Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FEARMORTALITY *v.* BAR ASSOCIATION

FROM CERTIFIED QUESTION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 06–01. Argued September 30, 2022—Decided October 16, 2022

On this matter, we release a non-precedential opinion into a certified question we received from now-former judge DarkAngelB98 in the mentioned case regarding whether he ought to recuse himself from the matter on the basis of accused bias, prejudice, and/or partiality.

Held: The judge in the lower court is to recuse himself. While we recognize this matter is no longer present, it is a non-precedential decision that was needed for court records as well as an answer to a certified question. Pp. 3–10.

HUGHES, C. J., delivered the opinion of the Court, in which RUSHING, SCALIA, GORSUCH, REHNQUIST, and BLACK, JJ., joined. BRANDEIS, and WAYNE, JJ., took no part in the consideration of this case.

SUPREME COURT OF THE UNITED STATES

No. 6–01

FEARMORTALITY, PETITIONER *v.* FEDERAL BAR ASSOCIATION

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

[October 16, 2022]

CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Oftentimes, a sitting judge when they feel they are in a complicated position and would prefer to leave the decision making to someone else, a judge may elevate their question to a higher body—that would be us. They do this through a certified question. In this matter, the judge in the lower court debates whether they should recuse from the case or not. To answer this, we granted certification to answer this question. In short, yes, we hold that the judge in the lower court ought to recuse from this matter.

I

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U. S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U. S., at 881. Of

particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison*, 349 U. S., at 136-137. The objective risk of bias is reflected in the due process maxim that "no man be a judge in his own case and no man is permitted to try cases where he has an interested in the outcome." *Id.*, at 136.

Professional codes of conduct that "provide more protection than due process requires." *Caperton*, 556 U. S., at 890. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986). Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See ABA Model Code of Judicial Conduct Rules; see also 28 U. S. C., sec. 455. Though, in all fairness, we have in past cases not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist' vote was not decisive. See *Lavoie*, *supra*, at 827-828 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome determinative).

In that, it gives us a little trouble as a Court to conclude that a due process violation would arise from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett* v. *United States*, 556 U. S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision-making process. Indeed, one purpose of judicial confidentiality is to

assure jurists that they can re-examine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence:

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U. S., at 831.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831-832 (Blackmun, J., concurring in judgment). Due process entitles a plaintiff to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall* v. *Jerrico*, *Inc.*, 446 U. S. 238, 242 (1980).

II

Required judicial recusal for bias did not exist in England at the time of Blackstone. 3 W. Blackstone, Commentaries *361. Since 1792, federal statutes have compelled district

judges to recuse themselves when they have an interest in the suit, or have been counsel to a party. See Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 278. In 1821, the basis of recusal was expanded to include all judicial relationship or connection with a party that would in the judge's opinion make it improper to sit. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Not until 1911, however, was a provision enacted requiring district-judge recusal for bias *in general*—in its current, codified at 28 U. S. C., sec. 144.

Under section 144 and its predecessor, there came to be generally applied in the courts of appeals a doctrine, more standard in its formulation than clear in its application, requiring—to take its classic formulation found in an oft-cited opinion by Justice Douglas for this Court—that "[t]he alleged bias and prejudice to be disqualifying [under sec. 144] must stem from an extrajudicial source." *United States* v. *Grinnell Corp*., 384 U. S. 563, 583 (1966). We say that the doctrine was less than entirely clear in its application for several reasons. First, *Grinnell* (the only opinion of ours to recite the doctrine) clearly meant by "extrajudicial source" a source outside the judicial proceeding at hand—which would include extrajudicial sources earlier judicial proceedings conducted by the same judge. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger* v. *United States*, 255 U. S. 22, 31. Any adverse attitudes that evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make." 384 U. S., at 583. The cited case, *Berger*, had found recusal required on the basis of judicial remarks made in an earlier proceeding.

Yet many, perhaps most, Courts of Appeals considered knowledge (and the resulting attitudes) that a judge properly acquired in an earlier proceedings *not* to be "extrajudicial." See*, e.g.*, *Lyons* v. *United States*, 325 F. 2d 370, 376

(CA9), cert. denied, 377 U. S. 969 (1964); *Craven* v. *United States*, 22 F. 2d 605, 607-608 (CA1 1927). Secondly, the doctrine was often quoted as justifying the refusal to consider trial *rulings* as the basis for section 144 recusal. See, *e.g.*, *Toth* v. *Trans World Airlines*, *Inc.*, 862 F. 2d 1381, 1387-1388 (CA9 1988); *Liberty Lobby*, *Inc.* v. *Dow Jones & Co.*, 838 F. 2d 1287, 1301 (CADC), cert. denied, 488 U. S. 825 (1988). But trial rulings have a judicial expression rather than a judicial source. They may well be based upon extrajudicial knowledge or motives. Cf. *In re International Business Machines Corp.*, 618 F. 2d 923, 928, n. 6 (CA2 1980). And finally, even in cases in which the "source" of the bias or prejudice was clearly the proceedings themselves (for example, testimony introduced or an event occurring at trial which produced insuppressible judicial animosity), the supposed doctrine would not necessarily be applied. See, *e.g.*, *Davis* v. *Board of School Comm'rs of Mobile County*, 517 F. 2d 1044, 1051 (CA5 1975) (doctrine has "pervasive bias" exception), cert. denied, 425 U. S. 944 (1976); *Rice* v. *McKenzie*, 581 F. 2d 1114, 1118 (CA4 1978) (doctrine "has always had limitations").

With this understanding of the "extrajudicial source" limitation in sections 144 and 455(b)(1)—respectively—, we turn to the question whether it appears in section 455(a) as well. A more categorical approach of the nature of the latter's language: Recusal is required *whenever* there exists a genuine question concerning a judge's impartiality, and not merely when the question arises from an extrajudicial source. A similar "plain-language" argument could be made, however, with regard to the two sections mentioned a moment ago is when it derives from an extrajudicial source. As we have described, the latter argument is invalid because the pejorative connotation of the terms "bias" and "prejudice" demands that they be applied only to judicial predispositions that go beyond what is normal and ac-

ceptable. We think there is an equivalent pejorative connotation, with equivalent consequences, to the term "partiality." See American Heritage Dictionary 1319 (3d ed. 1992) ("partiality" defined as "[f]avorable prejudice or bias").

We do find that the presiding judge at the time held a bias, given their speaking on this topic, and being no longer to remain impartial to execute their judicial duties.

III

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, *supra*, at 136. As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948). The early and leading case on the subject is *Tumey* v. *Ohio*, 273 U. S. 510 (1972). There, the Court stated that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Id*., at 523.

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial pecuniary interest" in a case. *Ibid*. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); see Frank, Disqualification of Judges, 56 Yale L. J. 605, 611-612 (1947). Under this rule, "disqualification for bias or prejudice was not permitted"; those matters were left to statutes and judicial codes. *Lavoie*, *supra*, at 820; see also Part IV, *infra* (discussing judicial codes). Personal bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Lavoie*, *supra*, at 820.

As new problems have emerged that were not discussed

at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U. S., at 47. For a judge to consider "[p]recedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings," *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009), this must be done with an impartial, clearheaded, and focused mind.

However, this Court is not composed of psychologists nor could certified and licensed practicing psychologists currently practicing provide their guidance through *amicus curiae* briefing. So, yes, it is true that extreme cases often test the bounds of established legal principles, and sometimes no admirable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated. See, *e.g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846-847 (1998) (reiterating the due process prohibition on "executive abuse of power . . . which shocks the conscience"); *id.*, at 858 (Kennedy, J., concurring) (explaining that "objective considerations, including history and precedent, are the controlling principle" of this due process standard).

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 of facts intro-

duced 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 favoritism 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-term 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 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).

* * *

Subsequently, we find that Judge DarkAngelB98 should recuse from the stated case in question as an answer to his certified question to us.

It is so ordered.