STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL August 1, 2022	No. I22-003 (R20-002) Re: A.R.S. § 38-431.01(H) and Responses by Individual Members of a Public Body

To: John Kavanagh, Representative
Arizona House of Representatives

Question Presented

Do rules or practices of a public body that do not allow individual members of the public body to respond to criticism made during a call to the public, ask staff to review a matter raised during a call to the public, or put a matter raised during a call to the public on a future agenda violate A.R.S. § 38-431.01(H)?

Summary Answer

Yes, if a public body were to enact a rule or practice prohibiting individual members of the public body from (1) responding to criticism made by those who have addressed the public body during a call to the public, (2) asking staff to review a matter raised during a call to the public, or (3) putting a matter raised during a call to the public on a future agenda, such rule or practice would violate A.R.S. § 38-431.01(H). Thus, a public body that has enacted such a rule or practice should rescind or modify it to make it consistent with Arizona law.

Background

Arizona enacted its Open Meeting Law ("OML") in 1962 to ensure that Arizona public bodies conduct their business in open, public meetings and to eliminate secret decision-making. *See* 1962 Ariz. Sess. Laws ch. 138, § 1 (2d Reg. Sess.) ("It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly."). The Legislature has since amended the OML several times. *See, e.g.*, Ariz. Att'y Gen. Op. 75-007 (detailed discussion of the early history of the OML through 1975); 2000 Ariz. Sess. Laws, ch. 358, § 1 (2d Reg. Sess.) (comprehensive amendments).

Relevant here is A.R.S. § 38-431.01(H), the text of which was added by the 2000 amendments and which provides the following:

> A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

This subsection is comprised of three operative parts. First, "[a] public body may" decide whether or not to hold a call to the public at a duly noticed public meeting (the "Call to the Public Provision"). A.R.S. § 38-431.01(H). Second, after a call to the public has concluded, "individual members of the public body may" respond to a member of the public in one of three ways (the "Response Provision"). *Id.* Finally, when a member of the public brings up a matter that is not listed on the agenda, "members of the public body shall not" discuss or take legal action on that matter unless the matter is listed on the agenda (the "Agenda Provision"). *Id.* At

issue here is the Response Provision and whether a public body is permitted to prohibit individual members of the public body from responding after a call to the public in one of the three ways specified in the statute.

Analysis

Statutory interpretation seeks "to effectuate the legislature's intent," *SolarCity Corp. v. Ariz. Dept. of Revenue*, 243 Ariz. 477, 480 ¶ 8 (2018), and the plain language of a statute is always the starting point, *see id.* ("The best indicator of [legislative] intent is the statute's plain language."); *Woyton v. Ward*, 247 Ariz. 529, 532 ¶ 8 (App. 2019) ("When interpreting a statute, we begin with its plain language."). In construing a specific provision, the words of a statute should be read in context with the statute as a whole to determine their meaning. *See Glazer v. State*, 244 Ariz. 612, 614 ¶ 10 (2018). Any interpretation should also avoid rendering "any clause, sentence or word 'superfluous, void, contradictory or insignificant.'" *State v. Cid*, 181 Ariz. 496, 499–500 (App. 1995) (citations omitted). Further, the OML instructs that "any person or entity charged with the interpretations of [Arizona's OML, A.R.S. § 38-431, et seq.,] shall construe [the OML] in favor of open and public meetings." A.R.S. § 38-431.09(A).

Both the Call to the Public Provision and the Response Provision use the term "may," while the Agenda Provision uses the term "shall not." *See* A.R.S. § 38-431.01(H). Arizona courts have generally interpreted the word "may" as permissive and "shall" as mandatory. *See Walter v. Wilkinson*, 198 Ariz. 431, 432 ¶ 7 (App. 2000) (The "use of the word 'may' generally indicates permissive intent . . . while 'shall' generally indicates a mandatory provision."); *but see HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364 ¶ 11 (App. 2001) (explaining that while the "ordinary meaning of 'shall' in a statute is to impose a mandatory provision . . . it may be deemed directory when the legislative purpose can best be carried out by

such construction."). When both "may" and "shall" are used "in the same paragraph of a statute, [courts] infer that the Legislature acknowledged the difference and intended each word to carry its ordinary meaning." *HCZ Const., Inc.*, 199 Ariz. at 365 ¶ 15; *see also City of Chandler v. Ariz. Dep't of Transp.*, 216 Ariz. 435, 438–39 ¶ 10 (App. 2007) (presuming "that the Legislature was aware of the difference between ['may' and 'shall'] and meant each to carry its ordinary meaning").

In the context of A.R.S. § 38-431.01(H), nothing indicates that the Legislature intended to give the terms "may" and "shall" anything other than their ordinary meanings. For example, interpreting "shall not" in the Agenda Provision as mandatory rather than discretionary is consistent with other provisions of the OML. *Compare* § A.R.S. 38-431.01(H) ("[M]embers of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.") *with* A.R.S. § 38-431.02(G), (H) (specific matters must be listed on agendas before a public body can discuss or take legal action). And interpreting the Call to the Public Provision to be discretionary rather than mandatory is not only consistent with the ordinary use of "may" in statutory interpretation, but it is also consistent with long-term guidance from the Attorney General's Office issued before the Call to the Public Provision was codified. *See* Ariz. Att'y Gen. Op. I99-006 ("[F]or more than 17 years, the Attorney General's Office has recognized that a 'call to the public' may be used if the members of the public body properly limit their responses to any item raised."). Thus, where the Response Provision states that "individual members of the public body *may*" react in one of three ways, the statute is best read as giving individual members of the public body discretion to respond.[1]

[1] This interpretation is also supported by the Legislature's use of the term "may" in other provisions of the OML. *See Qasimyar v. Maricopa County*, 250 Ariz. 580, 587 ¶ 19 (App. 2021) ("[A] word or phrase used in related

But that conclusion does not fully answer the inquiry here. If the public body has discretion whether or not to hold a call to the public in the first place, does the public body similarly have discretion to prohibit members from responding? The answer is also found in the statutory language itself.

The Call to the Public Provision grants discretion to hold a call to the public to a "public body," while the Response Provision grants discretion to respond to "individual members of the public body." A.R.S. § 38-431.01(H). We presume that the Legislature fully recognized the difference between a "public body" and its "individual members" and purposefully differentiated between the two when enacting this statute. *See State v. McDermott*, 208 Ariz. 332, 334–35 (App. 2004) ("[W]e . . . presume that the legislature does not include statutory 'provisions which are redundant, void, inert, trivial, superfluous, or contradictory.'").

Therefore, the statutory language in the Response Provision permits *individual members* to make the decision whether they will react to public comments in one of the three specified manners. A public body cannot override the Legislature's purposeful decision to grant each individual member of a public body with discretion to decide whether and how to respond—within the statutory constraints—to a public comment made during a call to the public. Allowing a public body to do so would effectively nullify the statutory language granting discretion to *individual members* and instead allow a *public body* to make the decision whether to respond to public comment, including by prospectively prohibiting a response in any circumstance. Thus, a public body that has enacted a rule or practice prohibiting individual members from responding

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statutes should be construed to bear the same meaning throughout."). For example, A.R.S. § 38-431.03(A) states that a public body "may hold an executive session" under nine enumerated circumstances. Reading "may" as mandatory in that provision would create the absurd result of requiring public bodies to hold an executive session any time any matter falls within one of the nine enumerated circumstances, rather than allowing public bodies discretion to utilize an executive session. This would result in public bodies discussing matters outside of public view far more often, which would contravene the purpose of the OML.

in a manner described in A.R.S. § 38-431.01(H) must rescind or modify the rule or practice to make it consistent with Arizona law.

Notwithstanding this conclusion, an individual member's ability to respond to public comment is not unlimited. The Legislature provided individual members the discretion to do so only at the conclusion of a call to the public and not after each individual speaker. A.R.S. § 38-431.01(H). Moreover, the ability to respond is limited only to (1) responding to criticism, (2) asking staff to review a matter, and (3) asking for a matter to be added to a future agenda. *Id.* And the Response Provision does not allow the public body to engage in a discussion or take legal action unless the matter is specifically listed on the agenda.[2] *Id.* Ultimately, however, individual members of a public body must have the opportunity to determine for themselves whether or not they provide a limited response to comments made by members of the public at the conclusion of the call to the public.

Conclusion

Because the Legislature expressly provided that individual members of a public body have the discretion to provide a limited response at the conclusion of a call to the public, a rule or practice prohibiting individual members of the public body from providing a limited response would violate A.R.S. § 38-431.01(H). Thus, a public body that has enacted such a rule or practice would need to rescind or modify it to render it consistent with Arizona law.

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[2] It is also likely that a public body could require individual members to follow content- and viewpoint-neutral rules of decorum when responding to public comments.