



October 17, 2022

Mr. Merrick B. Garland  
U.S. Attorney General  
The United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Ms. Elizabeth Prelogar  
U.S. Solicitor General  
The United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Dear Attorney General Garland and Solicitor General Prelogar:

On October 3, 2022, the Supreme Court of the United States invited the Solicitor General to submit a brief in *Suncor Energy (U.S.A.) Inc., et al., Petitioners v. Board of County Commissioners of Boulder County, et al.* to “express the views of the United States.” We write today to urge the Department of Justice (“DOJ”) to not only take the Court up on this offer, but to make clear that the Department no longer subscribes to its previous position under the Trump Administration, and that the DOJ supports the ability of plaintiffs to bring – and have adjudicated – climate-related state claims in state court without improper removal.

The need for the Department to weigh in cannot be overstated. First, our climate catastrophe is already here, costing billions of dollars and thousands of lives *presently*, with more damage and loss of life expected in the immediate future. The human, capital, and structural costs of preventing, mitigating, or recovering from this damage has fallen squarely on governments across the nation while entities responsible for climate change, like the fossil fuel industry, make record profits and escape accountability. Various lawsuits, including the one at issue in *Suncor Energy*, are attempts to recoup these costs under various state laws, a standard exercise in our legal system where plaintiffs bring claims in the court of their choosing, followed by that court making various determinations on the propriety of the claims, including whether the ultimate decision on the merits of their claims should be determined in another venue.

But the fossil fuel industry has argued that these state claims, for one reason or another, *must* be heard in federal court. Every Circuit court has rejected this argument.<sup>1</sup> That has not stopped the industry from

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<sup>1</sup> See *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022) (affirming remand to state court); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022) (same); *Baltimore IV*, 31 F.4th 178 (4th Cir. 2022) (same); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) (same); *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) (same). The Second Circuit considered similar arguments in *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021), but that opinion is distinguishable in two ways; first, the plaintiffs brought their suit in federal court in the first instance, thus allowing the court to bypass the removal from state court question; and, second, the Court made clear that environmental policy was *not* an exclusively federal matter, *Id.* at 87 (emphasis added) and explicitly stated that its opinion was not at odds with its sister Circuits rulings on this issue (“Here, the City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the

citing the DOJ's position<sup>2</sup> in courts throughout the country, improperly lending these rejected arguments credence. This is one of several reasons why we urge the DOJ to make its position clear to the highest court in the land.

Another is that silence appears to be at odds with President Biden's stated climate goals. On January 20, 2021, the Biden Administration issued an Executive Order on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."<sup>3</sup> In that Order, the Administration laid out several policy goals, including "to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities."<sup>4</sup> To further this policy, the Order also calls for all heads of agencies, including the Attorney General, to "*immediately* review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted [during the Trump Administration], that are or may be inconsistent with, or present obstacles to, the policy set forth in...this order."<sup>5</sup> The invitation from the Supreme Court to submit a brief in *Suncor Energy* presents an opportunity for the DOJ to uphold the spirit and letter of that Order by (1) providing a review of the previous Administration's position, (2) rejecting it as contrary to the current Administration's climate goals, and (3) providing clarity on why climate suits like the one at issue in *Suncor Energy* comport with this Administration's efforts to "hold polluters accountable."

As state policymakers intent on holding those responsible for causing and accelerating our climate catastrophe accountable, we, and all New Yorkers suffering the impacts of climate change, have an existential interest in the outcomes of climate litigation. As the Supreme Court weighs whether to grant certiorari in *Suncor Energy*, absent any Circuit split on the issue, the DOJ's brief may prove dispositive in the Court's decision to review the case. As such, the Department has a unique opportunity to set the tone for climate litigation, and consequently, our overall response to climate change, simply by adhering to the goals of its own Administration.

We urge the Department to take up the Supreme Court's offer and make clear that those responsible for damage to our planet must pay, whether that accountability is sought in federal or state court.

Respectfully,



Zellnor Y. Myrie  
New York State Senator  
Senate District 20



Hon. Michaelle C. Solages  
New York State Assembly Member  
Assembly District 22

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removability inquiry. So even if this fleet of cases is correct that federal preemption does not give rise to a federal question for purposes of removal, their reasoning does not conflict with our holding.") *Id.* at 94.

<sup>2</sup> See e.g., <https://www.documentcloud.org/documents/6596218-DOJ-Amicus-Climate-Brief-May-2018.html>

<sup>3</sup> See

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>

<sup>4</sup> *Id.* at Section 1.

<sup>5</sup> *Id.* at Section 2(a). Emphasis added.



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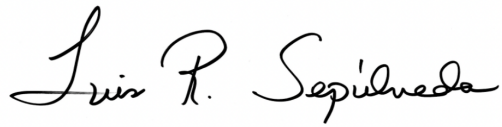
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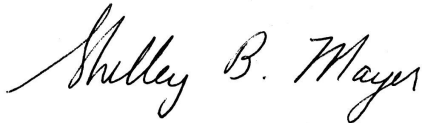
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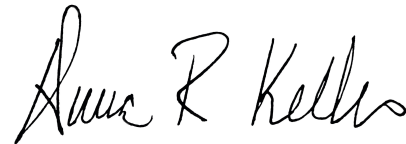
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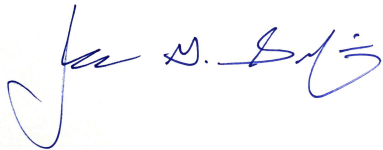
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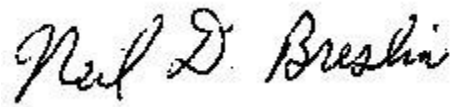
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Alessandra Biaggi  
New York State Senator  
Senate District 34

A handwritten signature in black ink, reading 'Neil D. Breslin' in a cursive style.

Neil D. Breslin  
New York State Senator  
Senate District 44

A handwritten signature in black ink, reading 'Jessica Ramos' in a cursive style.

Jessica Ramos  
New York State Senator  
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