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The Honorable Glenn Youngkin
Governor of Virginia
Patrick Henry Building, Third Floor
1111 East Broad Street
Richmond, Virginia 23219

The Honorable Ryan T. McDougle
Member, Senate of Virginia
Post Office Box 187
Mechanicsville, Virginia 23111

Dear Governor Youngkin and Senator McDougle:

I am responding to your requests for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the State Air Pollution Control Board is required to adopt California's Advanced Clean Cars Program II—particularly those regulations establishing certain standards for low- and zero- emission vehicles—for model years 2026 and beyond.

Response

It is my opinion that the Board is not required to adopt California's Advanced Clean Cars Program II, including those regulations establishing standards related to low- and zero- emission vehicles.

Background

As part of the federal Clean Air Act,[1] the United States Congress has provided that federal law should govern motor vehicle emissions standards.[2] To address "concern[s] that auto manufacturers might be subjected to multiple and inconsistent requirements" across jurisdictions,[3] Congress enacted § 209 of the Act, which specifically prohibits States from adopting or enforcing "any standard relating to the control of

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[1] 42 U.S.C. §§ 7401-7671q.

[2] *See generally* 42 U.S.C. §§ 7521 to 7590 (codifying §§ 201 to 250 of the Clean Air Act, governing "Emission Standards for Moving Sources" as applied to "Motor Vehicle Emission and Fuel Standards").

[3] Ford Motor Co. v. Env't Prot. Agency, 606 F.2d 1293, 1295 (D.C. Cir. 1979).

emissions from new motor vehicles or new motor vehicle engines" that are subject to the law.[4] Instead, the Environmental Protection Agency ("EPA") is charged with establishing emissions standards that apply nationwide.[5]

Section 209 nevertheless permits a State meeting certain conditions to petition the EPA for a waiver from the federal standards when "the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[6] Should the State receive a waiver from the EPA, "compliance with [the] State standards shall be treated as compliance with applicable Federal standards . . . ."[7] California is the only state that is qualified to seek and receive a waiver under § 209,[8] but § 177 of the Act provides that other States may adopt and enforce their own standards, provided "(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and (2) California and such State adopt such standards at least two years before commencement of such model year . . . ."[9]

In 2012, the California Air Resources Board ("CARB") formulated a regulatory scheme—the Advanced Clean Cars Program ("ACC I")—that combined rules governing greenhouse gasses as well as low- and zero-emission vehicles ("LEV" and "ZEV," respectively) for model years 2015-2025.[10] ACC I was designed, in part, to reduce emissions generated by motor vehicles over time by reducing the sale of new gas-powered vehicles relative to new electric car sales. In furtherance of this goal, ACC I established a credit system whereby each vehicle manufacturer was required to maintain a California-specific credit account: vehicle manufacturers earn credits for each zero-emission vehicle they sell and can trade or sell

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[4] 42 U.S.C. § 7543(a).

[5] 42 U.S.C. § 7521. *See, e.g.*, 40 C.F.R. Parts 85, 86 & 600. *See In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., 959 F.3d 1201, 1219 (9th Cir. 2020) (explaining that the Clean Air Act "allocate[s] authority between the federal government and state governments as follows: Section 209(a) gives the EPA exclusive authority to establish standards for new vehicles, 42 U.S.C. § 7543(a), while § 209(d) preserves the authority of state and local governments over post-sale vehicles, 42 U.S.C. § 7543(d)").

[6] 42 U.S.C. § 7543(b)(1). A waiver is available "to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," when each State standard is at least as stringent as the comparable applicable Federal standard, and the State needs the standards to meet compelling and extraordinary conditions. *See* 42 U.S.C. § 7543(b).

[7] 42 U.S.C. § 7543(b)(3).

[8] *See Ford Motor Co.*, 606 F.2d at 1296 (explaining that because "California was the only state which had adopted standards other than crankcase emission standards prior to March 30, 1966, it was the only one eligible for the waiver of federal preemption authorized by this section").

[9] 42 U.S.C. § 7507. This authority is limited to those States that are subject to other regulatory requirements due to the State's nonattainment of national ambient air quality standards, *see id.*; Virginia is such a State. *See* ENV'T PROT. AGENCY, *Nonattainment and Maintenance Area Dashboard*, https://awsedap.epa.gov/public/extensions/specs-area-dashboard/index.html (last visited June 4, 2024). A "model year" is "the manufacturer's annual production period . . . which includes January 1 of such calendar year, provided, that if the manufacturer has no annual production period, the term 'model year' shall mean the calendar year." 40 C.F.R. § 85.2302; *see also* 40 C.F.R. §§ 85.2303 (setting out the duration of a "model year"), 85.2304 (defining "annual production period").

[10] *See* CALIFORNIA AIR RESOURCES BOARD, ADVANCED CLEAN CARS PROGRAM, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/about (last visited June 4, 2024). For a history of California's evolving standards under its waiver allowance, *see* DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 5:22 "Preemption of state mobile source and fuel regulations—Low emission and zero emission vehicle requirements; national low emission vehicle program" (Sept. 2023).

these credits to other manufacturers or bank credits for future use.[11] As set forth in § 1962.2 of Title 13 of California's Code of Regulations, ACC I required that, commencing with model year 2018, each manufacturer obtain ZEV credits equal to at least 4.5% of all sales of new vehicles in California by such manufacturer. ACC I further directed that this percentage would increase by 2.5% each model year until, finally, in model year 2025 and subsequent years, ZEV credits equaling 22.0% of new vehicle sales in California would be required.[12] The EPA approved CARB's request for a § 209 waiver in 2013;[13] upon approval of the waiver, other States gained authority to implement California's ACC I program.[14]

In 2022, CARB determined that it wanted to pursue stricter emissions standards. Designed for model years 2026-2035, Advanced Clean Cars Program II ("ACC II") was created and set forth new regulations to "rapidly scale down emissions of light-duty passenger cars, pickup trucks and SUVs and require an increased number of zero-emission vehicles to meet air quality and climate change emissions goals."[15] While ACC I required ZEV credits totaling 22.0% of new vehicle sales in 2024 and subsequent model years, ACC II requires a significantly higher percentage of ZEV credits over time: per CARB, under the ACC II regulations, "by 2035 all new passenger cars, trucks and SUVs sold in California will be zero emissions."[16] The effect of the new regulations is a ban of all sales of non-electric vehicles by 2035 and for subsequent years. ACC II primarily implements new regulations; the addition of §§ 1961.4 and 1962.4 to Title 13, for example, specifically established the stricter LEV and ZEV standards.[17] ACC II also amended

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[11] CAL. CODE REGS. tit. 13, § 1962.2. ACC I also contained provisions to promote the sale of low-emission vehicles. *Id.* at § 1961.2. Credit calculations are based on a formula whereby not all vehicles receive a flat 1 credit per sale; the ZEV credit percentage therefore does not directly reflect the EV sales percentage. Regulations governing the creation and use of ZEV credits are set forth in § 1962.2(c), (d), and (g) of Title 13 of California's Code of Regulations.

[12] CAL. CODE REGS. tit. 13, § 1962.2. The Circuit Courts of Appeals for the First and Second Circuits have deemed such sales requirements to be emissions "standards" under the Clean Air Act. Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 200 (2d Cir. 1998) ("[A] ZEV sales requirement must be considered a standard 'relating to the control of emissions.'"); *accord* Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Env't Prot., 208 F.3d 1, 7 (1st Cir. 2000) ("[Massachusetts] ZEV mandates are standards as that term is used in §§ 209 and 177 of the CAA.").

[13] California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program,78 Fed. Reg. 2112 (Jan. 9, 2013).

[14] *See* 42 U.S.C. § 7507.

[15] CALIFORNIA AIR RESOURCES BOARD, ADVANCED CLEAN CARS PROGRAM, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/about (last visited June 4, 2024).

[16] *Id.* (further stating that the ACC II regulations "take the state's already growing zero-emission vehicle market and robust motor vehicle emission control rules and augments them to meet more aggressive tailpipe emissions standards and ramp up to 100% zero-emission vehicles").

[17] *See* STATE OF CALIFORNIA AIR RESOURCES BOARD, Advanced Clean Cars II Regulations, Resolution 22-12 at 17, 18 (Aug. 2022) (adopting, *inter alia*, §§ 1961.4 and 1962.4 as "new sections"), *available at* https://ww2.arb.ca.gov/sites/default/files/barcu/board/res/2022/res22-12.pdf (last visited June 4, 2024).

parts of ACC I to impose an express sunset on ACC I's LEV and ZEV standards effective at the end of 2024.[18] CARB's waiver request for ACC II is pending before the EPA.[19]

In contrast to CARB, the EPA has not promulgated standards that include restrictions on sales of gas-powered vehicles. In March 2024, however, the EPA announced the adoption of new federal emissions standards for model years 2027 and beyond.[20] These standards also are designed to significantly increase the nationwide move toward electric vehicles, but unlike ACC II, the federal regulations will not phase out the sale of gas-powered vehicles entirely. With the revised federal standards, "the EPA estimates that by 2032 . . ., [these] rules could result in electrification of 67% of new sedans, crossovers, SUVs, and light trucks."[21]

With this background, I turn to your question.

Applicable Law and Discussion

In 2021, before CARB created ACC II and set ACC I to expire December 31, 2024, the General Assembly amended Virginia law with respect to the adoption of motor vehicle emissions standards. Per the amendments, the legislature specifically provided that the State Air Pollution Control Board ("Board") "may adopt by regulation emissions standards controlling the release into the atmosphere of air pollutants from motor vehicles, only as provided in § 10.1-1307.05 . . . ."[22] Section 10.1-1307.05, in turn, also was added to provide that "[t]he Board may adopt by regulation and enforce any model year standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, including LEV and ZEV standards pursuant to § 177 of the federal Clean Air Act[,]"[23] *i.e.*, the California standards.

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[18] *See id.* at 18 (noting adoption of amendments to §§ 1961.2 and 1962.2). The sunset amendments applied to standards for passenger cars and light-duty trucks. *See also* Final Regulation Order, Amendments to Sections 1900, 1961.2, 1961.3, 1965, 1976, 1978, 2037, 2038, 2112, 2139, 2140, 2147, 2317, and 2903, Title 13, California Code of Regulations, at p.4; https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/2acciifro_lev_regs_etal.pdf; Final Regulation Rule, Amendments to Section 1962.2, Title 13, California Code of Regulations, https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/2acciifro1962.2.pdf.

[19] *See* California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 88 Fed. Reg. 88908 (Dec. 26, 2023).

[20] *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27842 (Apr. 18, 2024). The final rule is set to become effective on June 17, 2024, *id.*, but it is the subject of several legal challenges. On behalf of the Commonwealth, my Office has joined 25 other States in a lawsuit that contends the EPA exceeded its power when it adopted the rule. *See* Petition for Review, Kentucky v. EPA, No. 24-1087 (D.C. Cir. Apr. 18, 2024).

[21] *See* The White House, *FACT SHEET: Biden-Harris Administration Proposes New Standards to Protect Public Health that Will Save Consumers Money, and Increase Energy Security* (Apr. 12, 2023), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/12/fact-sheet-biden-harris-administration-proposes-new-standards-to-protect-public-health-that-will-save-consumers-money-and-increase-energy-security/. *See also* 88 Fed Reg. 29184, 29189.

[22] VA. CODE ANN. § 10.1-1307(B) (Supp. 2023). *See also* 2021 Va. Acts ch. 263 (Spec. Sess. I).

[23] Section 10.1-1307.05(B) (Supp. 2023) (citing 42 U.S.C. § 7507). Per the statute, "'LEV' means low-emission vehicle" and "'ZEV' means zero-emission vehicle." Section 10.1-1307.04(A). *See also* 2021 Va. Acts ch. 263 (Spec. Sess. I). When passed by the General Assembly, the provisions of § 10.1-1307.05 originally were to be codified as § 10.1-1307.04, but additional legislation adopted during the same session resulted in its current codification as § 10.1-1307.05. *See* 2021 Va. Acts ch. 263 (Spec. Sess. I); 2021 Va. Acts ch. 98 (Spec. Sess. I) (enacting the statute ultimately codified as § 10.1-1307.04).

The statute further provides that

> The Board shall promulgate final regulations for an Advanced Clean Cars Program that includes (i) an LEV program for criteria pollutants and greenhouse gas emissions and (ii) a ZEV program only for motor vehicles with a gross vehicle weight of 14,000 pounds or less. Such programs shall be applicable to motor vehicles beginning with the 2025 model year, or to the first model year for which adoption of such standards is practicable.[24]

Finally, "[t]he Board shall periodically amend any regulations adopted pursuant to this section to ensure continued consistency of such standards with the Clean Air Act."[25]

Pursuant to this legislation, the Board promulgated final motor vehicle emissions regulations in December 2021.[26] The regulations included both LEV and ZEV standards that mirrored those established by ACC I and set up a LEV and ZEV credit program that copied that created under ACC I. Throughout the regulations are numerous references to specific sections of the California Code of Regulations.[27] For instance, Board regulations relating to the ZEV credit system direct that manufacturers' annual reports be made "according to 13 CCR § 1962.2."[28] There is no reference to §§ 1961.4 and 1962.4, the relevant ACC II regulations related to LEV and ZEV standards.

The California LEV and ZEV standards incorporated by the Board expire by operation of law at the end of 2024.[29] Accordingly, the Board's current regulations do not operate to incorporate the standards California promulgated as part of ACC II; ACC II is primarily a new set of regulations, distinct from ACC I and found in different sections of the California Code of Regulations.[30] The Board has not incorporated ACC II's ZEV regulations or otherwise adopted the standards established under ACC II.[31]

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[24] Section 10.1-1307.05(B).

[25] *Id.*

[26] 9 VA. ADMIN. CODE §§ 5-95-10 to 5-95-50.

[27] *See, e.g.*, 9 VA. ADMIN. CODE §§ 5-95-20; 5-95-30; 5-95-40.

[28] *Id.* at § 5-95-40(C)(2).

[29] *See* CAL. CODE REGS. tit. 13, §§ 1961.2 & 1962.2 (both now applying only "through model year 2025").

[30] *Compare* CAL. CODE REGS. tit. 13, §§ 1961.2. & 1962.2 (ACC I), *with* CAL. CODE REGS. tit. 13, §§ 1961.4 & 1962.4 (ACC II). *See* Minnesota Auto. Dealers Ass'n v. Minnesota Pollution Control Agency, 986 N.W.2d 225 (Minn. Ct. App. 2023) (recognizing distinction between amendments to existing regulations and adoption of new parts of Title 13).

[31] I note that the practical effect of this for Virginia car manufacturers and buyers is as follows:

1) Model Year 2025 (corresponding to calendar year 2024): Virginia follows ACC I for calendar year 2024 so that manufacturers must obtain ZEV credits equal to 22.0% of new motor vehicle sales in Virginia during 2024. Because ACC I sunsets at the end of calendar year 2024, ACC I standards will cease to apply in Virginia, in conformity with the Clean Air Act. *See Cahill,* 152 F.3d at 201 ("[S]tates cannot opt-in to a California standard that no longer exists."); *accord Ass'n of Int'l Auto. Mfrs., Inc.*, 208 F.3d at 8.
2) Model Year 2026 (calendar year 2025): Under § 177 of the Clean Air Act, a State choosing to adopt California standards for a particular model year can do so only upon certain conditions: 1) they are the same as those for which California has obtained a waiver and 2) they are adopted "at least two years before commencement of such model year." Although ACC II applies in California beginning with Model Year 2026, subject to the EPA granting the ACC II waiver, Virginia cannot implement any ACC II standards for any model year that commences less than two years after the date it adopts such standards. Therefore, in 2025, car manufacturers will be free to sell new gas-powered vehicles in Virginia without restriction.

You ask whether the Board is required to adopt regulations implementing California's new LEV and ZEV standards, adopted as part of ACC II.

The powers and duties of Virginia's state agencies, including the Board, are determined by examining the statutes constituting a particular agency's enabling legislation.[32] Indeed, agency "regulations must be consistent with their governing statutes."[33] The governing statutes that comprise an agency's enabling legislation are subject to the same principles of statutory interpretation as other statutes.[34]

The "primary objective" in interpreting a statute is "'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute[,]"[35] and courts are "bound by the plain meaning of that language."[36] When "affording statutory language its plain and ordinary meaning, [courts] remain cognizant of context[,]"[37] and "adopt that sense of the words which harmonizes best with the context[.]"[38] Courts therefore do not "interpret the relevant words [] in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"[39] Accordingly, statutes are considered in their entirety.[40] Moreover, the General Assembly is presumed to "cho[o]se its words with care when enacting a statute[,]"[41] so that when it "employs a specific word in one section of a statute, and chooses a different term in another section of the statute, we must presume the difference in language was intentional."[42]

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3) Model Year 2027 (calendar year 2026): Should the EPA's newly adopted federal regulation overcome their pending legal challenges and become effective, the likely result is a gradual increase in market penetration of electric vehicles but not a total ban of new gas-powered vehicles.
4) Model Year 2028 and beyond (beginning calendar year 2027): Assuming the EPA grants CARB's waiver request for ACC II, Virginia could follow ACC II's standards if the Board chooses to promulgate regulations to do so two years prior to the commencement of the model year, *e.g.*, by December 31, 2024 for Model Year 2027.

[32] *See* VA. CONST. art. III, § 1 (providing that administrative agencies may have "such authority and duties as the General Assembly may prescribe"). "[T]he agencies established by the General Assembly are creatures of statute and 'derive[] [their] power only from [their] authorizing legislation.'" 2022 Op. Va. Att'y Gen. 95, 96 (alterations in original) (quoting Carpenter v. Virginia Real Est. Bd., 20 Va. App. 100, 106 (1995)). In determining the extent of an agency's regulatory authority, courts take into "account the text as well as the context of the underlying statute," whereby it is viewed as a "symmetrical and coherent regulatory scheme." 2022 Op. Va. Att'y Gen. at 96 (quoting Kavanaugh *ex rel.* Kavanaugh v. Virginia Birth-Related Neurological Inj. Comp. Program, 60 Va. App. 440, 447 (2012)).

[33] Chesapeake Hosp. Auth. v. State Health Comm'r, 301 Va. 82, 93 (2022).

[34] *See, e.g.*, 2022 Op. Va. Att'y Gen. at 96.

[35] Berry v. Bd. of Supervisors, 302 Va. 114, 127 (2023) (quoting Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425 (2012)).

[36] Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104 (2007).

[37] Suffolk City Sch. Bd. v. Wahlstrom, 302 Va. 188, 206 (2023).

[38] J.V. v. Stafford Cnty. Sch. Bd., 67 Va. App. 21, 35 (2016) (quoting Johnson v. Commonwealth, 53 Va. App. 608, 611 (2009)).

[39] 2022 Op. Va. Att'y Gen. 105, 108 n.4 (quoting Abramski v. United States, 573 U.S. 169, 179 (2014)).

[40] Dep't of Med. Assistance Servs. v. Beverly Healthcare of Fredericksburg, 268 Va. 278, 285 (2004) ("[A] statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute.").

[41] *Chesapeake Hosp. Auth.*, 301 Va. at 95.

[42] Jordan v. Commonwealth, 295 Va. 70, 75 (2018).

Accordingly, when the legislature "opts to invoke two different terms within the same act, 'those terms are presumed to have distinct and different meanings.'"[43]

The above 2021 General Assembly enactments govern your inquiry, but these Virginia statutes must be read in light of applicable federal law. The Clean Air Act makes clear that no State may adopt or enforce "*any* standard relating to the control of [new motor vehicle] emissions[.]"[44] This prohibition notwithstanding, a State may adopt standards "identical to the California standards for which a waiver has been granted" for model years two years in the future.[45] Accordingly, the only discretion regarding such emissions standards afforded States under federal law is choosing between 1) adopting no standards and adhering to the default federal standards or 2) adopting standards identical to EPA-approved California standards.

Sections 10.1-1307 and 10.1-1308 of the *Code of Virginia,* among other provisions, set forth numerous powers and duties of the Board; in them, the General Assembly has provided both that the Board "may" take certain actions and that it "shall" take others.[46] As amended in 2021, § 10.1-1307(B) currently provides that the Board "*may* adopt by regulation [motor vehicle] emissions standards . . . as provided in § 10.1-1307.05 . . . ."[47] Section 10.1-1307.05 expressly provides that "[t]he Board *may* adopt by regulation . . . LEV and ZEV standards pursuant to § 177 of the federal Clean Air Act[.]"[48] These new provisions delegate Section 177 discretion to the Board so that it "may" adopt emissions standards; neither directs that the Board "must" or "shall" adopt such standards generally or any particular set of standards.

The use of the word "may"—as opposed to "shall"—in a law evinces discretionary intent.[49] Indeed, "the Supreme Court of Virginia has consistently treated the word 'may' as '*prima facie* permissive[.]'"[50] Accordingly, absent a manifest legislative intent to the contrary, courts "will apply the ordinary meaning of the word 'may' in construing a statute[,]"[51] and the word "may" ordinarily signifies "'permission, importing discretion.'"[52] I find no language in § 10.1-1307 or in § 10.1-1307.05 suggesting that the word "may" is used in a mandatory, rather than its ordinary sense.

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[43] Cuccinelli v. Rector & Bd. of Visitors of the Univ. of Va., 283 Va. 420, 429 (2012) (quoting Indus. Dev. Auth. of Roanoke v. Bd. of Supervisors, 263 Va. 349, 353 (2002)).

[44] 42 U.S.C. § 7543(a) (emphasis added).

[45] 42 U.S.C. § 7507.

[46] *Compare* VA. CODE ANN. § 10.1-1307(H) (directing that the Board "shall submit an annual report"), *with* § 10.1-1308(E) (Supp. 2023) (providing that the Board "may establish . . . an auction program to sell allowances" in regulating carbon dioxide emissions from electricity generating units).

[47] Section 10.1-1307(B) (emphasis added). *See also* 2021 Va. Acts ch. 263 (Spec. Sess. I).

[48] Section 10.1-1307.05(B) (emphasis added).

[49] *See, e.g.*, AME Fin. Corp. v. Kiritsis, 281 Va. 384, 392 (2011).

[50] Fairfax v. CBS Corp., 2 F.4th 286, 296 (4th Cir. 2021) (quoting Harper v. Va. Dep't of Tax'n, 250 Va. 184, 462 (1995)).

[51] Sauder v. Ferguson, 289 Va. 449, 457 (2015). *See also, e.g.*, 1998 Op. Va. Att'y Gen. 56, 57 ("The term 'may,' as used in a statute, should be given its ordinary meaning intended by the General Assembly—'permission, importing discretion.'" (citing Masters v. Hart, 189 Va. 969, 979 (1949))); 2015 Op. Va. Att'y Gen. 105, 106 ("[T]he ordinary meaning of 'may' denotes permission, not compulsion.").

[52] Bd. of Supervisors v. State Corp. Comm'n, 292 Va. 444, 454 (2016). *See also* Spindel v. Jamison, 199 Va. 954, 957 (1958) ("The word 'may' should not be construed to mean 'must' or 'shall,' unless the clear intention of the legislature demands it."); Price v. Commonwealth, 209 Va. 383, 387 (1968) ("The word may is permissive.").

To the contrary, although "may" can be construed as mandatory when warranted by its specific context,[53] such a reading is disfavored when, as here, both words are used in a statute and "the statute itself thus distinguishes between 'shall' and 'may.'"[54] In enacting § 10.1-1307.05, the legislature employed the word "shall" three times within the same paragraph, in the sentences immediately following the language providing that the Board "may" adopt by regulation California emissions standards for any particular model year.[55] The associated enactment clauses also use "shall" multiple times.[56] Because "[t]he General Assembly is well aware of the difference between the words 'may' and 'shall,'"[57] I conclude that "may," as used in § 10.1-1307.05(B) to enable the Board to adopt LEV and ZEV standards identical to California's under § 177 of the Clean Air Act, is discretionary and not mandatory.

Although the statute does provide that the Board "shall" promulgate final regulations for certain LEV and ZEV programs and "shall" ordinarily "is the language of a command,"[58] the word "shall" is not to be interpreted in isolation.[59] Here, the mandatory language follows the permissive grant of authority to the Board to adopt LEV and ZEV standards. By employing "may" in § 10.1-1307.05(B) before listing the requirements that follow, the General Assembly maintained the general § 10.1-1307(B) grant of power and added conditionally mandatory provisions. The contemplated "final regulations" are the means of implementing California standards should the Board choose to adopt them. The mandatory language that follows the enabling provision therefore is predicated on the Board deciding to adopt EPA-approved California standards in the first instance.[60] Such an exercise of discretion is thus a condition precedent for the promulgation of the specific regulations contemplated in the remainder of the statute. Consequently, properly read in context of the statute as a whole, § 10.1-1307.05(B) imposes no independent duty on the Board to adopt any California standards or to promulgate any LEV or ZEV program or attendant final regulations and is thus conditionally mandatory at most.[61]

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[53] TM Delmarva Power v. NCP of Va., 263 Va. 116, 121 (2002) ("[W]hile the word . . . 'may' is primarily permissive in effect," it may be construed "as permissive or mandatory in accordance with the subject matter and context.").

[54] Wal-Mart Stores E., LP v. State Corp. Comm'n, 299 Va. 57, 71 (2020).

[55] *See also* Andrews v. Shepherd, 201 Va. 412, 414 (1959) (strictly construing the word "may" as permissive and the word "shall" as mandatory when the two words were used in close proximity to each other).

[56] *See* 2021 Va. Acts ch. 263 (Spec. Sess. I).

[57] *Sauder*, 289 Va. at 458.

[58] Last v. Virginia State Bd. of Med., 14 Va. App. 906, 911 (1992) (quoting *Andrews*, 201 Va. at 414.).

[59] Earley v. Landsidle, 257 Va. 365, 369 (1999) (acknowledging that statutes are not to be interpreted "by isolating particular words or phrases"); Barnett v. D.L. Bromwell, Inc., 6 Va. App. 30, 36 (1988) (presuming that specific terms are "not employed by the legislature in a vacuum" but are "used in the context of the functional purpose of the entire [statute]"). Accordingly, in context, "shall" will "not always impose a mandatory condition." Cirrito v. Cirrito, 44 Va. App. 287, 309 (2004) (citing Cook v. Radford Cmty. Hosp., Inc., 260 Va. 443, 447 (2000)).

[60] *See* Supervisors of Botetourt Cnty. v. Cahoon, 121 Va. 768, 780-82 (1917) (holding that the mandatory provisions of an act related to bonds were triggered only upon the county's exercise of discretion to issue the bonds under the preceding enabling provision).

[61] *Id.*; *cf. Berry*, 302 Va. at 137 (explaining that a statute providing that a locality "may" adopt a certain ordinance that "shall" be limited to specified restrictions "only grants localities discretion to adopt an ordinance, it does not require that a locality adopt any such ordinance at all"); 2002 Op. Va. Att'y Gen. 83, 84-85 (concluding that a statute simultaneously providing that a county "may" collect certain processing fees and that the fee "shall be used" in a specified manner implied that the collection was discretionary but, if fees were collected, then the specified use was mandatory); *accord* 2015 Op. Va. Att'y Gen. at 109.

The additional enactment clauses associated with the General Assembly's enactment of § 10.1-1307.05 are consistent with this reading.[62] Enactment clause 5, for example, provides the following:

> As part of any *update to the required regulations* to ensure compliance of the ZEV program with the federal Clean Air Act (42 U.S.C. § 7401 et. seq.), the Board shall adjust, *if necessary*, restrictions on the use of the proportional credits remaining in manufacturers' Virginia accounts in order to ensure that the percentage of ZEVs required to be delivered for sale under Virginia's ZEV program is approximately equivalent to, but does not exceed, the percentage required under California's ZEV program, taking into account only existing ZEV credit banks, any changes in restrictions on their use, and the effects of new regulatory requirements on the amount and timing of ZEVs required to be delivered for sale.[63]

Here, the reference to "the required regulations" simply refers back to the final regulations the Board must adopt in the event it first elects to adopt standards "pursuant to § 177 of the federal Clean Air Act." Adjustments under this provision thus will be warranted only to the extent the Board makes that election.[64]

In sum, the General Assembly knows how to express its intention and easily could have directed the Board to adopt standards identical to California's in accordance with § 177 of the Clean Air Act.[65] Instead, pursuant to the plain language of § 10.1-1307.05, the Board "may" adopt ACC II's LEV and ZEV standards, but because "'[m]ay' presupposes that the [agency] also 'may not[,]'" the Board is not required to do so.[66] Although the Board chose to adopt ACC I's model year standards, which are now set to expire at the end of 2024, it has not chosen to adopt ACC II's. Should the Board, in its discretion, choose to adopt ACC II's LEV and ZEV model year standards, then the Board "shall" comply with the otherwise conditionally mandatory provisions of the statute.

Conclusion

Accordingly, it is my opinion that the Board is not required to adopt the LEV and ZEV standards contained in California's Advanced Clean Cars Program II.

With kindest regards, I am,

Very truly yours,

Jason S. Miyares
Attorney General

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[62] Although uncodified, an enactment clause "is part of the body of the act" and courts "may rely on the [enactment] clause to determine the precise content of legislation." Kiser v. A.W. Chesterton Co., 285 Va. 12, 27 (2013) (alteration in original) (quoting Gilmore v. Landsidle, 252 Va. 388, 394 (1996)).

[63] 2021 Va. Acts ch. 263 (Spec. Sess. I) (emphasis added).

[64] This conclusion applies equally to the amendments required under the last sentence of § 10.1-1307.05(B).

[65] *See, e.g.*, 1999 Op. Va. Att'y Gen. 10, 11 ("When the General Assembly intends a statute to impose requirements, it knows how to express its intention."); 2003 Op. Va. Att'y Gen. 147, 149 ("When the General Assembly intends to enact a mandatory requirement, it, of course, knows how to express its intention.").

[66] *Wal-Mart Stores E., LP*, 299 Va. at 70.