idle wandering “without any lawful purpose or object.” *Id.* at 156. The Court held that the ordinance was “void for vagueness” because it failed to provide adequate notice of what conduct it prohibited. *Id.* at 162.

Similarly, in *Ricks v. District of Columbia*, 414 F.2d 1097, 1100 (D.C. Cir. 1968), the Court of Appeals struck down an ordinance that prohibited persons from walking about the streets at night “without any visible or lawful business.” The Court held that the ordinance was unconstitutionally vague because it failed to “provide a reasonable degree of guidance to citizens, the police and the courts as to just what constitutes” a violation of the ordinance. *Id.* at 1100. The Court went on to state:

Fluid language which sweeps citizens under the penumbra of penal legislation without warning is abhorrent. The imposition of criminal liability for behavior which a person could not reasonably understand to be prohibited offends the most rudimentary considerations of fairness.

Id. at 1100-01. The Supreme Court expressed a similar sentiment in *Coates*, 402 U.S. at 615, where it stated that an ordinance is plainly unconstitutional if it “makes a crime out of what under the

Constitution cannot be a crime.”

This is precisely what has happened here. There is no way Mr. Simpson and Mr. Mirto could have known that the peaceful distribution of Bibles—a quintessential First Amendment activity—from the public bike path/sidewalk in front of Key Largo School would be considered a criminal act under § 810.0975(2)(b). As with the cases cited above, the “legitimate business” standard employed by the Statute simply does not provide sufficient notice of what conduct the statute forbids. Like the ordinance struck down in *Coates*, F.S.A. § 810.0975(2)(b) is unconstitutionally vague because it “makes a crime out of what under the Constitution cannot be a crime.” Ordinary people simply could not have known that the Statute prohibited the peaceful distribution of religious literature from public rights of way.

Statutes affecting protected speech activities, such as F.S.A. § 810.0975(2)(b),

must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

Gooding v. Wilson, 405 U.S. 518, 522 (1972) (striking down Georgia statute which banned “opprobrious words or abusive language”) (quoting *Button*, 371 U.S. at 433). The Statute at issue here not only invites applications to protected expression, but has clearly been applied to prohibit Mr. Simpson’s and Mr. Mirto’s protected speech.³

³ Two Florida appellate courts have held that the “legitimate business” standard in § 810.097 is not vague on its face, *A.C. v. State*, 538 So. 2d 136, 137 (Fla. 3d DCA 1989) and *J.H. v. State*, 625 So. 2d 883, (Fla. 1st DCA 1993). However, these cases are neither applicable to nor control this case for several reasons. First, the State has dropped its charges under § 810.097. Second, § 810.097 applies to one’s presence on a school campus, while § 810.0975(2)(b) applies to one’s presence within 500 feet of school property, which of course includes public streets and sidewalks. Thus, § 810.0975(2)(b) directly implicates the exercise of fundamental freedoms on traditional public fora, as the facts in this case ably illustrate. Third, neither of these cases arose in the as applied context,

2. The Statute grants unfettered discretion as applied to the Defendants.

Closely related to the failure of § 810.0975(2)(b) to provide adequate notice is its vesting of unfettered discretion with police officers as to its enforcement. In cases where infringement of constitutional rights are implicated through the enforcement of such a statute, as here, the vagueness doctrine “demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The exercise of constitutional liberties is subjected to unfettered discretion when a police officer is required to interpret and apply a standardless law. Here, pursuant to a law that requires those present to have “legitimate business,” the arresting officer had unfettered discretion to ban the Defendants’ free speech activity in a traditional public forum. The discretion wielded in this case violates the dictates of the Supreme Court in *Papachristou*, in which it held:

Where . . . there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.

as Defendants’ case does. In *A.C.*, 538 So. 2d at 137, the court expressly noted that it was not “addressing whether the statute was unconstitutionally applied under the facts of this case because this issue was never raised below.” Fourth, these cases wrongly decided the facial vagueness issue as it relates to the term “legitimate business.” The court in *A.C.* mistakenly held that the phrase “on the campus” resolves the vagueness of the term “legitimate business” because it means that one’s activity has to be “connected with the operation of the school” to be “legitimate” under the Statute. 538 So.2d at 137. Similarly, the Court in *J.H.*, 625 So. 2d at 883 merely stated, with no accompanying analysis, that the phrase “legitimate business” is not vague because it is “clarified” by the words “or any other authorization, license, or invitation.” But neither the phrase “connected to the operation of the School” nor the authorization requirement clarify in any way what conduct is permitted or prohibited by § 810.097. This determination is still left to the unfettered discretion of the officials charged with enforcing the Statute. Further, the “standard” under § 810.097 of “being connected to the operation of the school” is not the standard for what conduct is permissible 500 feet onto public property. This is so because all activities (except Defendants’ protected expression) are allowed within 500 feet of school property even though not connected to the school, like jogging, biking, driving, and a multitude of other activities. Obviously, the court’s “limiting” of the term “legitimate business” in *A.C.* and *J.H.* has no bearing whatsoever on this case.

405 U.S. at 170. Under § 810.0975(2)(b) a school official or police officer may arbitrarily prohibit any activity he or she deems not to be “legitimate,” and may likewise permit any activity that he or she deems to be “legitimate.” This is the very definition of unfettered discretion.

Once again, the facts of this case underscore the unfettered discretionary authority inherent in the Statute. The Defendants received permission to conduct their Bible distribution from a Monroe County Sheriff’s Deputy prior to the day of their distribution, and from two School officials, including the Principal, on the day of the distribution. (DSUMF ¶¶ 17, 23-27, 32-37.) They even had a Florida State Patrol Officer stop by their position on the public bike path on the day of the distribution, who likewise gave no indication that their activities were in any way unlawful. (DSUMF ¶¶ 29-30.) Then a different Monroe County Sheriff’s Officer arrested them for the very conduct they had already received permission to engage in! If that is not incredible enough, the officer arrested the Defendants for distributing Bibles from the very location School Principal Martinson had indicated was a permissible location to distribute Bibles. (Ex. 20 (Principal Martinson told the Defendants to “stay on the bike path or west of it” while distributing Bibles).) The boundless discretion granted by § 810.0975(2)(b) is readily apparent, and woefully unconstitutional.

The openness of the Key Largo School campus also demonstrates the unfettered discretion the Statute grants enforcement officials. The School routinely permits a broad range of activities to occur on its campus. In doing so, people involved in those activities must enter the school safety zone to attend the activities and events at the School. Many of these events and activities occur within one hour after School dismisses, and thus during the time frame that § 810.0975(2)(b) is applicable. In practice, Tae Kwon Do classes, recreational sports league practices and games, cub

scout meetings, and more have been permitted to occur on campus during the time that the Statute is operative. Persons attending these activities obviously have “legitimate business” in the school safety zone.

In addition, innumerable activities with no connection to the School occur within the School’s safety zone. Pedestrians walk, bike, and jog on the public bike path/sidewalk within 500 feet of the School; persons drive their cars on US 1 within 500 feet of the School; and people visit businesses and homes located within 500 feet of the School, to name just a few. (Ex. 2, ¶¶ 87-94, Exs. 23-28 (pictures and maps showing the homes, businesses, and other uses located within the school safety zone around Key Largo School). § 810.0975(2)(b) is applicable to all these activities because its plain language applies to every entrance into a school safety zone, and the State obviously treats each and every one of these activities as “legitimate business.”

Despite all these activities constituting “legitimate business” within a school safety zone, the State deems the Defendants’ Bible distribution illegitimate. The selective enforcement of § 810.0975(2)(b) against the Defendants’ speech is illustrative of the danger posed by unfettered discretion. The Statute permits the State to pick and choose between speakers, permitting those whose message it favors to speak within a school safety zone, and throwing those whose speech it disfavors in jail.

C. THE STATUTE VIOLATES THE FREE EXERCISE OF RELIGION AS APPLIED TO THE DEFENDANTS.

Not only does the State’s application of § 810.0975(2)(b) violate Mr. Simpson’s and Mr. Mirto’s constitutional rights to free speech and due process, but it also violates their rights to free exercise of religion under the First Amendment to the United States Constitution. Mr. Simpson and

Mr. Mirto were arrested because they were exercising their sincerely held religious beliefs to share their faith on a public sidewalk. Arresting and prosecuting the Defendants based on this activity violates the Constitution because their sincerely-held religious beliefs require them to share their faith, which they do by distributing Bibles on the public bike path/sidewalk in front of Key Largo public schools. The State has targeted and substantially burdened this exercise of religion by filing criminal charges (not once, but twice) against the Defendants.

1. Free Exercise Standard.

The landmark decision *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) explains the Supreme Court's standard for analyzing laws which burden the free exercise of religion. *Lukumi* involved followers of the Santeria religion, which uses animal sacrifice as one of its primary rituals. *Id.* at 524-25. Residents of Hialeah, Florida, became concerned when it was announced by members of the Santeria religion that they intended to establish a house of worship, school, museum, and cultural center in Hialeah. Following emergency meetings of the City Council, new city ordinances were passed which outlawed animal sacrifice. *Id.* at 526-28.

The preliminary inquiry in Free Exercise cases is whether a law interferes with the religious obligations of a religious adherent. In *Lukumi*, the sincerity of the followers of Santeria was not at issue, so the Court proceeded to the substance of their First Amendment rights, laying out the general rule for laws which burden religious practices:

a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Id. at 531-32 (emphasis added). Thus, the key Free Exercise question in the present case is whether

the application of § 810.0975(2)(b) to the Defendants was “neutral and of general applicability.” If not, the law must be justified by a compelling, narrowly-tailored governmental interest. This standard is the same strict scrutiny standard which, as has already been made clear in other constitutional contexts, the State cannot meet.

2. The Defendants were exercising their religion by distributing religious literature.

As to the preliminary inquiry, it is clear that the application of § 810.0975(2)(b) restricts core aspects of the Defendants’ sincerely-held religious beliefs. Both Defendants sincerely believe that they have a religious obligation to share their Christian faith, and they do this in part by distributing Bibles to public school students from the public bike path/sidewalk adjacent to schools in Key Largo. (DSUMF ¶ 7.) Pursuant to these sincerely-held religious beliefs, the Defendants distributed free Bibles while standing on the public bike path/sidewalk in front of Key Largo School on January 19, 2007. (DSUMF ¶ 16.) Officer Perez arrested the Defendants for engaging in these religiously-motivated activities.

Once an individual has testified that an act is a part of his religious beliefs, the Court’s inquiry into this issue must end. *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990). “Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” *Smith*, 494 U.S. at 887.

Just as the sincerity of the Defendants’ religious beliefs are evident, so too is the substantial burden imposed on their religious practices. Indeed, there are few burdens on a religious practice more substantial than having its exercise subject to arrest by a police officer and prosecution by a

State. *Smith* recognized that “the ‘exercise of religion’ often involves not only belief and profession but the performance (or abstention from) physical acts.” *Id.* at 877. Such physical acts include evangelism, which is central to the Defendants’ religious beliefs. (DSUMF ¶ 6.) The arrest and prosecution of the Defendants for practicing their religious beliefs violates their free exercise rights.

3. As applied to the Defendants’ religious practices, the Statute is not neutrally and generally applied and is therefore subject to strict scrutiny.

The facts that Mr. Simpson’s and Mr. Mirto’s free speech activities were carried out at the command of their religion, and that Officer Perez’s arrest of the Defendants places a substantial burden on their religion, lead directly into the next aspect of the Free Exercise Standard: such official actions must be “neutral and of general applicability.” *Lukumi*, 508 U.S. at 531. The Court noted that this inquiry must go beyond the face of the ordinance to address its application:

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.

Id. at 534.

While F.S.A. § 810.0975(2)(b) seems neutral on its face (its tremendous overbreadth actually prohibits anyone from coming within 500 feet of any school for any reason unless they have prior permission), its lack of neutrality and general applicability becomes evident from the manner in which it was enforced against the Defendants. The Defendants’ speech was targeted solely because parents complained to the School about the Defendants’ Bible distribution. (DSUMF ¶¶ 31-32; Ex. 20.) Both before and after the Defendants began their distribution, other police officers and school officials permitted and/or approved of the Defendants’ activities. (DSUMF ¶¶ 17, 23-27, 32-37.)

The State applied § 810.0975(2)(b) to target the Defendants’ religious activities solely because others did not like those activities. The fact that this suppression occurred in a public forum makes the injury all the more egregious. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 839 (1995) (neutrality and equal treatment required with respect to access of a religious group to generally available government benefits and privileges, such as having access to an otherwise open forum).

4. The State cannot satisfy strict scrutiny in burdening the Defendants’ exercise of religion.

The State’s non-neutral, non-general application of § 810.0975(2)(b) can pass constitutional muster only if “justified by a compelling governmental interest and . . . narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 531-32. As has already been shown *supra* in § II.A.3.b-c, the Statute as applied to the Defendants in these circumstances is not narrowly tailored to advance the compelling interests the Statute was adopted to serve.

It should be noted, in addition, that in the context of government actions that substantially burden religious practices, the Supreme Court has stated that “[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). The Defendants’ peaceful, non-disruptive, non-confrontational distribution of Bibles on a public right of way simply cannot be characterized as “the gravest abuses, endangering paramount interests.” *Sherbert*, 374 U.S. at 406. Therefore, the State’s application of § 810.0975(2)(b), must be struck down as violative of the Free Exercise Clause, and the Amended

Information against Mr. Simpson and Mr. Mirto must be dismissed.

D. THE STATUTE VIOLATES FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT AS APPLIED TO THE DEFENDANTS.

Florida's Religious Freedom Restoration Act ("FRFRA") provides greater protection to the free exercise of religion "than that afforded by the decisions of the United States Supreme Court." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004). Under FRFRA, a government burden imposed on the exercise of religion is subject to the compelling interest test if a plaintiff demonstrates that "the government has placed a substantial burden on a practice motivated by a sincere religious belief." *Id.* at 1034. Here, it is beyond dispute that the Defendants' desire to distribute Bibles to public school students from the public bike path/sidewalk that fronts Key Largo public schools is motivated by their sincere religious beliefs. (DSUMF ¶ 7.)

Under FRFRA, a substantial burden is "one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner*, 887 So. 2d at 1033. The State's arrest and prosecution of the Defendants for engaging in religiously-motivated religious practices pursuant to § 810.0975(2)(b) imposes a substantial burden on their exercise of religion. It is difficult to think of a greater burden on the free exercise of religion than subjecting religious practices to arrest, prosecution, jail time, and weighty fines. Because the Defendants have demonstrated that § 810.0975(2)(b) substantially burdens a religious practice motivated by their sincerely held religious beliefs, the State must prove that the application of the Statute "furthers a compelling interest and is the least restrictive means of furthering that interest." *Warner*, 887 So. 2d at 1034. As shown above, the State cannot satisfy this heavy burden. *See* § II.A.3.b-c, *supra*.

E. THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO THE DEFENDANTS.

The State's charging of Mr. Simpson and Mr. Mirto with trespassing violations for the sole reason that they were engaging in protected religious speech which certain parents did not like is a violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

In the free speech context, the Supreme Court has held, "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461 (1980) (citing *Mosley*, 408 U.S. 92 at 98-99). In *Carey*, the defendants were arrested for unlawful residential picketing after they picketed the home of the Mayor of Chicago, "protesting his failure to support the busing of schoolchildren to achieve racial integration." 447 U.S. at 457. The Court struck down the statute under which they were convicted, because it prohibited their expressive conduct—sidewalk picketing—while allowing such picketing in labor disputes. Thus, some picketing was allowed, while other picketing was not, based solely on the message of the picketers.

Here, § 810.0975(2)(b) was applied to prohibit the Defendants' speech activities based on listeners' reaction to their speech. (DSUMF ¶ 31-32; Ex. 20.) This is illustrated by the fact that the Defendants engaged in a similar Bible distribution at another public school and were not punished for it. A month prior to their January 19, 2007 distribution at Key Largo School, the Defendants

engaged in a similar Bible distribution from the public bike path/sidewalk at Coral Shores Highschool. (DSUMF ¶¶ 8-15.) Coral Shores, like Key Largo School, is adjacent to the County-maintained public bike path/sidewalk. (Ex. 3, ¶ 14.) As they did at Key Largo School, the Defendants stood on the public bike path/sidewalk the entire time they distributed Bibles at Coral Shores. (Ex. 1, ¶ 13; Ex. 2, ¶ 14.) Police officers were present during and observed the Coral Shores distribution, and they did not interfere in any way. (Ex. 1, ¶¶ 14; Ex. 2, ¶¶ 15-16.) The only thing that distinguishes the Defendants' Bible distributions at Coral Shores and Key Largo School is that at Key Largo School parents complained about the distribution. (DSUMF ¶¶ 31-32; Ex. 20.) It was these complaints that motivated the restriction of the Defendants' speech activities at Key Largo School. (DSUMF ¶ 32; Ex. 20.) The disparate treatment of virtually identical speech activities on differing days shows the inherent inequality of how the State applies § 810.0975(2)(b).

Under the State's approach to applying § 810.0975(2)(b), had the Defendants' message not drawn the ire of its recipients it would have been permitted to occur. The careful scrutiny required of such a discriminatory application of the Statute, *Carey*, 447 U.S. at 461, shows its untenability, whether that scrutiny be strict, *supra* § II.A.3.b-c, or a time, place, and manner analysis, *supra* § II.A.4.a-c. Accordingly, the Equal Protection Clause requires that the application of § 810.0975(2)(b) to the Defendants' speech be declared unconstitutional.

III. F.S.A. § 810.0975(2)(b) IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE ON ITS FACE.

In addition to the Statute's as-applied unconstitutionality, it is also unconstitutional on its face. Its reach is substantially overbroad in that it prohibits all protected speech and it is vague because men of ordinary intelligence must necessarily guess at its meaning.

A. THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

Under the overbreadth doctrine, restrictions on speech cannot “sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). *See also Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). In the First Amendment area “government may regulate only with narrow specificity.” *Button*, 371 U.S. at 433. A regulation is void if it “does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise” of protected rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

F.S.A. § 810.0975(2)(b) requires persons to have “legitimate business” to enter or remain within a school safety zone. According to the plain language of the Statute, it applies to all speech and all conduct within a school safety zone. Undoubtedly, hundreds if not thousands of people go in and out of school safety zones between 1 hour prior to school beginning and 1 hour after school ends, whether driving in vehicles on streets, walking, biking, or jogging on a public bike path/sidewalk, visiting friends who live in the many homes located within school safety zones, conducting business at the many businesses located within school safety zones, or any other number of conceivable ways. (Ex. 2, ¶¶ 87-102, Exs. 23-34 (pictures and maps showing the homes, businesses, and other uses located within the school safety zones around Key Largo School and Coral Shores High School)). Obviously, the State is not arresting the innumerable people who enter or remain in a school safety zone by driving through it on a street, by walking, jogging, or biking through it via the public bike path, or by visiting businesses and residences located within such zones. Thus, all this conduct within a school safety zone is “legitimate business.”

Yet under the State’s interpretation of the Statute, all speech is not “legitimate business.”

Indeed, if handing out free Bibles on a public sidewalk is proscribed by the Statute, then all other speech must be similarly proscribed, unless the State is taking the blatantly unconstitutional position that all other speech is permitted in a school safety zone, except religious speech. *Mosley*, 408 U.S. at 95-96 (“government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views”). The State’s interpretation of § 810.0975(2)(b) turns the First Amendment on its head by treating non-expressive conduct better than constitutionally protected speech. Thus it is clear, under the facts of this case, that the “legitimate business” requirement violates the overbreadth doctrine because it sweeps so broadly that it proscribes all First Amendment activities within a school safety zone, while simultaneously permitting all non-expressive conduct.

Many courts, including the United States Supreme Court, have ruled that similar statutes were void under the overbreadth doctrine. In *Papachristou*, 405 U.S. at 158, the Court held unconstitutional a statute that prohibited “wandering or strolling around from place to place without any lawful purpose or object.” In addition to being unconstitutionally vague, the Court held that the statute was overbroad because it made “criminal activities which by modern standards are normally innocent,” and operated as “a trap for innocent acts.” *Id.* at 163-64. Similarly, in *Kirkwood*, 323 F. Supp. at 614-16, a federal district court held that a statute that prohibited persons from wandering “without any legitimate business or purpose” was “too vague and overbroad on its face to satisfy the constitutional requirements of Due Process.”

Florida courts have recognized and applied the overbreadth doctrine in striking down laws very similar to the one at issue here. In *K.L.J. v. State*, 581 So. 2d at 921, a Florida appellate court struck down a City ordinance that prohibited minors from wandering on the streets between certain

hours unless the minor was, among other exceptions, on “legitimate business.” The court noted that a law is overbroad “when it criminalizes legal as well as illegal activity and has a chilling effect on first amendment freedoms.” *Id.* The Court found the term “legitimate” particularly problematic, and held the ordinance was unconstitutionally overbroad because it could “be applied in a manner which would infringe on the basis [sic] rights guaranteed by the United States and Florida Constitutions.” *Id.* at 922. Under Supreme Court and Florida case law, F.S.A. § 810.0975(2)(b)’s requirement that a person have “legitimate business” is impermissibly overbroad. It sweeps all protected expression into its prohibitions, and must be struck down.

Florida’s Third District Court of Appeal held that § 810.0975(2)(b) was not overbroad in *J.L.S.*, 947 So. 2d at 641, however, key facts distinguish this case from *J.L.S.* The Court rejected the overbreadth challenge in *J.L.S.* because the plaintiff had “made no showing that persons seeking to engage in constitutionally protected speech or assembly rights within the school safety zone would have no authorization to do so.” *Id.* at 645. Obviously, the facts of this case demonstrate the factual predicate necessary to a finding of overbreadth according to *J.L.S.*: the exercise of First Amendment rights are subject to arrest and prosecution under § 810.0975(2)(b). The *J.L.S.* court stated that the party bringing an overbreadth challenge must demonstrate “from both the text of the statute and from actual facts that substantial overbreadth exists.” *Id.* Here, Defendants have cited numerous federal and state cases that have held that language like “legitimate business” is vague and overbroad, and have demonstrated facts that prove that § 810.0975(2)(b) prohibits Defendants’ (and all others’) constitutionally protected speech within a school safety zone. The requirements of *J.L.S.* have been met, and the Statute should be stricken under the overbreadth doctrine.

B. THE STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

It is axiomatic that a regulation that is impermissibly vague is unconstitutional. *Connally*, 269 U.S. at 391. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (citations omitted) the Supreme Court explained the dangers of vague laws:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. ...[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

And as the Florida Supreme Court has held, the vagueness doctrine favors the accused where a criminal law, like the one at issue here, is being applied:

Penal statutes must be strictly construed in favor of the accused where there is doubt as to their meaning and must be sufficiently explicit so that men of common intelligence may ascertain whether a contemplated act is within or without the law, and so that the ordinary man may determine what conduct is proscribed by the statute.

State v. Winters, 346 So.2d 991, 993 (Fla. 1977).

The vagueness of F.S.A. § 810.0975(2)(b) has been discussed above, *see* § II.B.1-2, and that section is hereby incorporated by reference. In addition, it should be reiterated that numerous courts, including the United States Supreme Court and a Florida appellate court, have found the term “legitimate business” and similar terms unconstitutionally vague, and have stricken laws that contain them. *Morales*, 527 U.S. at 56 (statute prohibiting loitering “with no apparent purpose” held to be unconstitutionally vague); *Papachristou*, 405 U.S. at 156 (law prohibiting wandering “without any lawful purpose” stricken for vagueness because it failed to give notice of what conduct was prohibited and led to arbitrary enforcement); *K.L.J.*, 581 So. 2d at 922 (law exempting minors from

curfew law who were on “legitimate business” stricken for vagueness because it failed to “provide sufficient guidance to parties as to what conduct was prohibited”). As these and other cases discussed above demonstrate, § 810.0975(2)(b)’s incorporation of the term “legitimate business” renders it unconstitutionally vague on its face.⁴

The vagueness of § 810.0975(2)(b) is highlighted under the facts in this case. As noted above, the Statute covers all speech and all conduct that occurs within a school safety zone during the applicable times, including, among many other things, people driving in cars, joggers, bikers, and walkers using the public bike path/sidewalk, and persons visiting churches, businesses, and residences. (Ex. 2, ¶¶ 87-102, Exs. 23-34 (pictures and maps showing the homes, businesses, and other uses located within the school safety zones around Key Largo School and Coral Shores High School). Undoubtedly, hundreds if not thousands of people drive, bike, or walk within a school safety zone in a given day. Apparently, the State views all these people entering or remaining upon a school safety zone to have “legitimate business.” How could the Defendants have known that their Bible distribution was illegitimate, when all these other individuals are permitted access to school safety zones? They couldn’t, and that is one of the many unconstitutional vices of the Statute.

The openness of the School’s campus further exemplifies the vagueness of the Statute. By policy, Key Largo School opens its facilities to use by the community. (Ex. 1, ¶ 63; Ex. 12.). The

⁴ The only Florida court to construe § 810.0975(2)(b) did not rule on the facial vagueness of the Statute because the plaintiff in that case lacked standing to raise a vagueness claim. *J.L.S.* 947 So. 2d at 646. The plaintiff in *J.L.S.* lacked standing because his own conduct was legitimately prohibited, he was not engaging in any protected speech activities and he had been warned twice by police to stay out of the school safety zone. Here, the Defendants’ speech can not legitimately be prohibited, they had not been warned to stay out of the school safety zone, but were authorized to be there by the Monroe County Sheriff’s Office and two school officials, including the Principal. Clearly, they have standing to challenge the vagueness of the Statute both on its face and as applied.

School's Community Use Policy states that "[a]pproved uses shall include meetings and activities of a literary, scientific, religious, educational, recreational, political, economic, artistic, character building and welfare nature which are of general public interest." (Ex. 12.) The School even permits the use of School facilities "during the hours school is in session" so long as the use does not "interfere with the regular conduct of school work or a regularly scheduled school function." (Ex. 12.) Thus, under the School's Community Use Policy, many activities, including constitutionally protected expression, are permitted to occur on the School's campus, including during the hours that § 810.0975(2)(b) is in effect (one hour before school begins to one hour after school ends).

In practice, Key Largo School is used by a wide array of community groups and individuals for a broad range of activities. The cub scouts use the School's facilities for meetings and banquets. (Ex. 4, ¶¶ 5-6, 14.) A local Church uses the School's grounds for picnics and softball games. (Ex. 1, ¶ 68.) A local community band uses the School's facilities for practices. (Ex. 1, ¶ 68.) The Keys Players have used the School for its productions. (Ex. 22, ¶ 15.) The Upper Keys Athletic Association uses the School's facilities for practices and games associated with its sports league. (Ex. 4, ¶¶ 7-9; Ex. 22, ¶¶ 3-14.) A youth football league uses the School's gym for pep rallies. (Ex. 4, ¶ 11.) The Key Largo Parent Teacher Association hosts a fund-raiser called Field Day each year that takes place on School grounds. (Ex. 4, ¶ 10.) And the playground located on campus is viewed as a community playground. (Ex. 4, ¶ 12.) People use the playground on weekends and on weekdays. (*Id.*) On weekdays, people use the playground both while school is in session and after the school day is over. (*Id.*)

Because the School grants wide-open access to its facilities, people routinely enter and remain within the school safety zone surrounding Key Largo School to access various activities and

events occurring at the School both with and without specific permission. These people often enter into the school safety zone around Key Largo School during the time frame that § 810.0975(2)(b) applies, including directly after School is dismissed, which is the same time the Defendants were conducting their Bible distribution. For instance, the Upper Keys Athletic Association used the School's baseball fields for practices. (Ex. 22, ¶ 6.) Several of these practices started directly after school was dismissed. (*Id.* ¶ 7.) Parents were permitted to come onto the School's property for the entire practice, even if they did not have children who attended Key Largo School, which of course necessitated that they enter the school safety zone. (*Id.* ¶ 8-11.) In addition, a local Cub Scouts den used the School's outdoor playground and pavilion area for many of its meetings. (Ex. 4, ¶ 14.) Parents of children in the den were required to attend the meeting, and so would come onto the School's campus for the duration of the meeting. (*Id.*) Several of the children in the den did not attend Key Largo School. (*Id.*) Again, this necessitated that the people coming to the den meeting enter the school safety zone. Finally, for about a year and a half, the School permitted a local man to run a Tae Kwan Do class on campus. (Ex. 4, ¶ 13.) This class met immediately after school let out and was open to any one in the community. (*Id.*) Any attendees of the class had to enter the school safety zone to access the class. The people attending these community events and activities at the School, and the innumerable other people conducting business at businesses located within 500 feet of the School, or driving, walking, and jogging past the School, have "legitimate business" within the school safety zone under § 810.0975(2)(b).

The Defendants simply could not have known that distributing Bibles from the public sidewalk in front of Key Largo School is "illegitimate" business, given all the other people found to have "legitimate business" within the school safety zone. The determination of what constitutes

“legitimate business” is left entirely to the unfettered discretion of the officials charged with enforcing the Statute, and no reasonable man could understand what the Statute proscribes.

CONCLUSION

WHEREFORE, the Defendants pray that their motion to dismiss be granted and sustained on each and every ground hereof, and that the Amended Information against them be dismissed.

Respectfully submitted,



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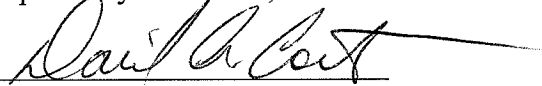
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and attached exhibits were mailed to Griska Mena at the Offices of the State Attorney, 88820 Overseas Highway, Tavernier, Florida 33070, this 5th day of April, 2007.

Respectfully submitted,



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DECLARATION

Under penalties of perjury, I declare that I have read the foregoing Defendants' Sworn Joint Motion to Dismiss the Amended Information and Statement of Undisputed Material Facts in Support Thereof and that the facts stated in it are true.

Executed this 31st day of March, 2007, in Key Largo, Florida.

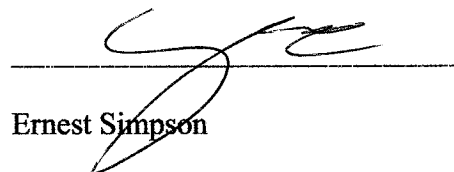
Anthony Mirto

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Ernest Simpson