Cahill Files Amicus Brief in Supreme Court of United States in First Amendment Case

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On December 29, 2017, Cahill filed an *amicus curiae* brief in the Supreme Court of the United States on behalf of the Institute for Free Speech in *Lozman* v. *City of Riviera Beach*. In *Lozman*, the Supreme Court will decide whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

Federal courts agree that to state a *prima facie* claim of First Amendment retaliation, a plaintiff must show three elements: (1) her speech was constitutionally protected, (2) defendant took adverse action that would likely deter a person of ordinary firmness from engaging in such speech (i.e. placing plaintiff under arrest); and (3) plaintiff's constitutionally protected speech was a substantial factor motivating the adverse action. The U.S. Circuit Courts of Appeal are divided on where probable cause to arrest fits into this framework in a retaliatory arrest case. The Ninth and Tenth Circuits consider whether probable cause for the arrest existed as part of a holistic inquiry into the third element, motivation for the arrest, while the Second, Fourth, Fifth, and Eighth Circuits require a plaintiff to plead and prove absence of probable cause as a separate element of the retaliation claim. Cahill's brief argues that the Supreme Court should adopt the Ninth and Tenth Circuit's approach in order to vindicate critical First Amendment interests, as separating the court's analysis of whether probable cause existed from its analysis of underlying motivation for the arrest requires dismissal of retaliation claims where plaintiffs were in fact targeted for arrest based on the messages conveyed by their protected speech.

Attorney

- Floyd Abrams