MAGISTRATE LAW — RULE 11 SANCTIONS — SECOND CIRCUIT LEAVES CLASSIFICATION OF MAGISTRATE JUDGES' RULE 11 SANCTIONS UNRESOLVED. — *Kiobel v. Millson*, 592 F.3d 78 (2d Cir. 2010).

The Federal Magistrates Act[1] of 1968 created a class of legal officers whose role is to promote judicial economy by decreasing the burgeoning strain on federal district courts.[2] The Act established that magistrate judges may issue only "recommendations" for dispositive judgments, to be reviewed de novo by district courts, but may issue "order[s]" for nondispositive determinations, to be reviewed only for clear error.[3] Recently, in *Kiobel v. Millson*,[4] the Second Circuit reversed a magistrate judge's grant of a motion for Rule 11 sanctions. The panel unanimously held the district judge's affirmance of those sanctions to be an abuse of discretion[5] but fractured over the mooted question of whether the magistrate judge's initial determination constituted a dispositive or nondispositive judgment.[6] While the court rightly found that the allegations in question did not merit sanctions, the concurrences addressing the standard of review potentially undercut the efficiency purpose of the Federal Magistrates Act by inviting increased litigation and functionally mandating review under both standards. The panel should have either declined to reach the question or classified Rule 11 sanctions as nondispositive and reviewable only for clear error to facilitate district court administration.

In *Kiobel*, the plaintiffs moved for class certification in the Southern District of New York against Royal Dutch Petroleum Co. and two affiliated corporations, alleging violations of the Alien Tort Statute arising from the company's oil exploration in Nigeria.[7] The district court referred the motion to a magistrate judge under 28 U.S.C.

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[1] Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended in scattered sections of 18 and 28 U.S.C.). The role of federal magistrate judges was first clarified by a 1976 amendment. *See* Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified as amended at 28 U.S.C. § 636(b) (2006)). Three years later, the passage of the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended in scattered sections of 18 and 28 U.S.C.), expanded the scope of magisterial jurisdiction. *See id.* Additionally, uniformity across the federal magistrate system was established with the 1983 passage of Rule 72 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 72.

[2] *See* R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 801 (1993); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1504 (1995).

[3] 28 U.S.C. § 636(b)(1); *see also* FED. R. CIV. P. 72.

[4] 592 F.3d 78 (2d Cir. 2010).

[5] *Id.* at 81.

[6] *Id.* at 79.

[7] *Id.* at 80.

§ 636(b)(1)(B).[8] Magistrate Judge Pitman recommended that the motion be denied, and plaintiffs objected.[9] Defendants filed a response alleging, among other things, that several of the plaintiffs' witnesses were paid for their testimony, that those witnesses were "giving testimony that [plaintiffs'] counsel knows to be false," and that plaintiffs' counsel wired $15,195 for the witnesses' benefit.[10] Plaintiffs charged defense counsel with violating Rule 11(b)(3),[11] which requires that "factual contentions have [or are likely to have] evidentiary support."[12]

Magistrate Judge Pitman issued an opinion and order finding that defense counsel's first allegation had sufficient evidentiary support in the record, but that the second and third allegations "lacked an evidentiary basis" and thus warranted imposition of sanctions.[13] He found these violations after applying both the "utterly lacking in support"[14] standard and the "objective reasonableness" standard, under which a lawyer faces liability for claimed evidentiary support that is not objectively reasonable.[15] Defense counsel appealed to the district court, which affirmed the sanctions.[16]

The Second Circuit reversed.[17] Writing for a unanimous panel,[18] Judge Cabranes found that the district court's decision had "no support in law or logic" and thus constituted an abuse of discretion.[19] Although the magistrate judge had found that defense counsel had no support for their claim that plaintiffs' counsel knew the testimony to be false, the panel noted evidence giving rise to an inference in support of the claim.[20] Accordingly, the court held that the magistrate judge had incorrectly sanctioned defense counsel by requiring them to have

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8 *Id.*

9 *Id.*

10 *Id.* (alteration in original).

11 *Id.*

12 FED. R. CIV. P. 11(b)(3). Rule 11(c) provides for sanctions for violations of Rule 11(b). *See* FED. R. CIV. P. 11(c).

13 Kiobel v. Royal Dutch Petroleum Co., No. 02CIV7618KMWHBP, 2006 WL 2850252, at *11 (S.D.N.Y. Sept. 29, 2006).

14 *Id.* at *2 (quoting Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 388 (2d Cir. 2003)) (internal quotation mark omitted).

15 *Id.* (quoting *In re* Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003)). Magistrate Judge Pitman declined as a matter of discretion to impose monetary sanctions for the third allegation but imposed a $5000 sanction on each attorney who had signed the filing with the second allegation. *See id.* at *12.

16 *Kiobel*, 592 F.3d at 81.

17 *Id.* at 84.

18 Judge Cabranes was joined by Chief Judge Jacobs and Judge Leval.

19 *Id.* at 81.

20 This evidence was a combination of "circumstantial evidence," "[m]ore concrete[] . . . moments during depositions when [defense counsel] directly told plaintiffs' counsel that certain witnesses were testifying falsely," and evidence of statements "so obviously false that plaintiffs' counsel must have known of their falsity." *Id.* at 81–82.

proof for their allegations rather than merely an evidentiary basis.[21] In addressing the other allegation found by the district court to violate Rule 11 (though not sanctioned), the panel clarified the standard in the Second Circuit: "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement."[22]

Because the Second Circuit held that the district court had abused its discretion, the panel would have reversed under any standard of review and so did not need to determine the correct standard. Nevertheless, each member of the panel wrote separately to address whether Rule 11 sanctions constitute dispositive determinations to be reviewed de novo by the district court, or nondispositive determinations to be reviewed only for clear error.[23] Judge Cabranes began his analysis by noting that the Second Circuit had not addressed the issue directly, but that other courts had offered guidance.[24] Following the reasoning of the Sixth[25] and Seventh[26] Circuits, he concluded that Rule 11 sanctions are dispositive and reviewable de novo by the district court because, although a Rule 11 motion "arises in the context of an underlying action, [it] is the functional equivalent of an independent claim."[27] He observed that the analogy to an independent claim found support in the fact that such proceedings generally involve parties different from the litigants of the underlying action.[28] Judge Cabranes distinguished Rule 11 sanctions from Rule 37 sanctions in the discovery context based on the "broad scope of a magistrate judge's authority over discovery disputes that provides the source of his [discovery sanction] authority."[29] He also noted that Rule 11 motions' immediate appealability in the Second Circuit supports their classification as dispositive.[30]

Judge Leval filed a separate concurrence maintaining that Congress authorized magistrate judges to impose Rule 11 sanctions directly and that such orders are nondispositive and reviewable only for clear er-

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[21] *Id.* at 82.

[22] *Kiobel*, 592 F.3d at 83 (quoting Navarro-Ayala v. Hernandez-Colon, 3 F.3d 464, 467 (1st Cir. 1993) (Breyer, C.J.)) (internal quotation marks omitted).

[23] *See id.* at 84–90 (Cabranes, J., concurring); *id.* at 90–105 (Leval, J., concurring); *id.* at 106–07 (Jacobs, C.J., concurring).

[24] *See id.* at 85 (Cabranes, J., concurring).

[25] The Sixth Circuit had held that Rule 11 sanctions were dispositive because following the resultant "award of money damages . . . [n]othing remained but to execute the judgment." *Id.* (quoting Bennett v. Gen. Caster Serv. of N. Gordon Co., 976 F.2d 995, 998 (6th Cir. 1992) (per curiam)) (second alteration in original) (internal quotation marks omitted).

[26] The Seventh Circuit had held that Rule 11 sanctions were dispositive based largely on the analogy to the power to award money damages, which "belongs in the hands of the district judge." *Id.* (quoting Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994)) (internal quotation mark omitted).

[27] *Id.* at 86.

[28] *Id.* at 87.

[29] *Id.* at 88.

[30] *See id.* at 87.

ror.[31] Judge Leval pointed to the Federal Magistrates Act's catch-all provision that authorizes magistrates to discharge "such additional duties as are not inconsistent with the Constitution and laws of the United States."[32] Because Rule 11 sanctions are not excluded from magistrate judge authority and because neither the Constitution nor any statutes would be inconsistent with such authority, Judge Leval concluded that a literal reading supports classification of Rule 11 sanctions as nondispositive.[33] Unlike Judge Cabranes, Judge Leval then made a historical argument: when Congress amended the Act in 2000 to grant magistrate judges authority over both civil and criminal contempt,[34] it implicitly conferred the authority to issue orders in Rule 11 proceedings and thus called into question the Sixth and Seventh Circuits' holdings that Judge Cabranes endorsed.[35] Judge Leval argued that this amendment was tantamount to an overt congressional statement that "[t]he fact that we expressly confer civil contempt power on magistrate judges should not be taken to imply that they lack the power to impose sanctions."[36] Furthermore, because contempt power is "considerably more awesome" than sanction power, Judge Leval concluded that Congress intended to classify Rule 11 sanction motions as nondispositive.[37]

Chief Judge Jacobs filed a separate concurring opinion.[38] Rather than forming a majority with either Judge Cabranes or Judge Leval, Chief Judge Jacobs noted that, although "[t]his issue has divided the district courts in our Circuit," the panel could not resolve it because "specific direction from Congress is still absent."[39] In light of the statutory ambiguity and the logical problems with both interpretations,[40]

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[31] *See id.* at 105 (Leval, J., concurring).

[32] *Id.* at 91 (quoting 28 U.S.C. § 636(b)(3) (2006)) (internal quotation marks omitted).

[33] *See id.* at 91–92.

[34] The 2000 amendment to § 636(e)(4) established that the grant of contempt power "shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute [or] the Federal Rules of Civil Procedure." Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2413 (codified as amended in scattered titles of the U.S.C.).

[35] *See Kiobel*, 592 F.3d at 93–96 (Leval, J., concurring). Indeed, as Judge Leval noted, the Sixth and Seventh Circuit decisions represented the minority position even prior to the amendment. *Id.* at 96 & n.6 (citing the decisions of five circuits, including the Second Circuit itself, reaching the opposite conclusion).

[36] *Id.* at 94.

[37] *Id.*

[38] *Id.* at 106 (Jacobs, C.J., concurring).

[39] *Id.*

[40] Chief Judge Jacobs deemed quixotic Judge Cabranes's distinction of magistrate judges' discovery authority from their sanction authority on the basis of the "broad scope" traditionally granted magistrate judges in the discovery context: "How does one classify misrepresentations regarding compliance (or not) with discovery obligations?" *Id.* at 107. Similarly, Chief Justice Jacobs argued, Judge Leval's argument would be "incoherent" if Rule 11 sanctions were nondis-

Chief Judge Jacobs concluded that "this knot needs to be untied by Congress or by the Supreme Court."[41]

Kiobel's holding represents sound reasoning and clarifies the "utterly unsupported by the evidence" standard: allegations must entirely lack an evidentiary basis to merit sanctions, and neither overly literal readings nor overstatements constitute violations. However, the concurrences debating the proper classification of, and standard of review for, Rule 11 sanctions will likely frustrate the purpose of the Federal Magistrates Act: to increase district court efficiency. Not only might the concurrences spur further litigation in this area, but district court judges will also have to undertake unwieldy and repetitive reviews of magistrate judges' determinations to avoid reversal. Because the court did not have to reach this question, it should have taken one of two alternative approaches. Either the panel should have handed down only the unanimous decision reversing the grant and not filed the concurrences, or Chief Judge Jacobs should have advanced the Act's purpose by joining Judge Leval's concurrence and establishing Rule 11 sanction motions as nondispositive.

When Congress passed the Federal Magistrates Act, its intent was unambiguous: "The Act grew from Congress' recognition that . . . an avalanche of additional work for the district courts . . . could be performed only by multiplying the number of judges or giving judges additional assistance."[42] The Act grew out of dissatisfaction with the commissioner system, in which commissioners charged with aiding district courts were inconsistently trained, were so underpaid that attracting qualified commissioners was a constant difficulty, and were given wildly different roles across jurisdictions.[43] After the Supreme Court twice read the Act narrowly,[44] Congress sought to revive its efficiency purpose with a 1976 amendment intended "to clarify and further define the additional duties which may be assigned to a United States Magistrate."[45] In short, the legislative history demonstrates that the Act sought to simplify, not complicate, district court administration.

By addressing but leaving unresolved the classification of Rule 11 sanctions and the proper standard of review, the panel created a greater administrative burden on district courts in the process of interpret-

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positive upon referral from a district court and yet immediately appealable under the collateral order doctrine. *Id.*

41 *Id.*

42 Mathews v. Weber, 423 U.S. 261, 268 (1976); *see also* S. REP. NO. 90-371, at 11 (1967) (noting that the Act's purpose was "to establish a system capable of increasing the overall efficiency of the Federal judiciary").

43 Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 567 n.14 (citing a summary of unpublished Senate subcommittee hearings).

44 *See Mathews*, 423 U.S. 261; Wingo v. Wedding, 418 U.S. 461 (1974).

45 H.R. REP. NO. 94-1609, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6162.

ing a statute intended to increase efficiency. In particular, in the wake of *Kiobel*, courts will likely face an increase in both litigation, given the panel's acknowledgement and exacerbation of uncertainty, and case complexity, owing to the difficulty of review under two standards. The reason *Kiobel* will lead to greater levels of litigation is plain: any party sanctioned by a magistrate judge and affirmed under clear error review will have an incentive to appeal on the ground that the district court should have reviewed the sanction de novo. Although pre-*Kiobel* uncertainty provided an incentive to litigate for parties and an incentive to apply both standards for district court judges to insulate their judgments from reversal, the *Kiobel* concurrences will likely further increase litigation in light of the panel's divided approach and recognition of uncertainty.

Additionally, district courts will likely heed Judge Leval's suggested approach and review Rule 11 sanctions both de novo and under the more deferential clear error standard.[46] Judge Leval clearly indicated the circumstances in which appellate review would be necessary by suggesting that "[i]t is only in the case where the district court would uphold the sanction if review is deferential but would withhold it if review is *de novo* that [we] will need to decide the question."[47] However, this observation fails to address the inefficiency inherent in a two-standard system. Efficiency does not turn on whether the *result* changes depending on the standard, but on whether the *process* differs. This distinction emerges in the context of credibility findings. The Supreme Court has indicated that district court judges reviewing de novo magisterial credibility findings should not reverse without a rehearing, but may do so under a clear error standard.[48] The Court has also indicated that Rule 11 sanctions arising from signed filings (as in *Kiobel*) involve "some assessment of the signer's credibility."[49] Thus, a district court judge could conclude that Rule 11 sanctions necessarily entail a credibility finding, that credibility findings cannot be reversed de novo without a rehearing, and that review under both standards therefore requires a rehearing whereas review only for clear error does not. *Kiobel*'s concurrences, then, could frustrate efficiency by increasing uncertainty and by requiring duplicative and cumbersome review.

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[46] *See Kiobel*, 592 F.3d at 105 (Leval, J., concurring).

[47] *Id.*

[48] In a footnote in *United States v. Raddatz*, 447 U.S. 667 (1980), the Supreme Court observed that while "it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness . . . whose credibility is in question could well give rise to serious questions . . . ." *Id.* at 681 n.7; *see also* Cullen v. United States, 194 F.3d 401, 407 (2d Cir. 1999) ("[A] district judge should normally not reject a proposed finding of a magistrate judge that rests on a credibility finding without having the witness testify before the judge.").

[49] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990).

Although the panel addressed the question of standard of review largely in terms of an academic exercise,[50] this issue has divided Second Circuit district courts[51] and will likely continue to do so. Furthermore, Chief Judge Jacobs's suggestion that "this knot needs to be untied by Congress or by the Supreme Court"[52] is unlikely to be met by high court or legislative resolution. In the Supreme Court context, a call by a circuit judge for clarification from above historically has proven fruitful, as "a separate opinion may signal . . . that the case is troubling and perhaps worthy of a place on [the Court's] calendar."[53] While it is true that Chief Judge Jacobs's direct appeal may increase the probability that certiorari will be granted, the reduced Supreme Court caseload[54] and increased caseload in the lower courts[55] still render Supreme Court review unlikely. Because classification and review of Rule 11 sanctions gave rise to a circuit split nearly twenty years prior to *Kiobel*,[56] it is unlikely that a concurrence from a circuit that has not resolved the question will lead to a grant of certiorari.[57] Similarly, while Congress overrides statutory interpretation decisions

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[50] *See Kiobel*, 592 F.3d at 84 (Cabranes, J., concurring) ("Judge Leval and I have now provided some modest assistance to notes and comments editors of law reviews in search of an agenda . . . .").

[51] *Id.* at 106 (Jacobs, C.J., concurring).

[52] *Id.* at 107.

[53] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990). In support of this proposition, then-Judge Ginsburg pointed to the frequency with which the Supreme Court heard cases with dissents from Judge Learned Hand's Second Circuit. *Id.* at 144 n.56 (citing MARVIN SCHICK, LEARNED HAND'S COURT 339–40 (1970)) (noting that "of 311 Second Circuit decisions issued with dissents from 1941 to 1951, the Supreme Court reviewed 47, reversing . . . 25 times").

[54] Whereas in 1950, 114 of the 1321 total cases on the Supreme Court docket (or roughly 8.6%) were disposed by a signed opinion, in 2004, when the underlying action in *Kiobel* was referred to the magistrate judge, only 85 of the 8593 cases on the docket (or roughly 1.0%) were so disposed. Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket*, 90 MINN. L. REV. 1363, 1369 tbl. (2006).

[55] In 1960, 3765 cases were filed in regional courts of appeals, and 79,200 cases were filed in the United States district courts. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 61 tbl.3.1 (1985). By 1983, the totals had grown to 29,580 and 277,031, respectively. *Id.* at 64 tbl.3.2. In 2009, the total in the twelve regional courts of appeals grew to nearly twice the 1983 level, as 57,740 cases were filed, while the district court total increased by only slightly over 25% (353,052 cases). John G. Roberts, Jr., *2009 Year-End Report on the Federal Judiciary*, app. at 2–3, *available at* http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf.

[56] *Compare* Maisonville v. F2 Am., Inc., 902 F.2d 746, 747 (9th Cir. 1990) (holding that Rule 11 sanctions constitute nondispositive judgments and thus should be reviewed only for clear error), *with* Bennett v. Gen. Caster Serv. of N. Gordon Co., 976 F.2d 995, 998 (6th Cir. 1992) (per curiam) (holding Rule 11 sanctions to be dispositive and properly reviewed de novo).

[57] *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987) (noting that "[t]he Court not only expects the lower courts to vary . . . , but also knows that it may not reach these unresolved conflicts for years"). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631 (2008) (noting that "a lower court conflict significantly increases the chances that the Court will hear the case").

with a frequency belying conventional wisdom,[58] there is little reason to expect that Congress, which amended the Act in 2000, will revisit it in the absence of appellate interpretation.[59]

Accordingly, the court should have either decided *Kiobel* narrowly or classified Rule 11 sanction motions as nondispositive. Judicial minimalism[60] suggests that once the panel had resolved the case narrowly, it should have refrained from opining on an unnecessary question.[61] But once Judge Cabranes and Judge Leval wrote separately, Chief Judge Jacobs's traditional minimalist move of calling for higher court or legislative resolution worked against minimalist goals by exacerbating uncertainty. Instead, the panel should have classified Rule 11 sanctions as nondispositive. As Judge Leval noted, the literal language of the statute supports such classification.[62] Further, Judge Leval's analogy between monetary sanctions and contempt strongly weighs in favor of clear error review. Magisterial authority to issue nondispositive sanctions in the discovery context supports similar authority under Rule 11. But even if Judge Cabranes was correct that magisterial authority is broader in discovery,[63] the 2000 amendment's expansion of magistrate authority to include contempt convictions[64] — a power "substantially more awesome than the power to impose a noncriminal sanction"[65] — provides compelling evidence that Congress overruled the two circuits previously classifying Rule 11 sanctions as dispositive. Finally, courts should resolve any remaining ambiguity in favor of the efficiency purpose of the Act. Because a single clear standard is more efficient than two standards in terms of both total litigation and complexity in each case, and because clear error review promotes the docket-easing utilization of magistrate judges contemplated by the Act, the panel should have established clear error as the standard for district court review.

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58 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 336–41 (1991) (arguing that "Congress frequently overrides or modifies statutory decisions by lower federal courts," *id.* at 338).

59 *Cf. Kiobel*, 592 F.3d at 99 n.9 (Leval, J., concurring) ("[I]t is no longer possible either to follow, or to reject, the Sixth and Seventh Circuit decisions because the statute they were interpreting has been so substantially modified.").

60 *See, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996) (defining minimalism as "saying no more than necessary to justify an outcome").

61 Judge Posner has similarly cautioned appellate judges, before writing separately, to "pause to ponder the question: Is this dissent or concurrence really necessary?" Ginsburg, *supra* note 53, at 149 (citing POSNER, *supra* note 55, at 232–42).

62 *Kiobel*, 592 F.3d at 91–92 (Leval, J., concurring).

63 *Id.* at 88 (Cabranes, J., concurring).

64 Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2413 (codified as amended in scattered titles of the U.S.C.).

65 *Kiobel*, 592 F.3d at 96 (Leval, J., concurring).