# Opportunity Zones: Whose Opportunity? Remedying Failed Federal Policy via State Pro Bono Policy Toolkits

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## INTRODUCTION

> *"The federal government has not shown that it is a partner whom we can depend on."*
>
> —*Mustafa Abdul-Salaam*[1]

Storey County is an arid, sparsely populated region in the high desert of western Nevada. Quietly nestled within its boundaries are the lucrative Tahoe-Reno Industrial center, the Tesla Gigafactory, and a rapidly expanding Google data facility.[2] As the third-least populous county in the state, Storey County's median household income is over $65,000 and its poverty rate is seven percent, well below the national average of 10.5 percent.[3] In 2018, U.S. Treasury Secretary Steven Mnuchin instructed his staff to designate Storey County as an Opportunity Zone—a low-income community eligible for capital gain tax incentives to stimulate private investment and bolster economic growth. Staff members did as they were instructed, despite the fact that Storey County was not low-income and did not otherwise meet the Opportunity Zone eligibility criteria set forth under the Tax Cuts and Jobs Act of 2017.[4] At Mnuchin's behest, Storey County became one of Nevada's designated Opportunity Zones.[5] In 2019, a *New York Times*

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1. Mustafa Abdul-Salaam, Class Remarks to Georgetown Law Community Development Seminar (Oct. 6, 2020).

2. Jason Hidalgo, *Milken Link to Storey County Opportunity Zone Raises More Concerns about Political Favors*, RENO GAZETTE-JOURNAL, Oct. 29, 2019, https://www.rgj.com/story/news/money/business/2019/10/29/storey-county-opportunity-zones-link-milken-raises-more-concerns/2491377001 [https://perma.cc/DN2L-DH3M].

3. UNITED STATES CENSUS BUREAU, QUICKFACTS: STOREY COUNTY, NEVADA (2019), https://www.census.gov/quickfacts/storeycountynevada [https://perma.cc/TU2Z-UTGD]; UNITED STATES CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2019 (2020), https://www.census.gov/newsroom/press-releases/2020/income-poverty.html#:~:text=The%20official%20poverty%20rate%20in,from%2014.8%25%20to%2010.5%25 [https://perma.cc/MTG7-UMVR].

4. *Neal, Wyden Investigate Abuse of Opportunity Zone Program*, WAYS AND MEANS COMMITTEE, Nov. 6, 2019, https://waysandmeans.house.gov/media-center/press-releases/neal-wyden-investigate-abuse-opportunity-zone-program#:~:text=According%20to%20the%20New%20York,criteria%20in%20the%20Tax%20Codec [https://perma.cc/AJK7-FCRP].

5. Hidalgo, *supra* note 2.

investigation revealed that Michael Milken, long-time Wall Street financier who had been convicted of felony securities fraud, was a major investor in Storey County at the time of the designation.[6] Milken and Mnuchin are longtime friends.[7]

The fate of Storey County symbolizes the troubled nature of federal community development policy initiatives such as Opportunity Zones. Blatant cronyism and backdoor favors are fundamentally at odds with local wealth creation and economic growth, the central goals of community development. An unwillingness among legislators to reform misaligned initiatives continues to damage the relationship between federal entities and local communities. This Note will focus on the shortfalls of the Opportunity Zone Program and propose a novel remedy to federal stagnation: the state-based development, passage, and circulation of Pro Bono Policy Toolkits linking legal specialists to small businesses in need of transactional counseling to become Qualified Opportunity Zone Businesses. With federal failure comes the possibility of state rectification.

Part I will provide background information on previous place-based community development "zone" policies aimed at achieving economic revitalization in the 1990s and 2000s. It will review these efforts to stimulate private investment through tax incentives and assess recurring patterns of ineffectiveness. Part II will dissect the current-day iteration of this effort, the Opportunity Zone Program, and analyze how it creates the same problems as its predecessors through legislative pitfalls and failed attempts at reform. It will conclude that the Program disproportionately enriches investors at the expense of communities it is supposedly designed to aid. Finally, in light of the discrepancy between legal services available to savvy outside businesses looking to move into an Opportunity Zones versus unconnected small businesses already located in Opportunity Zones, Part III proposes the use of state-sanctioned Pro Bono Policy Toolkits to link financial, tax, and real estate attorneys to small businesses that are eligible to receive designation as a Qualified Opportunity Zone Business. By providing pro bono transactional counseling to these businesses and enabling them to benefit, lawyers will be able to edge the Opportunity Zones Program closer to its initial purpose while fulfilling the American Bar Association (ABA) *Model Rules of Professional Conduct* Rule 6.1 (Voluntary Pro Bono Public Service).[8] The Oregon State Bar's current Pro Bono Policy Toolkit, which has been successfully implemented by Oregon firms for over a decade, is a strong template for this proposal.

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6. Eric Lipton & 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 [https://perma.cc/SQQ3-2XZ6].

7. *Id.*

8. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (AM. BAR ASS'N 2018) [hereinafter MODEL RULES].

## I. A BRIEF OVERVIEW OF PLACE-BASED FEDERAL COMMUNITY DEVELOPMENT POLICY

The federal government has long sought after, and failed to achieve, a successful approach to comprehensive community development. Diminished geographic mobility has left many individuals and families in locations that lack economic opportunity. But government attempts to implement place-based solutions to problems created by economic restructuring have overlooked the structural forces, both corporate and political, that continue to perpetuate systemic poverty.[9] Such place-based policies, or "zone" programs, have sought to attract investment capital into low-income areas by providing tax incentives to outside investors. Critics point out that zone programs often cause or accelerate gentrification or displacement without yielding significant results indicating wealth creation, livability, or affordability for targeted beneficiaries.[10] This trend is attributable to underlying federal policy favoritism towards deregulated labor markets, which has intensified racial and class segregation in residential life and, in turn, stifled the effectiveness of zone programs.[11]

The federal government has historically attempted to instigate place-based economic reform by relying on neoliberal principles such as free-market trade and deregulation of financial markets.[12] It has incentivized investment aimed at improving infrastructure and creating jobs in low-income areas by designating certain urban and rural census tracts as distressed and awarding tax credits to investors. However, these initiatives, particularly the current Opportunity Zone Program, are insufficient because they prioritize outsider wealth at the expense of local residents, leading to gentrification.[13] A 2019 study by the National Community Reinvestment Coalition described gentrification as a catalyst for "extreme and unnecessary cultural displacement", causing both the increase of property value in disinvested areas and the dramatic decrease of affordable housing.[14] Between 2000 and 2013, over 110,000 Black and 24,000 Hispanic residents were displaced from their homes due to gentrification.[15] Washington, D.C., the city that has experienced the most gentrification in America, witnessed a staggering drop of thirty-two percent of Black residents between 1990 and 2010.[16] Such

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9. Charlie Metzger, *We're Not in Kansas Anymore": Using State and Local Power to Fulfill the Potential of the Opportunity Zone Program*, 47 FORDHAM URB. L.J. 1121, 1161 (2020).

10. *Id.* at 1142-43.

11. Alice O'Connor, *Swimming against the Tide: A Brief History of Federal Policy in Poor Communities*, *in* THE COMMUNITY DEVELOPMENT READER 11, 12 (James DeFilippis & Susan Saegert eds., 2012).

12. *Id.* at 26.

13. Robin P. Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 79 (1987).

14. Jason Richardson et. al., *Shifting Neighborhoods: Gentrification and Cultural Displacement in American Cities*, NATIONAL COMMUNITY REINVESTMENT COALITION (Mar. 19, 2019), https://ncrc.org/gentrification/ [https://perma.cc/9KQU-M9KM].

15. *Id.*

16. *Id.*

statistics indicate that "all levels of the political economy sort Americans by race—institutionally, geographically, and physically," and little is being done to counteract such assumptions, practices, and institutional behaviors that "consistently give poor people of color too few of society's benefits and too many of society's punishments."[17] Place-based zone programs inadvertently accelerate this cycle.[18] As a result, the true beneficiaries of the programs are the investors.[19] In short, federal community development policy is "notorious for reinventing old strategies while failing to address the structural conditions underlying community decline."[20] Within the neoliberal paradigm, place-based policies as standalone initiatives are not effective in advancing the fundamental goals of community development.

The concept of a tax incentive-based investment zone originated during the 1968 presidential campaign trail, when then-candidate Richard Nixon proposed that "tax incentives . . . should be provided to those businesses that locate branch offices or new plants in poverty areas, whether in the core cities or in rural America."[21] His basic idea was to redirect capital that wealthy investors had accumulated from other investments towards low-income communities.[22] Although no such program came to fruition during his presidency, the idea was later embraced in the 1980s when federal funding for community development projects pivoted away from direct government grants towards government loans and tax credits for private investors.[23] In 1993, the Clinton Administration launched the federal Empowerment Zone Program via the Empowerment Zones and Enterprise Communities Act. [24] The government subsequently designated eleven Empowerment Zones, which were eligible for government grants of up to $100 million for urban areas and $40 million for rural areas, and ninety-five Enterprise Communities, which were eligible for smaller grants and business incentives.[25] Subsequent studies found "modest effects overall with relatively high costs."[26]

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17. Anne C. Kubisch et. al., *Strengthening the Connections between Communities and External Resources, in* THE COMMUNITY DEVELOPMENT READER 369, 376 (James DeFilippis & Susan Saegert eds., 2012).

18. Brett Theodos et. al., *An Early Assessment of Opportunity Zones for Equitable Development Projects*, URBAN INSTITUTE 22 (June 17, 2020).

19. *Id.*

20. O'Connor, *supra* note 11 at 11.

21. Bruce Bartlett, *Enterprise Zones: The Good, The Bad, and The Muddled*, TAX NOTES (Jan. 21, 2014), https://www.taxnotes.com/tax-notes-today/incentives/enterprise-zones-good-bad-and-muddled/2014/01/21/fb98 [https://perma.cc/HEV4-6UUF] (quoting 1968 Nixon Campaign Document).

22. *See* Benjamin W. Kennedy, *The Opportunity Zone Program*, 26 NEV. LAW. 19, 19 (2018) (discussing Opportunity Zones generally).

23. Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 220 (1999).

24. O'Connor, *supra* note 11, at 27.

25. *Id.*

26. *See, e.g.*, Deirdre Oakley & Hui-Shien Tsao, *A New Way of Revitalizing Distressed Urban Communities? Assessing the Impact of the Federal Empowerment Zone Program*, 27. J. URBAN AFFAIRS 443 (2006) ("With the exception of a few isolated incidences where individual zones fared better than comparison areas, zone initiatives had little impact."); Joel A. Elvery, *The Impact of Enterprise Zones on Resident*

Furthermore, in areas that have witnessed positive growth, such growth could not be definitively linked to Empowerment Zone designation status due to widespread economic growth experienced by a broad variety of sectors during the time period in question.[27]

The Empowerment Zones initiative has perpetuated many problematic patterns that have come to define federal community development policy. Its initial funding designation in the federal budget is insufficient to meet the country's needs, resulting in an overly selective designation process that leaves the vast majority of qualifying tracts behind without any semblance of support.[28] It also subordinates key community development objectives such as equity, redistribution, and racial integration to private sector provision and local practice.[29] The initiative "smacks of symbolic politics" against the backdrop of inadequate federal attention to the real needs of poor urban and rural communities.[30]

Due to the complicated and extensive nature of the initiative, implementation has been limited; under its original iteration, only eleven neighborhood zones were ever designated.[31] The program is alive under the FY2020 Appropriations Bill—the annual spending bill authorizing the expenditure of federal funds—but it has taken a backseat to the latest iteration of tax incentive-based zoning: the Opportunity Zone Program.[32]

## II. FLAWS OF THE OPPORTUNITY ZONES PROGRAM

The Opportunity Zone Program ("the Program"), created by the Investing in Opportunity Act under the Tax Cuts and Jobs Act of 2017, was initially a promising bipartisan initiative to attract investment capital to low-income census tracts across the country.[33] According to the IRS, Opportunity Zones are "an economic development tool — that is, they are designed to spur economic development and

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Employment, 23 ECON. DEV. Q. 44 (2009) ("The author finds no evidence that these enterprise zones affected the employment of zone residents."); Robert T. Greenbaum & Jim Landers, *Why Are State Policy Makers Still Proponents of Enterprise Zones? What Explains Their Action in the Face of a Preponderance of the Research?* 32 INT'L REG'L SCI. REV. 466 (2009) ("There is little evidence that they have succeeded.").

27. Joseph Bennett, *Lands of Opportunity: An Analysis of the Effectiveness and Impact of Opportunity Zones in the Tax Cuts and Jobs Act of 2017*, 45 J. LEGIS. 253, 260 (2019)

28. O'Connor, *supra* note 11, at 28.

29. *Id.* at 13.

30. *Id.* at 11.

31. Adam Looney, *Will Opportunity Zones Help Distressed Residents or Be A Tax Cut for Gentrification?*, BROOKINGS INSTITUTE (Feb. 16, 2018), https://www.brookings.edu/blog/up-front/2018/02/26/will-opportunity-zones-help-distressed-residents-or-be-a-tax-cut-for-gentrification/ [https://perma.cc/CY9K-5WSX].

32. *Work Opportunity Tax Credit, Empowerment Zones, and Indian Credits Extended*, BDO GLOBAL (Feb. 2020), https://www.bdo.com/insights/tax/state-and-local-tax/work-opportunity-tax-credit,-empowerment-zones,-an#:~:text=Empowerment%20Zone%20Employment%20Credit,wages%20paid%20to%20certain%20employees [https://perma.cc/P6QF-G5U5].

33. Theodos et. al., *supra* note 18.

job creation in distressed communities."[34] They incentivize private investment in low-income tracts by allowing investors to delay or avoid capital gains taxes by putting money into real estate, projects, or businesses located within designated Opportunity Zones. Like Empowerment Zones, Opportunity Zones are a tax incentive-based program for drawing outside investment into distressed communities. [35] However, Opportunity Zones are distinguishable from Empowerment Zones in three major ways: first, the Program is accessible not just to urban areas, but also to rural areas; second, it applies only to individuals and firms with capital gains on asset sales, thereby excluding less wealthy investors who lack these profits; and third, it provides back-end deferral benefits rather than front-end subsidies.[36]

Despite these differences, it fails to avoid the pitfalls of its predecessors. Storey Country demonstrates that the Program has deviated from its alleged purpose of economic development for low-income census tracts and has been blatantly repurposed as a tax shelter for corporate investors. [37] In the words of Senator Ron Wyden (D-OR), "the Opportunity Zone Program has been troubled from the start. . . . [T]here are no safeguards to ensure taxpayers are not simply subsidizing handouts for billionaires with no benefit to the low-income communities this program was supposed to help."[38] Many grassroots community organizations are either unaware of the fact that they meet the requirements to become Qualified Opportunity Zone Businesses (QOZBs) or simply cannot afford legal counseling to facilitate the certification.[39] They have been not just left behind, but in many cases, driven out of rapidly gentrifying areas as savvy startups have moved in to take advantage of the influx of Opportunity Zone investments.[40]

### A. DECONSTRUCTING THE LEGISLATION

The Investing in Opportunity Act is fundamentally flawed. Its eligibility criteria for Opportunity Zone designation, methodology of designation, length of designation, and investment incentive structure invite potential abuse of the statute's intended purpose.

First, the eligibility criteria for Opportunity Zone designation do not mandate that a census tract meet a threshold level of either high poverty or low median income. In fact, a census tract need only be *adjacent* to such a tract in order to

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34. INTERNAL REVENUE SERVICE, OPPORTUNITY ZONES FREQUENTLY ASKED QUESTIONS (2020), https://www.irs.gov/credits-deductions/opportunity-zones-frequently-asked-questions [https://perma.cc/57XF-KGLE].

35. Bennett, *supra* note 27 at 261-62.

36. *Id.*

37. *Wyden Introduces Legislation to Reform Opportunity Zone Program*, UNITED STATES SENATE COMMITTEE ON FINANCE, Nov. 6, 2019, https://www.finance.senate.gov/ranking-members-news/wyden-introduces-legislation-to-reform-opportunity-zone-program- [https://perma.cc/GD5F-8HBX].

38. *Id.*

39. Metzger, *supra* note 9 at 1140.

40. *Id.*

qualify for designation.[41] By permitting low-income-adjacent census tracts to be designated as Opportunity Zones, the statute diverts much-needed capital to gentrified areas. Furthermore, the Internal Revenue Service is willing to adjust its own metrics to accommodate exceptions.[42] Storey County, for example, is neither low-income nor low-income-adjacent, but the *New York Times* released an internal memorandum from an IRS official attesting that the department had "decided to adjust its process" for designation in regard to the county.[43] This flexibility for insider policymakers frustrates the statute's intended policy goal to provide "job creation, poverty reduction, and new business starts" to truly distressed communities.[44]

Second, the selection process is inherently inequitable. Governors are directed to hand-pick twenty-five percent of eligible census tracts for designation as Opportunity Zones, leaving seventy-five percent of needy areas behind.[45] This process leads not only arbitrary selections, but also—in worst-case scenarios—purposeful avoidance of the neediest tracts to promote "safer" investment opportunities for wealthy outsiders. Over 42,000 census tracts met the eligibility criteria promulgated by the legislation, and only 8,762 were designated.[46] Through the selection process, the statute permits cronyism and de facto excludes the unconnected, often highly distressed, tracts from designation.[47]

Third, the length of Opportunity Zone designation is far too long. By mandating that designations last ten years before the recertification process is triggered, the statute enables continued investment in areas that quickly develop stable economies and no longer need outside investment.[48] The tract may be completely transformed into a gentrified, high-income area five or six years into its designation, attracting further investment from risk-averse outsiders and diverting more capital from the neediest tracts.

Finally, and perhaps most significantly, the statute encourages investors to look for the most stable and most profitable investment opportunities by incentivizing investment by deferring capital gains tax.[49] It dictates that the largest tax incentives are given to the most profitable projects, regardless of their actual impact on the ground. This incentive signifies a "disconnect between the size of the potential tax costs, which are uncapped, and the social benefits from the investments, which will be hard to measure."[50]

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41. Investing in Opportunity Act, 26 U.S.C. § 1400Z-1 (2017).
42. *Neal, Wyden Investigate Abuse of Opportunity Zone Program*, *supra* note 4.
43. *Id.*
44. Investing in Opportunity Act, *supra* note 41.
45. *Id.*
46. *Id.*
47. *Neal, Wyden Investigate Abuse of Opportunity Zone Program*, *supra* note 4.
48. Investing in Opportunity Act, *supra* note 41.
49. *Id.*
50. Bennett, *supra* note 27, at 267.

The legislation is a particular boon to investors looking to build off surging rates of gentrification. In Washington, D.C., for instance, the National Community Reinvestment Coalition found that 20,000 Black residents were displaced between 2010 and 2013, according to the most recent data available,[51] and the study also named Washington, D.C. as the most gentrified major city in America by percentage of eligible neighborhoods experiencing gentrification.[52] Unsurprisingly, the real estate analytics company Yardi Matrix also named Washington, D.C. the most attractive region for Opportunity Zone investment on the East Coast.[53] The methodology underlying this designation included indicators such as GDP and population growth statistics; notably, it excluded social impact metrics and actually *penalized* Opportunity Zones with higher poverty rates.[54] In such areas, the concern of accelerating the pace of community displacement through Opportunity Zone investment is most severe. The statute is being used as a corporate tax shelter at the expense of low-income communities whom the legislation was supposedly designed to protect.[55] Since there are no concrete requirements that the investments create affordable housing, homeownership, living wage jobs, or other benefits for current Opportunity Zone businesses and residents, well-funded startups are free to move into qualified Opportunity Zones with the sole intent of pursuing tax breaks.[56] Without intervention, the Opportunity Zone Program will continue to cater to the profit-maximization interests of the private sector as gentrification rates soar.

### B. ATTEMPTED LEGISLATIVE REFORM AND STAGNATION

Both the U.S. Senate and House of Representatives have introduced reform legislation to tighten oversight and eliminate some of the loopholes within the Investing in Opportunity Act, but neither bill has been passed.[57] In 2019, a

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51. Richardson et. al., *supra* note 14.

52. Michael Quander, *Cost of Living Contributes to 'Intense' Level of Displacement in DC*, WUSA9 (Nov. 11, 2019), https://www.wusa9.com/article/features/producers-picks/gentrification-and-displacement-high-in-dc/65-4543c266-350b-456e-91ab-743b6a108c4d [https://perma.cc/TM7C-R4CS].

53. Erika Morphy, *DC Is the Most Attractive Opportunity Zone on the East Coast*, GLOBEST.COM (Mar. 25, 2019), https://www.globest.com/2019/03/25/dc-is-the-most-attractive-opportunity-zone-on-the-east-coast/?slreturn=20200003153652 (explaining that the study used "such indicators as GDP and population growth, number of eligible Opportunity Zones, and poverty rates in each area, attributing points for each of these and calculating the total. The data for the indicators came from The US Census Bureau, the Bureau of Labor Statistics and the US Department of Treasury."). [https://perma.cc/JKC8-NKY7].

54. Diana Sabau, *Study: Top Counties for Opportunity Zone Investment*, COMMERCIALCAFE (Mar. 18, 2019), https://www.commercialcafe.com/blog/top-counties-opportunity-zone-investment/ [https://perma.cc/27DV-F8TB] ("[F]or the poverty rate indicator, between 0 and 15 points were awarded in inverse proportion, with a lower poverty rate leading to more points.").

55. Metzger, *supra* note 9, at 1160-61.

56. Oscar Perry Abello, *Now's The Opportunity for Cities to Work on Their Zone Defense,* Next City (July 25, 2019), https://nextcity.org/daily/entry/nows-the-opportunity-for-cities-to-work-on-their-zone-defense [https://perma.cc/UEU2-RXLT].

57. *See* Opportunity Zone Accountability and Transparency Act, H.R. 5011, 116th Cong. (1st Sess. 2019); Opportunity Zones Reporting and Reform Act, S. 2797, 116th Cong. (1st Sess. 2019).

bipartisan coalition in the House of Representatives introduced the Opportunity Zone Accountability and Transparency Act.[58] The Act, a proposed amendment to the Tax Cuts and Jobs Act, would implement mandatory reporting requirements by qualified Opportunity Funds, mandate public disclosure of the reports, and institute penalties for failure to follow these requirements.[59] In the same year, Senator Ron Wyden (D – Oregon) introduced the Opportunity Zones Reporting and Reform Act, which would similarly amend the Internal Revenue Code to require reporting for qualified Opportunity Funds and would immediately terminate Opportunity Zone designations that are adjacent to low-income tracts but do not themselves meet the low-income threshold.[60] Despite such calls for increased transparency and accountability, neither bill has been voted on.

In addition to attempted reform legislation, various senators have spearheaded efforts to investigate potential abuses of the Opportunity Zone Program.[61] Following the *New York Times* report on the Storey County designation, a four-member coalition of senators called upon the U.S. Government Accountability Office to examine the Program's implementation and to determine whether senior officials in the Trump Administration exploited the Program for tax shelter purposes.[62] The House Ways and Means Committee and Senate Finance Committee launched an investigation into Storey County in November 2019, but as of December 2020, no results have been proffered.[63] Storey County's designation remains intact, and policy advocates have no avenue for substantive relief.[64] Amidst this stagnancy, the Opportunity Zone Program has fallen into similar problematic patterns as its policy predecessors.

### C. HISTORIC PATTERNS REEMERGE THROUGH IMPLEMENTATION

Opportunity Zone designations have been in effect since 2018, and historic problems that have plagued federal community development policy are already resurfacing in dramatic fashion. First, the investment activity triggered by the Program is misaligned with its statutory purpose.[65] Second, the limited scope of Opportunity Zone funding guarantees that the vast majority of qualifying tracts are left behind.[66] Third, targeted communities lack critical knowledge about the

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58. Opportunity Zone Accountability and Transparency Act, H.R. 5011, 116th Cong. (1st Sess. 2019).
59. *Id.*
60. Opportunity Zones Reporting and Reform Act, S. 2797, 116th Cong. (1st Sess. 2019).
61. Press Release, Cory Booker, Senator, Booker, Wyden, Lewis, Neal Request GAO Study on Opportunity Zones, (Nov. 7, 2019), https://www.booker.senate.gov/news/press/booker-wyden-lewis-neal-request-gao-study-on-opportunity-zones [https://perma.cc/XG6Z-JCHL].
62. *Id.*
63. *Neal, Wyden Investigate Abuse of Opportunity Zone Program, supra* note 4; Lipton & Drucker, *supra* note 6.
64. *Id.*
65. Brett Theodos et. al., *supra* note 18.
66. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MAP OF OPPORTUNITY ZONES, https://opportunityzones.hud.gov/resources/map [https://perma.cc/F6Z3-5AFJ] (last visited Dec. 29, 2020).

Program and are therefore largely unable to strategically capitalize on it.[67] Fourth, the benefits accrued by outside investors are significantly larger than those realized by targeted communities.[68] These exploitative trends have fostered a growing sense of distrust among local communities of the worthiness and effectiveness of federal intervention.[69]

First, although Opportunity Zones were designated to spur job creation, the vast majority of Opportunity Zone capital has been poured into real estate development projects.[70] Capital flows from investors to qualified Opportunity Zone properties through qualified Opportunity Funds.[71] As of September 2020, only 3.7 percent of 811 total qualified Opportunity Funds are even partially focused on directing investments into operating businesses.[72] On the other hand, 75.4 percent of qualified Opportunity Funds are at least partially focused on residential development, and 57.9 percent are at least partially focused on commercial development.[73] This data suggests that even if Opportunity Zone designations are aptly chosen by governors and non-gentrified communities truly stand to benefit from the Program, the vast majority of investment capital is being used to purchase real estate rather than to directly fund small businesses, which are the primary tools for job creation and growth. As with previous tax benefit initiatives, these investment patterns contradict the stated purpose of the Program.

Second, due to a shortage of federal funding, seventy-five percent of qualifying tracts do not receive Opportunity Zone designation despite having numerically high need.[74] To ensure that states have so-called equal footing under the statute, governors are limited to selecting only twenty-five percent of qualifying tracts within their borders. This calculus results in high numbers of neglected tracts in highly impoverished states like Mississippi and Louisiana in comparison to affluent counterparts such as Connecticut and New Hampshire.[75] This reflects a trend among zone programs that "a limited number of available designations competes with demands to disperse those designations throughout the country without placing any one zone adjacent to each other."[76] When a tract is designated as an Opportunity Zone, neighboring tracts are often removed from consideration despite being similarly economically situated.[77] These neighboring tracts not only

67. Kubisch, *supra* note 17, at 373.

68. Bennett, *supra* note 27 at 264.

69. Abdul-Salaam, *supra* note 1.

70. Brett Theodos et. al., *supra* note 18.

71. INTERNAL REVENUE SERVICE, INVEST IN A QUALIFIED OPPORTUNITY FUND (2020), https://www.irs.gov/credits-deductions/businesses/invest-in-a-qualified-opportunity-fund [https://perma.cc/AJ4R-4SSC].

72. Michael Novogradac, *Opportunity Funds List Surpasses $12 Billion in Investment*, NOVOGRADAC (Sep. 1, 2020), https://www.novoco.com/notes-from-novogradac/novogradac-opportunity-funds-list-surpasses-12-billion-investment [https://perma.cc/DEP5-EPN6].

73. *Id.*

74. Investing in Opportunity Act, *supra* note 41.

75. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 66.

76. Bennett, *supra* note 27 at 261-62.

77. *Id.* at 260.

fail to benefit from the Program, but also experience a direct market disadvantage due to the diversion of potential capital away from their projects and into the designated Opportunity Zone.[78] As with Empowerment Zones, there have even been documented instances of businesses relocating from one non-designated zone to a designated zone, resulting in a net economic loss due to transactional relocation costs.[79]

Third, small businesses within designated Opportunity Zones often do not have the knowledge base or resources to file for QOZB status. It is rare for less sophisticated entities to know the amount and type of federal funding that flows into their neighborhoods.[80] This may be partially due to an intentional effort by government entities who wish to keep "outsiders" to the political system from applying pressure to their own actions and inactions.[81] As a result, savvy outside investors looking to gentrify promising areas often possess the most knowledge about the Program. This reflects a longstanding lack of fundamental knowledge among community organizations and organizers about the status and source of public funding available to their neighborhoods.[82]

Fourth, the Opportunity Zone Program's only direct benefit is in the form of uncapped tax breaks to investors; any benefit accumulated by targeted communities is indirect.[83] The Joint Committee on Taxation has estimated that the Program will cost taxpayers $6.7 billion over the next five years, and yet none of this money goes directly to low-income communities.[84] While the communities stand to benefit from an influx of capital that would hypothetically be invested elsewhere if the tax incentive did not exist, investors may use the excess cash from their tax break in any manner that they choose.[85] The Program effectively keeps community members' tax rates the same while reducing rates for outside investors.[86] This disproportionate benefit to America's wealthiest individuals is at odds with the legislative intent of the Program. It is also indicative of a historic

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78. Andrew Hanson & Shawn Rohlin, *Do Spatially Targeted Redevelopment Programs Spill Over?,* 43 REG'L SCI. & URBAN ECON. 86 (2013).

79. *Id.* at 98 ("Establishments can benefit by literally moving across the street into the EZ to enjoy the benefits of the program without incurring relocation costs associated with moving further from a customer base, employees, or losing other advantages of the immediate location . . . If the goal of policy makers is to induce relocation, it seems that even this modest objective may come at a cost of destroying jobs and establishments in areas that compete with targeted places."); Theodos, *supra* note 18 at 29 ("A vertical farming operation that relocated to an Opportunity Zone reported that '[locating in] an Opportunity Zone was a big factor for us – a key factor.'").

80. Kubisch, *supra* note 17, at 373.

81. *Id.*

82. *Id.*

83. Bennett, *supra* note 27 at 264.

84. Zoe Sagalow, *Opportunity Zones Could Benefit Investors More Than Communities*, TAX NOTES (Aug. 6, 2018), https://www.taxnotes.com/tax-notes-today/tax-cuts-and-jobs-act/opportunity-zones-could-benefit-investors-more-communities/2018/08/06/289zk [https://perma.cc/Y3UX-GE6N].

85. Bennett, *supra* note 27 at 264.

86. *Id.*

trend that the benefits gained by investors significantly outstrip those gained by targeted communities.[87] The collective result of these trends is an increase in distrust of federal intervention among community members.[88]

## III. A STATE-BASED SOLUTION: PRO BONO POLICY TOOLKITS

The Opportunity Zone Program will continue to disproportionately benefit investors, even at the expense of its intended recipients, as long as its incentive structure and eligibility criteria remain unchanged. As Section II has discussed, Congress' refusal to pass even mild reform amendments or oversight bills indicates that more dramatic structural change is highly unlikely. A potential remedy to this stagnation could be found on the state level.[89] ABA Model Rule 6.1 states that every lawyer "has a professional responsibility to provide legal services to those unable to pay" and advises a minimum of fifty hours of pro bono service per year.[90] To this date, no mandatory guidelines have been implemented due to "fear of a slippery slope to required pro bono service and a life of servitude for lawyers, fear of people who do not have a financial investment in their case clogging the courts, and fear that people seeking pro bono help can really afford it."[91] Despite such longstanding reservations within the legal profession, state bars may promulgate non-mandatory pro bono guidelines that encourage firms to match attorneys with pro bono opportunities that are aligned with their practice areas as a means of promoting adherence to this Model Rule. Oregon was among the first states to successfully do so.[92] These guidelines, or Pro Bono Policy Toolkits, may be employed within the Opportunity Zones space to provide transactional counseling to small businesses who meet the standards for QOZB designation.

### A. OREGON'S DEVELOPMENT OF THE PRO BONO POLICY TOOLKIT

In 1988, the Legal Aid Committee of the Oregon State Bar (OSB) recommended to the OSB Board of Governors that a pro bono standard be developed for Oregon attorneys.[93] The Board created an ad hoc committee to study the issue

87. *Id.* at 267.

88. Abdul-Salaam, *supra* note 1.

89. *See* Metzger, *supra* note 9; *see also* Michael Neiman, *Qualified Opportunity Zones-How Active Participation and Complementary Legislation Can Help States Develop Their Distressed Communities*, 48 CAP. U. L. REV. 457 (2020).

90. MODEL RULES R. 6.1.

91. Telephone Interview with William Penn, Assistant Director of Legal Services Program, Oregon State Bar (Jan. 8, 2021).

92. AMERICAN BAR ASSOCIATION, LAW FIRMS (2020), https://www.americanbar.org/groups/center-pro-bono/resources/pro-bono-role/law_firms/ [https://perma.cc/VBC7-P69K].

93. OREGON STATE BAR, PRO BONO (2021), https://www.osbar.org/probono/#:~:text=What%20does%20the%20aspirational%20standard,%2C%20church%2C%20or%20community%20board [https://perma.cc/9PSD-ZJ9G].

and develop a proposal.[94] Although various Board members voiced concerns about a slippery slope to mandatory pro bono service and the potential to clog the judicial system with unmeritorious claims,[95] the so-called OSB Pro Bono Aspirational Standard was ultimately adopted in a non-unanimous vote and integrated into the OSB bylaws.[96] In 2007, the OSB released the Pro Bono Policy Toolkit, which was intended to guide Oregon firms in integrating the Aspirational Standard into their office culture and delegating pro bono work to their attorneys.[97] According to William Penn, the Assistant Director of the Legal Services Program at the OSB, a large number of the biggest firms in Oregon have downloaded the Toolkit.[98]

Although Oregon does not implement a mandatory pro bono reporting system, there has been an uptick in number of pro bono hours logged by Oregon attorneys since the implementation of the Pro Bono Policy Toolkit.[99] In 2020, 8.7 percent of bar members reported some type of pro bono work, as opposed to 5.1 percent in 2004 (before the release of the Toolkit).[100] The voluntary nature of reporting guarantees that these numbers would almost certainly be higher if mandated, but OSB's reporting statistics indicate that the percentage of attorneys who report pro bono hours is slowly trending upwards since the implementation of the Toolkit.[101]

After OSB's promulgation of the Toolkit, other states have followed suit, including Montana and Tennessee.[102]

### B. APPLYING THE PRO BONO POLICY TOOLKIT TO THE OPPORTUNITY ZONES PROGRAM

States can use the Toolkits encourage firms to match attorneys with pro bono opportunities to provide transactional counseling to preexisting small businesses within Qualified Opportunity Zones. The OSB Pro Bono Policy Toolkit asks firms to specify the particular types of pro bono activities that they would like their attorneys to engage in.[103] The Toolkit should be further tailored by state bars to fit specific policy contexts that may require intervention in order to realign their effect with their intended purpose.

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94. Interview with William Penn, *supra* note 91.
95. *Id.*
96. *Id.*
97. *See* OREGON STATE BAR, *supra* note 93.
98. Interview with William Penn, *supra* note 91.
99. *Id.*
100. *Id.*
101. *Id.*
102. AMERICAN BAR ASSOCIATION, *supra* note 92.
103. OREGON STATE BAR, MODEL PRO BONO POLICY TEMPLATE (last visited Jan. 10, 2020), https://www.osbar.org/_docs/probono/policy/ProBonoPolicyTemplate.pdf [https://perma.cc/D4CJ-YK8D]. Participating firms fill out the template, including a section on "Pro Bono Defined" stating: "[This firm's] pro bono commitment focuses on particular types of service, including...". In response to this prompt, the firm enumerates the types of pro bono opportunities that its attorneys should focus on.

Most small businesses within Opportunity Zones fulfill the criterion for QOZBs—they derive "substantially all" of their gross income from business located within an Opportunity Zone[104]—but many are not aware that the Program exists because they lack access to legal counseling.[105] The Opportunity Zones Program requires that a QOZB Pro bono assistance from financial, real estate, and tax attorneys could help to fill this void, and state-level Pro Bono Policy Toolkits could be utilized to encourage this. As a result, fewer organizations would be pushed out by savvy outside startups looking to move into Opportunity Zones and capitalize on the investment opportunities. More local businesses would be enabled to apply for QOZB status and benefit from private investment. Attorneys would thus be able to help realign the outcome of Opportunity Zones legislation with its intended purpose despite federal legislative stagnation.

This solution would have the added benefit of increasing the likelihood that attorneys fulfill the recommended annual hours of ABA Model Rule 6.1. Under standard conditions, pro bono matters suffer from lack of expertise among private lawyers in relevant poverty or cause issues.[106] Furthermore, attorneys often work on pro bono matters that cater to their own interests rather than community needs, typically resulting in fewer hours of service.[107] The Pro Bono Policy Toolkit would remedy both setbacks. As evidenced by Oregon's uptick in logged pro bono hours since the implementation of the Pro Bono Policy Toolkit, attorneys are likelier to participate in pro bono opportunities that directly cater to their legal skillset.[108] The toolkit would link attorneys with technical expertise in relevant financial, real estate, and tax matters to pro bono opportunities counsel QOZBs on eligibility status and the application process involved in becoming a QOZB. Attorneys would thus meet an established policy need that builds off their specific career interests and encourages them to support local businesses — an inherently more appealing alternative to pro bono matters unrelated to their expertise, interests, or communities.

If state bars were to make pro bono reporting mandatory, it would be possible to more accurately gauge the effectiveness of Pro Bono Policy Toolkits in the future. This procedural requirement would ideally yield an increase of pro bono hours served without imposing a substantive mandate on attorneys. Such a measure is a strong candidate for state board approval because "requiring an attorney to report pro bono is different than requiring the attorney to *do* pro bono."[109]

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104. INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR FORM 8996 (2020), https://www.irs.gov/instructions/i8996 [https://perma.cc/F7CP-9DD6].

105. Sagalow, *supra* note 84.

106. Catherine Albiston, *Alan K. Chen and Scott Cummings, Public Interest Lawyering: A Contemporary Perspective*, 63 J. Legal Educ. 554, 558 (2014).

107. *Id.*

108. Interview with William Penn, *supra* note 91.

109. *Id.*

## CONCLUSION

Place-based community development policies such as Empowerment Zones and Opportunity Zones have failed to reliably revitalize low-income communities across America. Recurring patterns of outsized benefits for investors at the cost of community displacement have demonstrated that the Opportunity Zone legislation and implementation thereof have failed. However, a potential remedy lies in state bar implementation of Pro Bono Policy Toolkits. Although voluntary rather than mandatory, such Toolkits could be used to match legal specialists with pro bono opportunities to aid small businesses in receiving QOZB designation. Although this proposal does not solve the fundamental structural flaws of the Opportunity Zones legislation, it does enable more local businesses to benefit from the Program rather than suffer displacement at the hands of outside businesses moving into Opportunity Zones to qualify for lucrative outside investments. If paired with a mandatory pro bono reporting requirement, Pro Bono Policy Toolkits could edge the legislation closer to its intended purpose while simultaneously encouraging more attorneys to fulfill the recommendations of ABA Model Rule 6.1.