



June 19, 2020

Sent Via Electronic Mail to: mayor.gallego@phoenix.gov

Mayor Kate Gallego
City Phoenix
200 W. Washington Street
Phoenix, AZ 85003

Re: Proclamations Concerning Face Masks

Dear Mayor Gallego:

The Arizona Center for Disability Law (ACDL) is a non-profit law firm and the designated protection and advocacy agency for Arizona. We assist Arizonans with disabilities to promote and protect their legal rights to independence, justice, and equality.

Based on news reports, your city is planning to issue a proclamation concerning the required use of face masks¹ in your city, to reduce community spread of the coronavirus (COVID-19). While ACDL supports these efforts to ensure that Arizona communities are protected from COVID-19 as much as possible, the requirements of the Americans with Disabilities Act (ADA) apply to these actions by local government.

We write to request that any proclamation or other declaration of emergency policy issued for the City of Phoenix include a specific exception for people with disabilities who are unable to wear face masks due to their disabilities.

There are many reasons why a person with a disability may not be able to wear a face mask. Just a few examples include:

- people living with disabilities such as chronic obstructive pulmonary disease, cystic fibrosis, asthma, or other disabilities that impact the ability to breathe;
- people living with disabilities that interfere with the ability to independently remove a face mask;
- people living with developmental disabilities or other cognitive disabilities who may be unable to tolerate wearing a face mask; and

¹ For purposes of this letter, “face mask” encompasses any kind of face covering.

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- people living with disabilities such as severe anxiety or post-traumatic stress disorder who may experience adverse reactions to wearing a face mask.

Both law and public health guidance support this request.

Specifically, Title II of the ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Public entities” are defined by the ADA to include any state or local government. 42 U.S.C. § 12131(1). Title II’s use of “program, services and activities” is interpreted broadly and includes all operations of local government, to include emergency proclamations.²

Public entities must provide reasonable modifications to otherwise generally applicable policies where necessary to avoid discrimination against people with disabilities. 28 C.F.R. § 35.130(b)(7)(i).

Further, the Centers for Disease Control and Prevention advises that any person who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the face mask without assistance should not wear a face mask. See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-wear-cloth-face-coverings.html> (last visited June 18, 2020).

Proclamations can be written in a manner that protect the public without interfering with the rights of people with disabilities. For example, the City of Tucson issued a proclamation clearly noting this exception on June 18, 2020: “Exceptions: A Face Covering is not required under the following circumstances:...(3) for any person who cannot wear a Face Covering because of a medical condition, mental health condition or developmental disability, or who is unable to remove the Face Covering without assistance. A person who cannot wear a Face Covering because of a medical condition is not required to produce medical documentation of the condition, provided that an employer may require such documentation from an employee in accordance with state and federal law.” See City of Tucson, Arizona, Proclamation of the Mayor Declaring a Continuing Emergency or Local Emergency Related to COVID-19 and Declaring Regulations and Advisories Necessary for Public Safety and Protection of Life and to Mitigate the Spread of COVID-19, https://www.tucsonaz.gov/files/pdfs/FINAL_Proc_6.18.20_Signed.pdf (last visited June 18, 2020).

ACDL requests that any forthcoming proclamations concerning the required use of face masks in the City of Phoenix provide a similarly clear exception for people with disabilities who are unable to wear a face mask due to their disability, to ensure they have access to goods and services without facing citation. If a proclamation has already been issued and does not include

² Any actions that are within the “normal function of a governmental entity” are covered under Title II of the ADA. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076-1077 (9th Cir. 2002), cert. denied 539 U.S. 958 (2003) (internal citation omitted). Other courts across the country have also construed “the ADA’s broad language [as] bring[ing] within its scope ‘anything a public entity does.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (quoting *Yeskey v. Pa. Dep’t of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff’d*, 524 U.S. 206 (1998)); see also *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998) (finding that “the phrase ‘services, programs, or activities’ encompasses virtually everything that a public entity does”).

such an exception, we request that you update and reissue the proclamation to ensure this critical exception is noted.

Please do not hesitate to contact ACDL if you would like to discuss this request or require any additional information concerning this issue. We appreciate your swift action on this important topic, and your efforts to reduce COVID-19 community spread.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J.J. Rico', with a stylized flourish at the end.

J.J. Rico
Chief Executive Officer