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15 **IN THE UNITED STATES DISTRICT COURT**

16 **DISTRICT OF ARIZONA**

17 ASHLEY CERVANTES, a single woman,

18 Plaintiff

19 v.

20 UNITED STATES OF AMERICA; UNITED
21 STATES CUSTOMS AND BORDER
22 PROTECTION AGENT SHAMEKA
23 LEGGETT and "JOHN DOE" LEGGETT;
24 UNKNOWN UNITED STATES CUSTOMS
25 AND BORDER PROTECTION AGENTS;
26 HOLY CROSS HOSPITAL, INC; PATRICK
27 F. MARTINEZ AND "JANE DOE"
28 MARTINEZ; QUANTUM PLUS, INC., dba
TEAMHEALTH WEST; JOHN DOES 1-5;
JANE DOES 1-5; XYZ CORPORATIONS 1-
5; ABC PARTNERSHIPS 1-5

Defendants

4:16-CV-00334-CKJ

**OPPOSITION TO DEFENDANT
PATRICK MARTINEZ'S MOTION
FOR SUMMARY JUDGMENT**

1 Plaintiff Ashley Cervantes (“Ashley”) opposes Defendant Patrick Martinez’s (“Dr.
2 Martinez”) Motion for Summary Judgment (Doc. 149) because there is ample evidence Dr.
3 Martinez performed unconstitutional forensic evidentiary searches on her while functioning
4 as a federal actor. As set out below, Dr. Martinez was acting as extension of federal law
5 enforcement, not rendering medical care, when he searched Ashley’s body cavities for
6 evidence of a crime while she was in the custody of the U.S. Customs and Border
7 Protection (“CBP”). Because those searches were performed while she was in custody and
8 without her consent, Dr. Martinez violated Ashley’s constitutional rights. Because Dr.
9 Martinez was not rendering medical care, traditional medical malpractice tort law is
10 inapplicable and does not provide an alternative remedy such that a *Bivens* claim against
11 him is foreclosed. Rather, a *Bivens* action is the proper cause of action for such federal
12 constitutional tort violations against a federal actor who was searching for evidence of a
13 federal crime.

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18 This Opposition is supported by the following Memorandum of Points and
19 Authorities, the Controverting Statement of Dr. Martinez’s Facts (“CSOF-M”) and the
20 record.

21 MEMORANDUM OF POINTS AND AUTHORITIES

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23 In opposing the pending Motion, Ashley need not establish a material issue of fact
24 conclusively in her favor; it is sufficient that “the claimed factual dispute be shown to
25 require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *First*
26 *Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968). Moreover, the
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1 evidence Ashley provides in her CSOF-M is to be believed and all justifiable inferences are
2 to be drawn in her favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 at 255 (1986).

3
4 **I. FACTUAL BACKGROUND**

5 Considering the legal guidance described above, the following facts establish the
6 basis for Ashley’s federal constitutional tort claims against Dr. Martinez:
7

8 **Ashley’s Custodial Detention**

9 1. On the morning of Saturday, October 18, 2014, Ashley, a natural-born US
10 Citizen, crossed the international border at the Nogales Port of Entry. CSOF-M ¶ 8. She
11 crossed into Sonora to have breakfast at a restaurant she frequented. *Id.* After enjoying her
12 breakfast, Ashley returned to the Port of Entry and crossed back into the United States. *Id.*

13
14 2. Ashley did not use drugs while in Mexico, did not possess any contraband at
15 the time she re-entered the United States and did not have any drugs on her person during
16 her interactions with the Defendants. CSOF-M ¶¶ 9 and 26.

17
18 3. Despite being a US citizen who was not in possession of contraband, Ashley
19 was detained at the Port of Entry for at least a few hours by CBP agents. CSOF-M ¶ 10.

20 4. While at the Port of Entry, Ashley was taken into custody. CSOF-M ¶ 11.

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22 5. During that custodial detention, CBP escalated the method and manner of its
23 searches and eventually requested authority to transport Ashley to a medical facility. CSOF-
24 M ¶ 12. As set out in the United States Public Health Services Division of Immigration
25 Health Services’ Treatment Authorization Request (“TAR”), Ashley was “diagnosed” as an
26 alleged “potential internal carrier of foreign substance” and the “course of treatment” was
27 identified as “request for X-Ray” *Id.*
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1 6. CBP did not obtain a search warrant. CSOF-M ¶ 13.

2 **Invasive Searches at Holy Cross**

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4 7. Ashley was then taken, in custody, to Defendant Holy Cross Hospital to
5 determine whether she was carrying contraband. CSOF-M ¶ 14.

6 8. She was transported by CBP to Holy Cross in handcuffs and led into the
7 hospital in handcuffs. CSOF-M ¶ 15.

8 9. CBP policy prohibits CBP officers from performing body cavity searches.
9 CSOF-M ¶ 15. Body cavity searches are also prohibited at the Port of Entry and must occur
10 at a medical facility. *Id.*

11 10. CBP policy allows for body cavity searches during custodial detentions,
12 however, those searches must be conducted by medical doctors. CSOF-M ¶ 15. When a
13 body cavity search is conducted, the medical doctor is performing it on behalf of CBP. *Id.*

14 11. Ashley was never X-rayed. CSOF-M ¶ 16.

15 12. Rather, Dr. Martinez entered the exam room and, after asking a few cursory
16 questions and with the CBP agents watching, invaded Ashley's body on a warrantless and
17 unjustified search for contraband. CSOF-M ¶ 17.

18 13. Dr. Martinez performed those invasive body exams without obtaining
19 Ashley's consent, as she never consented to a pelvic or rectal search. CSOF-M ¶ 17.

20 14. Dr. Martinez was not providing medical treatment, nor was he testing or
21 evaluating Ashley for an emergent medical condition. CSOF-M ¶ 18. He was acting as an
22 extension of CPB for the express purpose of searching her for contraband. *Id.*

1 **Ashley was at Holy Cross for a Law Enforcement Search, Not Medical Care**

2 15. Based on the Holy Cross records, Ashley did not present to the emergency
3 department for medical care or in an emergent situation. CSOF-M ¶ 21. The Holy Cross
4 charts indicate Ashley’s vitals were near normal, and she did not complain of any pain. *Id.*
5 The records do not document that Ashley presented with any symptoms consistent with
6 internal drug smuggling or that she exhibited any symptoms of feeling sick or unwell. *Id.*
7 Ashley denied using or carrying drugs. *Id.* She was in the midst of her menstrual cycle. *Id.*

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10 16. Ashley was not a patient for medical purposes. CSOF-M ¶ 24.

11 17. There is no evidence Ashley consented to any examination in writing. CSOF-
12 M ¶ 23. There is also no documented evidence in her medical records that she verbally
13 consented to any examination while at Holy Cross. *Id.* There is no indication in the Holy
14 Cross records that Ashley expressly provided her knowing and informed consent for a
15 pelvic and/or rectal exam. *Id.* Regardless, Dr. Martinez performed vaginal and rectal exams
16 on her. *Id.*

17
18 18. Ashley was brought to Holy Cross for the forensic collection of evidence
19 only, not for a medical emergency or for medical treatment. CSOF-M ¶ 25. The federal
20 Emergency Medical Treatment and Labor Act (“EMTALA”) applied to this situation only
21 to the extent necessary to perform a Medical Screening Examination to determine and rule
22 out an imminent condition threatening her life or limb. *Id.* That type of an exam can be
23 performed by a nurse or non-doctor during the triage/initial admission process. *Id.*
24 EMTALA does not provide any basis for the pelvic or rectal examinations which Ashley
25 underwent.

1 19. Holy Cross, Defendant Quantum Plus and Dr. Martinez have all denied that
2 Dr. Martinez was working within the course and scope of his employment with Holy Cross
3 and Quantum Plus. CSOF-M ¶ 27.

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5 **II. THE FACTS REQUIRE A BIVENS CLAIM AGAINST DR. MARTINEZ**

6 Based on those facts, which for summary judgment must be accepted as true with
7 inferences resolved in Ashley's favor, Ashley's claims against Dr. Martinez arise from her
8 federal constitutional rights and are based on his serving as a federal actor conducting a law
9 enforcement search. Because Dr. Martinez was not providing medical treatment or care,
10 Ashley's claims against him are properly pursued as *Bivens* claims.

11
12 Ashley's claims are not based on the proper (or improper) rendering of medical
13 treatment or health care. To be clear: based on the record currently before the Court, Ashley
14 did not receive anything close to medical treatment or health care. Without due process of
15 law, she was searched for evidence of a crime in the presence of CBP agents and while in
16 federal law enforcement custody. CBP policy prohibits CBP agents from conducting the
17 searches which Ashley endured. CBP policy requires body cavity searches to be performed
18 by medical doctors and at a medical facility. Moreover, Shameka Leggett, the CBP officer
19 who was with Ashley at Holy Cross when she was searched, testified at her deposition that
20 doctors perform body cavity searches on CBP's behalf.

21
22 Ashley did not consent, in any way, shape, or form to the searches Dr. Martinez
23 performed on her. As such, neither *Minneeci* nor Arizona's medical malpractice law control
24 the outcome of Ashley's claims against Dr. Martinez. Her claims against Dr. Martinez are
25 based on violations of her federal constitutional rights and are properly pursued under
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1 *Bivens*. Ashley is not seeking to expand the reach of *Bivens*, as the Supreme Court has
2 specifically approved *Bivens* actions for violations of the Fourth Amendment (the *Bivens*
3 case itself) and the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979). Those are
4 the constitutional protections Dr. Martinez violated while searching Ashley.
5

6 Ashley was brought to Holy Cross Hospital in handcuffs by armed and uniformed
7 federal law enforcement officers. She was led into the emergency department (while still in
8 handcuffs) and federal law enforcement officers were with her the entire time she was at
9 Holy Cross. Of crucial importance, Ashley was brought to Holy Cross for only one reason:
10 to determine whether she was an internal carrier of drugs. There is no mention in the record
11 currently before the Court that Ashley's trip to Holy Cross was due to concerns for her
12 safety or well-being. That is because Ashley (who was not carrying drugs and continually
13 denied carrying drugs) was in no physical distress and showed no signs of being sick or
14 unwell. In fact, Ashley was brought to Holy Cross only after she was detained at the Port of
15 Entry for a number of hours. Thus, Dr. Martinez's assertion that he was providing medical
16 care or treatment is an after-the-fact attempt to revise history. In reality, he was serving as a
17 federal actor and searching Ashley on a warrantless search for contraband. That search
18 violated Ashley's federal constitutional rights and allegations of medical malpractice are not
19 part of this case.
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24 **III. ARIZONA'S MEDICAL MALPRACTICE ACT IS FOR MEDICAL**
25 **MALPRACTICE CLAIMS, NOT FEDERAL CONSTITUTIONAL LAW**
26 **VIOLATIONS**

27 Arizona's Medical Malpractice Act (the "Act") is not the exclusive remedy for
28 claims against a medical doctor and does not apply to a situation such as has arisen in this

1 case. It exists to pursue claims against licensed medical providers who are negligent in
2 rendering care or treatment, not who search a detained suspect for contraband.

3
4 In fact, despite the Act setting out the potential claims which are covered, it does not
5 reference the violation of an individual's constitutional rights as the type of claim it
6 encompasses. Specifically, A.R.S. § 12-561(2) requires that an action be based on the
7 provider's alleged negligence, misconduct, errors or omissions or breach of contract in the
8 rendering of health care, medical services, nursing services or other health-related services.
9 In all of those situations, the provider must be rendering health care, medical services or
10 other health-related services. That is simply not the case here, as Dr. Martinez was not
11 rendering care, and Ashley was not being treated. She was brought to Holy Cross,
12 handcuffed and detained, so that federal law enforcement agents could find out whether she
13 had committed a crime by carrying drugs internally.

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16 Ashley was not receiving health care, medical services, or even health-related
17 services. She was being searched for evidence of an alleged crime without due process of
18 law. The Act, and general state tort law, are not the appropriate means for her to pursue a
19 remedy against the individual who violated her federal constitutional rights.

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22 **IV. MINNECI'S LIMITED HOLDING IS INAPPLICABLE TO ASHLEY'S**
23 **CLAIMS**

24 Based on the warrantless searches described above, Ashley brought *Bivens* claims
25 against Dr. Martinez for violating her Fourth and Fifth amendment rights. Dr. Martinez
26 seeks summary judgment of those *Bivens* claims based on *Minnecci*. His reliance on *Minnecci*
27 is without merit.
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1 By its own wording, *Minneci* is a narrow holding which applies only to the facts
2 presented in that case. Specifically, *Minneci* provides that an already-convicted federal
3 inmate may not assert an Eighth Amendment *Bivens* claim against private prison employees
4 for the failure to provide adequate medical care. Ashley is not alleging Dr. Martinez
5 provided her with any medical care, because he did not. For that reason alone, *Minneci* has
6 no application to Ashley's Fourth and Fifth Amendment claims against Dr. Martinez, who
7 was searching for evidence to be used against her if found and nothing more. Moreover, the
8 Eighth Amendment is not mentioned in Ashley's First Amended Complaint and the Fourth
9 and Fifth Amendments are not at issue in *Minneci*. As such, the holding has no relevance to
10 Ashley's claim and does not support, let alone require, summary judgment in Dr.
11 Martinez's favor. A jury should be allowed to weigh the credibility of the witnesses to
12 determine whether Dr. Martinez was "treating" Ashley (as he claims) or searching her for
13 contraband as an extension of federal law enforcement (as she has established through her
14 deposition and through her expert, Dr. Michael Levine, MD).

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18 Dr. Martinez's reliance on *Correctional Services Corp. v. Malesko*, 534 U.S. 61
19 (2001) is also misplaced. Ashley does not allege Dr. Martinez had a contract with the
20 federal government, as is the case in *Malesko* and the many lawsuits filed by convicted
21 inmates seeking to hold private correctional companies liable for alleged constitutional
22 violations related to medical care under the Eight Amendment. Rather, Ashley alleges that
23 Dr. Martinez was acting as a federal actor, in the presence of armed, uniformed federal
24 agents, at the time he searched her body cavities without a warrant and without her consent.
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1 **V. PRIVATE PARTIES MAY BE FEDERAL ACTORS FOR *BIVENS***
2 **PURPOSES**

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4 To establish a claim under *Bivens*, Ashley must simply allege: (1) that a right secured
5 by the Constitution of the United States was violated, and (2) that the alleged violation was
6 committed by a federal actor. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (42
7 U.S.C. § 1983 and *Bivens* actions are identical save for replacement of state actor under §
8 1983 by federal actor under *Bivens*). The Ninth Circuit has repeatedly held that
9 governmental involvement with a private entity may confer jurisdiction under § 1983 if the
10 involvement is significant and is the specific activity of which a party complains. *See*
11 *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 313 (9th Cir. 1974); *Ascherman v.*
12 *Presbyterian Hospital of Pacific Medical Center*, 507 F.2d 1103 (9th Cir. 1974). Moreover,
13 it is well-established that private defendants can be sued under *Bivens* if they engage in
14 federal action. *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1337–38 (9th Cir.
15 1987). Moreover, it is a question of fact whether a private party was acting as a federal
16 actor. *Schowengerdt*, at 1338.

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20 To implicate private individuals in *Bivens* actions, Ashley must establish facts
21 showing Dr. Martinez jointly participated with the government to a sufficient enough extent
22 to be characterized as a federal actor. *Schowengerdt*, 1338. That is exactly what Ashley has
23 established. CBP Officer Leggett testified that CBP requires body cavity searches to be
24 performed at medical facilities and relies on medical doctors to perform body cavity
25 searches. Dr. Martinez performed a body cavity search on Ashley searching for evidence of
26 an alleged crime while in custody of CBP agents. Had the CBP agents searched her rectal or
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1 anal cavities at the Port of Entry, they would have been subject to a *Bivens* claim. The fact
2 that CBP policy required her to go to Holy Cross where Dr. Martinez performed the
3 searches does not extinguish Ashley's constitutional rights. Dr. Martinez was acting as a
4 federal actor and was subject to the same constitutional limits as the CBP Agents.
5 Moreover, Dr. Martinez cannot extricate himself from the lawsuit by simply claiming he
6 was not a federal actor as that is a question of fact. Put another way, to allow Dr. Martinez
7 to escape responsibility at this stage would be to allow a circumventing of critical
8 constitutional protections.
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11 **VI. CONCLUSION**

12
13 Ashley was brought to Holy Cross for the purpose of a federal forensic evidence
14 investigation, not medical treatment. She has established Dr. Martinez was acting as a
15 federal actor at the time he undertook to search her for alleged illegal drugs. As such, and
16 because the Eighth Amendment is not at issue, *Minneci* is neither relevant nor dispositive of
17 Ashley's claims against Dr. Martinez. Moreover, Arizona's Medical Malpractice Act is not
18 the appropriate vehicle for Ashley to pursue Dr. Martinez and is not an alternative remedy.
19 Her Fourth and Fifth Amendment Constitutional tort claims are properly pursued under a
20 *Bivens* theory. The Motion for Summary Judgement is, therefore, properly denied.
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23 Filed this 20th day of March, 2018.

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25 **MARCHETTI LAW, PLLC**

26
27 By: /s/ Brian Marchetti
28 Brian Marchetti
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants:

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