UNLOCKING THE "OPPORTUNITY" IN OPPORTUNITY ZONES: A PROPOSAL TO REVOLUTIONIZE THE OPPORTUNITY ZONE TAX PROGRAM

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I. INTRODUCTION

A majority of the United States population lives in densely populated urban areas known as cities.[1] Unfortunately, many American cities have long been associated with elevated levels of poverty.[2] Following the "Great Recession" of 2010,[3] the number of impoverished people living in cities remains significantly higher than before the economic downturn of the Great Recession.[4] This economic downturn, coupled with a multitude of factors such as: the outsourcing of manufacturing jobs to other countries, the rise of automation, and wage stagnation among working class Americans, has led to continued elevated levels of urban poverty. This phenomenon of "concentrated poverty,"[5] working in concert with the decline of basic infrastructure,

[1] *U.S. Cities are Home to 62.7 Percent of the U.S. Population, but Comprise Just 3.5 Percent of Land Area*, UNITED STATES CENSUS BUREAU, (March 4, 2015), https://www.census.gov/newsroom/press-releases/2015/cb15-33.html.

[2] Elizabeth Kneebone, *The Changing Geography of U.S. Poverty*, BROOKINGS INST. (Feb. 15, 2017), https://www.brookings.edu/testimonies/the-changing-geography-of-us-poverty/. ("As poverty grew in the 2000s, it continued to climb in those places: both large cities and rural counties experienced an uptick in their poor populations of roughly 20 percent between 2000 and 2015.").

[3] *See generally* DAVID B. GRUSKY, ET AL., THE GREAT RECESSION (2011). ("Officially over in 2009, the Great Recession is now generally acknowledged to be the most devastating global economic crisis since the Great Depression. As a result of the crisis, the United States lost more than 7.5 million jobs, and the unemployment rate doubled—peaking at more than 10 percent.").

[4] Kneebone, *supra* note 2. "The number of people living below the federal poverty line in the United States has only recently begun to subside from the historic highs reached in the wake of the Great Recession. In 2015, the most recent year for which we have data, 43.1 million people (or 13.5 percent of the population) were poor. Even after years of a sustained economic expansion, that number remains 5.8 million higher than before the recession began in 2007."

[5] *See generally* Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 753 (2019) (defining concentrated poverty as the "clustering of people

afflicts many previously bustling American cities. These problems are seen most clearly in particularly downtrodden areas, such as the "Rust Belt" of the midwestern United States.[6]

The United States frequently employs tax policy to effectuate positive changes in society. For example, the government often uses the Internal Revenue Code to fight poverty.[7] Furthermore, the Earned Income Tax Credit (EITC) and Child Tax Credit (CTC) are also representative of such attempts.[8] Both programs provide tax incentives to help individuals who need additional assistance stave the effects of poverty.[9]

The government has also tested several taxation policies that seek to aid low-income individuals by instead encouraging investors to devote funds to poorer areas. These efforts are aptly referred to as "place-based" investment tax incentives.[10] Many studies show that place-based tax policies have not had a measurable impact on alleviating poverty.[11] The United States, however, continues to rely upon place-based tax incentives to attempt to reduce urban poverty.[12] The Opportunity Zone program is the latest place-based government tax

experiencing poverty within discrete neighborhood settings" and asserting that it is on the rise in the United States.).

6 Eve Watling, *The Cities Americans Are Abandoning*, NEWSWEEK (Aug. 20, 2018), https://www.newsweek.com/cities-americans-are-abandoning-1080779 (asserting that many core "Rust Belt" cities such as Flint, Michigan and Detroit, Michigan are experiencing declines in population and crumbling infrastructure).

7 *See, e.g.,* Patricia K. Tong, *Fighting Poverty With Taxes*, RAND CORP. (Nov. 22, 2017), https://www.rand.org/blog/2017/11/fighting-poverty-with-taxes.html. ("One way the U.S. federal income tax system provides low-income families with financial support is through refundable tax credits.").

8 *See* 26 U.S.C. § 32 (1998) *and* 26 U.S.C. § 24 (2018).

9 Tong, *supra* note 7 ("Both credits target the working poor."); *see also What is the Child Tax Credit? Tax Policy Center Briefing Book*, TAX POL'Y CENTER, https://www.taxpolicycenter.org/briefing-book/what-child-tax-credit (last visited Mar. 20, 2021). The EITC program is designed to incentivize workforce participation in exchange for refundable tax credits. Additionally, the CTC is an income tax credit designed to provide relief to low-earning families with dependent children. Following the Tax Cut and Jobs Act, the Tax Policy Center estimates that 90 percent of families with children will receive an average CTC of $2,380 in 2020, as the phaseout threshold is now $400,000 for "married filing jointly" (MFJ) taxpayers and $200,000 for single taxpayers. The new threshold is double the old one; you do not have to work to get the CTC.

10 *See generally* Layser, *supra* note 5

11 *See generally* Layser, *supra* note 5.

12 *See generally* KYE LIPPOLD, URBAN INSTI., REDUCING POVERTY IN THE UNITED STATES (2015), https://www.urban.org/research/publication/reducing-poverty-united-states.

initiative designed to spur investment in inner cities to change the downward trajectory of urban areas.[13]

The previous failures of "place-based" tax incentives do not portend future success for the Opportunity Zone program. The mainstream reporting of the early returns on Opportunity Zones have largely been shrouded in a negative light.[14] These reports posit that investors in Opportunity Zones have thus far invested in zones and developed projects that focus on risk minimization rather than community benefit. Examples of such projects include luxury apartment buildings, parking structures in college towns, and previously-gentrifying urban areas.[15] Importantly, these early investments have seemingly provided scant social benefit to the existing members of such communities, due to the inherent nature of such projects.[16] Some projects even accelerate forces of gentrification in many cities by driving prices up and forcing existing community members to relocate.[17] Instead of fulfilling the stated legislative intent of "spurr[ing] economic development and job creation in distressed communities throughout the country," investors strategically select zones and projects that will minimize risk, rather than focusing on driving benefits to some of the most impoverished communities.[18]

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[13] 26 U.S.C. § 1400Z-1. Under the new tax law, taxpayers who sell appreciated property can defer – or even permanently avoid – taxes they would otherwise owe on capital gains by reinvesting sales proceeds into investment vehicles that make investments in designated "Opportunity Zones.".

[14] *See, e.g.,* Mark A. Pinsky & Keith Mestrich, Opinion, *Opportunity Zones Are All Sizzle, Fizzle and The Abuse of Good Intentions*, MARKETWATCH (Nov. 22, 2019), https://www.marketwatch.com/story/opportunity-zones-are-all-sizzle-fizzle-and-the-abuse-of-good-intentions-2019-10-08 ("The results to date show that the outcomes are more likely to be luxury apartments and sparse jobs, not affordable housing and employment opportunities.").

[15] Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Aug.31, 2019), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html (reaffirming the manipulation of the program by investors looking to minimize risk by investing in high-end assets with little-to-no benefit going to the members of the community).

[16] *Id.* Experts argue that a luxury apartment complex or parking structure in a gentrified downtown Opportunity Zone is contrary to the stated legislative goal of helping low-income families in downtrodden areas.

[17] *See, e.g.,* William Fulton, *Opportunity Zones: Gentrification on Steroids?*, KINDER INST. FOR URB. RES. (Feb. 20, 2019), https://kinder.rice.edu/urbanedge/2019/02/20/opportunity-zones-gentrification-steroids.

[18] *See Tax Reform Creates Opportunity Zone Tax Incentive*, IRS (December 11, 2018), https://www.irs.gov/newsroom/tax-reform-creates-opportunity-zone-tax-incentive. *See also* Pinsky, *supra* note 14.

Despite negative press coverage, the visionary idea behind Opportunity Zones still has the potential to revolutionize urban redevelopment in the wake of the Great Recession.[19] The Opportunity Zone law must be amended to more effectively align the private investor participation with the stated legislative goal of the program. To do this, Congress must ensure that the most disadvantaged communities receive funding. That would reduce the number of zones to drastically reduce the Opportunity Zone "loopholes" that investors have thus far taken advantage of. Moreover, Congress must change the law to engender accountability and visibility into Opportunity Zone investments by implementing reporting standards in Opportunity Zone projects. Finally, Congress must expand access to the program by eliminating Section 1014, or the rule allowing the "step-up" in basis on appreciated assets at death.[20] Eliminating Section 1014 will remove a powerful disincentive to "realize" capital gains and allow greater access to the estimated $6.1 trillion in "unrealized" capital gains in the United States.[21] Implementing these common-sense changes would allow this program to provide immeasurable assistance to the neediest of our citizens.

Part II of this comment will provide a detailed background of the Opportunity Zone program and discuss the history of place-based tax policy in the United States, while discussing the taxation of capital gains and how this relates to Opportunity Zones.

Part III of the comment will analyze the current state of the Opportunity Program and set forth a package of reforms to better target impactful investments in Opportunity Zones. This section will argue that the law should be amended to decrease the number of Opportunity Zones and will advocate for stronger reporting requirements for Opportunity Zone projects Part III will also argue that the Internal Revenue Code be amended to eliminate Section 1014, which allows individuals who inherit appreciated property to "step up" their basis in such property. By amending Section 1014, there will be more incentivization for participation in the Opportunity Zone program.

Part IV will reaffirm the potential of this new tax law as a prescient vehicle toward helping transform the lives of members of Opportunity

[19] *See, e.g.,* Drucker, *supra* note 15.

[20] *See* 26 U.S.C. § 1014 (2015).

[21] Jennifer Pryce, *There's A $6 Trillion Opportunity In Opportunity Zones; Here's What We Need To Do To Make Good On It*, FORBES (Aug. 14, 2018), https://www.forbes.com/sites/jenniferpryce/2018/08/14/theres-a-6-trillion-opportunity-in-opportunity-zones-heres-what-we-need-to-do-to-make-good-on-it/#3c7a3e3c6ffc.

Zone communities. Part IV will also emphasize how this proposal ties together the goals of the government, investors, and community stakeholders to create a better future for a wide range of citizens in the United States.

II. OPPORTUNITY ZONES, PLACE-BASED TAXATION, AND CAPITAL GAINS TAXATION

The Opportunity Zone program is a creative way to incentivize investors to direct private investment in low-income urban areas – areas that normally would not receive much private investment. Opportunity Zones use the Internal Revenue Code to galvanize investors with assets that have appreciated in value to "realize" these capital gains in exchange for generous tax "recognition" deferral and reduction benefits.[22] As an example, investors buy assets, such as property or stock, and hold these assets over time to generate a return on each investment. These assets can appreciate (increase in value) or depreciate (decrease in value). If an asset has appreciated in value, the asset is said to have a "built-in gain" for federal tax purposes. This means that an investor will normally owe "capital gains tax" when they sell the appreciated asset.[23] Investors do not owe tax intermittently on these gains; the "capital gains tax" is only due when an investor sells an appreciated asset. Therefore, some investors show reluctance to sell property with built-in gain, so as not to pay capital gains tax.[24]

The Opportunity Zone program provides a special opportunity for investors that hold significant value in appreciated assets with built-in gains. If an investor sells an asset with a built-in gain and subsequently invests the sale proceeds "realized" in this asset sale into a Qualified Opportunity Fund (which then invests in a project in an Opportunity Zone), the investor will receive a generous tax deferral and reduction on

[22] *What Are Opportunity Zones and How Do They Work? Tax Policy Center Briefing Book*, TAX POL'Y CENTER, https://www.taxpolicycenter.org/briefing-book/what-are-opportunity-zones-and-how-do-they-work (last visited Mar. 11, 2021).

[23] *See* 26 U.S.C. § 1011 (1969) (establishing that a taxpayer's "basis" in an asset is the price they paid to acquire such asset) *and* 26 U.S.C. § 1001 (1993) (establishing that the gain from the sale of property is the excess of the amount realized [generally the sale price of the asset] over the adjusted basis of the property [generally the price which the asset was purchased for]).

[24] Bruce Brumberg, *6 Ways to Defer or Pay No Capital Gains Tax On Your Stock Sales*, FORBES (Nov. 5, 2019), https://www.forbes.com/sites/brucebrumberg/2019/11/05/tax-strategies-6-ways-to-defer-or-pay-no-capital-gains-tax-on-your-stock-sales/#2ed3479b7ae1.

the tax bill owed on the initial asset sale.[25] In this way, this program seeks to incentivize investors with appreciated assets to invest money in areas that would normally receive little private investment by offering generous tax breaks.[26] The Opportunity Zone program is intended to be a win for investors, underserved communities, and the government by directing private investment to areas of high poverty, purportedly enriching downtrodden communities and alleviating poverty.

This comment explores several areas of the Internal Revenue Code and how these provisions interact with the Opportunity Zone program. The first area is the Opportunity Zone provision, which was enacted by the Tax Cuts and Jobs Act of 2017 and codified generally in Section 1400Z of the IRS Code.[27] The second area relates to the several federal "place-based" tax programs in the United States. This analysis will provide a useful framework with which to compare the Opportunity Zone program, as this is the latest government foray into place-based taxation to combat poverty.[28] The final area is the critical interplay of capital gains tax policy and investment strategy. This analysis will provide insight into how to better incentivize investors to participate in Opportunity Zones. These three pillars will enlighten the argument that the current Opportunity Zone law must change to ensure its success.

A. OPPORTUNITY ZONE PROGRAM

1. *Opportunity Zone Background: The Birth of Opportunity Zones*

The Tax Cuts and Jobs Act,[29] passed in December of 2017, was one of the largest overhauls of the federal tax code in decades.[30] Senators Cory Booker (D-NJ) and Tim Scott (R-SC), working in concert with tech billionaire Sean Parker, created "Opportunity Zones" in the Tax Cut and Jobs Act.[31] The Opportunity Zone provision is codified in Section §

[25] *Id.*

[26] *See generally* 26 U.S.C. § 1400Z-2 (2017).

[27] As codified in Internal Revenue Code Section § 1400Z-1 and § 1400Z-2.

[28] *See* 26 U.S.C. §§ 42, 1396, 45D (discussing key programs such as the Low-Income Housing Tax Credit, Empowerment Zones, and New Market Tax Credit).

[29] Tax Cut and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[30] Erica York, *The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households*, TAX FOUND. (Aug. 7, 2018), https://taxfoundation.org/the-tax-cuts-and-jobs-act-simplified-the-tax-filing-process-for-millions-of-americans/.

[31] *See* Steven Bertoni, *An Unlikely Group Of Billionaires And Politicians Has Created The Most Unbelievable Tax Break Ever*, FORBES (Jul. 18, 2018), https://www.forbes.com/sites/forbesdigitalcovers/2018/07/17/an-unlikely-group-

1400Z-1 and Section § 1400Z-2 of the Internal Revenue Code and was intended to spur private investment in undercapitalized communities.[32]

Billionaire Sean Parker, the brainchild of the idea and the first president of tech giant Facebook, noticed a huge opportunity in the investing markets. Parker noted that many investors avoided paying capital gains tax by holding onto assets with significant appreciation.[33] In the United States, an estimated $6.1 trillion dollars in unrealized capital gains are locked up in appreciated assets.[34] Recognizing this massive opportunity, Parker began thinking of ways to creatively incentivize these investors to "realize" their capital gains and deploy these realized gains towards a socially beneficial end.[35] Parker believed that, with the development of a tax deferral and reduction program, investors with appreciated assets could be incentivized into deploying those gains into investments in underserved communities.[36]

Armed with this idea, Parker contacted Senator Cory Booker – then Mayor of Newark, New Jersey. Booker saw a path forward for this idea and its possibilities of driving private investment into inner cities. Booker's vision was personal, as his hometown of Newark, NJ was a prime candidate for such investment.[37] Booker, working in concert with Parker, joined Senator Tim Scott to cosponsor a bill creating the Opportunity Zone program.[38] The bill successfully passed as part of the Tax Cuts and Jobs Act.[39]

of-billionaires-and-politicians-has-created-the-most-unbelievable-tax-break-ever/#74e8256f1485. *See also* S. Res. 293, 115th Cong. (2017-218) (enacted).

32 TAX POL'Y CENTER, *supra* note 22. *See generally* 26 U.S.C. § 1400Z-1 and 26 U.S.C. § 1400Z-2.

33 *See* Bertoni, *supra* note 31 (Parker commented that "[p]eople were sitting on large capital gains with low basis and huge appreciation" and "[t]here was all this money sitting on the sidelines.").

34 Pryce, *supra* note 21.

35 Bertoni, *supra* note 33. (Parker constantly asked himself how he could convince "investors to put money into places where they wouldn't normally invest.").

36 Bertoni, *supra* note 33.

37 Bertoni, *supra* note 33. (Booker understood that the Opportunity Zone program could "[create] jobs and opportunity" in distressed communities "if we can get the trillions of dollars of capital off the sidelines and get the best investment minds coming into our communities.").

38 *Senators Introduce Bipartisan Opportunity Zones Reporting Requirements Bill*, ENTERPRISE (May 8, 2019), https://www.enterprisecommunity.org/blog/senators-introduce-o-zone-reporting-requirements-bill.

39 *Opportunity Zones: Tapping Into a $6 Trillion Market*, ECON. INNOVATION GRP. (Mar. 21, 2018), https://eig.org/news/opportunity-zones-tapping-6-trillion-market.

2. *Mechanics of Opportunity Zones*

The Opportunity Zone legislation allows state governments to nominate, for Opportunity Zone designation, up to 25% of low-income municipalities that qualify as "low-income tracts" under Section 45D(e) of the Internal Revenue Code as Qualified Opportunity Zones.[40] The Secretary of the Treasury of the United States then certifies these qualifying tracts.[41]

Importantly, the Opportunity Zone law allows each state to designate a maximum of five percent of population census tracts, *contiguous* with low-income communities, as Opportunity Zones.[42] These contiguous tracts do not have to be classified as "low-income tracts" under §45D(e) of the Internal Revenue Code and can thus have a higher median income than the Opportunity Zone communities, exposing a potentially-advantageous loophole to investors looking to pursue safer projects in the program.

The legislation further allows any investor with unrealized capital gains on appreciated assets to defer and reduce the normal amount of capital gains tax paid on the sale of such appreciated assets if the investor takes the proceeds and invests in a Qualified Opportunity Fund, which is required to deploy the invested capital into a Qualified Opportunity Zone.[43] There are several in-depth rules for certification as a Qualified Opportunity Fund, specifically as to where the money in the fund must be invested.[44]

Investors realize three major tax benefits by investing in a Qualified Opportunity Fund established in an Opportunity Zone. The first benefit is a temporary tax deferral on any capital gain invested in a Qualified Opportunity Fund within a 180-day period after the realization of the capital gain.[45] Additionally, if an investment is held in a Qualified Opportunity Fund for five years, there is a ten percent step-up in basis

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[40] 26 U.S.C. § 45D(e) (2019). See also 26 U.S.C. § 1400Z-1(d).

[41] *Opportunity Zones*, NJ DEPARTMENT OF COMMUNITY AFFAIRS (June 1, 2021), https://www.nj.gov/dca/divisions/lps/opp_zones.html (Up to 25% of low-income neighborhoods that meet the income qualifications of the program (and up to 5% of non-low income tracts that meet other income and geographic requirements) in each state, district, or territory can be designated as Opportunity Zones. In states, territories, and districts with fewer than 100 census tracts, up to 25 census tracts can be designated as Opportunity Zones.).

[42] 26 U.S.C. § 1400Z-1(e) (2018).

[43] 26 U.S.C. § 1400Z-2 (2017).

[44] *See* SCOTT EASTMAN & NICOLE KAEDING, TAX FOUND. OPPORTUNITY ZONES: WHAT WE KNOW AND WHAT WE DON'T (2019), https://taxfoundation.org/opportunity-zones-what-we-know-and-what-we-dont/.

[45] 26 U.S.C. § 1400Z-2(a)(1)(A) (2017).

on the initial investment.[46] Furthermore, if an investment is held for seven years, there is an additional five percent increase in basis.[47] Perhaps the greatest benefit to the program is the special rule for investments held for at least ten years. The basis of these investments will equal the fair-market value of the investment on the date that the investment is sold or exchanged.[48] Put simply, any increase in value of an investment held by a Qualified Opportunity Fund after ten years can be realized tax-free.[49] The long-term upside through investing in Opportunity Zones represents a substantial tax savings for investors.

3. Example of an Opportunity Zone Investment

As an example, if an investor sells a long-term capital asset[50] for $11 million and had an initial basis[51] in the investment of $1 million, the investor would normally owe the government tax on the $10 million "capital gain" and would be taxed at a rate pursuant to the investor's tax bracket.[52] Assuming for simplicity's sake that the investor was in the top long-term capital gain tax bracket (20%), the investor would owe the government 20% of the $10 million gain (or $2 million in tax) for the taxable year in which the asset was sold. However, if the investor decided to participate in the Opportunity Zone program, the investor could defer payment of the $2 million tax bill on the sale of the asset by rolling over the $10 million gain from the sale of the asset into a Qualified Opportunity Fund.[53]

The benefits to investors begin after five years of investment in a Qualified Opportunity Fund.[54] After holding the investment for five years, the investor can increase the basis in the initial Opportunity Zone

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46 26 U.S.C. § 1400Z-2(b)(2)(B)(iii) (2017).

47 26 U.S.C. § 1400Z-2(b)(2)(B)(iv) (2017).

48 26 U.S.C. § 1400Z-2(c) (2017).

49 26 U.S.C. § 1400Z-2(c) (2017).

50 26 U.S.C. § 1221 (2014). *See also* Alicia Tuovila, *Capital Asset*, INVESTOPEDIA (Nov. 12, 2020), https://www.investopedia.com/terms/c/capitalasset.asp ("Capital assets are significant pieces of property such as homes, cars, investment properties, stocks, bonds, and even collectibles or art.").

51 26 U.S.C. § 1012 (2014). *See also* Julia Kagan, *Basis*, INVESTOPEDIA (Aug. 26, 2020) https://www.investopedia.com/terms/b/basis.asp ("'basis' holds various meanings in finance, it most frequently refers to the difference between the prices and the expenses involved in transactions when calculating taxes. Such usage relates to the broader terms 'cost basis' or 'tax basis' and is specifically used when capital gains or losses are calculated for income tax filings.").

52 *See* 26 U.S.C. § 1(h) (2019) (setting the capital gains tax rates).

53 Assuming the Qualified Opportunity Fund invests this money in an Opportunity Zone and follows the rules prescribed in the legislation.

54 26 U.S.C. § 1400Z-2(a)(1)(A) (2017).

investment by 10%.[55] Thus, after five years, the investor would only owe tax on 20% of *$9 million*, or a $1.8 million tax payment.[56] This represents a $200,000 (or 10%) savings. Moreover, if the investor holds an Opportunity Zone investment for seven years, the investor can increase the basis in the initial investment by an additional 5% (for a total of 15%).[57] This would make the tax bill only *$1.7 million* (20% of $8.5 million) after seven years of Opportunity Zone investment. This represents a $300,000 (or 15%) savings to investors who sell capital assets and invest in opportunity zones long-term.

Perhaps the greatest incentive is to hold an Opportunity Zone investment for at least ten years. If the previously mentioned investor took the initial $10 million gain from the initial sale of a capital asset and invested in a Qualified Opportunity Fund that subsequently bought a $10 million asset in an Opportunity Zone, and after ten years, the investor sold the asset, the investor now would only owe the *$1.7 million* deferred tax bill from the initial sale of the initial capital asset from ten years prior. The best part of this deal for the investor is that any increase in value on the investment is tax-free after holding for ten years.[58] Thus, if the Opportunity Zone asset increased in value from $10 million to $15 million in the ten-year window, the investor would not pay any tax on the additional $5 million ($15 million minus $10 million) made on the investment. The investor would only owe the deferred tax of $1.7 million from the initial capital asset sale which was used to fund the Qualified Opportunity Fund.

Each party theoretically receives a substantial benefit from the Opportunity Zone tax deferral incentive structure. Private investors have the flexibility to recognize a substantial tax benefit and can choose projects outside of government oversight. State governments have the latitude to choose Opportunity Zones. Communities can also prepare projects that need financing for investors to participate in, ideally providing benefits to the community members.[59] Unfortunately, with limited regulation, Opportunity Zone investments are free from oversight and accountability.[60] Thus, early returns show that the

[55] *See* 26 U.S.C. § 1400Z-2(a)(1)(A) (2017). This means that instead of owing tax on $10 million of gain, the investor would only owe tax on $9 million.

[56] This is compared to the $2 million immediately after the initial sale.

[57] 26 U.S.C. § 1400Z-2(b)(2)(B)(iv) (2017).

[58] 26 U.S.C. § 1400Z-2(c) (2017).

[59] *See, e.g.,* Ben Bartlett & Matt Napoli, *A Community Blueprint for Opportunity Zones*, MEETING OF THE MINDS (Aug. 8, 2019), https://meetingoftheminds.org/a-community-blueprint-for-opportunity-zones-30896.

[60] There is no language in the Opportunity Zone law that requires such oversight and accountability.

legislative goals are not being furthered in the first reporting of Opportunity Zone projects.

B. Place-Based Tax Policy

1. *The Problem of Concentrated Poverty*

An individuals' economic fortunes are intricately tied to where they live.[61] There are many negative consequences of living in an economically distressed area.[62] As a result, the federal government makes a concerted effort to enact tax policies targeted toward specific downtrodden places. These targeted tax policies are a popular way for legislators to respond to the issue of "concentrated poverty." Concentrated poverty is the "clustering of people experiencing poverty in discrete neighborhood settings," and it is on the rise in the United States.[63] Concentrated poverty limits opportunities for achievement and produces negative effects, such as reduced cognitive ability in children and reduced earning capacity for adults.[64] This principle presents a massive threat to equality in America by disproportionately affecting minorities.[65]

United States lawmakers have attempted to combat concentrated poverty by enacting place-based tax policies designed to target low-income communities.[66] These programs generally receive broad bipartisan support; lawmakers can boast that tax policies directed toward a specific place are valuable to a variety of stakeholders including investors, downtrodden communities, and taxpayers.[67] The tax benefits of these programs are typically targeted toward the places with the highest concentrated poverty levels. In theory, place-based tax incentives sound like the perfect solution to fight economically distressed areas of high concentrated poverty. The government can incentivize investors to invest in low-income areas that are inherently risky and normally would not receive much economic activity, by

61 David Neumark, *Do Place-Based Policies Work?*, ECONOFACT (Nov. 28, 2017), https://econofact.org/do-place-based-policies-work.

62 *Place-Based Tax Incentives for Community Development*, OFFICE OF POL. DEV. AND RESEARCH (Spring/Summer 2019), https://www.huduser.gov/portal/periodicals/em/SpringSummer19/highlight1.html. ("Living in economically distressed areas is associated with negative health, education, and other outcomes.").

63 Layser, *supra* note 5 at 753 (Concentrated poverty has "been increasing over the last 4 decades.").

64 Layser, *supra* note 5 at 755.

65 Layser, *supra* note 5 at 757.

66 *See, e.g.,* 26 U.S.C.S. § 45D (2019).

67 Layser, *supra* note 5 at 749.

providing tax breaks.[68] The Opportunity Zone program is one of the latest federal place-based tax policies.[69]

Unfortunately, there is insufficient evidence that these place-based tax policies achieve the goal of alleviating concentrated poverty.[70] There is ample research that shows place-based systems "fail to increase employment, raise wages, or advance general economic opportunity for targeted residents because they have not addressed the main causes of poverty."[71] There is a wide range of empirical case studies and literature reviews finding that place-based programs do not revitalize distressed communities.[72] In fact, targeted policies are seemingly less effective than those that similarly apply the benefits to all taxpayers.[73]

Likewise, empirical evidence is consistent with predictions that mobility affords wealthy people the ability to benefit from tax incentives directed at specific areas at a higher rate than poor individuals.[74] "Tiebout sorting" is the process of the comparatively wealthy moving to a specific location to take advantage of place-based tax incentives.[75] Since spatially-oriented investment tax incentives lack regulatory constraints that protect local communities, wealthy outsiders tend to reap the benefits designed for the members of those local communities.[76] This lack of regulatory constraints results in high levels of concentrated poverty, as the movement of wealthy outsiders into these communities displaces poor residents, causing the residents to lose local jobs and homes.[77] There is also a risk that these tax policies, designed specifically to benefit a particular place, increase the likelihood of gentrification.[78] Despite overwhelming evidence to the

[68] Anjalee Khemlani, *Booker, Murphy explain wow Opportunity Zones can unleash billions of dollars of investment in urban areas*, NJ.COM (Jul. 17, 2018), https://www.roi-nj.com/2018/07/17/politics/booker-murphy-explain-how-opportunity-zones-can-unleash-billions-of-dollars-of-investment-in-urban-areas/.

[69] Daniel Hemel, Symposium Article, *A Place for Place in Federal Tax Law*, 45 OHIO N.U.L. REV. 525, 525 (2019) ("The opportunity zone provision of the 2017 tax law is one of the most significant experiments with place-based taxation in federal tax history.").

[70] Joel Griffith & Adam Michel, *Opportunity Zones, Understanding Them in the Context of Past Place-Based Incentives*, HERITAGE FOUNDATION (Jul. 10, 2019), https://www.heritage.org/taxes/report/opportunity-zones-understanding-them-the-context-past-place-based-incentives.

[71] *See generally* GRIFFITH & MICHEL, *supra* note 70.

[72] *See generally* GRIFFITH & MICHEL, *supra* note 70.

[73] *See generally* GRIFFITH & MICHEL, *supra* note 70.

[74] Layser, *supra* note 5 at 763.

[75] Layser, *supra* note 5 at 763.

[76] Layser, *supra* note 5 at 763.

[77] Layser, *supra* note 5 at 763-64.

[78] Layser, *supra* note 5 at 763-64.

contrary, the government continues to favor place-based tax policies as a key weapon in its arsenal of poverty-fighting tools.[79]

To understand the future outlook and necessary changes in the law for Opportunity Zones, it is instructive to briefly mention some historical place-based tax policies. The most prominent federal policies that fall under this category are the Low-Income Housing Tax Credit, Empowerment Zone, and New Markets Tax Credit.

2. *Brief Overview of Historical Place-Based Tax Policies*

i. Low-Income Housing Tax Credit Program ("LIHTC")

The LIHTC program was enacted as part of the Tax Reform Act of 1986.[80] Section 42 of the Internal Revenue Code outlines the provisions of the program.[81] The program gives tax credits to those investing in residential real estate developments targeted towards providing housing to low-income individuals.[82] Despite the target on low-income areas, the LIHTC program gives curiously high value credits to buildings in severely impoverished areas as well as areas with high costs relative to the median income of the area.[83] Interestingly, in practice and in light of the confusing stipulation driving credits toward high poverty and high cost, developers have the incentive to target either the poorest or richest parts of a locality.[84] Since it would not make sense for developers to develop low-income housing in rich neighborhoods, they target these investments towards the poorest parts of towns.

Critics assert that the program "contributes to the concentration of poverty and exacerbates existing patterns of economic and racial segregation" by "encouraging developers to pack more low-income families into already low-income neighborhoods."[85] The detractors of the LIHTC program claim that this program does nothing but further gentrify communities by providing tax breaks that move individuals into areas with the highest levels of concentrated poverty.[86] Furthermore, from an economic standpoint, this program has not proven to be an

[79] Layser, *supra* note 5 at 763-64.
[80] Tax Reform Act of 1986 (TRA), Pub.L. 99-514, 100 Stat. 2085 (enacted October 22, 1986).
[81] 26 U.S.C. § 42 (2020).
[82] *Id.*
[83] Hemel, *supra* note 69 at 4.
[84] Hemel, *supra* note 69 at 4.
[85] Hemel, *supra* note 69 at 5.
[86] Hemel, *supra* note 69 at 14.

efficient expenditure for the government.[87] Evidence indicates LIHTC may hurt communities more than it helps by offering confusing incentives that may subtly support gentrification at a high cost to the government.[88]

ii. Empowerment Zones (EZs)

Congress established the "Empowerment Zone" program in 1993 during the Clinton Administration; the program designated roughly one hundred high-poverty communities with high levels of unemployment as deserving of the targeted tax incentives of the program.[89] One of the biggest incentives involved giving a $3,000 tax credit per worker employed by a company who lived inside the zone, resulting in a cost of approximately $2.5 billion dollars in the first ten years of the program.[90] Despite the data showing additional job creation inside the empowerment zones, estimates suggest that each new position cost the government over $100,000.[91] To make matters worse, rent increased inside the zones and created jobs that may have simply shifted from existing locations outside the area.[92] Critics of the Empowerment Zone Program claim it delivers benefits to low-income areas at an extremely inefficient cost to the government and accelerates gentrification by attracting workers from outside the "empowerment zones" to derive the benefits of the program.[93]

iii. New Markets Tax Credit (NMTC)

The New Markets Tax Credit is a program that provides tax credits incentivizing investment in low-income housing and businesses in low-income areas.[94] The program works by allowing investors to invest in Community Development Entities (CDEs), which then invest directly into the low-income communities.[95] The only large-scale assessment of the program has concluded that most CDE investments were merely investments moved from other areas, and "do not likely represent new

[87] Hemel, *supra* note 69 at 6 (Noting that the LIHTC costs the government about $9 billion per year).
[88] Layser, *supra* note 5 at 770-71 n. 131.
[89] Hemel, *supra* note 69 at 5.
[90] Hemel, *supra* note 69 at 5.
[91] Hemel, *supra* note 69 at 6.
[92] Hemel, *supra* note 69 at 6.
[93] Hemel, *supra* note 69 at 6.
[94] Griffith and Michel, *supra* note 73 at 4.
[95] Griffith and Michel, *supra* note 73 at 1.

funds to low-income communities."[96] Many legal scholars contend that this program indeed fueled gentrification in low-income, tax-favored zones by increasing the incidence of large-scale projects that had no community impact.[97]

iv. Conclusion

There is significant criticism regarding the implementation of the LIHTC, EZ, and NMTC programs. Importantly, the Opportunity Zone program deviates from these past programs; however, the program must be further differentiated from these past place-based tax policies to better serve undercapitalized communities.

C. TAX POLICY AND INVESTMENT STRATEGY

Risk and taxation are absolutely fundamental concepts to investing, as investors generally seek to maximize the value of their investments while minimizing risk and tax liability. Because of this, risk and taxation are two massively important metrics that investors use when evaluating whether to participate in Opportunity Zones.[98] Since the locations of Opportunity Zones are usually low-income areas, investors who consider Opportunity Zones as an investment must perform ample due diligence before deciding to put money into an Opportunity Fund.[99] To complicate matters, attorneys are hesitant to advise investments in Opportunity Zones due to the inherent risk associated in these areas.[100] As a result, investors view investing in Opportunity Zones as a critical wealth management and investment decision.[101] Some wealth managers and investment advisors offer

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96 Tami Gurley-Calvez et. al., *Do Tax Incentives Affect Investment? An Analysis of the New Markets Tax Credit,* 37 PUB. FIN. REV. 371, 394 (2009).

97 Layser, *supra* note 5 at 787-88.

98 *See generally* Darla Mercado, *Advisors must weigh benefits and real dangers before offering this hot new tax play*, CNBC (May 28, 2019), https://www.cnbc.com/2019/05/27/advisors-must-assess-risk-and-rewards-of-opportunity-zone-funds.html.

99 *Id.* (quoting Lisa Featherngill, CPA and member of American Institute of CPAs personal finance executive committee: "[T]here is a level of due diligence required [and] not just of the investment itself.").

100 *See id.* (quoting Michael Burwick, a partner at The Wagner Law Group in Boston: "You have to know who you're investing with and their track record relative to turnarounds in areas that are less than sterling," and Ben Edwards, a law professor at the University of Nevada Las Vegas: "You might see Ponzi schemes come into play to capitalize off the excitement around opportunity zone funds.").

101 *See generally* Kurt Piwko, *Are Opportunity Zones for You? 5 Questions to Ask*, KIPLINGER REAL ESTATE INVESTING (October 27, 2020), https://www.kiplinger.com/real-estate/real-estate-investing/601624/are-opportunity-zones-for-you-5-questions-to-ask.

Opportunity Zone services as part of a holistic wealth management strategy; advisors must evaluate whether the risk-adjusted benefits of Opportunity Zone investments make sense for investors.[102]

1. Capital Gains Tax Policy

As a general rule, the United States tax system seeks to tax any and all accessions to wealth.[103] This basic principle is subject to the notion of realization. Realization allows taxpayers to defer paying tax until a realization event has occurred, normally the sale or exchange of a good.[104] This realization principle is based on the overarching tax policy ideal of administrative convenience, which makes it easier for the United States government to monitor and ascertain tax liability at a definitive level.[105] The concepts of wealth accretion and the realization principle have combined to serve as the bedrock of United States tax policy for the last several years.[106] As discussed before, many investors are reluctant to "realize" capital gains in an effort to avoid paying costly amounts of capital gains tax in light of the existing tax framework.[107]

Tax policy and investment strategy are intimately intertwined. As a default position, most rational investors seek to maximize the amount of return on investment (ROI).[108] Investors calculate ROI by calculating the increase (or decrease) in value of an investment compared to the initial investment amount.[109] In order to truly ascertain the real success of a particular investment, investors must take taxes into account and calculate the "after-tax real rate of return."[110] Investors seek to

[102] *See, e.g., Qualified Opportunity Zones: What Investors Should Know*, WELLS FARGO (May 2020), https://www.wellsfargo.com/the-private-bank/insights/planning/wpu-qualified-opportunity-zones/ *and The Greatest Tax Incentive Program Since the Roth IRA*, ENDOWMENT WEALTH MANAGEMENT, https://www.endowmentwm.com/qoz/ (last visited Mar. 20, 2021) (supporting the proposition that many wealth advisement and investment advisement services offer Opportunity Zone participation to clients).

[103] *See* 26 U.S.C. § 61 (2017); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429-33 (1955). An "accession to wealth" is generally regarded as any income or value gained. See, e.g., Cesarini v. U.S., 428 F.2d 812 (6th Cir. 1970).

[104] *See, e.g.,* 26 U.S.C. § 1001 (1993); Helvering v. Horst, 311 U.S. 112, 116 (1940).

[105] Helvering v. Horst, 311 U.S. 112, 116 (1940).

[106] Richard Schmalbeck et. al., *Advocating a Carryover Tax Basis Regime*, 93 NOTRE DAME L. REV. 109, 110 (2017).

[107] Brumberg, *supra* note 24.

[108] *Return on Investment*, INVESTOPEDIA (last updated Mar. 1, 2021) ("Return on Investment (ROI) is a performance measure used to evaluate the efficiency of an investment.").

[109] *Id.*

[110] *After-Tax Real Rate of Return*, INVESTOPEDIA ("The after-tax real rate of return is the actual financial benefit of an investment after accounting for the effects of inflation and taxes. It is a more accurate measure of an investor's net earnings after income taxes have

maximize ROI in a variety of ways, including reducing tax liability and risk.

2. *I.R.C. Sections 1221 and 1222 – Capital Assets and Capital Gains*

Section 1221 and 1222 of the Internal Revenue Code govern capital gains taxation.[111] A capital gain is a profit from the sale of a capital asset (such as a share of a stock, business, parcel of land, or work of art) – subject to notable exceptions listed in the Internal Revenue Code.[112] A capital gain is realized when an asset is sold for a higher price than its basis.[113] Short-term capital gains (assets held for less than a year) are taxed as ordinary income and subject to an individual's tax bracket.[114] Long-term capital gains have a unique tax structure, with the highest capital gain tax rate being 20 percent.[115] Capital gain tax rates inherently discourage the realization of capital gains because these capital gains are taxed only when realized.[116] Additionally, the deferral of capital gains tax until realization reduces the effective tax rate an investor pays below the statutory tax rate by reducing the present value of the tax.[117]

As a result of these factors, investors are "locked-in" when they are incentivized to hold assets with significant appreciation because of the looming capital gains tax liability in situations when they would otherwise sell.[118] Long-held and highly appreciated assets provide a greater financial incentive to stay "locked-in."[119] This incentive is manifestly increased by the "step-up in basis at death," governed by Section 1014 of the Internal Revenue Code.[120]

been paid and the rate of inflation has been adjusted for. Both of these factors will impact the gains an investor receives, and so must be accounted for.").

[111] *See generally* 26 U.S.C. § 1221 (2017); 26 U.S.C. § 1222 (2014).

[112] *See* 26 U.S.C. § 1221 (2017).

[113] *See* 26 U.S.C. § 1222 (2014).

[114] *See* 26 U.S.C. § 1222(1) (2014).

[115] *See* 26 U.S.C. § 1222 (2014); 26 U.S.C. § 1(h) (2019).

[116] Gerald Auten, *Capital gains taxation*, *in* ENCYCLOPEDIA OF TAX'N AND TAX POL'Y 59 (Joseph J. Cordes et al. eds. 1999) http://webarchive.urban.org/UploadedPDF/1000519.pdf.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 58.

3. *I.R.C. Section 1014 – Basis of Property Acquired from a Decedent*

Section 1014 of the Internal Revenue Code provides a special rule for taxpayers inheriting assets with built-in appreciation upon the death of another person.[121] When a person bequeaths an asset upon death to an heir, the United States tax code provides that the investment's basis is "stepped-up" from the original basis that the previous taxpayer held in the item to its "fair-market value" at the time of the original owner's death.[122] This presents a large tax savings for individuals who receive items upon the death of a previous owner with massive amounts of built-in appreciation.[123] This policy allows an individual to pass on property to heirs without the threat of a looming capital gains tax.[124]

Section 1014 of the Internal Revenue Code, colloquially known as the "step-up in basis" rule, has been criticized for exacerbating the "lock-in" effect described above.[125] The step-up in basis rule benefits mainly high net-worth taxpayers at the expense of foregone federal revenue.[126] If an heir receives assets with significant appreciation from the original basis of the decedent and decides to immediately sell the assets upon transfer, no capital gains tax would be owed.[127] This rule historically has received "grudging acceptance" because of the acknowledgement that it would be extremely difficult (in the pre-technology era) to maintain an accurate asset's adjusted tax basis identification.[128] However, this rule "violates fundamental tax principles," and there have been calls by

[121] 26 U.S.C. § 1014(e) (2015).

[122] Scott Eastman, *The Trade-Offs of Repealing Step-Up in Basis*, TAX FOUND. (Mar. 13, 2019), https://taxfoundation.org/step-up-in-basis/#_ftn1.

[123] *Id.* ("Step-up in basis reduces capital gains tax liability on property passed to an heir by excluding any appreciation in the property's value that occurred during the decedent's lifetime from taxation.").

[124] *Id.*

[125] *See* Peter Eilbott & Larry Hersh, *The Capital Gains Tax and the "Lock-In" Effect*, 15 NEB. J. OF ECON. AND BUS. 21 (1976).

[126] Joint Committee on Taxation, *Estimates of Federal Tax. Expenditures for Fiscal Years 2019-2023* (JCX-55-19) at 33 (Dec. 18, 2019).

[127] *Id.* at 5.

[128] Schmalbeck, *supra* note 106, at 110; *see also* Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 388 (1993) ("During the hearings that led to the repeal of carryover basis, many opponents of Section 1023 cited the need to determine a decedent's basis in his assets as the single biggest practical problem with the carryover basis – even for assets acquired after the effective date of the legislation. Many argued the problem was so serious as to make carryover basis impractical.").

academics and lawmakers to repeal Section 1014 of the code due to improvements in technology that make record-keeping easier.[129]

III. THE PROPOSAL TO IMPROVE OPPORTUNITY ZONES

A. CURRENT STATE OF OPPORTUNITY ZONES

The Opportunity Zone program's success remains unclear after more than two years since its inception.. As an initial matter, the design of the program as a placebased tax incentive does not portend future success. Historical data from the Low-Income Housing Tax Credit, Empowerment Zone, and New Markets Tax Credit programs show that place-based tax policies do not deliver benefits to community members at a reasonable price to the government or in an efficient manner.[130] Additionally, these programs show evidence of "tiebout sorting" and appear to accelerate dangerous forces of gentrification.[131] It is not clear that these government-funded programs do anything at all to tackle elevated levels of concentrated poverty.[132]

Alternatively, it is not clear whether a large number of investors are sufficiently persuaded by the tax deferral and savings framework to participate in Opportunity Zones. Many investors have not yet turned general interest in the program into actual capital investments in Opportunity Zones.[133] As investors work with wealth managers to make decisions on whether to participate in the Opportunity Zone program, there is uncertainty as to whether the tax benefits associated with Opportunity Zones make these investments the most attractive option for investors when compared to other, less risky investments.

1. There is Hope for the Opportunity Zone Program

Despite the checkered history of previous place-based taxation programs and early reluctance by investors to jump headfirst into

[129] Schmalbeck, *supra* note 106, at 110-12 ("First, technological advancements have grown at a rapid pace, and these advancements greatly facilitate tax basis record keeping and retention.").

[130] *See generally* Hemel, *supra* note 69.

[131] *See generally* Hemel, *supra* note 69.

[132] *See generally* Hemel, *supra* note 69.

[133] *Few Rush to Invest in Opportunity Zones*, INVESTMENTNEWS (Apr. 10, 2019), https://www.investmentnews.com/article/20190410/FREE/190419995/few-rush-to-invest-in-opportunity-zones ("But despite a feverish push from developers, accountants and law firms, investors are hesitating before jumping into Opportunity Zone funds, according to wealth advisers.").

participating in Opportunity Zones, there is still hope for the program. However, Congress must make core changes to the legislation. These changes must: a) reduce the number of available Opportunity Zones to streamline investments into the neediest of communities; and b) incentivize broader participation in the deferred capital gains tax break that Opportunity Zones provide by repealing Section 1014 of the Internal Revenue Code.

Opportunity Zones can be significantly more successful than previous place-based tax policies because the program is starkly distinguishable from other place-based tax programs. As a principal matter, the Opportunity Zone program incentivizes private investors to invest capital largely free of government involvement. In fact, the only involvement the federal government has in the Opportunity Zone process is certifying a tract proposed by the individual state governments.

In addition, Opportunity Zones are funded as "revenue foregone" to the federal government; the government is not actively giving taxpayer funds to participants.[134] Previous place-based tax policies instead involve government disbursement of federal funds to participants who invest in low-income municipalities. In the LIHTC, EZ, and NMTC programs, the federal government provides tax credits and other tax incentives for taxpayers to participate in such programs. In the Opportunity Zone program, the federal government allows private investors to defer capital gains tax recognition. The government does not direct where private investments must go, outside the general requirements to certify a Qualified Opportunity Fund and which zones these may invest in to get tax deferrals.

Finally, Opportunity Zones present significant upside because funds can be scaled to reduce risk.[135] As mentioned previously, shrewd investors seek to increase upside while minimizing the amount of risk on investments. Investing in Opportunity Zones presents an inherent

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[134] Olivia Barlow, *Opportunity Zones*, NAT'L LOW INCOME HOUSING COALITION, https://nlihc.org/sites/default/files/AG-2019/08-04_Opportunity-Zones.pdf at 1 (last visited March 14, 2021). ("The Opportunity Zones tax benefit is not funded through federal appropriations; it is a tax expenditure, meaning that the federal government forgoes tax revenue in order to incent an activity.").

[135] Scott Eastman, *Measuring Opportunity Zone Success: Fiscal Fact No. 657*, TAX FOUND., at 4 (May 2019) ("Economists Jared Bernstein and Kevin Hassett argue Opportunity Zones are 'a new approach to geographically targeted economic policy that could be far more effective than those tried in the past'" because the program allows investors "'to pool their resources and invest in numerous projects at any given time in a highly nimble fashion.'" This resource pooling minimizes risk to investors and "gives investors the ability to 'the capacity to move a high volume of investments into depressed communities at relatively low cost to the Federal Government.'").

level of risk. This is due to the nature of the place-based taxation model, as well as the uncertainty of delivering funds into historically undercapitalized communities.[136] One potentially mitigating attribute of the Opportunity Zone structure is the ability to scale the size of qualified opportunity funds.[137] Private investors, by pooling together capital to invest in an opportunity fund, can scale investments into these zones and potentially invest this money in a variety of different projects.[138] This scaling of funds protects against downside risk on the investor's end by allowing for exposure to a broader section of investments within multiple zones or a single zone.[139] Opportunity Zones can be more successful than previous policies because of the widely available tax savings to any investor with capital gains. This wide inclusion could attract any investor with appreciated capital gains, regardless of any other factors.

2. The Goals of the Proposal

This proposal serves to achieve two main goals. The first goal of the proposed changes is to reduce the number of zones available for Opportunity Zone investment, thereby eliminating several "loophole zones" that have clearly developed through the early reporting of this program. This goal can be accomplished in two primary ways. First, Congress must enact stricter reporting requirements for Opportunity Funds to engender accountability toward where Opportunity Zone investors direct private investments. Second, Congress must reduce the number of Opportunity Zones to target only the neediest areas. Both changes would ensure accountability in how investments are benefitting the neediest communities, thereby tying the implementation of the legislation toward the stated Congressional goals.

The second goal of this proposal is to expand the amount of capital to fund Opportunity Zone projects. Congress must alter the tax code to recalibrate the investment metrics regarding Opportunity Zone investments. Eliminating Section 1014 of the Internal Revenue Code and thereby eliminating the "step-up" in basis rule will eliminate a powerful incentive for investors to hold on to built-in capital gains in appreciated assets, to pass along to heirs at their death. By eliminating

136 *See generally* Angelique Brunner, *Opportunity Zones: The Dire Risks for Investors and the Communities*, FORBES (Jun. 14, 2019), https://www.forbes.com/sites/forbesrealestatecouncil/2019/06/14/opportunity-zones-the-dire-risks-for-investors-and-the-communities/#2469bdea16ec.

137 Eastman, *supra* note 135 at 2.

138 Eastman, *supra* note 135 at 2.

139 Eastman, *supra* note 135 at 2.

this powerful incentive, Opportunity Zones would be a more attractive option for deferring and eliminating capital gains tax payments to the federal government.

B. THE PROPOSAL TO IMPROVE OPPORTUNITY ZONES

1. Congress Must Implement Stronger Opportunity Zone Reporting Requirements to Provide Oversight and Accountability into the Program

Congress must impose stronger reporting requirements with respect to the activities of Qualified Opportunity Funds. Stronger reporting requirements would impose oversight and accountability into where investments are going within Opportunity Zones.

The current Opportunity Zone law and Treasury Regulations provide scant guidelines on how Qualified Opportunity Funds must operate in compliance with the law. The Internal Revenue Code mandates that "at least 90 percent of [a Qualified Opportunity Fund's assets must be invested] in qualified opportunity zone property."[140] The code further determines "qualified opportunity zone property" to be "qualified opportunity zone stock," a "qualified opportunity zone partnership interest," or "qualified opportunity zone business property."[141]

The Internal Revenue Service issued several Treasury Regulations[142] that further clarified the requirements of the wording of the law. A "qualified opportunity zone business" must have "substantially all" its tangible property invested in "opportunity zone business property."[143] The Treasury Regulations define "substantially all" to mean "70 percent" of a qualified opportunity zone business' assets must be invested in opportunity zone business property.[144] As an example, an investor may invest in a Qualified Opportunity Fund. That Qualified Opportunity Fund may invest a minimum of 90 percent of its assets in a qualified opportunity zone business. This opportunity zone business may then invest a minimum of 70 of its assets in qualified opportunity zone business property. Thus, a single investor in a

[140] 26 U.S.C. § 1400Z-2(d)(1) (2017).

[141] 26 U.S.C. § 1400Z-2(d)(2) (2017).

[142] 26 C.F.R. §§1.1400Z2(a)-1 through 1.1400Z2(f)-1 (2020); 26 C.F.R. § 1.1502-14Z (2020); 26 C.F.R. §1.1504-3 (2019).

[143] I.R.C. § 1400Z-2(d)(3) (2017).

[144] Blake Christian & Alejandra Lopez, *Opportunity zone regulations: Tranche II clarifies important information*, ACCOUNTINGTODAY (May 22, 2019), https://www.accountingtoday.com/opinion/opportunity-zone-regulations-tranche-ii-clarifies-important-information.

Qualified Opportunity Fund may have a minimum of 63 percent of an investment actually deployed in an Opportunity Zone. This sounds unconscionable, yet the public has no visibility into how funds are deployed in an Opportunity Zone.

Legislative momentum for improved reporting standards grows daily.[145] Senators Cory Booker and Tim Scott introduced S. 1344, a bill designed to reimplement reporting standards that were included in the original bill but removed upon inclusion in the Tax Cuts and Jobs Act.[146] These reporting requirements would "require[] the Department of the Treasury to collect data and report to Congress on investments held by qualified opportunity funds . . . [and] make certain information regarding the investments publicly available."[147] Representatives Ron Kind, Mike Kelly, and Terri Sewell also introduced the "Opportunity Zone Accountability and Transparency Act," which would establish a reporting framework, disclosure requirements, and a penalty for failure to file complete and correct returns for Qualified Opportunity Funds.[148] Additionally, Senator Ron Wyden of Oregon introduced the "Opportunity Zone Reporting and Reform Act" which would require increased reporting for Qualified Opportunity Funds in a similar manner to the previous two proposals.[149] The proposals all center around the need for more insight into how Qualified Opportunity Funds invest money into Opportunity Zones. Each bill has its own mechanism for ensuring that disclosures are made to the public, which would engender accountability and insight into whether Opportunity Zones are going to achieve the legislative goals stated at the inception of the program.

Congress should synthesize and adopt a combination of these proposals to mandate annual returns and information disclosures for Opportunity Funds. These proposals, at their core, would mandate the

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145 *Why the Newly Introduced Opportunity Zone Reporting Bills are a Win for Transparency*, JTC AMERICAS (Nov. 7, 2019), https://nesfinancial.com/why-the-newly-introduced-opportunity-zone-reporting-bills-are-a-win-for-transparency?utm_campaign=News%20&%20Insights%2011%2F19&utm_medium=email&utm_source=Eloqua (quoting Reid Thomas, EVP of NES Financial's Specialty Financial Administration Business: "Legislative momentum around reporting requirements continues to increase . . . This is expected because ultimately in the long term, the Opportunity Zone initiative will be measured by whether it ends up doing the good it was intended to do.").

146 S. 1344, 116th Cong. (2019-2020) (introduced).

147 Congressional Research Service, Summary for S. 1344, 116th Cong. (introduced in the Senate (5/07/2019)).

148 H.R. 5011, 116th Cong. (2019-2020) (introduced).

149 S. 2787, 116th Cong. (2019-2020) (introduced).

participants in Opportunity Funds to disclose the details of investments, as well as the assets and investments of each fund.[150] Synthesizing these bills would make great leaps toward imposing penalties on investors who fail to comply with the requirements. Such an aggregate of ideas would also provide necessary insight into the activities of Opportunity Funds and would force investors to operate with more accountability. This would also serve as a guardrail to ensure investors are choosing projects that benefit communities by providing a direct line-of-sight to the financiers of non-beneficial projects. Congress must take the ideas formulated in these three bills to remove the veil of secrecy surrounding Opportunity Fund activities.

Increasing reporting requirements would promote compliance with the legislative goals of the program. As investors currently seek risk averse investments, sometimes at the expense of ensuring community members benefit from projects (as seen in the news), changing the bill to improve visibility will allow public oversight into the process. The government foregoes billions of dollars in revenue that would normally be collected in capital gains taxation as a tradeoff to funding this program, and thus must demand that participants disclose the activities of Opportunity Funds.[151]

These proposed legislative reforms recently introduced in Congress underscore the importance of changing the law to increase visibility into the Opportunity Zone projects. Thus far, investors in Opportunity Zone projects have been able to largely operate outside the scope of oversight into how and where money is being deployed. This "grey area" is due to the private nature of the Opportunity Zone program and the fact that the government is not directly providing taxpayer funds to such projects. This is a dangerous proposition, as the stated legislative goal of the program is "to spur economic development and job creation in distressed communities" throughout the country.[152] Unfortunately, the law is vague about the mechanics behind how investors must achieve this goal. Thus, the law must change to ensure that investors are truly investing in the spirit of stated Congressional intent. More stringent data collection requirements and stricter noncompliance penalties are simple ways to ensure this symbiosis.

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[150] *Id.*

[151] JOINT COMM. ON TAXATION, *supra* note 126, at 20, 26 (citing that the federal government will forego approximately $16.9 billion in revenue to fund Opportunity Zones in the years 2019-2023).

[152] *Opportunity Zones Frequently Asked Questions*, IRS, https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions (last visited Jun. 15, 2021).

2. *Congress Must Reduce the Number of Opportunity Zones to Ensure the Neediest Areas Receive Investment*

Congress must reduce the number of zones that state governments can certify by imposing stricter certification requirements in the law. By cutting the number of available zones in half and eliminating loopholes, such as allowing "contiguous" tracts to low-income areas to be certified, many of the early issues with the program can be solved.

Section 1400Z-1(d) of the Opportunity Zone law provides that "the number of population census tracts in a state [that may be Opportunity Zones] . . . may not exceed 25 percent of the number of low-income communities in the State."[153] Further, Section 1400Z-1(e) provides, in relevant part, that certain "contiguous" tracts may be designated as Opportunity Zones.[154] Thus far, the Secretary of Treasury has certified 8,762 municipalities as Opportunity Zones since December 2017, representing twelve percent of national census tracts.[155] However, only a fraction of these zones will receive private investment through the program—often times the zones that need investment the least will reap the greatest investments, such as already-gentrifying urban downtowns and college towns that fall under the umbrella of the definition in Section 1400Z-1.[156]

Investors currently take advantage of the large number of zones by searching for the projects in the most investor-friendly areas—namely areas that provide the least amount of risk. Investors have overwhelmingly sought to participate in the program by decreasing the risk of their investments while still obtaining generous tax treatment. Investors find these loopholes in tracts certified as "contiguous" to low-income municipalities and municipalities that qualify as Opportunity Zones.[157] However, these "Opportunity Zones" are actually college towns or other previously gentrifying urban downtowns.[158]

The media is working hard to amplify the instances where investors have found loopholes in the Opportunity Zone law. There are a multitude of stories, in newspapers such as the Wall Street Journal, that highlight the exploitation of the vague legal guidelines by wealthy

153 26 U.S.C. § 1400Z-1(d) (2018).
154 *See id.*
155 TAX POL'Y CTR., *supra* note 22.
156 *See, e.g.,* Drucker, *supra* note 15
157 *See, e.g.,* Drucker, *supra* note 15
158 *See, e.g.,* Drucker, *supra* note 15.

investors seeking to minimize risk.[159] The New York Times also released a lengthy report about how "billions of untaxed investment profits are beginning to pour into high-end apartment buildings and hotels, storage facilities that only apply a handful of workers, and student housing in bustling college towns, among other projects."[160] More recently, the Times made a salacious allegation that "swashbuckling financier" and ex-Wall Street mogul Michael Milken exercised his personal friendship with Treasury Secretary Steven Mnuchin to certify an industrial park that violated the traditional certification parameters.[161] These allegations underscore the lengths that investors are willing to go to find investment projects with the least amount of risk.[162]

The Opportunity Zone program was ostensibly designed to help the constituents of the underserved communities by creating jobs and promoting an influx of capital into the areas. However, it is awfully hard to justify large investments such as a "ritzy new office tower with a landscaped roof terrace" in Miami and "46-story, glass-wrapped apartment tower" with "amenities includ[ing] a yoga lawn and a pool surrounded by cabanas and daybeds" in a Houston Opportunity Zone.[163] Another glaring example of brazen Opportunity Zone exploitation involves former Under Armour CEO Kevin Plank and Goldman Sachs investing in an Opportunity Zone in Baltimore.[164] Unfortunately, the area in which these groups invested, Port Covington, became an Opportunity Zone merely because of a census error.[165] Plank took advantage of an area where "[a] major investment was already planned

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[159] Tony Mecia, Opinion, *Opportunity Zones Knock Where They're Needed Least*, WALL ST. J. (Sept. 13, 2019), https://www.wsj.com/articles/opportunity-zones-knock-where-theyre-needed-least-11568412633 (maintaining that developers have analyzed the existing Opportunity Zones and identified the zones with the lowest risk, namely zones in already gentrifying areas or close to college campuses).

[160] Drucker and Lipton, *supra* note 15 (reaffirming the manipulation of the program by investors looking to minimize risk by investing in high-end assets with little-to-no benefit going to the members of the community).

[161] Eric Lipton and Jesse Drucker, *Symbol of '80s Greed Stands to Profit From Trump Tax Break for Poor Areas*, N.Y. TIMES (Oct. 26, 2019), https://www.nytimes.com/2019/10/26/business/michael-milken-trump-opportunity-zones.html.

[162] *See id.*

[163] Drucker and Lipton, *supra* note 15.

[164] *See* Jeff Ernsthausen & Justin Elliott, *One Trump Tax Cut Was Meant to Help the Poor. A Billionaire Ended Up Winning Big*, PROPUBLICA (Jun. 19, 2019), https://www.propublica.org/article/trump-inc-podcast-one-trump-tax-cut-meant-to-help-the-poor-a-billionaire-ended-up-winning-big.

[165] *Id.*

and now is in a zone where they are going to qualify for all kinds of beneficial tax treatment."[166]

Despite the apparent veil of secrecy that allows private investors to make investments without reporting requirements, as discussed above, some states make Opportunity Zone investment data available to the public. New Jersey is one of the few states that has proprietary reporting software to provide such insight.[167] New Jersey provides an interactive map of the Opportunity Zones available in the state.[168] The state has even developed an online marketplace "connecting New Jersey communities and project opportunities with a national network of investors and project partners."[169] Unfortunately, despite the key insights provided by the state and attempts at regulating the market for capital with available projects, many New Jersey Opportunity Zones have yet to attract any investment.[170] Towns in urgent need of redevelopment and revitalization, such as Asbury Park and Dover, have no active projects currently listed after more than two years of being certified as designated Opportunity Zones.[171] Moreover, already gentrifying areas such as downtown Newark are full of investment.[172]

The allegations against wealthy business moguls exploiting the Opportunity Zone certification rules underscore a more salient point—that the certification requirements must be stricter. Congress must close the loopholes as alleged in the above reporting by cutting the number of Opportunity Zones available for investment. Sections 1400Z-1(d) and (e) must be rewritten to limit the number of Opportunity Zones and funnel investment into the areas with the most need.

It is clear that the current law allows too many low-income municipalities and contiguous tracts to be designated as Opportunity Zones. This conclusion follows from loophole seeking investors, and the inability for some of the neediest locations to attract funding. To be

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166 *Id.*

167 *See, e.g.,* N.J. Community Asset Map, N.J. DEPT. OF COMMUNITY AFFAIRS, https://njdca.maps.arcgis.com/apps/webappviewer/index.html?id=96ec274c50a348 90b23263f101e4ad9b (last visited Mar. 20, 2021) (providing data on current projects in Opportunity Zones in the state and showing that deals are concentrated in a select few zones).

168 *See id.*

169 *New Jersey's Opportunity Zone Marketplace*, OPPSITES (last visited Jun. 15, 2021), https://oppsites.com/newjerseymarketplace.

170 N.J. Community Asset Map, N.J. DEPT. OF COMMUNITY AFFAIRS, https://njdca.maps.arcgis.com/apps/webappviewer/index.html?id=96ec274c50a348 90b23263f101e4ad9b (last visited Mar. 20, 2021).

171 *Id.*

172 *Id.* (showing that multiple high-value projects have centered around the Prudential Center in downtown Newark).

clear, there can be a variety of factors influencing an investment decision in an Opportunity Zone, such as community attractiveness, risk, and infrastructure. However, as is evident in the early reporting on the program, investors will do extensive research to identify the most attractive investments that comply with the current Opportunity Zone law.

Therefore, Congress must change the existing law to close these loopholes and ensure that the loopholes stay closed. Congress must reduce the maximum number of Opportunity Zones that may be certified in Section 1400Z-1(d). Reducing this number in half, from the current 25% requirement down to 12.5%, would more accurately ensure that the loopholes are closed and only the neediest communities receive investment. Additionally, in light of the reporting that not all certified zones are receiving investment, such a change will ensure that each certified zone will have a greater chance of receiving investment. As a concluding point, the policy allowing contiguous tracts to be designated as Opportunity Zones must be eliminated. Many of the existing investment loopholes are being exploited through zones "contiguous" to low-income tracts.[173] These contiguous tracts include many of the college towns in which investors are profiting greatly without providing the benefits envisioned upon the program's inception.[174]

Curtailing these seemingly stringent, but realistically loose, existing requirements will close the current loopholes. The law holds much promise, yet the early reporting on the Opportunity Zone program has exposed serious flaws in the current model. The loopholes must be eliminated by cutting the number of zones in half, as well as denying the certification of contiguous tracts. These efforts will truly ensure the neediest communities receive funding.

3. Congress Must Eliminate Section 1014 to Further Incentivize Participation in the Opportunity Zone Program

Eliminating Section 1014 and reducing the "lock-in effect" of appreciated capital gains property holds the key to expanding participation in Opportunity Zones. The lock-in effect is an extremely powerful disincentive toward realizing capital gains.[175] Investors are reluctant to sell property with massive built-in appreciation because

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[173] *See, e.g.,* Drucker, *supra* note 15

[174] *See, e.g.,* Drucker, *supra* note 15

[175] Schmalbeck, *supra* note 106, at 112 n. 23. (The "lock-in" effect refers to the powerful disincentive on realizations created by making them the trigger of taxability.").

they do not want to pay capital gains tax.[176] Instead, these investors hold appreciated property and pass it on to heirs at a "stepped-up" basis.[177] If the heirs sell this stepped-up property immediately, they owe no capital gains tax.[178]

At this juncture in the life of the Opportunity Zone program, it is unclear whether investors are participating in the program at the levels envisioned by the drafters of the legislation. Wealthy investors with appreciated assets and capital gains are shrewd. If these investors do not need immediate liquidity, they will seek to avoid paying capital gains tax. Sophisticated investors, with the aid of wealth advisors, can pass the assets to their heirs and utilize the generous "step-up" in basis rule provided by Section 1014 of the Internal Revenue Code.

Eliminating Section 1014 will remove a golden arrow in the quiver of investors looking to avoid paying capital gains taxation. As such, the generous tax deferral and reduction structure provided by Opportunity Zones will incentivize these investors, who hold roughly $6 trillion in unrealized capital gains, to increase participation in the Opportunity Zone program.[179]

The permanent forgiveness of tax on appreciated property at the time of death, represented by Section 1014, has been called "the most serious defect in our federal tax structure."[180] As of 1993, it is estimated that the federal government loses $25 billion annually (in terms of revenue lost) as a consequence of this rule.[181] Step-up in basis is both one of the main revenue drains and also one of the least justified revenue drains.[182] It is estimated that this rule has "resulted in well over a trillion dollars of lost revenue and skewed the scales of equity in a way that decidedly favors those taxpayers who are economically well-to-do."[183]

There was an effort in the late 1970s to institute a "carryover basis" rule which would eliminate the longstanding "step-up" in basis rule.[184]

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176 *See generally* Auten, *supra* note 116.

177 *See generally* Auten, *supra* note 116.

178 *See generally* Auten, *supra* note 116.

179 *Opportunity Zones – An Overview*, FREDDIE MAC MULTIFAMILY RES. CTR. at 1 (Mar. 2019), https://mf.freddiemac.com/docs/opportunity-zones.pdf.

180 Zelenak, *supra* note 128, at 363 (quoting Stanley Surrey & Jerome Kurtz, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, The Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1381 (1970)).

181 Zelenak, *supra* note 128, at 363.

182 Schmalbeck, *supra* note 106, at 153–54.

183 Schmalbeck, *supra* note 106, at 153–54.

184 Joseph M. Dodge & Jay A. Soled, *Debunking the Basis Myth Under the Income Tax*, 81 IND. L. REV. 539, 541 (2006).

This effort resulted in the installation of Section 1023 of the Internal Revenue Code, codifying the elimination of the step-up in basis rule.[185] However, this attempt was met with tremendous public upheaval.[186] The upheaval was centered around two main arguments—namely that ascertaining the tax basis of a decedent's item would be extremely complex and that the IRS did not have the means to ensure that the rule was followed.[187] As a result of these concerns, Section 1023 was subsequently repealed, and the step-up in basis rule is preserved in the modern Section 1014.[188]

With the advent of technology and widespread personal computing, these concerns with keeping track of basis adjustments and IRS enforcement ring hollow. Modern attempts to eliminate the step-up in basis rule will prove to be more fruitful than the failed historical attempts. Eliminating Section 1014 would be a minimally invasive and administratively feasible way to eliminate the powerful lock-in effect on appreciated property. The historical arguments against a "carryover basis" tax regime (the opposite of the current "step-up" regime at death) were centered around administrative feasibility, as people were worried how to keep track of changing basis in the absence of technology.[189] Now, because of technological advancements, a "carry-over basis" program is significantly more feasible than it was in the past. Computers ensure that basis adjustments are easily trackable and enforceable.[190]

This rule is stuck in the past; it is time to eliminate Section 1014 to improve Opportunity Zones. By removing the step-up in basis rule and thus eliminating the lock-in effect, the Opportunity Zone tax deferral provision will look more attractive to investors who would derive no benefit from preserving the lock-in effect and passing property to future generations for tax breaks. Repealing Section 1014 would encourage people to "shift investments to more productive uses during their

[185] *Id.* (citing Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005, 90 Stat. 1520, 1872–77 (1976) (repealed 1980)).

[186] *Id.* at 541–42.

[187] *Id.*

[188] *Id.* at 544 (citing Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a), 94 Stat. 229, 299 (1980)).

[189] *See* Schmalbeck, *supra* note 106, at 112.

[190] Schmalbeck, *supra* note 106, at 112.

lifetimes, rather than retaining those assets so that their heirs can benefit from the tax advantages[.]"[191]

In light of the repeal of IRC Section 1014, a taxpayer would pass on no advantage to his/her heirs by holding an appreciated asset and eventually passing it to an heir at death. This would change asset planning strategies and theoretically free up more capital to be eligible for the Opportunity Zone program. The proposal could also unlock over $100 billion over the next 10 years,[192] some of which could be used to fund Opportunity Zone projects. With an added pool of investment of an estimated $100 billion over 10 years (and likely more, because the estimated figures merely represent increased revenue from the realization of appreciated assets without the added incentive of Opportunity Zone deferral and reduction), this change to the tax code would be just what the Opportunity Zone program needs to unleash the $6.1 trillion in appreciated and unrealized capital gain assets. With an influx of cash, Opportunity Zones would have more interested investors and more projects could be funded to help underserved communities.

The Internal Revenue Code must be changed to alter the calculations of many tax planners and wealth management advisors by eliminating Section 1014. Eliminating the "step-up" in basis on appreciated property acquired upon the death of a decedent will allow the government to modernize the Code and eliminate a key incentive for wealthy investors to hold on to property with massive built-in gain.[193] By changing this incentive in a manner minimally invasive to taxpayers, Opportunity Zone programs will be more attractive despite the myriad of other wealth and tax planning strategies available to investors.

IV. CONCLUSION

In sum, the Opportunity Zone program holds immense promise. However, the law is too vague in its current form to deliver benefits to the areas that need the most help. The stated legislative goal of providing increased investment and economic opportunities for disadvantaged communities is noteworthy. Using the $6.1 trillion opportunity in unrealized capital gains to rebuild downtrodden communities by incentivizing investors to realize these gains in

[191] *Change the Tax Treatment of Capital Gains From Sales of Inherited Assets*, CONG. BUDGET OFFICE (Dec. 13, 2018), https://www.cbo.gov/budget-options/2018/54792.
[192] *Id.*
[193] *See generally* Taylor LaJoie, *Booker's Plan to Eliminate Step-up in Basis and Expand the Estate Tax*, TAX FOUND. (Sep. 27, 2019), https://taxfoundation.org/cory-booker-estate-tax-step-up-in-basis/.

exchange for tax benefits is a phenomenal concept. However, the early returns of the program, the vague guidelines in the law, and the powerful disincentive of the step-up in basis rule are holding the program back from changing the fabric of impoverished American communities.

In order to achieve a symbiotic relationship for investors, Opportunity Zone community members and Congress must take several decisive steps. Congress must enact stronger Opportunity Zone reporting requirements by aggregating the ideas contained in three current bills residing in the House of Representatives and Senate. Passing a bill that aggregates these stronger reporting requirements will engender accountability by allowing for oversight into Opportunity Zone investments and activity. Congress must also close the loopholes embedded in the certified Opportunity Zones to detract investors merely seeking risk minimization. By cutting the number of Opportunity Zones in half and preventing the certification of tracts "contiguous" to low-income areas, Congress would take a significant step toward ensuring that the investment benefits truly are flowing to the areas most in need. Finally, Congress must eliminate Section 1014 allowing heirs to "step-up" the basis of inherited assets. By eliminating Section 1014, Congress will remove the most powerful disincentive for investors to participate in Opportunity Zones, thereby expanding the capital available to revitalize urban communities.

The Opportunity Zone model is a fantastic step toward revitalizing downtrodden communities across the United States of America. With several common-sense reforms to the law, this framework has the potential to change the trajectory of communities most in need.