ALAN WILSON
ATTORNEY GENERAL

January 28, 2013

The Honorable Jim Matthews
Sheriff, Kershaw County
821 Ridgeway Road
Lugoff, SC 29078

Dear Sheriff Matthews:

We received your letter regarding the enforcement of gun laws in Kershaw County. By way of background, you indicate that citizens of Kershaw County are concerned about recent gun control legislation proposed by the federal government.[1] You request an opinion from this Office regarding the authority of the Kershaw County Sheriff's Department (the "Department") to enforce federal gun laws. In addition, you ask whether or not federal law enforcement officers may be prohibited from enforcing those federal laws in South Carolina.

Law/Analysis

Typically, South Carolina state and local officers are authorized to arrest for violations of the "criminal laws of this State." See, *e.g.*, S.C. Code Ann. §17-13-30 [sheriffs and deputy sheriffs may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State]; §23-1-60 [constables appointed to assist in the detection of crime and the enforcement of any criminal laws of this State]; §23-6-140 [officers and troopers shall have the same power and authority held by deputy sheriffs for the enforcement of the criminal laws of the State]; §24-21-280 [a probation agent has the power and authority to enforce the criminal laws of the State].

Based upon these statutes, this Office has consistently advised that state or local law enforcement officers do not possess the authority to enforce federal laws. See, *e.g.*, Ops. S.C. Atty. Gen., September 25, 2008 (2008 WL 4489053); June 18, 2003 (2003 WL 21471506). In an opinion dated September 13, 1971 (1971 WL 22233), we concluded that "a State or local officer is an agent of the State, county or municipality by which he is employed. He is not empowered to enforce federal law." In Opinion dated June 10, 1966 (1966 WL 8532), we stated:

> [i]t is therefore apparent, in the opinion of this office that a city police officer or deputy sheriff would not be authorized to arrest a person for failure to have a

[1]No specific federal gun legislation is referenced in your letter.

> draft card in his personal possession, the offense being one solely against the laws of the United States. He of course could file a complaint with the proper federal authorities, who would then proceed at their discretion.

The Legislature has enacted legislation which authorizes the enforcement of state criminal laws by federal law enforcement officers. See §23-1-212. However, this Office has consistently recognized that no such enabling authority exists to allow state and local officers to enforce federal criminal laws. See Op. S.C. Atty. Gen., March 6, 2002 (2002 WL 399643). Accordingly, this Office advises that the Department has no general authority to enforce a violation of federal gun laws.

Turning now to your other question, we note the United States Supreme Court has explained that the Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Effective federal law enforcement, including efforts by the United States to uncover, investigate and prosecute violations of federal law, unquestionably is a unique federal interest. Rovario v. United States, 353 U.S. 53, 59 (1957); cf. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) [holding that there are areas of unique federal interest that are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed ... by the courts"]. State law enforcement officers and federal officers derive their power from the authority of different and independent governments. See Printz v. United States, 521 U.S. 898, 929 & n.14. (1997).

The Supremacy Clause would thus serve to prevent state law officials, or state law, from interfering with or otherwise impeding federal officers as they perform their lawful duties. See Tennessee v. Davis, 100 U.S. 257, 263 (1880) ("No state government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will ..."); Baucom v. Martin, 677 F.2d 1346, 1351 (11th Cir. 1982) ("[sufficient urgency] justifying preemption of state law exists in avoiding state interference with an on-going federal criminal investigation"). The United States Supreme Court explained this principle in In re Neagle, 135 U.S. 1 (1890), where California sought to prosecute a United States deputy marshal assigned to protect a state Justice during his circuit assignment after the marshal shot and killed an angry litigant. In Neagle, the Court held that the marshal was immune from state prosecution: "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." Id. at 75. The Court explained that under the Constitution, the United States "may, by means of physical force, exercised through its official agents, execute ... the powers and functions that belong to it" free from the interference of state law. Id. at 60-61; see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ["just as state law may not authorize federal agents to violate the Fourth Amendment ... neither may state law undertake to limit the extent to which federal authority can be exercised"]; Davis, 100 U.S. at 262 [noting that the government can act only through its officers and agents, who must act within the States' territories, and allowing state law to interfere with government officers would paralyze governmental functions]; Martin v. Hunter's, 14 U.S. (1 Wheat. 363) 304, 363

(1816) (Johnson, J., concurring) ("[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force ... or judicial process ... are the only means to which governments can resort in the exercise of their authority").

Neagle has broader applications to your question, standing for the proposition that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law. An act cannot simultaneously be necessary to the execution of a duty under the laws of the United States and an offense to the laws of a state. To the contrary, the obligations imposed by federal law are supreme, and where any supposed right or claim under state law would impede an officer from performing his duties, it must relent. See Johnson v. Maryland, 254 U.S. 51, 56-57 (1920) (Holmes, J.) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States"); Ohio v. Thomas, 173 U.S. 276, 283 (1899) ("When discharging [their] duties under [F]ederal authority pursuant to and by virtue of valid Federal laws, [Federal officers] are not subject to arrest or other liability under the laws of the State in which their duties are performed").

In fact, we observe that courts have almost universally invoked Supremacy Clause immunity to protect the operations of the federal government and persons acting under its direction. See, *e.g.*, Hunter v. Wood, 209 U.S. 205 (1908) [railroad official acting under a federal injunction who was charged under state law with overcharging for a railroad ticket]; Boske v. Comingore, 177 U.S. 459 (1900) [Treasury official who, pursuant to federal regulations, refused to produce records to state officials]; West Virginia v. Laing, 133 F, 887 (4th Cir. 1904) [two citizens enlisted by federal marshals as a *posse comitatus* to help serve a federal arrest warrant shot and killed the subject of the warrant]; Brown v. Nationsbank Corp., 188 F.3d 579 (5th Cir. 1991) [private defendants acting under FBI direction are shielded from state law claims]; Kentucky v. Long, 837 F.2d 727, 745 (6th Cir.1988) [FBI agent who allegedly committed a burglary as part of an undercover operation; "a mistake in judgment or a 'botched operation,' so to speak, will not of itself subject a federal agent to state court prosecution"]; Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) [federal narcotics agent immune to state murder prosecution for shooting fleeing felon]; Baucom, 677 F.2d at 1350-51 [FBI agent who bribed a state prosecutor in an undercover operation]; Ex Parte Beach, 259 F. 956 (S.D. Cal. 1919) [customs agent who fired shots at the roadster of a suspected opium smuggler]; Connecticut v. Marra, 528 F. Supp. 381, 386 (D. Conn. 1981) [Federal Informant who, in an "error resulting from confusion or nervousness or bad judgment," exceeded his authority and attempted to bribe a police officer]; In re Turner, 119 F. 231, 235 (S.D. Iowa 1902) [federal officer constructing sewer pipe to army base against prosecution for violation of a state injunction; "an officer of the United States ... acting in obedience to commands ... is not subject to arrest on a warrant or order of a state court"]; In re McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964) [United States marshals used tear gas to disperse large crowd challenging integration at state university; state charged United States Marshal with breach of peace and felonious use of force]; United States *ex rel.* Flynn v. Fuellhart, 106 F. 911 (W.D. Pa. 1901) [Secret Service agents charged with assault and battery for arresting a counterfeiter]; United States *ex rel.* McSweeney v. Fullhart, 47 F. 802 (W.D. Pa. 1891) [United States marshals drew their guns at state constables while escorting a federal arrestee into custody]; Texas v. Carley, 885 F. Supp. 940 (W.D. Tex.

1994) [Fish and Wildlife officer charged with criminal trespass while making National Wetlands Inventory]; Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945) [naval shore patrolman charged with assault for striking city policeman who interfered with arrest of a serviceman]; In re Lewis, 83 F. 159, 160 (D. Wash. 1897) [Treasury agents who, with "bad judgment," executed an illegal search warrant].

Consistent with the Court's Neagle decision, the courts have held that federal agents are immune from state prosecution even when their conduct violated internal agency regulations or exceeded their express authority, so long as the agents did not act out of malice or with criminal intent. For example, the court in Long affirmed the federal district court's dismissal of a burglary indictment against an FBI agent who had violated internal FBI regulations regarding the documentation of contacts with informants, based on the district court's findings that the agent had no motive other than to discharge his duty under the circumstances as they appeared to him, and that he had an honest and reasonable belief that what he did was necessary to the performance of his duty. Id., 837 F.2d at 740, 752; see also Baucom, 677 F.2d at 1350 [federal agent who used undercover operations in connection with investigation of possible federal crimes held immune under Supremacy Clause from state prosecution for attempted bribery when he did not act out of "any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it"]; Marra, 528 F. Supp. at 387 [affirming dismissal of bribery prosecution on Supremacy Clause grounds where defendant had exceeded his authorization but acted without criminal intent and honestly believed his actions were necessary to his assigned mission]. Even when courts have questioned the legality of the mission in connection with which the federal officer was acting, the officer has not been held subject to state prosecution as long as he had an honest and reasonable belief that what he did was necessary in the performance of his duty.

The Lewis court granted a writ of habeas corpus for a federal marshal who wrongfully seized some private papers while executing a search warrant. The court stated:

> ... the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government.

Id., 83 F. at 160; see also In re Fair, 100 F. 149 (D. Neb. 1900) [a state could not prosecute an infantry soldier who, following orders, shot and killed escaping prisoner when an order to halt was not obeyed, even though the orders to shoot were questionable in light of Infantry Regulations].

We have previously discussed the impeding of individuals who have federal authority to enforce federal laws. In an opinion of this Office dated December 9, 2011 (2011 WL 6959373), we addressed

proposed "Sheriff's First" legislation intended, *inter alia*, to restrict federal arrests, searches or seizures in the absence of written permission of the county sheriff in which the arrest, search or seizure occurred, or the South Carolina Attorney General. The legislation also provided that the county sheriff or Attorney General could refuse permission for a federal arrest, search or seizure for "any reason" deemed sufficient. Relying upon the Supremacy Clause, we advised that the proposed legislation:

> . . . would undeniably interfere with and/or prohibit conduct explicitly authorized by federal law and touch upon a unique area of federal concern - the enforcement of the federal criminal laws. A court would likely conclude that the proposed legislation which regulates federal law enforcement would thus be preempted by the Supremacy Clause of the United States Constitution. Under the Supremacy Clause, state law cannot operate to impede individuals who have federal authority to enforce federal laws, and who act as necessary and proper within that federal authority. If federal employees are to perform their duties vigorously, they cannot be unduly constrained or undermined by fear of state prosecutions. We believe a court would likely conclude that to apply the state law in the manner proposed here would frustrate important federal interests in violation of the Supremacy Clause.

In an opinion of this Office dated June 6, 2012 (2012 WL 2168289), we addressed whether underage youth working with South Carolina Department of Alcohol and Other Drug Abuse Services inspectors who are commissioned by the United States Food and Drug Administration to enforce federal regulations against the sale of tobacco products to individuals under the age of eighteen have legal immunity from being charged with possession, purchasing, or attempting to purchase tobacco products under State law. Again relying in part upon the authority discussed above,[2] we concluded that state law cannot operate to impede individuals who have federal authority to enforce federal laws, or act as necessary and proper within that federal authority. We therefore advised that "[i]f federal inspectors are to perform their duties vigorously, they cannot be unduly restrained or undermined by fear of state prosecutions."

It appears to us that the same reasoning discussed above is applicable to the situation described in your letter, and that the Department should neither interfere with nor otherwise attempt to impede federal law enforcement officers as they perform their lawful duties to enforce federal laws, and who act as necessary and proper within that federal authority.

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[2]Generally, §16-17-500 prohibits any person in South Carolina from selling, furnishing or distributing to, or purchasing for, minors under the age of eighteen any tobacco products. In addition, a minor may not lawfully purchase or possess any tobacco product. We noted, however, that §16-17-500(F) expressly provides that the prohibition against possession of tobacco products by a minor shall not apply to his/her possession of tobacco products while "participating within the course and scope of an authorized inspection or compliance check."

Having rendered the foregoing opinion, we further take this occasion to note the holding of the United States Supreme Court in Printz. In Printz, the Court considered the constitutionality of the Brady Handgun Violence Protection Act's (the "Brady Act") amendments to the federal Gun Control Act, which required the States' chief law enforcement officers to perform background checks of people desiring to acquire guns from gun dealers to determine whether possession by those individuals was contrary to federal law. The precise issue before the Court was "the forced participation of the States' executive in the actual administration of a federal program." Id., 521 U.S. at 916. The Court held that the States' executive could not be so forced. The Court held that Congress cannot force state officers to administer or enforce federal law. Id. at 925. The Court commented:

> [b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Id. at 930. Finding that the federal government may not compel the States to enact or administer a federal regulatory program, the Court struck the Brady Act's mandatory obligation imposed on chief law enforcement officers to perform background checks on prospective handgun purchasers. Id. at 933. The Court held that no constitutionally significant distinction could be drawn between compelling a state legislature to make federal law and compelling state officials to enforce federal law. Id.; see also New York v. United States, 505 U.S. 144, 174-77 (1992) [invalidating a federal law requiring states either to regulate the disposal of radioactive waste by private parties according to federal guidelines or to take title to such waste]. The Court ultimately concluded that the federal statute at issue was unconstitutional under the Tenth Amendment, because it required state officers to enact or enforce the Brady Act.

However, we are mindful that when considering a question of federal law, an opinion of this Office is only advisory and questions of federal law must be decided in the federal courts and, ultimately, may only be resolved by the United States Supreme Court. See, *e.g.*, Op. S.C. Atty. Gen., January 9, 2007 (2007 WL 419435). In the absence of any specific legislation to review, however, there is nothing for this Office to consider.

Conclusion

South Carolina state and local officers are authorized to arrest for violations of the "criminal laws of this State." These officers, however, are not empowered to enforce federal law. In addition, under the Supremacy Clause of the United States Constitution, neither state law nor state law officials may interfere with or otherwise impede federal law enforcement officers as they perform their lawful duties. We further advise that conduct intending to impede the discharge of the lawful responsibilities of federal law enforcement officials may expose such persons to criminal liability. See, *e.g.*, United States v. Brown, 669 F.3d 10 (1st Cir. 2012) [conspiracy to prevent United States Marshals from discharging official

duties]; United States v. Hall, 342 F.2d 849 (4th Cir. 1965) [agreement to interfere with performance of official duties by Government officer by causing him to be unlawfully arrested].[3]

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

[3]These convictions were based on conspiracies to impede federal law enforcement officers in violation of 18 U.S.C. §372 [Conspiracy to impede or injure officer], which provides that:

> [i]f two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both.