Supreme Court Midterm

Organized by the **State and Local Legal Center**

Hosted by the **National Association of Counties**

Featuring **Colleen Roh Sinzdak**, **Richard A. Simpson**, and **Brian Cardile**

About the Webinar

- Speakers' bios and a handout
- Questions
- Recording
- Technical difficulties
- The views expressed in this webinar do not necessarily reflect the views any of the sponsoring organizations
- Survey

About the SLLC

- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- National League of Cities
- National Association of Counties
- International City/County Management Association
- U.S. Conference of Mayors
- International Municipal Lawyers Association
- Government Finance Officers Association

About the SLLC

- Since 1983 the SLLC has filed over 350 briefs
- This term the SLLC will file 14 briefs before the Supreme Court
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example!

About the Speakers

- **Colleen Roh Sinzdak**, Hogan Lovells
- **Richard A. Simpson**, Wiley Rein, LLP
- **Brian Cardile**, Daily Journal

McDonough v. *Smith*

Petitioner: Former Democratic Commissioner of Rennselaer County Board of Elections, who was tried twice based on fabricated evidence

Respondent: Special District Attorney for Rensselaer, who prosecuted petitioner and allegedly fabricated the evidence

Question Presented: When does the statute of limitations begin to run for a Section 1983 claim based on the fabrication of evidence in criminal proceedings?

-When the proceedings are terminated in the defendant's favor?

-When the defendant becomes aware of the tainted evidence and its improper use?

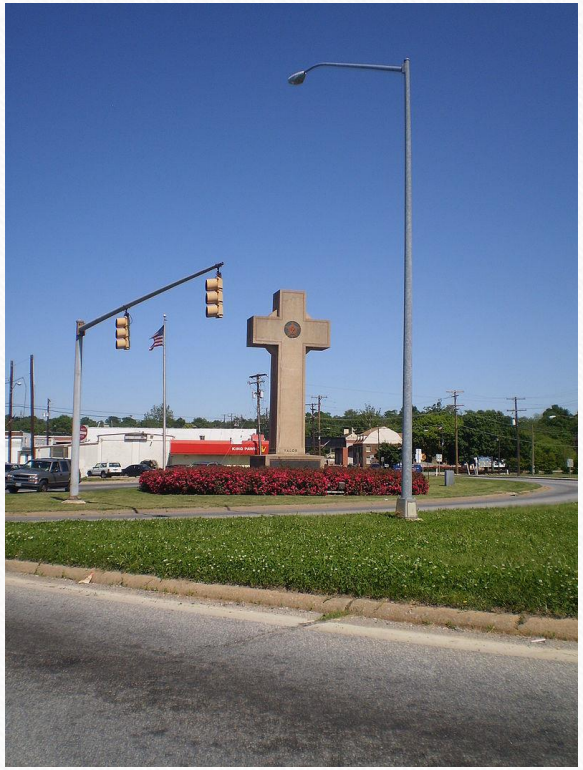
Fort Bend County v. *Davis*

Petitioner: Fort Bend County Texas, the former employer of Lois Davis

Respondent: Lois Davis, former IT employee of Fort Bend County, alleges that she was fired because of sexual harassment, retaliation, and religious discrimination

Question Presented: Does a court have jurisdiction over a Title VII employment discrimination claim that has not been presented to the EEOC?

Maryland-National Capital Park & Planning Commission v. *American Humanist Association*



Petitioners: The Maryland state entity charged with maintaining the State's parks and monuments, including the 40 foot war memorial at the heart of the case. (The American Legion, which first built and maintained the memorial, is also a petitioner.)

Respondents: A humanist group and several members who allege that they are injured by the war memorial because the State's maintenance of a cross shaped memorial infringes on their religious freedoms.

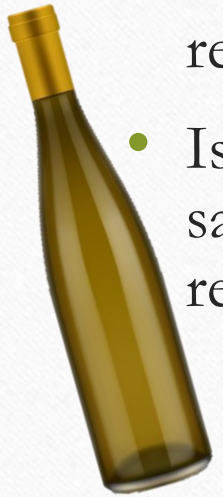
Question Presented: Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross?

Tennessee Wine and Spirits Retailers Association v. Clayton Byrd et al.

- Commerce Clause:
  - "the Congress shall have Power ...to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes"
- Dormant Commerce Clause Principle:
  - States may not discriminate against out of state goods or economic interests
- Twenty-First Amendment:
  - "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Tennessee Wine and Spirits Retailers Association v. Clayton Byrd et al.

- Tennessee statute: two year durational residency requirement for any individual to obtain a retail license to sell alcoholic beverages
- Ten year durational residency requirement to renew a retail license (renewal required annually)
- Issue: Does the dormant Commerce Clause permit a State to regulate liquor sales by granting licenses only to individuals who meet state residency requirements?
  - Petitioner sought review only as to the two year residency requirement



Tennessee Wine and Spirits Retailers Association v. Clayton Byrd et al.

- Sixth Circuit: requirements violate dormant Commerce Clause; Judge Sutton dissents
- Most recent Supreme Court decision: *Granholm v Heald*, 544 U.S. 460 (2005)
- Majority analysis
  - Neutral dormant Commerce Clause analysis
  - State law that discriminates against interstate commerce can be upheld only if it "advances a legitimate local purpose that cannot be adequately served by reasonable non discriminatory alternatives"
  - Recognizes legitimacy of three tier system (producer, wholesaler, retailer)
- Dissenters argue for broad reading of Twenty-First Amendment

Tennessee Wine and Spirits Retailers Association v. Clayton Byrd et al.

- Petitioner: core v. non-core approach
  - Core regulation protected so long as in-state and out-of-state products treated the same
- SLLC amicus: deferential rational basis test
  - Attempt to present a middle ground (all state regulation permissible so long as it has a minimal rational connection to a legitimate state interest)
  - Two year residency requirement passes muster under this test; ten year residency for renewal does not (although express statement to this effect not included in our brief)

Mount Lemmon Fire District v. Guido

- Case brought by two firefighters (age 54 and 46) who were laid off following a budget shortfall
- Oldest two firefighters employed by the District
- Issue: Does the Age Discrimination in Employment Act apply to State entities (including subdivisions) with fewer than 20 employees?

Mount Lemmon Fire District v. Guido

- The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees ….The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State
- Circuits split: at least three Circuits siding with the States that numerosity requirement applies (6th, 7th 10th) and one (9th in this case) holding that ADEA applies to all State entities without regard to size
- SLLC amicus: numerosity requirement should apply to State entities, just as it does for Title VII discrimination claims

Mount Lemmon Fire District v. Guido

- Unanimous (8-0) decision
- ADEA applies to all State entities regardless of size
- Plain language of the statute is additive; Title VII uses different language

Gerald P. Mitchell v. State of Wisconsin

- Police had blood drawn from Petitioner Mitchell while he was unconscious at hospital
- Resulted in charge and conviction of operating vehicle while intoxicated
- Issue: Does an implied consent statute specifying that an unconscious motorist is presumed not to have withdrawn consent to a blood draw where there is probable cause to believe the motorist was driving while intoxicated violate the Fourth Amendment warrant requirement?
- Set for Argument April 23, 2019

Gerald P. Mitchell v. State of Wisconsin

- Wisconsin relies on two statutes:
  - (1) first provides that any person who drives on state roads impliedly consents to testing of breath, blood or urine;
  - (2) second provides that a person who is unconscious or otherwise incapable of withdrawing consent is presumed not to have withdrawn consent where, among other things, an officer has probable cause to believe the person was driving while intoxicated
- Implied consent laws in some form in all 50 States

Gerald P. Mitchell v. State of Wisconsin

Prior Decisions

- *Missouri v. McNeely*, 569 U.S. 141 (2013)
  - Natural dissipation of blood alcohol level does not create a per se exigency that categorically justifies drawing blood without a warrant
- *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)
  - Statute imposing criminal penalties for refusing to consent to blood draw was unduly coercive

Gerald P. Mitchell v. State of Wisconsin

Wisconsin Supreme Court Decision

- Plurality (3) upheld search based on the implied consent theory
  - Given "significant, well-publicized laws designed to curb drunk driving," implied consent statute is valid and, although a conscious person can withdraw that consent, a person who drinks sufficient alcohol to render himself unconscious "forfeit[s] all opportunity to withdraw the consent he had given."
- Concurring justices (2) held that the search was valid as reasonable incident to arrest
  - No less intrusive option available unlike in *Birchfield*
- 2 justices dissented

Dept. of Commerce, et al v. New York, et al (18-966)

Questions Presented:

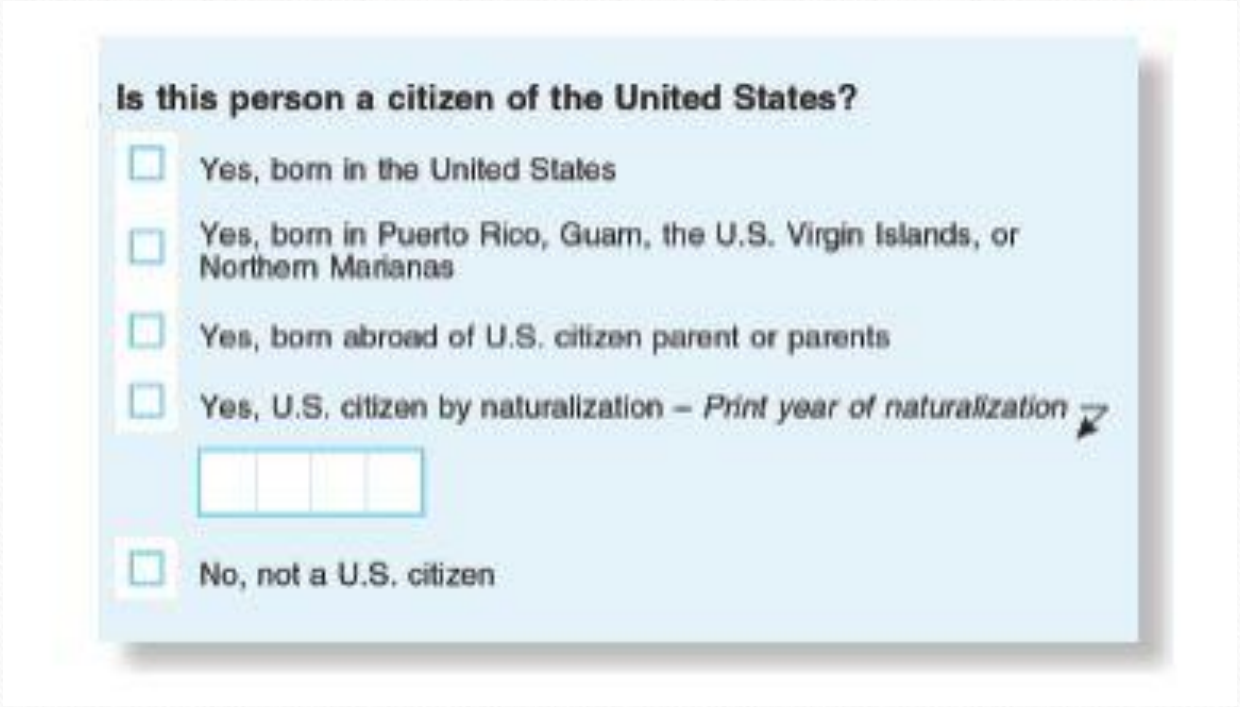
1. Did district court err in enjoining Commerce Secretary Wilbur Ross from reinstating/adding citizenship question to the 2020 Census on Administrative Procedure Act grounds?

2. In APA suit seeking to set aside agency action, does scope of discovery extend beyond provided administrative record, to allow for, e.g., deposition of agency decisionmaker (here, Ross), "without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis?"

3. Did decision to add citizenship question violate Enumeration Clause (added 3/15)?

Dept. of Commerce, et al v. New York, et al (18-966)

Proposal:



Dept. of Commerce, et al v. New York, et al (18-966)

Key Constitutional/Statutory Provisions:

1. **Enumeration Clause** (art. 1, Section 2): "Representatives and direct Taxes shall be apportioned among the several States…according to their respective Numbers."
2. **Fourteenth Amendment** (Section 2): "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."
3. **APA** (5 U.S.C. Section 706(2)): Court will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
4. **Census Act** (Section 6(c)): "To the maximum extent possible…the Secretary shall acquire and use information available [administrative records] instead of conducting direct inquiries."

Dept. of Commerce, et al v. New York, et al (18-966)

Procedure:

March 2018: Ross announces 2020 Census would include question about citizenship
April: New York (plus 17 states) file suit in SDNY, asserting statutory (APA) and constitutional claims (5Amd Due Process; Enumeration Clause)
June: SDNY dismisses Enumeration Clause claim; lets others go forward
July – Nov: Significant wrangling re: scope of discovery, proposed depo of Ross
Nov: SCOTUS stays Ross depo; grants cert as to question; SDNY trial continues
Jan 2019: SDNY issues 277-page ruling; finds violations of APA, finds Ps did **not** carry burden as to Due Process claim that Ross acting with discriminatory intent
Feb: SCOTUS grants cert before appellate judgment, sets argument for April
March: SCOTUS adds Enumeration Clause question to grant, after request from SG Francisco and after NDCA ruling that addition of question violates the Enum. Clause

Dept. of Commerce, et al v. New York, et al (18-966)

SDNY Rationale:

- Per Fourteenth Amendment congressional apportionment based on "whole number of persons in each state," not whole number of citizens

-History: Citizenship was inquired about from 1820-1950 but not after 1960, to avoid depressing turnout of already "hard to count" groups. Citizenship continues to be asked about in American Community Survey (a rolling, detailed survey of 3.5M/yr)

-Addition of Q **violates APA** because: (1) **Contrary to law** – Section 6(c) of Census Act says Secretary must use admin records where possible, rather than direct inquiries. Records (e.g. from ACS) could have provided citizenship data; Section 141(f) requires Secretary to notice Congress 3 years in advance of changes (2) **Arbitrary and capricious** – Ross' given basis for decision was pretextual (conceived before DOJ's Voting Rights Act rationale), and contrary to evidence before agency (that adding Q would depress response in non-citizen and Hispanic communities)

Dept. of Commerce, et al v. New York, et al (18-966)

NDCA Rationale:

-Also finds **APA violation** for reasons similar to SDNY (Ross decision pretextual, contrary to evidence from agencies, contrary to law)

-**Enumeration Clause violation** because: Clause mandates "actual Enumeration" of the population. "While each and every question on the census need not be related to the goal of actual enumeration, a decision to alter the census in a way that affirmatively interferes with the actual enumeration, and does not fulfill any other reasonable governmental purpose, is subject to a challenge under the Enum Clause."

Addition of question will "materially harm the accuracy of the census without advancing any legitimate governmental interest."

Dept. of Commerce, et al v. New York, et al (18-966)

Petitioners' Arguments:

-Standing: Not present because theory is based on assumption third parties will act illegally (i.e. not respond to census); such conduct not attributable to Ross/DOC

-Agency Discretion: Inclusion of items on census within agency discretion; not reviewable

-Re: APA, decision not arbitrary and capricious: Citizenship Q has been used previously; evidence of likely undercount is mixed; decision is not pretextual merely because Ross may have "additional motivations for his decision." Also, not contrary to law, because available records not sufficient; 3-year time frame required for report of change to Congress not reviewable by courts

Partisan Gerrymandering Cases

Appeals, Questions before Court:

Lamone v. Benisek (18-726) - From D. Md.

1. Are legal claims unmanageable?
2. Did DC err in granting SJ to Ps when it "resolved disputes of material fact [and] failed to view the evidence in the light most favorable to Ds"?
3. Is it abuse of discretion to grant relief notwithstanding Ps' delay in seeking injunction, since result would impact, at most, one election?

Rucho v. Common Cause (18-422) – From M.D. NC

1. Do Ps have standing to press partisan gerrymandering cases?
2. Are Ps partisan gerrymandering claims justiciable?
3. Was North Carolina's 2016 congressional map, in fact, an unconstitutional partisan gerrymander?

Partisan Gerrymandering Cases

Background - Previous Partisan Gerrymandering Cases

Baker v. Carr (1962) – "One person, one vote"
-Established that federal courts may hear constitutional challenges to redistricting

Gaffney v. Cummings (1973) – "Political fairness" permissible goal
-In interest of "political fairness," CT drew map to make vote share = seats awarded

Davis v. Bandemer (1986) – Partisan G-mandering "properly justiciable" under EPC
-This even though "there is no likely arithmetic presumption, such as the 'one person, one vote'" with which to draw clean constitutional line
-Standard: Only claim where maps arranged "in manner that will **consistently degrade** a voter's influence on the political process as a whole."
-Three justices (O'Connor, Rehnquist, CJ Berger) say claim non-justiciable, pol. Q

Partisan Gerrymandering Cases

Background - Previous Partisan Gerrymandering Cases, cont'd

Vieth v. Jubelirer (2004) – Kennedy leaves door open
-No manageable standard had evolved in lower courts since *Davis*
-4 justices: No standard exists by which Court can find unconstitutional partisan GM
-J. Kennedy: Claims *may* be justiciable, under First Amd theory
-Stevens, Ginsburg, Souter, Breyer would have allowed claim to go ahead

Gill v. Whitford (2018) – Narrow holding re: standing

Partisan Gerrymandering Cases

Background – Current Appeals

Lamone v. Benisek:
-Maryland's Sixth Congressional District redrawn by Dem Governor/officials in 2011
-District had historically been safe GOP district
-Record shows partisan intent. Gov. O'Malley said "decision made to go for the 6th"
-Redrawing = 90,000 voter swing for Democrats (out of aprx 230,000 voters)

-Suit filed by three GOP voters in district on, inter alia, First Amd grounds
    -2014: Suit dismissed
    -2016: Amended complaint, three judge court empaneled
    -2017-8: Motion for PI or SJ denied, SCOTUS affirms
    -2018: Three-judge court finds for Ps; enjoins use of 2011 maps

Partisan Gerrymandering Cases

Background – Current Appeals

Rucho v. Common Cause:
-North Carolina is "purple" state, congressional vote generally about 50-50
-2011 redistricting by GOP Assembly yields 9 GOP CDs/4 Dem in 2012; 10-3 in 14
-2016: *Cooper v. Harris*: 2 districts struck down as "predominantly race-motivated"
-New 2016 Plan explicitly seeks to maintain 10-3 balance; Assembly member David Lewis states in committee: "I propose we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."
-2016: Suit filed under First Amd and Equal Protection Clause theories
-2018: DC holds Ps have standing, and that plan violates 1Amd & EPC
-2018: SCOTUS remands, citing *Gill v. Whitford*
-2018: DC again finds standing exists, and that plan violates 1Amd & EPC

Partisan Gerrymandering Cases

Core arguments in the appeals, Plaintiffs/Respondents:

1. Significant partisan gerrymandering violates First Amendment
-States cannot penalize citizens because of their disfavored political views
-Partisan GM is penalty for expression of past political speech
-"No redistricting exception" to the above well-established principle

2. First Amendment claim is justiciable
-Judiciary has responsibility to decide cases, "even those it would gladly avoid"
-PQ doctrine "high bar:" Question is whether issue "entirely defies judicial treatment"
-Proposed 1Amd framework (in *Lamone*) asks whether:

1. State acted with intent to burden citizens based on their political beliefs
2. Did maps dilute votes/disrupt pol assn in "discernible/concrete way"
3. Is there other, constitutionally acceptable explanation for maps' ill effects?

Partisan Gerrymandering Cases

Core arguments in the appeals, Plaintiffs/Respondents:

3. Significant partisan gerrymandering violates Eq Protection Cl (Rucho)
-EPC prohibits state action that "disfavors class of citizens absent suff. justification"
-Where state action burdens C'l right, need compelling interest and narrow tailor
-Not disputed that NC maps based "predominantly" on intent to burden Dems
-No other compelling interest/no narrow tailor

Partisan Gerrymandering Cases

Core arguments in the appeals, Defendants/Petitioners:

1. No Standing

-Many R CDs under plan proposed by Ps would likely remain R, such that there is no injury shown in those districts

-Even for CDs that would change, no standing, because "voters do not have a legally protected interest in being able to vote for candidates they like. If each vote is counted and counted equally, and no one is sorted by race or another invidious basis, then individual voters lack an Article III injury."

-Standing to challenge plan overall (rather than by CD) is "deeply flawed;" would give "every voter in the State the right to challenge every CD in the state."

Partisan Gerrymandering Cases

Core arguments in the appeals, Defendants/Petitioners:

2. Partisan Gerrymandering Claims Aren't Justiciable (based on BvC factors)
-**Textual commitment to coordinate branch** (Elections Clause):
-States have "primary authority" to regulate congressional elections, but Congress may at any time by law make or alter such regulations
-**No manageable standard** (another BvC factor):
-Court has yet to find it, despite centuries of partisan gerrymandering
-*Intent* only useful factor when considering forbidden action (e.g. race d/c); Court acknowledges "a degree of partisan motivation is inevitable…and permissible." So, how much is too much?
-*Effects*; how to measure? Cases "clearly foreclose…claim that Constitution requires proportional representation"

Kisor v. Wilkie (18-15)

Question Presented

1. Should Court overrule *Auer v. Robbins* and *Seminole Rock & Sand Co.* (1945), which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation?

Kisor v. Wilkie (18-15)

Background

-*Chevron* deference v. *Auer/Seminole Rock* deference:
-Under *Chevron*, courts defer to reasonable agency interpretation of ambiguous law
-Under *Auer*, deference where agency interprets **own** ambiguous regulation

-James Kisor, Marine veteran who served during the Vietnam War
-Filed for benefits related to PTSD symptoms, VA grants them, but not retroactively to 1983, as Kisor had sought. VA cites interpretation of its own regulations

-Kisor appeals to Federal Circuit, which defers based on *Auer*

Kisor v. Wilkie (18-15)

Arguments, Kisor

-APA incompatibility

-*Auer* circumvents APA safeguards; whereas regulatory action usually subject to public (N&C) and judicial oversight, "subregulatory action" escapes such review

-Unpredictability/Pernicious Incentives

-Cognizant of *Auer*, agencies are motivated to write vague regulations that lack guidance and that can later be interpreted in whatever manner benefits the agency

-Separation of Powers concerns

-Courts under *Auer* doctrine cede their constitutional responsibility to interpret law

-Stare Decisis

-Seminole Rock "badly reasoned," and experience and practical developments "made its earlier error all the more egregious and harmful" (language from *Wayfair*)

Kisor v. Wilkie (18-15)

Arguments, Dept of VA

-Concedes that *Seminole Rock* should be narrowed and clarified

-*SR/Auer* deference "not well grounded historically," and "more difficult to justify" than *Chevron* deference

-With appropriate limitations and clarifications, Seminole Rock/Auer OK

-Courts should apply more rigorous review to ensure agency action reasonable, issued with fair notice, not inconsistent with prior policy, rests on agency expertise, and represents *agency's* considered view, not views of low-level employees.

-Stare Decisis

-Practice has been "feature of admin law for decades;" high reliance interests

-Separation of Powers

-Where agency makes & interprets rules, only exercises executive power

Kisor v. Wilkie (18-15)

Some Dynamics

-Gathering momentum against administrative state

-Js CJR and Alito have noted "serious questions" about *Auer*

-Js Gorsuch and Kavanaugh have both questioned related doctrines of *Chevron* deference and *Humphrey's Executor.* Some view this case as first step in the unwinding of both of those doctrines

-Long-standing precedents, impact on view of Court

-If *Auer/SR* overruled, would be among multiple recent instances of settled case law being reversed (e.g. *Abood*; *Wayfair*)

-With new conservative majority, more Js likely to be concerned about setting precedent wherein settled law becomes easier to change

Questions?

Thanks for attending