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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Nicholas Woodall,

10 Plaintiff,

11 v.

12 Phoenix Police Department, et al.,

13 Defendants.  
14

No. CV-21-00962-PHX-GMS

**ORDER**

15  
16 Pending before the Court are the City of Phoenix, Officer Kody King, and Officer  
17 Richard Sias’s (“Defendants”) Motion to Dismiss (Doc. 39) and Motion to Strike All  
18 References To Ongoing Investigation (Doc. 41). Also pending are Nicholas Woodall’s  
19 Motion for Leave to File Fourth Amended Complaint (Doc. 51), Motion to Amend/Correct  
20 Amended Complaint (Doc. 57), Motion for Discovery (Doc. 45), and Motion for Subpoena  
21 Duces Tecum (Doc. 54). For the following reasons, Plaintiff’s Motion to Amend/Correct  
22 Amended Complaint (Doc. 57) is granted. However, the Court denies Defendants’ Motion  
23 to Strike All References To Ongoing Investigation (Doc. 41), and Plaintiff’s Motion for  
24 Leave to File Fourth Amended Complaint (Doc. 51), Motion for Discovery (Doc. 45), and  
25 Motion for Subpoena Duces Tecum (Doc. 54). Finally, the Court grants in part and denies  
26 in part Defendants’ Motion to Dismiss (Doc. 39). The Court will issue a ruling on the  
27 remaining claims in the Fourth Amended Complaint pending a conference with the parties,  
28 and its determination as to how to treat it. The parties shall appear before the Court for a

1 scheduling conference on January 26, 2023 at 11:00 a.m.

2 **BACKGROUND**

3 On October 30, 2020, Plaintiff had an encounter with two police officers from the  
4 Phoenix Police Department (“PPD”), Kody King and Richard Sias. (Doc. 35 at 3; Doc.  
5 35-1 at 2.) According to the Fourth Amended Complaint, the PPD received a call reporting  
6 a suspicious person near an FBI building. (Doc. 58 at 6.) King and Sias were sent to  
7 investigate that call. When they arrived at the FBI building, they encountered Plaintiff.  
8 Allegedly, upon confronting Plaintiff, they told him that “the FBI wanted [Plaintiff]  
9 trespassed,” informed him he was not allowed to leave, detained him, and asked him to  
10 provide identifying information under threat of citation or “possible incarceration or  
11 charges.” (Doc. 58 at 6.) Plaintiff challenged the officers’ grounds for this stop because,  
12 on his account, the officers knew that their statements were deceitful given that Plaintiff  
13 was on “public property, considered a public forum” and, therefore, was not trespassing.  
14 (Doc. 58 at 6.) This encounter, during which Plaintiff alleges he was not free to leave,  
15 went on for an unspecified period of time. Eventually, Plaintiff says that an unidentified  
16 supervisor told him he was free to leave, and he did so. (Doc. 38 at 6.)

17 In light of these events, Mr. Woodall brought this action against Officers King and  
18 Sias and the City of Phoenix. In his Third Amended Complaint (“TAC”), he alleged that  
19 Defendants’ actions amount to violations of his civil rights under 42 U.S.C. §§ 1983, 1985,  
20 and 1986, and the First, Fourth, and Fifth Amendments. He also sought to bring a criminal  
21 charge against Defendants pursuant to 18 U.S.C. § 241. In response, Defendants filed their  
22 Motion to Dismiss and subsequently filed a Motion to Strike a portion of Plaintiff’s  
23 Response. Thereafter, Plaintiff asked the Court for leave to amend his complaint a fourth  
24 time and filed his Motion for Discovery and Motion for Subpoena Duces Tecum. Plaintiff  
25 lodged his Fourth Amended Complaint (“FAC”) with the Court. The FAC contains the  
26 claims in the TAC, but also includes Eighth and Fourteenth Amendment claims, and state  
27 law claims for negligence and intentional infliction of emotional distress.

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1 **DISCUSSION**

2 **I. Motion for Leave to Amend**

3 A court should grant a plaintiff leave to amend his complaint when justice so  
4 requires. *See* Fed. R. Civ. P. 15(a)(2). “Generally, this determination should be performed  
5 with all inferences in favor of granting the motion,” especially when the plaintiff is  
6 pro se. *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citations  
7 omitted). However, when assessing a motion for leave to amend, a court may consider the  
8 plaintiff’s bad faith, undue delay, prejudice to the opposing party, the futility of  
9 amendment, and whether the plaintiff has previously amended the complaint. *Foman v.*  
10 *Davis*, 371 U.S. 178, 183 (1962).

11 Plaintiff has already filed five versions of his complaint and seven corresponding  
12 motions to correct or amend his amended complaints. This has delayed the Court’s  
13 resolution of this case. Defendants filed their first Motion to Dismiss on August 19, 2021,  
14 in which they responded to all of the claims described above and an additional Fourteenth  
15 Amendment claim. Plaintiff failed to respond to that motion. In granting the Defendants’  
16 first Motion to Dismiss, the Court noted that prior to the motion, Plaintiff attempted to file  
17 two amended complaints in violation of the Court’s procedural rules. (*See, e.g.*, Doc. 22,  
18 30, 32.); (*See also* Doc. 29.) Nevertheless, the Court granted the motion without prejudice,  
19 but also noted: “Plaintiff’s failure to follow the Court’s procedural rules resulted in a nearly  
20 two-month delay in the filing and deciding of the instant Motion to Dismiss, and it has now  
21 been over a year since the incident in question. It would be prejudicial to allow Plaintiff  
22 to continue to drag out the litigation by his noncompliance after being repeatedly warned  
23 that he must adhere to the Court’s procedural rules, which he continues to disregard.”  
24 (Doc. 36 at 3.) The Court also granted two extensions of time for Plaintiff to file a proper  
25 Motion to Amend and a proposed TAC. (Docs. 29, 31.) Plaintiff failed to timely file either  
26 document.

27 The Court then gave Plaintiff another chance to amend his complaint. At that point,  
28 Plaintiff filed his TAC, and Defendants filed a new Motion to Dismiss on February 22,

1 2022. Thereafter, Plaintiff filed a Motion for Leave to File his FAC, (Doc. 51), and a  
2 subsequent Motion to Amend that complaint, (Doc. 57). To the claims in the TAC, the  
3 FAC adds Eighth and Fourteenth Amendment claims and state law claims of intentional  
4 and negligent infliction of emotional distress.<sup>1</sup> Defendants may have defenses to these new  
5 claims that they could have asserted at a motion to dismiss stage, but which Defendants  
6 have not been able to assert in their pending motion. Thus, allowing Plaintiff to file the  
7 FAC will require Defendants to file a third Motion to Dismiss. Still, in light of the relaxed  
8 standards that apply to pro se plaintiffs, the Court—for one last time—will grant the  
9 Plaintiff’s Motion to Amend and direct that his lodged Fourth Amended Complaint  
10 (Doc. 58) be filed. The Court will not allow Plaintiff to file any more amendments to his  
11 complaint absent the most compelling circumstances, except to the extent otherwise  
12 indicated in this order.

13 **II. Motion to Dismiss**

14 In the interest of efficiency, the Court will apply Defendants’ present Motion to  
15 Dismiss against the FAC to the extent that its claims overlap with the claims pleaded in the  
16 TAC. However, the Court also wishes to hold a scheduling conference with the parties to  
17 explore the most expeditious way to finalize claims and defenses and otherwise proceed  
18 with this suit. Thus, for now, the Court will hold Plaintiff’s Eighth Amendment, Fourteenth  
19 Amendment, and state law claims under advisement until both parties have been “given a  
20 reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R.  
21 Civ. P. 12. The Court will also hold its consideration of Plaintiff’s claims against the City  
22 under advisement until such time because, at least in this respect, Plaintiff’s theory of  
23 liability in the FAC is materially different from his theory in the TAC.

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26 <sup>1</sup> In their Motion to Dismiss (Doc. 39) Defendants avow that this Court instructed in  
27 Doc. 37 that anything not raised in Plaintiff’s Third Amended Complaint would be  
28 considered waived.” (Doc. 39 at 1.) The Court can find no such statement in the Order.  
The Defendants shall immediately file with the Court the citation from the order in which  
the Court said that matters not raised by Plaintiff in his Third Amended Complaint will be  
waived.

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**A. Legal Standard**

“A defendant may move to dismiss a claim for relief pursuant to Rule 12(b)(6) if the claim ‘fail[s] to state a claim upon which relief can be granted.’” *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1175 (9th Cir. 2021) (quoting Fed. R. Civ. P. 12(b)(6)). A claimant states such a claim when he has “pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, “where the petitioner is pro se, particularly in civil rights cases, [a court should] construe the pleadings liberally and [] afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). In fact, a pro se plaintiff’s complaint should only be “dismissed for failure to state a claim if it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To the extent that the pleadings can be cured by the allegation of additional facts, a pro se plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir.1990).

**B. Criminal Charge**

Plaintiff is a private citizen and lacks standing to sue under Title 18 of the United States Code, which lists federal crimes. *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“[P]rivate parties . . . have no legally cognizable interest in the prosecutorial decisions of the Federal Government.”); *Robinson v. Cunan*, 489 F. App’x 187 (9th Cir. 2012) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”). This cannot be cured with additional facts. Accordingly, Plaintiff’s 18 U.S.C. § 241 claims are dismissed with prejudice.

**C. § 1983 Claims**

Construing the FAC liberally, the Court will reclassify Plaintiff’s constitutional claims under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1983 (creating a statutory cause of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or

1 usage, of any State . . . subjects, or causes to be subjected, any citizen of the United  
2 States . . . to the deprivation of any rights, privileges, or immunities secured by the  
3 Constitution and laws.”).

4 *i. First Amendment*

5 Plaintiff’s allegations most closely resemble a First Amendment retaliation claim.  
6 *Az. Students’ Assn. v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (“A plaintiff  
7 may bring a § 1983 claim alleging that public officials, acting in their official capacity,  
8 took action with the intent to retaliate against, obstruct, or chill the plaintiffs First  
9 Amendment rights.”). “To bring a First Amendment retaliation claim, [a] plaintiff must  
10 allege that (1) [he] engaged in constitutionally protected activity; (2) the defendant's actions  
11 would “chill a person of ordinary firmness” from continuing to engage in the protected  
12 activity; and (3) the protected activity was a substantial motivating factor in the defendant's  
13 conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill  
14 speech.” *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016)  
15 (internal punctuation omitted).

16 First, Plaintiff alleges that he held a “large poster sign for the F.B.I to read,”  
17 (Doc. 58 at 6.), outside of the FBI building, and “public demonstrations and protests are  
18 clearly constitutionally protected activity.” *Index Newspapers LLC v. U.S. Marshals Serv.*,  
19 977 F.3d 817, 830 (9th Cir. 2020). Next, “the mere threat of harm can be an adverse action,  
20 regardless of whether it is carried out because the threat itself can have a chilling effect”  
21 that would dissuade people of ordinary firmness from engaging in protected activity.  
22 *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (emphasis in the original). Here,  
23 Plaintiff alleges that his protest was chilled in fact, and, at this stage, the Court cannot say  
24 that a person of ordinary firmness would not have been dissuaded from participating in an  
25 act of personal protest after the investigatory stop described in the FAC.

26 However, Plaintiff has not yet plausibly pleaded that his protest “was a substantial  
27 or motivating factor” behind the officers’ decision to apprehend Plaintiff or the manner in  
28 which they performed their investigatory stop. *Capp v. Cnty. of San Diego*, 940 F.3d 1046,

1 1055 (9th Cir. 2019). To show the third element of a retaliation claim, Plaintiff must allege  
2 that the officers' retaliatory animus was a "but-for" cause of his injury, "meaning that the  
3 adverse action against the plaintiff would not have been taken absent the retaliatory  
4 motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). "At the pleading stage, the  
5 complaint must simply allege plausible circumstances connecting the defendant's  
6 retaliatory intent to the suppressive conduct[,] and motive may be shown with direct or  
7 circumstantial evidence." *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019) (internal  
8 quotations omitted).

9 In the FAC, Plaintiff explains that he initially objected when the officers told him  
10 he was being "trespassed," but "in fear of retaliation I asked no questions." (Doc. 58 at 6.).  
11 However, even in light of the liberal pleading standard, this allegation is insufficient to  
12 sustain Plaintiff's First Amendment claim. Plaintiff simply fails to explain why he feared  
13 the officers' retaliation, and he does not allege any retaliatory motive that might have  
14 motivated King and Sias. Still, the Supreme Court has noted that a pro se plaintiff's  
15 complaint should only be "dismissed for failure to state a claim if it appears 'beyond doubt  
16 that the plaintiff can prove no set of facts in support of his claim which would entitle him  
17 to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Thus, Plaintiff's First Amendment  
18 claim is dismissed without prejudice.

19 **ii. Fourth Amendment**

20 The Fourth Amendment protects citizens from unreasonable searches and seizures.  
21 U.S. Const. amend. IV. Contrary to Defendant's assertions, the FAC implicates the Fourth  
22 Amendment. "[L]aw enforcement officers do not violate the Fourth Amendment by merely  
23 approaching an individual on the street or in another public place, [or] by asking him if he  
24 is willing to answer some questions." *United States v. \$25,000 U.S. Currency*, 853 F.2d  
25 1501, 1504 (9th Cir. 1988). However, this is only true "[as] long as the officers do not  
26 convey a message that compliance with their requests is required." *Florida v. Bostick*, 501  
27 U.S. 429, 437 (1991). In the FAC, Plaintiff alleges that the officers *did* convey that  
28 compliance with their requests was required. Thus, a Fourth Amendment analysis is

1 appropriate at this stage.

2 “A person has been ‘seized’ within the meaning of the Fourth Amendment only if,  
3 in view of all of the circumstances surrounding the incident, a reasonable person would  
4 have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544,  
5 545 (1980). “Only when the officer, by means of physical force or show of authority, has  
6 in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has  
7 occurred.” *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968); *see also United States v. \$25,000*  
8 *U.S. Currency*, 853 F.2d 1501, 1504 (9th Cir. 1988); *United States v. Jefferson*, 566 F.3d  
9 928, 933 (9th Cir. 2009). In the FAC, Plaintiff alleges that he did not leave the scene until  
10 a supervisor told him that he could go. Additionally, Plaintiff alleges that the officers made  
11 demands for his “private documents,” and threatened him with arrest. (Doc. 58 at 6.) At  
12 this stage, these allegations are sufficient to support the notion that a reasonable person  
13 might not have believed he was free to go and that the officers used a show of authority to  
14 restrain Plaintiff’s liberty.

15 Additionally, the FAC plausibly suggests that the officers did not have a reasonable,  
16 articulable suspicion that justifies the manner in which Plaintiff alleges they conducted  
17 their investigatory stop. Plaintiff acknowledges that the officers were responding to a  
18 suspicious persons call, which at least gave them a right to make an initial inquiry of  
19 Plaintiff at the scene. The suspicious persons call did not, however, absent more, justify  
20 the officers’ decision to detain Plaintiff. Indeed, Plaintiff implicitly alleges that the officers  
21 had no basis for suspicion that warranted action beyond their initial inquiries because “[he]  
22 had a sign, was attempting anonymity and [his] actions were not unusual.” (Doc. 58 at 6.)  
23 It is not clear from the pleadings alone what Plaintiff was doing to attempt anonymity.  
24 Nevertheless, the FAC alleges that Plaintiff was told he was not free to leave and includes  
25 no facts from which the Court could infer that the officers had a reasonable, articulable  
26 suspicion that justified Plaintiff’s detention.

27 Defendants ask the Court to consider evidence that would establish that the officers  
28 had reasonable suspicion to detain Plaintiff, including Officer King’s police report,



1 assertions about the contents of a 911 call, and “several commonly known facts” about the  
2 officers’ investigatory stop, such as Defendants’ allegation that Plaintiff was wearing a ski  
3 mask at the time of the incident. While a court can consider “documents incorporated by  
4 reference in the complaint or matters of judicial notice,” without converting a motion to  
5 dismiss into a motion for summary judgment, the Court cannot do so here for two reasons.  
6 *Grant v. City of Phoenix*, No. CV2200184PHXJATMHB, 2022 WL 11729649, at \*3  
7 (D. Ariz. Oct. 20, 2022).

8 First, “[c]ourts may only take judicial notice of adjudicative facts that are not subject  
9 to reasonable dispute.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (internal  
10 punctuation omitted). It is not clear at this point in the case that none of the operative facts  
11 are subject to dispute.

12 Second, documentary evidence, like Officer King’s report, is only incorporated into  
13 the complaint if “(1) the complaint refers to the document; (2) the document is central to  
14 the plaintiff’s claim; and (3) no party questions the authenticity of the document.” *United*  
15 *States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). Although Mr. Woodall’s  
16 complaint references the report, the report is not sufficiently central to his claims to be  
17 considered incorporated by reference. Typically, a document is only incorporated by  
18 reference when a document provides the basis for Plaintiff’s claim. *See e.g., Ritchie*, 342  
19 F.3d at 908 (noting that an insurance policy is central to a coverage-based claim and an  
20 SEC filing is central to a fraud claim). Thus, Defendant’s Motion to Dismiss is denied as  
21 to Plaintiff’s Fourth Amendment claims.

22 **iii. Fifth Amendment**

23 “[T]he Fifth Amendment’s Due Process and Equal Protection Clauses apply only  
24 to the federal government, not to state actors.” *Peoples v. Schwarzenegger*, 402 F. App’x  
25 204, 205 (9th Cir. 2010) (citing *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir.2008)).  
26 Here, Plaintiff only asserts claims arise from the actions of city police officers; thus, there  
27 is no way this claim can be cured by amendment. Accordingly, his Fifth Amendment  
28 claims are dismissed with prejudice.

1                                   **D. §§ 1985 and 1986 Claims.**

2           To state a claim under 42 U.S.C. § 1985(3), “the plaintiff must be a member of a  
3 class that requires special federal assistance in protecting its civil rights.” *Gerritsen v. de*  
4 *la Madrid Hurtado*, 819 F.2d 1511, 1519 (9th Cir.1987); *see also Trerice v. Pedersen*, 769  
5 F.2d 1398, 1402–03 (9th Cir.1985). Plaintiff does not allege that he is a member of a  
6 protected class in the FAC. Nevertheless, he might be able to plead facts to support this  
7 claim. Accordingly, Plaintiff’s Section 1985 claim is dismissed without prejudice.  
8 Further, a plaintiff is only entitled to damages under 42 U.S.C. § 1986 when he can prove  
9 violations of 42 U.S.C. § 1985. *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 626 (9th  
10 Cir. 1988). Thus, because Plaintiff has not adequately alleged a Section 1985 claim, his  
11 Section 1986 claim is also dismissed without prejudice.

12                                   **III. Motion to Strike**

13           Pursuant to Fed. R. Civ. P. 12(f), Defendants have moved to strike references to an  
14 ongoing federal investigation in Plaintiff’s Response to Defendant’s Motion to Dismiss.  
15 However, the plain text of Rule 12(f) only applies to pleadings—“thus not a motion to  
16 dismiss.” *Casavelli v. Johanson*, No. CV-20-00497-PHX-JAT, 2020 WL 3035959, at \*3  
17 (D. Ariz. June 5, 2020); *see also Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885-86  
18 (9th Cir. 1983); *Holyoak v. United States*, No. CV 08-8168-PHX-MHM, 2009 WL  
19 1456742, at \*1 (D. Ariz. May 21, 2009). *Compare* Fed. R. Civ. P. 7(a) (describing  
20 pleadings), *with* Fed. R. Civ. P. 7(b) (describing motions). Accordingly, the Defendants’  
21 Motion is denied.

22                                   **IV. Motion for Discovery & Motion for Subpoena**

23           Finally, Plaintiff’s Motion for Discovery (Doc. 45) and a Motion for Subpoena  
24 *Duces Tecum* (Doc. 54) will be addressed at the scheduling conference.

25                                   **CONCLUSION**

26           Accordingly,

27           **IT IS HEREBY ORDERED** that Defendants’ Motion to Strike (Doc. 41) is  
28 **DENIED.**

1           **IT IS FURTHERED ORDERED** that Plaintiff's Motion to Amend/Correct  
2 Amended Complaint (Doc. 57) is **GRANTED**. The Clerk of the Court is directed to file  
3 the Fourth Amended Complaint lodged at Doc. 58.

4           **IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to File Fourth  
5 Amended Complaint (Doc. 51) is **DENIED** as moot in light of the Court granting  
6 Plaintiff's Motion to Amend/Correct Amended Complaint (Doc. 57).

7           **IT IS FURTHER ORDERED** that Defendants' Motion to Dismiss (Doc. 39) is  
8 **GRANTED** in part and **DENIED** in part:

- 9           1. The motion is granted as to Plaintiff's Fifth Amendment and 18 U.S.C. § 241  
10           claims, and these claims are dismissed with prejudice.
- 11           2. The motion is granted as to Plaintiff's First Amendment and 42 U.S.C. §§ 1985  
12           and 1986 claims, but these claims are dismissed without prejudice.
- 13           3. The motion is denied as to Plaintiff's Fourth Amendment claims.

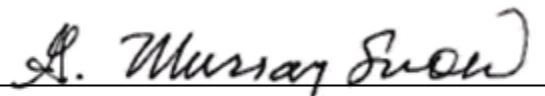
14           **IT IS FURTHERED ORDERED** that Plaintiff's Motion for Discovery (Doc. 45)  
15 is **DENIED**.

16           **IT IS FURTHERED ORDERED** that Plaintiff's Motion for Subpoena Duces  
17 Tecum (Doc. 54) is **DENIED**.

18           **IT IS FURTHER ORDERED** that Plaintiff is prohibited from filing any further  
19 amendments to his complaint, absent the most compelling circumstances without obtaining  
20 leave from the Court prior to filing, except to the extent otherwise indicated in this order.

21           **IT IS FURTHER ORDERED** setting an in-person scheduling conference for  
22 **January 26, 2023 at 11:00 a.m.** before Chief Judge G. Murray Snow in Courtroom 602,  
23 Sandra Day O'Connor U.S. Federal Courthouse, 401 West Washington Street, Phoenix,  
24 Arizona 85003-2151.

25           Dated this 19th day of January, 2023.

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27           \_\_\_\_\_  
28           G. Murray Snow  
                  Chief United States District Judge