November 5, 2015

Caroline D. Ciraolo
Acting Assistant Attorney General
Tax Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Ms. Ciraolo:

Democracy 21 and the Campaign Legal Center are writing to request that the Tax Division of the Justice Department investigate the Conservative Solutions Project (CSP), an organization claiming tax-exempt status as a social welfare organization under section 501(c)(4) of the tax code, 26 U.S.C. § 501(c)(4). The investigation should determine whether CSP is improperly conferring a "private benefit" on Senator Marco Rubio's presidential campaign in violation of federal tax law by engaging in excessive campaign activity on Senator Rubio's behalf that is not permitted for a section 501(c)(4) organization.

As we explain below, CSP was formed by a former aide to Senator Rubio and is spending large sums of money on television advertisements that are being aired in support of Rubio's presidential campaign. This campaign activity by a social welfare organization violates the statutory requirement that a section 501(c)(4) organization be devoted "exclusively" to social welfare purposes—which do not include intervention in campaigns—and also violates the requirement that a social welfare group serve general community purposes, and not provide a private benefit to any individual or political group.

Enforcement of the tax code provisions in order to ensure proper use of non-profit organizations is fully consistent with the Tax Division's mission to "maintain public confidence in the integrity of the tax system, and promote the sound development of the law." www.justice.gov/tax. Those purposes would be served by civil or criminal enforcement of the tax laws here.

1. Conservative Solutions Project.

According to published reports, CSP has not filed an advance application for recognition of non-profit status under section 501(c)(4), but is claiming exemption from taxation under that provision.[1]

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[1] J. Martin & N. Confessore, "Nonprofit Masks Source of Ads Backing Rubio," *The New York Times* (Oct. 11, 2015). On its website, CSP states that it is "an independent, nonprofit organization exempt from federal taxation under section 501(c)(4) of the Internal Revenue Code." https://secure.campaignsolutions.com/csproject/donation1/?initiativekey=P37OR6CCTXVU

CSP was "formed by allies of Senator Marco Rubio."[2] It "shares a name and some staff" with the individual candidate Super PAC supporting Rubio's presidential campaign, the Conservative Solutions PAC.[3] The CSP nonprofit and the Super PAC also share a spokesman.[4] CSP was established by Warren Tompkins, who is now on its board and who is also the head of the Rubio Super PAC, which shares fundraising consultants with CSP.[5] Tompkins is a Republican consultant who was once a business partner with Rubio's campaign manager.[6] CSP is now run by Pat Shortridge, who was an adviser on Rubio's 2010 Senate campaign.[7]

CSP has been airing television advertisements supporting Rubio's presidential campaign. The group's commercials "all focus on Mr. Rubio."[8] As one report states about CSP's television ad campaign:

> Every single one of the group's thousands of television ads, in fact, has featured Rubio, and nobody else—perhaps unsurprisingly, given that the group coordinates with a pro-Rubio super PAC and that its leader co-founded a political consulting firm with the manager of Rubio's presidential campaign.[9]

According to *The New York Times:*

> Of all the television advertisements aired in support of the Florida Senator so far this year—$5.5 million worth—none have been paid for by Mr. Rubio's own campaign. Even the "super PAC" supporting him has not yet spent a dime on ads.

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[2] N. Confessore, "Nonprofit Group Tied to Marco Rubio Raises Millions While Shielding Donors," *The New York Times* (July 6, 2015).

[3] N. Confessore, "Nonprofit Group Tied to Marco Rubio Raises Millions While Shielding Donors," *The New York Times* (July 6, 2015).

[4] J. Bykowicz, "Rubio's presidential bid boosted by secret-money commercials," *The Associated Press* (October 8, 2015).

[5] S. Bland, "Secret-Money Group Tied to Marco Rubio Super PAC Has Been Researching Presidential Primary Voters," *The National Journal* (April 10, 2015).

[6] J. Martin & N. Confessore, "Nonprofit Masks Source of Ads Backing Rubio," *The New York Times* (Oct. 11, 2015).

[7] J. Martin & N. Confessore, "Nonprofit Masks Source of Ads Backing Rubio," *The New York Times* (Oct. 11, 2015).

[8] J. Martin & N. Confessore, "Nonprofit Masks Source of Ads Backing Rubio," *The New York Times* (Oct. 11, 2015).

[9] S.V. Date, "Rubio Relying on Secret Donors to Finance Ad Blitz," *National Journal* (Oct. 22, 2015).

> Instead, the money has flowed through a political nonprofit group called the Conservative Solutions Project, formed by a former Rubio aide and now overseen in part by a Republican strategist who is close to Mr. Rubio's campaign manager.[10]

According to *AP*:

> Every pro-Rubio television commercial so far in the early primary states of Iowa, New Hampshire and South Carolina has been paid for not by [Rubio's] campaign or even by a super PAC that identifies its donors, but instead by a nonprofit called Conservative Solutions Project. It's also sending Rubio-boosting mail to voters in those same states.[11]

According to the *AP*, CSP "is spending more than $3 million on a commercial that shows Rubio, 44, speaking at the Iowa State Fair. . . ." This follows "a $3 million summertime ad campaign by the same group that promoted Rubio's strong opposition to the Iran nuclear deal." In addition, CSP "also has reserved nearly $2 million in additional satellite TV time through February 16. . . ." According to this article, CSP is giving Rubio "at least an $8 million assist" in television advertising.[12]

The CSP website also features promotion of Rubio:

> Visitors to the website of the Conservative Solutions Project first see a pop-up box showing Sen. Marco Rubio, R-Fla., "leading the fight" against the nuclear agreement with Iran and asking them to add their names to a petition opposing it.
>
> After clicking away the box, they are presented with page after page of videos about the alleged flaws of the agreement, quite a few starring Rubio, a presidential candidate. Mixed in are videos on a few other topics, such as Rubio's plan for dealing with China and Rubio's "pro-growth and pro-family" ideas on taxes.[13]

After being established, CSP "conducted extensive research on early-state primary voters" and "commissioned a minutely detailed, 270-page political research book on early state

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[10] J. Martin & N. Confessore, "Nonprofit Masks Source of Ads Backing Rubio," *The New York Times* (Oct. 11, 2015).

[11] J. Bykowicz, "Rubio's presidential bid boosted by secret-money commercials," *The Associated Press* (October 8, 2015).

[12] J. Bykowicz, "Rubio's presidential bid boosted by secret-money commercials," *The Associated Press* (October 8, 2015).

[13] P. Barton, "Judging Candidate-Related 501(c)(4)s Is a Tricky Business," *Tax Analysts* (Sept. 9, 2015).

primary voters. . . ."[14] The report, which was published in December 2014, was prepared by "a Republican data-analytics firm that started working for Rubio's leadership PAC in 2013." Rubio's PAC paid the data firm $200,000 in 2013 and 2014 for data and analytics consulting.[15] The report is published on the website of the firm that prepared it, "where a description says it was produced 'in conjunction with the Conservative Solutions PAC,' though the report itself is branded with the nonprofit's name."[16]

2. Tax law prohibits use of a social welfare organization for "private benefit," including partisan political purposes.

Section 501(c)(4) provides tax-exempt status to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." 26 U.S.C. §§ 501(a) and 501(c)(4). IRS regulations make clear that, in order to be tax-exempt under section 501(c)(4), an organization must be "operated exclusively for the promotion of social welfare" and that an "organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[17]

The requirement that a section 501(c)(4) organization be primarily engaged in promoting "the common good and general welfare of the people of the community" and not, by contrast, primarily engaged in promoting the good of a private individual or organization is a clear requirement with regard to section 501(c)(4) status—often referred to as the "private benefit" doctrine.

As the U.S. Court of Appeals for the Third Circuit explained in *Erie Endowment v. U.S.*, 316 F.2d 151, 156 (3rd Cir. 1963), in denying an organization's claim of section 501(c)(4) status, a civic organization "must be a community movement designed to accomplish community ends." Similarly, the Sixth Circuit stated in *U.S. v. Pickwick Electric Membership Corp.*, 158 F.2d 272, 276 (6th Cir. 1946), that a "civic league or organization embodies the idea of citizens of a community cooperating to promote the common good and general welfare of people of the community."

An IRS publication explains the "private benefit" doctrine as follows:

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[14] S. Bland, "Secret-Money Group Tied to Marco Rubio Super PAC Has Been Researching Presidential Primary Voters," *The National Journal* (April 10, 2015).

[15] S. Bland, "Secret-Money Group Tied to Marco Rubio Super PAC Has Been Researching Presidential Primary Voters," *The National Journal* (April 10, 2015).

[16] S. Bland, "Secret-Money Group Tied to Marco Rubio Super PAC Has Been Researching Presidential Primary Voters," *The National Journal* (April 10, 2015).

[17] 26 C.F.R. §§ 1.501(c)(4)-1(a)(1) and 1.501(c)(4)-1(a)(2)(i) (emphasis added).

- "Organizations that promote social welfare should primarily promote the common good and general welfare of the people of the community as a whole.

- An organization that primarily benefits a private group of citizens cannot qualify for IRC 501(c)(4) exempt status."[18]

In *American Campaign Academy v. Commissioner of Internal Revenue*, 92 T.C. No. 66, 92 T.C. 1053, 1063 (1989), the Tax Court considered application of the "private benefit" doctrine to an organization that the IRS had concluded operated to "benefit Republican Party entities and candidates more than incidentally" and therefore operated to "serve the private interests of Republican Party entities rather than public interests exclusively[,]" in violation of the "private benefit" doctrine.

The Tax Court noted that the Academy was an "outgrowth" of the National Republican Congressional Committee and that "[t]wo of the Academy's six full-time faculty were previously involved in the NRCC's training program" and that one of the Academy's three initial directors was the Executive Director of the NRCC and another initial director was a member of the Republican National Committee. *Id*. at 1056. The Academy's curriculum had a "Republican party focus," *id*. at 1070, and the record did not include a single example of a graduate working for a Democratic candidate. *Id*. at 1072.

The court stressed that it was applying an "operational test" examining the "actual purpose for the organization's activities and not the nature of the activities or the organization's statement of purpose." *Id*. at 1064. The court explained: "In testing compliance with the operational test, we look beyond the four corners of the organization's charter to discover 'the actual objects motivating the organization and the subsequent conduct of the organization.'"[19]

The Tax Court agreed with the IRS' determination, finding that the American Campaign Academy, which operated a school to train campaign professionals, "conducted its educational activities with the partisan objective of benefiting Republican candidates and entities." *Id*. at 1070 (emphasis added). The court found that the American Campaign Academy "operated to advance Republican interests" and "conferred a benefit on those [Republican] candidates" for whom the school's graduates worked. *Id*. at 1073.

The court rejected the contention that "because the Republican party is comprised of millions of individuals with like 'political sympathies,' benefits conferred by the Academy on Republican entities and candidates should be deemed to benefit the community at large[,]" responding that it was "not persuaded by petitioner's argument." *Id*. at 1076.

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[18] J.F. Reilly, C. Hull & B. Allen, *IRC 501(c)(4) Organizations* I-3 (IRS Exempt Organizations—Technical Instruction Program for FY 2003) (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopici03.pdf.

[19] *Id*. at 1064 (citing *Taxation with Representation v. U.S.*, 585 F.2d 1219, 1222 (4th Cir. 1978), *Samuel Friedland Foundation v. U.S.*, 144 F. Supp. 74, 85 (D.N.J. 1956); *Christian Manner International v. Commissioner*, 71 T.C. 661, 668 (1979)).

The Tax Court also rejected the American Campaign Academy's contention that, should the court "determine that a private benefit is conferred on Republican entities and candidates, such benefit is incidental and collateral to its primary purpose of benefiting the general public[,]" arguing that because the Academy could not control such benefit it "must be incidental in nature." *Id*. at 1078. Noting that the Academy cited "no compelling authority in support of its contention that nonincidental benefits must be controllable by the organization," the court found that the Academy was "formed with a substantial purpose to train campaign professionals for service in Republican entities and campaigns[.]" *Id*. at 1078.

The court concluded that the organization was operated for the benefit of private interests, a nonexempt purpose, and because more than an insubstantial part of the organization's activities furthered this nonexempt purpose, the organization was not entitled to tax-exempt status. *Id*. at 1079.

The IRS has applied the "private benefit" doctrine in numerous recent cases to deny section 501(c)(4) status to groups engaged in partisan political activities. In one such ruling, relying on *American Campaign Academy*, *supra*, the IRS concluded that "an organization which conducts its educational activities to benefit a political party and its candidates serves private interests. And . . . an organization that primarily serves private interests fails to qualify for exemption under section 501(c)(4)." *Id*. at 6 (citing *American Campaign Academy*). The IRS determination in that matter stated:

> In summary, you are not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole. Accordingly, you do not qualify for exemption as an organization described in section 501(c)(4) of the Code and you must file federal income tax returns.

Id.; *see also* Determination Letter 201128034 (April 18, 2011) ("Educational activities undertaken to provide a partisan benefit are considered to serve private interests, rather than the common good. . . . [Y]ou fail to qualify for exemption because your training program primarily benefits the interests of the Party and its candidates."); Determination Letter 201128035 (April 18, 2011) (same); Determination Letter 201221028 (March 2, 2012) (same); Determination Letter 201224034 (March 21, 2012) (same).

The IRS denied section 501(c)(4) status to a group called Emerge Maine on the grounds that the organization's "activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole." Determination Letter ID No. 0782253 (Jan. 13, 2011). The IRS explained that "[e]ducational activities undertaken to provide a partisan benefit are considered to serve private interests, rather than the common good." *Id*. "Thus, notwithstanding any benefit your educational activities may provide to the community, you fail to qualify for exemption because your training program primarily benefits the interests of the Democratic party and its candidates." *Id*.; *see also* Determination Letter 201403029 (October 25, 2013) (denying exempt status because status because "your program and activities primarily benefit the interests of the X Party.")

Federal Circuit Court, Tax Court and IRS precedent make clear that organizations conducting activities with the partisan objective of benefiting a particular political party's candidates are operating for the benefit of private interests—in violation of the "private benefit" doctrine—and are not entitled to tax-exempt status under section 501(c)(4).

3. CSP is providing a private benefit to the Rubio presidential campaign, in violation of the requirement for status as a social welfare organization.

As a practical matter, CSP is operating as an arm of the Rubio presidential campaign. As such, it is providing a "private benefit" for a partisan campaign purpose, and is accordingly in violation of its asserted status as a section 501(c)(4) social welfare organization.

The fact that "[e]very pro-Rubio television commercial so far in the early primary states of Iowa, New Hampshire and South Carolina has been paid for" by CSP,[20] and that "[e]very single one of [CSP's] thousands of television ads, in fact, has featured Rubio, and nobody else,"[21] shows the integral and exclusive role that CSP is playing in the Rubio presidential campaign. In playing this role, CSP has spent millions of dollars on ads promoting the Rubio campaign in the key early primary states.

The fact also that CSP shares a name, and staff, and a founder with the Rubio Super PAC reinforces the tightly integrated role that CSP plays in the larger Rubio campaign operation.

There can be little doubt that CSP is providing an impermissible "private benefit" under applicable judicial and IRS precedent. Just as the Tax Court noted that the group at issue in *American Campaign Academy* was to "serve the private interests of Republican Party entities rather than public interests exclusively[,]" 92 T.C. 1053, 1063, so too CSP is serving the private interests of the Rubio presidential campaign and its supporters, not the public interest. Indeed, the "private benefit" served by CSP is even narrower than that deemed impermissible in *American Campaign Academy*. There, the group at issue served "the partisan objective of benefiting Republican candidates and entities" generally. By contrast, CSP serves the specific interest of just one Republican candidate and his campaign. If serving the interests of all Republican candidates confers an impermissible "private benefit," then *a fortiori* serving the interests of just one Republican candidate must do so as well.

This position is consistent with the series of recent IRS letter rulings applying the "private benefit" doctrine. Just as the IRS found that "an organization which conducts its educational activities to benefit a political party and its candidates serves private interests," Determination Letter 201128032, *supra*, so too CSP serves a private interest in spending millions of dollars to assist the presidential campaign of a single candidate.

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[20] J. Bykowicz, "Rubio's presidential bid boosted by secret-money commercials," *The Associated Press* (October 8, 2015).

[21] S.V. Date, "Rubio Relying on Secret Donors to Finance Ad Blitz," *National Journal* (Oct. 22, 2015).

4. CSP is primarily engaged in participation or intervention in a political campaign, not in social welfare activity.

In addition to the "private benefit" issue, the tax code also requires a social welfare organization to be "operated exclusively" for the promotion of social welfare. 26 U.S.C. § 501(c)(4). According to IRS regulations, "[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (emphasis added).

Political activity—spending to influence electoral campaigns—does not constitute promoting the social welfare. IRS regulations state, "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii) (emphasis added).

In other words, an organization primarily engaged in political campaign activity is not primarily engaged in the promotion of the social welfare of the community and, therefore, is not eligible for tax-exempt status under section 501(c)(4). For example, "[a]n organization whose primary activity is rating candidates for public office is not exempt from Federal income tax under section 501(c)(4) of the Internal Revenue Code of 1954 because such activity does not constitute 'promotion of the social welfare.'" Rev. Rul. 67–368, 1967–2 C.B. 194.

On information and belief, CSP is primarily engaged in participation or intervention in a political campaign, not in social welfare activity. That fact that, according to published reports, all of CSP's television ads feature Rubio, and that all of its ads have run in early primary states, are compelling indicators that CSP is primarily engaged in promoting the Rubio campaign. In addition to providing a "private benefit" to the Rubio campaign, this is a second basis for concluding that CSP cannot properly operate under color of section 501(c)(4).

5. Conclusion.

There is an important reason that this matter has special urgency. The impermissible use of social welfare organizations to conduct campaign activities has the purpose and effect of defeating the donor disclosure requirements of federal tax law that are applicable to "political organizations." 26 U.S.C. §527.

Social welfare groups organized under section 501(c)(4) are not required by tax law to disclose their donors to the public. By contrast, a "political organization" under section 527 of the tax code is required to disclose its donors. By engaging in campaign activity (and in so doing, by conferring a "private benefit" on the candidate supported), but doing so under a claim of section 501(c)(4) status, a group such as CSP is frustrating the requirement of the tax code that there be public disclosure of donors who are funding efforts to influence elections.

The use of section 501(c)(4) groups to serve as conduits for injecting secret money into federal campaigns, particularly into the presidential campaign, causes enormous harm to citizens by shielding from scrutiny the identity of those who are funding efforts to influence elections.

This is a growing problem. In the 2012 presidential election, social welfare organizations spent approximately $257 million on campaign activity without any disclosure of the sources of that funding.[22] In the current election cycle, several of the presidential candidates in addition to Rubio have social welfare organizations associated with their campaigns, and the sources of money spent by those groups is not being disclosed.

CSP presents an especially clear-cut and egregious example of flaunting of the tax code. By electing not to file an application for recognition of exemption, the group seeks to avoid any scrutiny of its activities until its first tax filing and thus to continue to serve as a conduit for undisclosed money through the 2016 election cycle.

The Tax Division has the authority to intervene to stop this abuse of the tax laws. Given the extraordinary public interest in combating CSP's effort to deprive the public of timely disclosure about its efforts to influence the 2016 election, the Tax Division should act promptly to investigate and take appropriate action against CSP.

Sincerely,

/s/ Gerald Hebert	*/s/ Fred Wertheimer*
J. Gerald Hebert	Fred Wertheimer
Executive Director	President
Campaign Legal Center	Democracy 21

Copy to:

Hon. John Koskinen
Commissioner of the Internal Revenue Service

[22] *See* https://www.opensecrets.org/outsidespending/nonprof_summ.php