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## AN OPPORTUNITY FOR REFORM: TAXATION, INEQUALITY, AND OPPORTUNITY ZONES

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President Biden took office during a period with significant social and economic challenges. Longstanding problems—such as rising income inequality, a persistent racial wealth gap, and affordable housing shortages—have been exacerbated by the COVID-19 pandemic.<sup>1</sup> The unprecedented public health crisis has disrupted job markets in ways that disproportionately impact women and minorities.<sup>2</sup> Meanwhile, recent police shootings of Black men and women have renewed attention to deep structural inequality.

Against this backdrop, one of the top priorities articulated by the Biden Administration was to “build back better by advancing racial equity across the American economy,” including the reform of a Trump-era tax incentive program called Opportunity Zones.<sup>3</sup> Yet, in the first 100 days of President Biden’s term, discussion of Opportunity Zones has largely quieted, despite growing evidence that the law is deeply problematic. If the Biden Administration is serious in its intent to advance racial inequality across the American economy, then Opportunity Zones reform should return to the top of his list of priorities.

During the contentious Trump Administration, the Opportunity Zones law, a seemingly obscure provision within the 186-page Tax Cuts and Jobs Act of 2017,<sup>4</sup> received bi-partisan support in a deeply polarized Congress. But in the months and years following its enactment, the law drew increasing scrutiny from watchdog groups, tax academics, and politicians. Reporters from the *New York Times*, *ProPublica*, and other major news outlets published story after story about political maneuvering—and outright errors—that had led to the Oppor-

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1. See Michelle D. Laysner, Edward De Barbieri, Andrew Greenlee, Blaine Saito & Tracy Kaye, *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. (forthcoming 2021) (on file with author).

2. *Id.*

3. *Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy*, JOE BIDEN FOR PRESIDENT: OFF. CAMPAIGN WEBSITE, <https://joebiden.com/racial-economic-equity/> (last visited Apr. 25, 2021) [<https://perma.cc/T8MV-SYJZ>].

4. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13823 (2017) (codified at 26 U.S.C. §§ 1400Z-1, 1400Z-2).

tunity Zone designation of high-income and gentrifying neighborhoods throughout the country.<sup>5</sup> Reports surfaced that high-profile multi-millionaires like Michael Milken<sup>6</sup> and Jared Kushner<sup>7</sup> stood to benefit from the new Opportunity Zones law, along with megacompanies like Amazon.<sup>8</sup>

At the same time, anti-poverty advocates and researchers bemoaned the law's lack of reporting requirements and worried about how Opportunity Zone development, which appeared to favor construction of luxury condos over affordable housing, would impact low-income communities and racial minorities.<sup>9</sup> Democrats in the 116th Congress responded by introducing a series of bills that would strip some higher-income census tracts of their Opportunity Zone status, require residential real estate developers to include affordable units, and impose new reporting requirements on Opportunity Funds.<sup>10</sup> None of these bills made it out of committee.

Since President Biden took office, no new legislation has been introduced to scale back the program (though some proposed bills would expand Opportunity Zones or provide relief to Opportunity Funds facing delays due to COVID-19).<sup>11</sup> President Biden has voiced support for a reformed version of the Opportunity Zones program, but he has not yet taken significant steps in that direction. Instead, his tax proposals have focused on raising tax rates for corporations and high-income individuals to help fund a massive \$2.3 Trillion infrastructure package, childcare, and education.<sup>12</sup> In short, Opportunity Zones reform has fallen to the back burner, and the economic recovery has dominated early policy proposals.

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5. See, e.g., Jeff Ernsthause & Justin Elliott, *An Opportunity for the Rich*, WNYC STUDIOS (June 19, 2019), <https://www.wnycstudios.org/podcasts/trumpinc/episodes/trump-inc-opportunity-for-rich> [<https://perma.cc/KL4J-8ZUH>]; Eric Lipton & Jesse Drucker, *Lawmakers Increase Criticism of 'Opportunity Zone' Tax Break*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/business/opportunity-zones-congress-criticism.html> [<https://perma.cc/5EUC-6JZN>].

6. See 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/AM2Z-E93D>].

7. 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> [<https://perma.cc/6LE2-SZZQ>].

8. Stephen Braun, *Amazon's NYC Headquarters In 'Opportunity Zone' Eligible for GOP Tax Breaks*, PBS NEWSHOUR (Nov. 14, 2018), <https://www.pbs.org/newshour/economy/amazons-nyc-headquarters-in-opportunity-zone-eligible-for-gop-tax-breaks> [<https://perma.cc/7M3Y-XSYY>].

9. Brian Faler, *Treasury Wrestles with How to Measure Success in Opportunity Zones*, POLITICO (July 12, 2019, 11:28 AM), <https://www.politico.com/story/2019/07/12/treasury-wrestles-with-how-to-measure-success-in-opportunity-zones-1586993> [<https://perma.cc/W52U-QUBK>].

10. See, e.g., Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. (2020); Opportunity Zone Accountability and Transparency Act, H.R. 5011, 116th Cong. (2020); Opportunity Zone Reform Act, H.R. 5042 (2020).

11. See, e.g., Opportunity Zone Extension Act of 2021, H.R. 970, 117th Cong. (2021); Workforce for an Expanding Economy Act, H.R. 1740, 117th Cong. (2021) (to designate all of Puerto Rico as an opportunity zone).

12. Alan Rappeport, *The Biden Administration Seeks to Raise \$2.5 Trillion Through Corporate Tax Increases*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/04/07/business/biden-corporate-tax-increases.html> [<https://perma.cc/6V8J-ZKGU>]; Jim Tankersley, *Biden Will Seek Tax Increase on Rich to Fund Child Care and Education*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/business/economy/biden-taxes.html> [<https://perma.cc/U7JQ-K3SC>].

This is not to say that the Biden Administration has been indifferent to problems of inequality and taxation. In fact, on April 20, just ten days before Biden's 100th day in office, the United States Senate Finance Committee held a hearing called "Combatting Inequality: The Tax Code and Racial, Ethnic, and Gender Disparities." The hearing featured experts like Professor Dorothy Brown, who testified about features of the tax code—including joint tax returns, capital gains preferences for home sales, and tax breaks for employer retirement accounts—that systematically favor White taxpayers to the detriment of racial minorities.<sup>13</sup>

Also featured was testimony from Shay Hawkins, President of the Opportunity Funds Association.<sup>14</sup> Hawkins used his time to showcase examples of Opportunity Zones "success stories." In his testimony, Hawkins described Virtua Partners, a woman- and minority-founded private equity firm that has raised "\$100 Million across four Opportunity Funds to build a combination of commercial real estate and affordable housing nationwide."<sup>15</sup> He highlighted the minority- and veteran-owned Bridgeport group, which has raised Opportunity Zones capital to invest in healthcare.<sup>16</sup> He spoke of the development of a new waterfront hotel in Panama City, Florida that is expected to "create 150 direct jobs for current residents."<sup>17</sup> Finally, he described an 11,325 square-foot office project developed by RevOZ, which will house "San Bernardino County's Children's Department of Behavioral Health (DBH), providing mental wellness care to some of the most vulnerable and underserved members of the community."<sup>18</sup> Hawkins optimistic testimony stood out as a bright spot among the other experts' more critical analyses of race and taxation.

As presented by Hawkins, the Opportunity Zones law has the potential to promote equality and lift up low-income communities. But I'm skeptical. My research has shown that the Opportunity Zones preference provides little incentive to invest in pro-social projects like affordable housing or community facilities,<sup>19</sup> and the law seems poised to fuel gentrification in ways that may harm low-income communities.<sup>20</sup> Moreover, during the same week that Hawkins testified before the Senate Finance Committee, researchers from the University of California at Berkeley and the Joint Committee on Taxation publicized a preliminary

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13. *Combatting Inequality: The Tax Code and Racial, Ethnic, and Gender Disparities: Hearing Before the S. Comm. on Fin.*, 117th Cong. (2021) (testimony of Dorothy A. Brown), <https://www.finance.senate.gov/hearings/combating-inequality-the-tax-code-and-racial-ethnic-and-gender-disparities>.

14. *Combatting Inequality: The Tax Code and Racial, Ethnic, and Gender Disparities: Hearing Before the S. Comm. on Fin.*, 117th Cong. 1 (2021) (testimony of Shay Hawkins), <https://www.finance.senate.gov/hearings/combating-inequality-the-tax-code-and-racial-ethnic-and-gender-disparities>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Michelle D. Laysner, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, 74 TAX L. REV. (forthcoming 2021) (on file with author).

20. See Michelle D. Laysner, *Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives*, 12.1 U.C. IRVINE L. REV. (forthcoming 2021) (on file with author).

analysis of census tract level tax data showing that Opportunity Fund money is disproportionately flowing to the highest income Opportunity Zones.<sup>21</sup>

While it is undoubtedly true that some worthwhile projects have been financed through Opportunity Funds, there is little evidence that the program has delivered significant benefits to low-income communities. On the other hand, there is strong evidence that many higher-income and White people are benefiting from the Opportunity Zones law. Even setting aside the most high-profile, eyebrow-raising examples that make news headlines, it is clear that capital gains preferences are predominantly claimed by high-net-worth individuals and institutional investors.<sup>22</sup> Less obviously, tax-based development subsidies like the Opportunity Zones law support an elaborate industry of specialists—consultants, accountants, lawyers, investors and others—who are often White and rarely, if ever, low-income.

At minimum, the Biden Administration should act quickly to implement Opportunity Zones reporting requirements to increase transparency and monitor impacts. In addition, they should increase oversight by moving the program under the joint-authority of the CDFI Fund and the Internal Revenue Service. Finally, they should amend the statute to require Opportunity Funds to develop an impact strategy to benefit low-income communities, such as through affordable housing, permanent and accessible employment, healthy and affordable food, or support for minority-owned businesses. Opportunity Zones reform was not a priority for the Biden Administration during its first 100 days, but I hope it will become a priority in the next 100.

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21. Jim Tankersley, *Biden Administration Debating How to Overhaul a Trump-Era Tax Break*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/business/biden-trump-opportunity-zones.html> [<https://perma.cc/TV6L-UNPQ>].

22. Grace Enda & William G. Gale, *What Are Capital Gains Taxes and How Could They Be Reformed?*, BROOKINGS, (Feb. 14, 2020), <https://www.brookings.edu/policy2020/votervital/what-are-capital-gains-taxes-and-how-could-they-be-reformed/> [<https://perma.cc/V6DQ-3YT9>].