

## Syllabus

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**SUPREME COURT OF THE UNITED STATES**

## Syllabus

ELLUS *v.* BOYCERTIFICATE BY THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

No. 10–08. Decided December 12, 2020

After being presented with an affidavit calling for his recusal in this case, a District Court Judge certified a question to this Court seeking guidance on how to construe the mandatory recusal statute, 28 U.S.C. §144, in a manner that both prevents frivolous demands for recusal while mitigating the risk of prejudiced judges. In addition, he sought guidance on how to proceed in a case where the judge is accused of an extrajudicial bias “with little indication that such an impairment even exists.” This Court set the certified questions for briefing and argument.

*Held:*

1. A judge must recuse under 28 U.S.C. §144 when an affidavit is filed that is timely and alleges facts that (1) are material and stated with particularity; (2) are such that, if true, they would convince a reasonable person that a bias exists; and (3) show that the bias is personal, as opposed to judicial, in nature. Such an affidavit must be accompanied by a certificate of good faith and a party may submit no more than one such affidavit in a case.

2. In considering an affidavit the court may only consider the contents of the affidavits and may construe all matters against the affiant. The party seeking recusal bears the burden of rebutting the presumption that the presiding judge was impartial.

STEWART, J., delivered the opinion for a unanimous Court.

Opinion of the Court

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**SUPREME COURT OF THE UNITED STATES**

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No. 10–08

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**RAFELLUS *v.* PAPASBESTBOY**

ON CERTIFIED QUESTION BY THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

[December 12, 2020]

JUSTICE STEWART delivered the opinion of the Court.

Before us are two questions certified to us by the District Court. Firstly, “what are the objective requirements of a § 144 which both prevent frivolous affidavits and prejudiced judges?” and secondly, “How should one proceed in my situation, when a judge is accused of an extrajudicial bias with little indication that such an impairment even exists?”

For reasons that follow, we hold that a judge must recuse themselves under 28 U.S.C § 144 if an affidavit is filed that is timely and alleges facts that: (1) are material and stated with particularity; (2) are such that, if true they would convince a reasonable person that a bias exists; and (3) show that the bias is personal, as opposed to judicial, in nature. It also requires that the affidavit be accompanied by a certificate of good faith by counsel and that no affidavit be filed by that same party previously in the case. In considering an affidavit, the court may only consider the contents of the affidavits and may construe all matters against the affiant. The party seeking recusal bears the burden of rebutting the presumption that the presiding judge was impartial. *United States v. Melton*, 738 F. 3d 903, 905 (CA8 2013).

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## I

There are 3 main judicial disqualification statutes: 28 U.S.C § 144, 28 U.S.C § 455 and 28 U.S.C. § 47. 28 U.S.C. § 47 provides that a Judge must disqualify themselves on cases which they sat on as a trial judge. 28 U.S.C § 455 is aimed at the appearance at partiality as well as circumstances that give rise to an appearance of partiality. Most importantly, 28 U.S.C § 144 is aimed at *actual* partiality, not the mere appearance of it; it also exclusively applies on the district level.

Section 144 states in its entirety:

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.”

Most decisions around section 144 occur on the circuit court level as the “Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. *Liljeberg v. Health Services Acquisition Corp.*, 486 U. S. 847, 862 (1988).

## II

A section 144 affidavit must state facts with particular-

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ity. The statute, on its plain terms, requires this. “[T]he reasons and facts for the belief the litigant entertains are an essential part of the affidavit and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.” *Berger v. United States*, 255 U. S. 22, 33–34 (1921). “Assertions merely of a conclusionary nature are not enough.” *United States v. Haldeman*, 559 F.2d 31, 134 (CA9 1976).<sup>1</sup> A Judge is furthermore entitled to determine the sufficiency of the affidavit, the command to proceed “no further” is only of effect once the affidavit is deemed sufficient. See *United States v. Azhocar*, 581 F.2d 735, 738 (CA9 1978); *Berger*, *supra*.

The affidavit must allege such material and particularized facts as would convince a reasonable person that a bias exists. Importantly, and distinct from section 455, the facts must convince a reasonable person that a bias *actually exists* and not just the appearance of it. “Neither the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge’s personal knowledge to the contrary.” *Mims v. Shapp*, 541 F.2d 415, 417 (CA3 1976).

The judge’s bias must be personal in nature. “[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favorit-

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<sup>1</sup>It is in this matter that plaintiff’s affidavit is legally insufficient. His affidavit does not allege any particular facts, only the mere conclusion that the Judge is prejudiced against him because of Attention Deficit Hyperactive Disorder (ADHD). See *Griffith v. Edwards*, 493 F.2d 495 (CA8 1974) (“scurrilities and generalities” fall short of the statute’s requirements). In order for the affidavit to be legally sufficient, the plaintiff must allege facts that would cause a reasonable person to believe that the court was prejudiced against him on the basis of ADHD, not the mere conclusion that it is.

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ism or antagonism that would make fair judgment impossible.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). “Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.” *Id.*, at 555-556. Bias perceived during judicial proceedings are “[a]lmost invariably, . . . proper grounds for appeal, not for recusal.” *Ibid.* A judge’s action in prior proceedings is still judicial in nature. See *United States v. Gordon*, 61 F. 3d 263, 268 (CA4 1995)

In regard to the second question, the only issue that the court has to resolve is whether the affidavit adequately alleges facts that give rise to the impairment. It is not for the court to consider facts or evidence arising from something outside the affidavit; the only evidence for the court to consider is that inside the affidavit.

## III

When the party can allege facts that cannot be challenged, the procedural requirements must be strictly followed. Section 144 provides three important procedural requirements.

Firstly, a certificate of counsel must accompany the affidavit. The affidavit must be sworn by the party themselves. This is to prevent abuse as counsel of record have an “obligation which he owes to the court as well as to his client, and he owes a public duty to aid the administration of justice, to uphold the dignity of the court and respect its authority.” *United States v. Onan*, 190 F. 2d 1, 7 (CA8 1951). Various circuit courts have held that the certificate requirement requires an admitted counsel to provide the certificate, however, as there is currently no bar, we do not resolve

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how this statute might apply within this context. See, e.g. *Currin v. Nourse*, 74 F. 2d 273 (CA8 1934).

Secondly, an affidavit can only be filed one by one party per case. This restriction is plain on the terms of the statute. This is to prevent section 144 from being used as a tool to judge shop and endless frivolous affidavits.

Thirdly, the affidavit must be timely. Generally, this means that a party must file the affidavit as soon as reasonable practicable once the party becomes aware of the biased conduct. “One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives.” *In re United Shoe Mach. Corp.*, 276 F. 2d 77, 79 (CA1 1960).

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We answer the certified questions as follows:

1. Recusal is required under 28 U.S.C § 144 if an affidavit is filed that is timely and alleges facts that: (1) are material and stated with particularity; (2) are such that, if true they would convince a reasonable person that a bias exists; and (3) show that the bias is personal, as opposed to judicial, in nature. It also requires that the affidavit be accompanied by a certificate of good faith by counsel and that no affidavit be filed by that same party previously in the case.
2. In considering an affidavit, the court may only consider the contents of the affidavits and may construe all matters against the affiant. The party seeking recusal bears the burden of rebutting the presumption that the presiding judge was impartial.

*It is so ordered.*