**CV 2013-011198**

This is a case in which plaintiff Usama Abujbarah contests his removal as the Cave Creek Town Manager. Following the denial of their cross-motion for summary judgment, the defendants filed a motion for partial reconsideration.[[1]](#footnote-1) That motion presents a straightforward question of statutory construction, namely, does the term “members of a public body,” as it appears in the Arizona Open Meetings Law, apply to persons who are not members (i.e., persons who have been elected but have not assumed office, or, as the Abujbarah response memorandum identifies them, “members-elect”). The court has concluded that “members” in that law is unambiguous, no expression of the Arizona Legislature requires a contrary conclusion, and therefore, that law does not apply to persons who are not members of a public body, including members-elect. This conclusion merely reflects the plain language of the Open Meetings Law, and if that law, as written, leaves open the potential for abuse, it is for the Legislature and not this court to undertake any recrafting.[[2]](#footnote-2)

Section 38-431.01(A) of the Open Meetings Law prohibits a “public body” from taking any “legal action” other than “during a public meeting.” Section 38-431(4) defines a meeting to include the “gathering” of “a quorum of members of a public body” at which they “discuss” or “deliberat[e]” about “tak[ing] legal action.” The Arizona Attorney General has issued opinions that, although not controlling authority, offer well-reasoned guidance: they explain that it is not permissible to maneuver around the Open Meetings Law by meeting informally or socially to exchange views about issues that require discussion in public, by having less than a quorum meet in a series of gatherings at which such issues are discussed, or by communicating through technological means (e.g., texting or e-mail) or intermediaries. See Op. Ariz. Atty. Gen. Nos. I79-4 (Jan. 9, 1979), I07-013 (Dec. 24, 2007). Any action taken by a public body that violates the Open Meetings Law is “null and void.” A.R.S. 38-431.05(A).[[3]](#footnote-3)

At a public meeting on June 10, 2013, the Cave Creek Town Council voted 4-3 to remove Abujbarah as the Town Manager. Abujbarah maintains that his removal violated the Open Meetings Law in two ways. The motion for reconsideration, and thus this ruling, concern one of those grounds, namely, the vote was purportedly predetermined, having been the subject of private discussions preceding the June 10 meeting.[[4]](#footnote-4) Those said to have participated in the discussions, either directly or through an intermediary, were the four who voted in favor of removing Abujbarah: defendants Trenk, Monachino, Durkin, and Spitzer. Abujbarah maintains that the prohibited discussions occurred after the four were elected and before they assumed office.[[5]](#footnote-5)

The Cave Creek Town Council is a public body, and thus, it is required to comply with the Open Meetings Law. A.R.S. §38-431(6). Trenk, Monachino, Durkin, and Spitzer each deny having participated in any private discussions with one another regarding Abujbarah’s employment as Town Manager before they voted to remove him. For purposes of this ruling, however, it is not necessary to decide whether they did. Even if one were to assume that, after the four were elected to the Town Council but before they assumed office, they did discuss terminating Abujbarah’s employment, the Open Meetings Law was not violated because those discussions did not take place among “members of a public body.”[[6]](#footnote-6)

A court’s first obligation when interpreting a statute “is to find and give effect to legislative intent.” *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, 329-30, ¶11, 26 P.3d 510, 512-13 (2001) (citation and internal quotation marks omitted). The “best and most reliable” indication of that intent is the statute’s plain language. *State v. Williams*, 175 Ariz. 98, 100, 854P.2d 131, 133 (1993) (citation and internal quotation marks omitted). Thus, “[t]o determine intent, [courts] look first at the language of the statute and give the words used their ordinary meaning.” *Arizona Dep’t of Rev. v. Rally,* 204 Ariz. 509, 512, ¶14, 65 P.3d 458, 461 (App. 2003); see also A.R.S. §1-213 ("Words and phrases [in statutes] shall be construed according to common and approved use of the language").[[7]](#footnote-7)

When determining what the ordinary meaning is, courts frequently rely on established dictionaries. *E.g.*, *Arpaio v. Steinle,* 201 Ariz. 353, 355, ¶¶5-6, 35 P.3d 114, 116 (App. 2001); *State v. Mahoney,* 193 Ariz. 566, 568, ¶12, 975 P.2d 156, 158 (App. 1999); *see also* *Rodgers v. Anthem Community Council*, No. 1-CA-CV 10-0539, 2011 WL 2586374, at \*2, ¶9 n.6 (Ariz. App. June 30, 2011) (relying on dictionary to define “member”). No dictionary has been cited to the court, nor has the court’s independent research uncovered one, that would allow “members” to be construed here in a way that assists Abujbarah’s argument. Instead, “members” are defined as those who belong to a group and not those whose membership in the group is forthcoming. For example, *Webster’s Third New International Dictionary of the English Language* defines “member” as “one of the individuals composing a society, community, association, or other group: as . . . a person having membership in any of numerous legislative bodies,” and *The American Heritage Dictionary of the English Language* defines “member” as “one that belongs to a group or organization.”[[8]](#footnote-8)

That said, determining the plain meaning of a statutory term is more than an exercise in looking up dictionary definitions. *See e.g., Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, ¶12, 266 P.3d 349, 352 (2011) (recognizing that “[w]e do not . . . consider words in isolation when interpreting statutes”); *see also Yates v. U.S.*, 135 S. Ct. 1074, 1081-82 (2015) (“Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words”). Thus, treating with the Legislature’s use of the term “members” elsewhere in the Open Meetings Law is appropriate. *Estate of Braden*, 228 Ariz. at 326, ¶13, 266 P.3d at 352 (“a statutory term is interpreted in context of the accompanying words”). And, absent a clear expression of contrary intent that is not evident here, words that appear more than once in a legislative act should be ascribed the same meaning throughout. *Obregon v. Industrial Comm’n*, 217 Ariz. 612, 616, ¶21, 77 P.3d 873, 877 (App. 2008) ("It is a normal rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning" (citations and internal quotation marks omitted)); *see also Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (“The normal rule of statutory construction assumes that identical words used in different parts of the same act,” addressing the same basic issue, “are intended to have the same meaning”) (citations and internal quotation marks omitted)).

Here, the ordinary meaning of “members” accords with its uses in the Open Meetings Law. That law permits public bodies to meet in private (i.e., in executive session) for defined purposes, but only upon “a public majority vote of the members.” A.R.S. §38-431.03(A) (emphasis added). Discussions that occur during executive sessions must “be kept confidential except from . . . [m]embers of the public body” (and others, not relevant here, that the statute identifies). A.R.S. §38-431.03(B)(1) (emphasis added). Moreover, “members of the public body” who violate the Open Meetings Law may be subject to a civil penalty and removal from office. A.R.S. §38-431.07; see also Op. Ariz. Atty. Gen. No. I79-4 (Jan. 9, 1979). Elsewhere, the Open Meetings Law uses the terms “member[]” and “public officer” synonymously [A.R.S. §38-431.07(A)], and the Legislature has defined “public officer” as one who is able to exercise “the powers and duties” of the office [A.R.S. §38-101(3)].

Given the manner in which the Open Meetings Law uses the term “members,” it is not reasonably conceivable that the Legislature considered “members of a public body” to include both those who had assumed office and those waiting to do so. Otherwise, the Open Meetings Law would, among other things, permit those without any power, authority, or duties of any office not only to attend executive sessions, but to vote for holding them, which, if they did, could expose them to criminal prosecution for performing the act of a public officer without taking the oath of office [see A.R.S. §38-442(A)]. Thus, if both members and members-elect are within the Open Meetings Law, then that law, at once, permits members-elect to perform at least some acts associated with the offices to which they were elected while subjecting them to criminal prosecution for doing so. In short, the term “members of a public body,” as it is used throughout the Open Meetings Law, cannot include members-elect without creating the potential for absurd outcomes. And, statutes are to be interpreted in a way that avoids absurdities. *Sharpe v. Arizona Health Care Cost Containment Sys.,* 220 Ariz. 488, 497, ¶30, 207 P.3d 741, 750 (App. 2009) ("One of the primary principles of statutory interpretation is not to construe statutes to give an absurd result"); *P&P Mehta LLC v. Jones,* 211 Ariz. 505, 507, ¶11, 123 P.3d 1142, 1144 (App. 2005) ("A standard interpretive directive to courts is to construe statutes to reach sensible results"); *Goddard v. Superior Court,* 191 Ariz. 402, 404, ¶8, 942 P.2d 831, 835 (App. 1997) (courts decline statutory interpretations that are contrary to common sense).

The plain meaning of “members” notwithstanding (and, presumably, to avoid what that plain meaning compels), the Abujbarah response memorandum (at 4) would have the court look to the Open Meeting Law’s context, language, subject matter, historical background, effects and consequences, and spirit and purpose. Those factors, however, warrant consideration only when the “the plain meaning of the [statutory] language is not clear.” *State ex rel. Winkelman v. Arizona Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 241, ¶24, 229 P.3d 242, 253 (2010); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in anycase of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, [the analysis] ends there as well”) (citations and internal quotation marks omitted)); *Aros v. Beneficial Ariz., Inc.,* 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999) (“If a statute is clear and unambiguous, we apply it without using other means of statutory construction”). When, as here, a statute is unambiguous, courts “do not resort to legislative history,” “use legal legerdemain,” or rely on other factors “to cloud a statutory text that is clear” as a means to escape the “usual and commonly understood meaning” of a statutory expression. *Ratzlaff v. U.S.*, 510 U.S. 135, 147-48 (1994); *Kilpatrick v. Superior Court*, 105 Ariz. 413, 421, 466 P.2d 18, 26 (1970).

Fairly considered, the Abujbarah response is less a legal argument and more a policy argument that urges what amounts to “an enlargement of the statute by the court, so that what was omitted” (presumably “members-elect” or similar language) “may be included within its scope. [But,] [t]o supply omissions transcends the judicial function.” *Iselin v. United States*, 270 U.S. 245, 251 (1926); *Padilla v. Industrial Comm’n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (similar). In other words, "where the language of a statute is clear and unambiguous, courts are not warranted in reading into the law words the legislature did not choose to include.” *Home Builders Ass'n v. City of Scottsdale,* 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (rejecting an interpretation that “would have [the Court] read an absent word into the statute” because such an interpretation “would result not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court” (second and third alterations in original) (citation and internal quotation marks omitted)).

To be sure, concluding that the Open Meetings Law applies only to those who have assumed their offices creates the opportunity for mischief, or even abuse, as Abujbarah has alleged here, where, before taking office, nonincumbents who would later become a quorum of the public body to which they had been elected purportedly deliberated in private about legal action they would take once they were sworn into office. But identifying a problem that a statute leaves unaddressed is not license for a court to correct it by, in effect, assuming the role of the legislature and rewriting the statute. *New Sun Bus. Park, LLC v. Yuma County*, 221 Ariz. 43, 47, ¶16, 209 P.3d 179, 183 (App. 2009) (recognizing that a court is “not at liberty to rewrite [a] statute under the guise of judicial interpretation” (citation and internal quotation marks omitted)); *see also Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach [to interpreting a statute] and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted”).

*Hough v. Stembridge*, 278 So.2d 288 (Fla. App. 1973), on which the Abujbarah response (at 4-5) principally relies, does not compel a different result. Indeed, *Hough* is significant far less for its holding than for what it reveals about Florida’s willingness to allow lawmaking by judges. In *Hough*, both the trial and appellate courts discerned that, read literally, Florida’s Sunshine Law, which prohibits discussions of foreseeable government action unless they take place in public meetings, did not apply to discussions undertaken by “members-elect.” Both of those Florida courts decided that what they perceived as an anomaly in that law was sufficient to, in effect, permit the rewriting of the statute consistent with what they thought the Florida legislature meant to say. Thus, they held that the law applied to “members-elect.” 278 So.2d at 289. By the time *Hough* was decided, that approach to the Sunshine Law had become accepted in Florida where, to a substantial extent, the law’s history reflects the acquiescence of the Florida legislature to judicial rulings establishing the law’s reach. Cheryl Cooper, *“Beyond Debatable Limits”: A Case for Legislative Clarification of Florida’s Sunshine Law*, 41 Stetson L. Rev. 305, 306-07 (2012) (“[T]he fact remains that Florida’s Sunshine Law has been shaped more by judicial action than by legislative action; scores of opinions have addressed the Sunshine Law . . . [that] over the course of time, have established boundaries around open-meetings requirements”).

Unlike what has occurred in the Florida courts, the Arizona Supreme Court has declined to broaden the scope of the Open Meetings Law when given the opportunity, choosing instead to interpret it literally despite the express declaration that it should be construed "in favor of open and public meetings" [A.R.S. § 38-431.09] and leaving it for the Legislature to resolve any problems that a literal interpretation fails to address. For example, in *Washington Sch. Dist. No. 6 v. Superior Court*, the court defined "public body" narrowly, thus excluding all state advisory committees from the law’s operation. 112 Ariz. 335, 338, 541 P.2d 1137, 1140 (1975). Following that decision, the Legislature amended the statute by redefining "public body" to include such committees. Similarly, in *Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals*, the court adopted a narrow interpretation of “judicial proceeding.” 113 Ariz. 545, 547-48, 558 P.2d 697, 699-700 (1976). In response, the Legislature widened the Open Meeting Laws’ reach to include meetings of administrative agencies.

Contrary to what the Abujbarah response suggests (at 5), the directive to construe the Open Meetings Law broadly in favor of open meetings is not license for a court to assume that the Legislature must have intended to include members-elect within the scope of that law, and then issue a ruling as if the Legislature had done so. The question for the court is not what the Legislature may have wanted, but what it enacted. *See Padilla*, 113 Ariz. at 106, 546 P.2d at 1137 (recognizing the presumption “that what the Legislature means, it will say”); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). “Courts are not at liberty to impose their views of the way things ought to be simply because that’s what must have been intended, otherwise no statute, . . . no matter how explicit, could be saved from judicial tinkering.” *Kilpatrick v. Superior Court*, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033-34 (2014) (“[J]ust because the text [of a statute] as written creates an apparent anomaly as to some subject it does not address” does not give courts a “roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress ‘must have intended’ something broader”).

In short, the result here merely respects “the universal rule that courts will not enlarge, stretch, expand, or extend a statute to matters not falling within its express provisions.” *In re Martin M.*, 223 Ariz. 244, 246, ¶7, 221 P.3d 1058, 1060 (App. 2009) (citations and internal quotation marks omitted). No fair notion of democratic government permits a contrary conclusion. See e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) (“[N]o one will gain-say that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature”); see alsoAntonin Scalia, *A Matter Of Interpretation: Federal Courts and the Law* 16-23 (1997) (“Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former”: to conclude otherwise “is simply incompatible with democratic government, or indeed, even with fair government”).

**IT IS ORDERED:**

1. The defendants’ motion for partial reconsideration is granted.

2. The defendants’ cross-motion for summary judgment is granted in part. Plaintiff’s claim is denied to the extent that it is based on a violation of A.R.S. §38-431.01 having been committed by discussions that may have taken place among persons who were newly-elected to the Cave Creek Town Council before they assumed their offices.

1. The defendants are the Town of Cave Creek, Vincent Francia, Adam Trenk, Mike Durkin, Reg Monachino, Charlie Spitzer, Ernie Bunch, and Thomas McGuire. When Abujbarah began this action, Francia was the mayor of the Town, and the others were members of the Town Council. [↑](#footnote-ref-1)
2. In reaching its conclusion, the court has considered the motion, the response filed on Abujbarah’s behalf, and the relevant sections of the memoranda and accompanying statements of fact that the parties submitted in support of or opposition to defendants’ summary judgment motion. [↑](#footnote-ref-2)
3. An action that violates the Open Meetings Law may be corrected if ratified as prescribed by section 38-431.05(B). Among other requirements, the ratification must occur within 30 days of the violation. *Id*. That provision of the Open Meetings Law has no applicability here where more than 30 days have passed since the meeting at which Abujbarah was removed from his position. [↑](#footnote-ref-3)
4. Abujbarah also urges that the vote to remove him was ineffective because the published notice and agenda for the June 10 meeting failed to comply with the requirements of the Open Meetings Law, and because the motion that preceded the vote to remove him was procedurally defective. Nothing said here is intended to suggest anything about the merits of either of those grounds. [↑](#footnote-ref-4)
5. The Town Council consists of seven members, a majority of whom “constitute a quorum for transacting business.” Cave Creek Town Code §§30.01, 30.37. Trenk was elected to the Town Council on March 12, 2013. Durkin, Monachino, and Spitzer were elected in a runoff election on May 23, 2013. All four were sworn into office on June 3. At the time of their elections, none of them was an incumbent council member. [↑](#footnote-ref-5)
6. There is no allegation here, much less evidence, that any of the four engaged in private discussions about Abujbarah’s removal after being sworn into office on June 3 and before the vote on June 10. [↑](#footnote-ref-6)
7. When courts remain faithful to the plain language of a statute, those responsible for crafting and passing a law can be assured that an ordinary word used in an ordinary way will be “given a predictable meaning.” *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting). And, those whom the statute affects can govern their behavior accordingly without fear that the Legislature has hidden an elephant in a mouse hole. Thus, only “a clear indication of legislative intent to the contrary” will warrant departure from the plain meaning rule. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994); *see also Public Citizens v. Dep’t of Justice*, 491 U.S. 440, 417 (1989) (courts are “bound” to apply statutes as they are written unless it is “so clear as to be obvious to most anyone” that the plain meaning allows a result that Congress could have never intended) (Kennedy, J. concurring)). [↑](#footnote-ref-7)
8. *Webster’s Third New International Dictionary of the English Language* 1408(1986); *The American Heritage Dictionary of the English Language* 1097 (5th ed. 2011). [↑](#footnote-ref-8)