The Honorable Ralph S. Northam  
Governor of Virginia  
Post Office Box 1475  
Richmond, Virginia 23218

Dear Governor Northam:

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

**Issue Presented**

You have asked whether the words “a dead body,” as used in § 18.2-323.02 of the Code of Virginia, include the remains of a human fetus that expired in utero.

**Background**

Through two provisions of the Code of Virginia, the General Assembly has criminalized certain conduct with respect to “a dead body” when such conduct is undertaken with malicious and specific intent. Section 18.2-323.02 provides:

> Any person who transports, secretes, conceals or alters a dead body, as defined in § 32.1-249, with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death is guilty of a Class 6 felony.\(^1\)

Section 32.1-249(1), in turn, defines “dead body” as follows:

> “Dead body” means a human body or such parts of such human body from the condition of which it reasonably may be concluded that death recently occurred.\(^2\)

---

\(^1\) VA. CODE ANN. § 18.2-323.02 (2015).

Applicable Law and Discussion

As explained above, your question turns on whether a fetus constitutes “a human body” as used in § 32.1-249(1). The term “a human body” is not defined in § 32.1-249 or anywhere else in the Code of Virginia. Nor has the Supreme Court of Virginia previously construed the term “a human body,” either as used in § 32.1-249 or elsewhere in the Code.

Your question thus involves a matter of statutory construction, where the “central focus is to ascertain and give effect to the intention of the General Assembly.” Legislative intent is determined “from the words used in the statute,” and the text is “to be given [its] ordinary meaning unless it is apparent that the legislative intent is otherwise.”

There is considerable reason to doubt that the ordinary meaning of the words “a human body,” standing alone, would be understood as including a fetus. There is, however, no need to answer that question here, because it is “a cardinal rule of statutory construction . . . that a statute be construed from its four corners and not by singling out a particular word or phrase.”

The statutory context makes clear the legislature did not intend for the definition of “dead body” contained in § 32.1-249(1) to include a fetus. At least three different sections of the Code of Virginia—including another definition contained in § 32.1-249 itself—specifically distinguish between a dead body and a fetus by providing that they apply to “a dead body or fetus” (emphasis added). For example, § 32.1-249(4) defines “[f]inal disposition” as “the burial, interment, cremation, removal from the Commonwealth or other authorized disposition of a dead body or fetus.” Another provision of the same statutory chapter governs transfers in or out of the Commonwealth (as well as disinterments or reinterments) and contains three separate uses of “a dead body or fetus” and three separate uses of “the body or fetus.” The third provision imposes record-keeping obligations on funeral directors, embalmers, and others “in charge of final disposition of a dead body or fetus.” These provisions demonstrate that the Code of Virginia distinguishes between a dead body and a fetus and show that the General Assembly knows how to indicate that a given statutory provision applies to both. It is therefore telling that the provision at issue here—§ 18.2-323.02—refers only to “a dead body” and omits the words “or fetus.”

---

4 Id. (internal quotation marks and citation omitted).
7 Section 32.1-249(4) (emphasis added).
8 Section 32.1-265(A), (C), & (E) (2015); see also id. at subsection (D) (referring to “dead bodies or fetuses”).
9 Section 32.1-274(C) (2015) (emphasis added).
11 See Russello v. United States, 464 U.S. 16, 23 (1983) (stating that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (internal quotation marks and citation omitted).
It is especially appropriate to consider these statutes in pari materia because "‘they relate to . . . the same subject or to closely connected subjects or objects.’”\footnote{12} All three of the statutory provisions listed above are contained in the same statutory chapter as § 32.1-249(1)’s definition of “dead body.” The chapter in question is Chapter 7 (Vital Records) of Title 32.1 (Health). Section 32.1-249 is the first section of that Chapter, and its first words are: “As used in this chapter . . .’” So if § 32.1-249(1)’s definition of “a dead body” already included a fetus, every use of “a dead body or fetus” throughout that chapter would be superfluous. “[S]tatutory language,” however, should be interpreted “so as to give effect to every word,”\footnote{13} and construing § 32.1-249(1)’s general definition of “a dead body” as already encompassing a fetus would violate the “rule[ ] of statutory construction that discourage[s] any interpretation of a statute that would render any part of it useless [or] redundant.”\footnote{14}

Other provisions of § 32.1-249 reinforce the same conclusion. The very next statutory subsection defines the term “fetal death,” and uses the words “product of human conception” rather than “human body.”\footnote{15} “When the General Assembly uses two different terms in the same act, it is presumed to mean two different things,”\footnote{16} which suggests that “a human body” and a “product of human conception” are not the same thing. Another provision of § 32.1-249—the definition of “vital records”—specifically distinguishes between “deaths [and] fetal deaths,”\footnote{17} which reinforces the same distinction.

The relevant statutory histories also support the conclusion that a fetus that expired in utero is not encompassed within either § 32.1-249(1) (the definition of a “dead body”) or § 18.2-323.02 (the underlying criminal prohibition). The definitions now contained in § 32.1-249 were first enacted in 1960 as Senate Bill 249.\footnote{18} Although the list of defined terms (and their order) was somewhat different than in the current Code of Virginia, the original 1960 enactment already included all of the essential features listed above, including (a) a definition of “final disposition” that referred separately to “a dead body or fetus”;\footnote{19} (b) separate definitions for “dead body” and “fetal death”;\footnote{20} (c) two provisions that used the words “product of human conception” rather than “human body”;\footnote{21} and (d) a provision that specifically distinguished between “death [and] fetal death[s].”\footnote{22} The same 1960 legislation also contained other

\footnote{12} Lucy v. Cty. of Albemarle, 258 Va. 118, 129, 516 S.E.2d 480, 485 (1999) (“[T]he reason for considering statutes in pari materia is that this permits any apparent inconsistencies [to] be ironed out whenever that is possible.”) (internal quotation marks and citation omitted).
\footnote{14} Id.
\footnote{15} Section 32.1-249(2); accord § 32.1-249(2)(B) (also using “product of human conception” rather than “human body” for purposes of defining “spontaneous fetal death”); § 32.1-249(6) (same for purposes of defining “live birth”).
\footnote{17} Section 32.1-249(10); accord § 32.1-265(D) (drawing same distinction); § 32.1-274(D) (same); see also Va. S. Ct. R. 2:803(9) (same).
\footnote{19} Id. § 32-353.4(h).
\footnote{20} Id. § 32-353.4(f) & (g).
\footnote{21} Id. § 32-353.4(e) & (f).
\footnote{22} Id. § 32-353.4(a).
provisions distinguishing between “a dead body or fetus” and referring separately to “death, or fetal death.”

In contrast, the criminal statute at issue (§ 18.2-323.02) was enacted in 2007. At that point, Virginia law in general—and the Health title in particular—had been distinguishing between a dead body and a fetus (and between a human body and a product of human conception) for nearly 50 years. For that reason as well, the legislature’s decision in 2007 to use the words “a dead body, as defined in § 32.1-249” is most logically understood as a considered and deliberate choice.

For these reasons, it is my view that the best reading of § 18.2-323.02 is that it does not apply to the remains of a human fetus that expired in utero. To the extent any doubt remained, however, the rule of lenity also would counsel in favor of the same conclusion. It is important to reiterate that the rule of lenity applies at the end of the process of statutory construction rather than the beginning and that it is properly used to resolve ambiguity rather than to create it in the first place. That said, § 18.2-323.02 is a criminal law that imposes significant penalties. The statute thus must be “strictly construed,” with “any reasonable doubt concerning the statute’s construction” being resolved against expanded criminal liability.

I am aware that a recent brief filed by this Office urged a different view about the proper interpretation of § 18.2-323.02 and that that case resulted in an unpublished and non-precedential opinion upholding a criminal conviction. I have concluded, however, that the position set forth in that brief was incorrect and did not serve the ends of justice. Although that particular case is now over because the defendant did not seek further review in the Supreme Court of Virginia, this opinion sets forth my official view about how § 18.2-323.02 should be applied going forward.

---

23. Id. § 32-353.22(a); § 32-353.22(e).
24. Id. § 32-353.12(b); accord id. § 32-353.13 (“death, and fetal death”).
26. Section 18.2-323.02.
27. Subsequent unsuccessful attempts to amend the criminal code to expressly cover certain actions involving “remains” following a “fetal death” also support this interpretation. See, e.g., S.B. 962, 2009 Reg. Sess. (unsuccessful proposal that would have made it a Class 1 misdemeanor to “remove, destroy, or otherwise dispose of any remains” when “a fetal death occur[red] without medical attendance”); see also generally Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980) (“In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly.”) (Emphasis added).
28. See, e.g., Johnson v. Commonwealth, 292 Va. 738, 743 n.2, 793 S.E.2d 321, 324 n.2 (2016) (stating that “the rule of lenity . . . does not apply when the statute is unambiguous”); Fitzgerald v. Loudoun Cty. Sherriff’s Office, 289 Va. 499, 508 n.3, 771 S.E.2d 858, 862 n.3 (2015) (stating that “the rule of lenity serves only to resolve genuine ambiguities and does not abrogate the well-recognized canon that a statute should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language’” (alteration, and citations omitted)).
Conclusion

For the reasons stated above, it is my opinion that the words “a dead body,” as used in Virginia Code § 18.2-323.02, do not include the remains of a human fetus that expired in utero.

With kindest regards, I am,

Very truly yours,

Mark R. Herring
Attorney General