No. 16-40611

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRANDY HAMILTON; ALEXANDRIA RANDLE,
Plaintiffs - Appellees

V.

AARON KINDRED,
Defendant – Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION

APPELLANT'S PETITION FOR REHEARING EN BANC AND REQUEST TO RECALL MANDATE

Brazoria County District Attorney's Office
111 E. Locust, Suite 408A
Angleton, Texas 77515
Tel: 979-864-1233
Fax: 979-864-1712

Christopher Garza
Assistant District Attorney
State Bar No. 24078543
Southern District No. 1670532
Email: chrisg@brazoria-county.com

Attorney for Appellant Aaron Kindred

CERTIFICATE OF INTERESTED PARTIES

No. 16-40611 *Brandy Hamilton; Alexandria Randle v. Aaron Kindred*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:

1. Brandy Hamilton
2. Alexandria Randle

Counsel of Record:

Allie R. Booker
The Booker Law Firm
1200 Rothwell
Houston, Texas 77002
Fax: 713-583-3995
Email: booker@bookerlawfirm.com

Joseph K. Plumbar
Law Office of Joseph K. Plumbar
1200 Rothwell
Houston, Texas 77002
Fax: 866-252-3048
Email: jplumbar@plumbarlaw.com

Defendant-Appellant

1. Aaron Kindred

Counsel of Record:

Christopher Garza, Attorney-in-Charge
Assistant District Attorney
SBN: 24078543
FBN: 1670532
Email: chrisg@brazoria-county.com
Jesse M. Blakley
Assistant District Attorney
SBN: 24060952
FBN: 1104455
Email: jesseb@brazoria-county.com
Brazoria County District Attorney's Office
111 E. Locust, Suite 408A
Angleton, Texas 77515
Tel: 979-864-1233
Fax: 979-864-1712

Other Interested Parties

1. Texas Department of Public Safety
2. Nathaniel Turner
3. Jennifer Bui
4. Charles Wagner
5. Brazoria County

By: /s/ Christopher Garza
Christopher Garza
Assistant District Attorney

Dated: January 20, 2017

RULE 35 STATEMENT OF REASONS FOR REHEARING EN BANC

Deputy Kindred respectfully requests a rehearing en banc because the Panel's Opinion in this appeal conflicts with the precedent of the Supreme Court and this Court.

A. The Opinion conflicts with Supreme Court precedent in qualified immunity cases relating to (1) jurisdiction and (2) the clearly established law analysis.

1. The Opinion conflicts with Supreme Court precedent because it dismisses for lack of jurisdiction Deputy Kindred's interlocutory appeal relating to a denial of qualified immunity based on whether his actions violated clearly established law, which is a legal question for which this Court has jurisdiction. Op. at 2; *see Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1945, 173 L. Ed. 2d 868 (2009); *Scott v. Harris*, 550 U.S. 372, 381 and n.8, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007).

2. The Opinion conflicts with Supreme Court precedent because it fails to identify a prior case with similar circumstances that put Deputy Kindred on notice his actions would violate clearly established law. Op. at 7; *see White v. Pauly*, 16-67, 2017 WL 69170 (U.S. Jan. 9, 2017); *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015); *City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015).

A. The Opinion conflicts with this Court's precedent in qualified immunity cases relating to (1) bystander liability and (2) the heightened pleading standard.

1. The Opinion conflicts with this Court's precedent relating to bystander liability and makes a determination regarding clearly established law that was explicitly rejected in *Whitley v. Hanna.* Op. at 7; *see Whitley v. Hanna*, 726 F.3d 631, 646-647, n.11, n.13 (5th Cir. 2013) cert. denied, 134 S. Ct. 1935 (U.S. 2014); *Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995); *see also Estep v. Dallas County, Tex.*, 310 F.3d 353, 362 (5th Cir. 2002).

2. The Opinion conflicts with this Court's precedent relating to the heightened pleading standard. *See Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 994–95 (5th Cir. 1995); *Nunez v. Simms*, 341 F.3d 385, 388 (5th Cir. 2003); *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986).

Therefore, because the Panel's Opinion conflicts with the precedent of the Supreme Court and this Court, en banc consideration is necessary under Federal Rule of Appellate Procedure 35(b)(1)(A) to secure and maintain the uniformity among the federal circuits and this Court's decisions.

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I. ISSUES PRESENTED

1. In qualified immunity cases, Supreme Court precedent shows an appellate court has jurisdiction to hear a government officer's interlocutory appeal relating to a denial of qualified immunity based on whether the officer's actions violated clearly established law because this is a legal question. *See Mitchell,* 472 U.S. 511; *Iqbal*, 556 U.S. 662. *Scott*, 550 U.S. at 381 and n.8. Does the Opinion conflict with precedent because it dismisses, for lack of jurisdiction, Deputy Kindred's interlocutory appeal relating to a denial of qualified immunity based on whether his actions violated clearly established law?

2. In qualified immunity cases, Supreme Court precedent mandates a court conducting the clearly established analysis identify one prior case with similar circumstances that put the officer on notice his/her actions would violate clearly established law. *See White*, 16-67, 2017 WL 69170; *Mullenix*, 136 S. Ct. 305; *Sheehan*, 135 S. Ct. 1765. Does the Opinion conflict with precedent because it fails to identify one prior case that showed Deputy Kindred's actions violated clearly established law, and is he therefore entitled to qualified immunity?

3. In *Whitley v. Hana*, this Court explicitly rejected the argument that *Hale v. Townley* showed bystander liability was clearly established in all excessive force cases. *See Whitley,* 726 F.3d at 647, n. 13 (5th Cir. 2013); *Hale*, 45 F.3d 914. Does the Opinion conflict with precedent by determining *Hale s*hows bystander

liability is clearly established in all excessive force cases, when this exact argument was explicitly rejected in *Whitley*?

4. In qualified immunity cases, this Court imposes a heightened pleading standard. *See Wicks*, 41 F.3d 991; *Nunez*, 341 F.3d 385; *Jacquez*, 801 F.2d 789. The Opinion acknowledges Appellees Brandy Hamilton and Alexandria Randle excluded an excessive force claim from the proposed jury instructions, "never used the words 'excessive force' in their complaint and were less than clear during the proceedings about exactly which theories they were advancing …" Op. at 6. Did the Panel's Opinion conflict with precedent when it determined the heightened pleading was nevertheless satisfied and excessive force is a claim in this case?

II. FACTUAL BACKGROUND

On Memorial Day 2012, a Texas Department of Public Safety ("DPS") trooper pulled Hamilton and Randle over for speeding. [ROA.950 (2C:0:00-1:30), 2028] The DPS trooper smelled marijuana and ordered Hamilton and Randle to exit. [ROA.950 (2C5:15-6:20, 2028] The DPS trooper, a male, requested a female officer from any nearby law enforcement agency come search Hamilton and Randle. [ROA.950 (2C:5:15-6:20), 873] None were available, so a female DPS trooper was requested. [*Id.*]

The DPS trooper also requested a Brazoria County Sheriff's Deputy come perform traffic control and security. [ROA.950 (2C:6:25-6:33)] Sheriff's Deputy Kindred arrived and performed these tacks. [ROA.748-751, 874-876, 950 (2C:14:05-14:43)]

When the female DPS trooper arrived, she searched Hamilton in the front passenger seat of the male DPS trooper's patrol vehicle. [ROA.950:30:00-30:30] The female DPS Trooper then searched Randle in the back seat of her patrol vehicle. [ROA.770:13-772:5, 851:16-853:19, 860, 873-875]

Deputy Kindred never searched Hamilton or Randle. [ROA.748-751, 870-876] He never saw or heard how DPS searched them. [*Id.*]

Hamilton and Randle filed a 42 U.S.C. § 1983 lawsuit, in which they allege the female DPS trooper conducted an unconstitutional cavity search on them.

[ROA.123-164] They have settled with DPS. [ROA.326.] Their claim against Deputy Kindred is for bystander liability, with the underlying violation being the alleged cavity search. The district court denied Deputy Kindred's motion for summary judgment based on qualified immunity. [ROA.2027-2039] Deputy Kindred filed an interlocutory appeal of that decision. A Panel of this Court issued an Opinion that dismisses Deputy Kindred's appeal for lack of jurisdiction.

III. ARGUMENT

Deputy Kindred respectfully requests that this Court grant rehearing en banc because the clearly established law in 2012 did not require a bystander sheriff's deputy investigate whether a DPS trooper was conducting a cavity search inside the trooper's vehicle during a traffic stop, and, if the trooper was, it did not require the bystander sheriff's deputy intervene to stop it.

This issue was briefed but not addressed in the Opinion. Instead, the Opinion applies one category of cases (cavity searches are unconstitutional), adds a second category (a bystander may have a duty to intervene to stop excessive force), and determines the two categories of cases equal clearly established law (if a DPS trooper conducted a cavity search in 2012, a bystander sheriff's deputy had a duty to intervene to stop it). However, this contradicts Supreme Court precedent for qualified immunity cases, which states a prior case must show that an officer in

similar circumstances violated the law for it to be clearly established. Prior to 2012, there was no case that showed Deputy Kindred's actions would violate clearly established law.

Therefore, the Opinion conflicts with Supreme Court precedent relating to qualified immunity cases because (1) the Court has jurisdiction and (2) Deputy Kindred did not violate clearly established law. The Opinion also conflicts with this Court's precedent in qualified immunity cases relating to (1) bystander liability and (2) the heightened pleading standard.

A. The Panel's Opinion conflicts with Supreme Court precedent relating to qualified immunity cases because (1) the Court has jurisdiction and (2) Deputy Kindred did not violate clearly established law.

1. Jurisdiction

Supreme Court precedent shows an appellate court has jurisdiction to hear a government officer's interlocutory appeal relating to a denial of qualified immunity based on whether the officer's actions violated clearly established law because this analysis is a legal question. *See Mitchell*, 472 U.S. at 526-27; *see also Iqbal*, 556 U.S. at 672 (concluding a denial of qualified immunity is "a final decision subject to immediate appeal") (internal quotations and citations omitted); *Scott*, 550 U.S. at 381 and n. 8 (noting, "whether [an officer's] actions were objectively reasonable" based on clearly established law is a legal question).

The Panel dismissed Deputy Kindred's interlocutory appeal of the district

court decision that denied him qualified immunity. Op. at 2. This conflicts with Supreme Court precedent, and the Court has jurisdiction over Deputy Kindred's interlocutory appeal.

2. Clearly established law

In *White v. Pauly,* the Supreme Court reiterated that "'clearly established law' should not be defined 'at a high level of generality.'" *White*, 2017 WL 69170, at *4 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Instead, a court conducting "the 'clearly established' analysis … [must] identify a case where an officer acting under similar circumstances … was held to have" violated the same law. *Id.* at *5; *see also Sheehan*, 135 S. Ct. at 1774, n.3. Citing its own precedent, the Supreme Court noted, "[i]n the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *Id.* at *4.

The Supreme Court's determination in *White* is like *Mullenix v. Luna. Mullenix,* 136 S. Ct. at 308. In *Mullenix*, a motorist fled from police during a high-speed chase and a DPS trooper stopped the motorist by using deadly force—he shot and killed him. This Court affirmed the decision to deny the DPS trooper qualified immunity because it determined there was a genuine issue of fact regarding whether the deadly force was excessive based on clearly established law. *Id.* at 307.

The Supreme Court reversed, determining prior cases failed to show it was clearly established an officer was prohibited from using deadly force to stop a motorist during a high-speed chase. *Id.* at 309-312. Therefore, the DPS trooper was entitled to qualified immunity because, the Supreme Court explained, an officer will not be denied qualified immunity unless a prior case with similar circumstances puts the officer on notice his/her actions will violate the law. *Id.*

This case is like *White* and *Mullenix.* Prior to 2012 there was no Supreme Court or Fifth Circuit case with similar circumstances that showed a bystander sheriff's deputy had a duty to investigate whether a DPS trooper was conducting a cavity search inside the trooper's vehicle during a traffic stop and, if so, intervene to stop it.

In fact, the most similar bystander liability cases from this Court before and after 2012 show the opposite—a bystander deputy has no such duty. *See Estep*, 310 F.3d at 362 (affirming summary judgment and qualified immunity for an officer who observed a fellow officer conduct an unconstitutional search during a traffic stop on the side of the road but did not intervene to stop it); *Whitley,* 646-47 and n. 11, n. 13 (determining an officer who knew a fellow police officer was sexually assaulting children but did not immediately stop it so he could gather more evidence and strengthen his case against the fellow officer would be entitled to qualified immunity because it was not clearly established he had a duty to

intervene).

Accordingly, assuming *arguendo* Deputy Kindred knew a DPS trooper was conducting a cavity search inside the trooper's vehicle, under *White*, *Mullenix*, *Whitley*, and *Estep*, he is entitled to qualified immunity because no cases prior to 2012 showed it was clearly established a bystander officer in similar circumstances violated the law by not intervening.

Therefore, the Opinion conflicts with Supreme Court Precedent because it dismissed Deputy Kindred's appeal without identifying a case that showed it was clearly established in 2012 that a bystander sheriff's deputy in a similar circumstance violated the law.

B. The Panel's Opinion conflicts with this Court's precedent in qualified immunity cases relating to (1) bystander liability and (2) the heightened pleading standard.

1. Bystander Liability

No Supreme Court case has addressed whether a bystander officer under similar circumstances violates clearly established law. There is also no Fifth Circuit case. Although there is no bystander liability case with similar facts, the Fifth Circuit cases *Whitley v. Hanna* and *Estep v. Dallas County* may be the most similar. *Whitley*, 726 F.3d at 646-647, n.11, n.13 (determining, an officer who knew a fellow police officer was sexually assaulting children but did not immediately stop it so he could gather more evidence and strengthen his case

against the fellow officer would be entitled to qualified immunity because it was not clearly established he had a duty to intervene); *Estep*, 310 F.3d at 362 (affirming summary judgment and qualified immunity for an officer who observed a fellow officer conduct an unconstitutional search during a traffic stop on the side of the road but did not intervene to stop it).

The Opinion acknowledges *Whitley*, but solely for the fact that *Whitley* states the elements of bystander liability. Op. at 7. *Whitley* conflicts with the Opinion. *See Whitley,* F.3d at 647, n.13, and at 654-55 (J. Elrod, J., concurring).

In *Whitley*, which was decided over a year after the DPS traffic stop in this case, this Court affirmed the dismissal of a bystander liability claim against an officer who witnessed a fellow officer sexually assaulting children and allowed it to continue so he could gather more evidence and strengthen his case against the fellow officer. *Id.* at 646-47 and n. 11, n. 13. The *Whitley* Court noted:

> **Even if bystander liability did apply, we nevertheless would be compelled to affirm the district court's judgment [dismissing the case against the officers] on the second prong of the qualified immunity analysis because [the plaintiff] has failed to identify clearly established law requiring an officer immediately to intervene** while engaged in covert surveillance of a perpetrator … **[The plaintiff] cites no case that would put [the officers] on notice that they were required to intervene** in some unspecified way.

Whitley, 726 F.3d at 647, n.13 (emphasis added); *see also* at 654-55 (J. Elrod, J., concurring).

Accordingly, over a year *after* the DPS traffic stop in this case, this Court

concluded in *Whitley* that no clearly established law required an officer to intervene in every situation where a fellow officer uses excessive force. (Otherwise, the *Whitley* Court implicitly concluded sexually assaulting children is not excessive force, which would also conflict with the Opinion's determination that a cavity search is excessive force. Op. at 4-7.) Therefore, *Whitley* confirms that in 2012 no clearly established law required Deputy Kindred to intervene, and he is entitled to qualified immunity.

The Opinion states *Hale v. Townley* clearly established "that an officer could be liable as a bystander in a case involving excessive force …" at the time of the DPS traffic stop. Op. at 7 (citing *Hale*, 45 F.3d at 918). However, applying *Hale* (which involved an officer's failure to intervene when another officer beat a suspect) to this case (where a sheriff's deputy failed to investigate and intervene when a DPS trooper conducted a cavity search inside the trooper's vehicle) fails to comport with the second prong of the qualified immunity analysis mandated by Supreme Court precedent. *See White*, 2017 WL 69170, at *4-6 (reversing a court of appeals decision, which affirmed a denial of summary judgment, because the court of appeals failed to identify a prior case with similar circumstances that would put the officer on notice his actions violated clearly established law); *see also al-Kidd*, 563 U.S. at 742 (stating, "[**t]he general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of**

little help in determining whether the violative nature of particular conduct is clearly established" for qualified immunity purposes) (internal citation omitted) (emphasis added); *Sheehan*, 135 S. Ct. at 1776 (stating, **"[q]ualified immunity is no immunity at all if clearly established law can simply be defined as the right to be free from unreasonable searches and seizures**") (internal quotations and citations omitted) (emphasis added).

Moreover, the *Whitley* Court explicitly rejected the argument that *Hale* put an officer on notice his failure to intervene and stop a fellow officer from sexually assaulting children—arguably an excessive force under the Opinion's analysis—violated clearly established law. *Whitley*, 726 F.3d at 647, n. 13 (determining, "[t]he only case [the plaintiff] cites is *Hale*, but, as discussed, that case is factually inapposite … **[w]e do not find that *Hale* put [the officer] on notice** …") (internal citations omitted) (emphasis added).

Therefore, the Opinion conflicts with *Whitley*, which shows *Hale* is not applicable, and Deputy Kindred is entitled to qualified immunity because no case has been identified that shows it was clearly established in 2012 that a bystander sheriff's deputy in a similar circumstance violated the law.

2. Heightened Pleading Standard

For decades, this Court has recognized a heightened pleading standard in qualified immunity cases. *See Wicks*, 41 F.3d at 994–95. This standard

requires plaintiffs "rest their complaint on more than conclusions alone and **plead their case with precision** and factual specificity." *Nunez*, 341 F.3d at 388 (emphasis added); *see also Jacquez*, 801 F.2d at 793 (reversing and "direct[ing] the district court to render final judgment dismissing" the case because after being put on notice that the complaint failed to satisfy the heightened pleading standard, the plaintiff continued to insist nothing was wrong and failed to amend it).

Here, the Opinion acknowledges, "when [Hamilton and Randle] submitted proposed jury instructions, those instructions explicitly stated that 'excessive force does not apply in this case.'" Op. at 6. It also acknowledges that "[Hamilton and Randle] never used the words 'excessive force' in their complaint and were less than clear during the proceedings about exactly which theories they were advancing …" *Id.* Nevertheless, the Opinion determined the heightened pleading was satisfied and excessive force is claim in this case. Op. 4-7. This conflicts with this Court's heightened pleading standard in qualified immunity cases, and any excessive force claim should be excluded.

IV. CONCLUSION

For the foregoing reasons, Deputy Kindred respectfully requests that the Court grant rehearing en banc. He also respectfully requests that the mandate be recalled and stayed pending final resolution of this appeal pursuant to Federal Rule

of Appellate Procedure 41.

Respectfully submitted,

Brazoria County District Attorney's Office
111 E. Locust, Suite 408A
Angleton, Texas 77515
T:979/864-1233
F:979/864-1712

By: /s/Christopher Garza
Assistant District Attorney
SBN: 24078543
FBN: 1670532
Email: chrisg@brazoria-county.com

COUNSEL FOR DEFENDANT
AARON KINDRED

CERTIFICATE OF SERVICE

I certify that on January 20, 2017, a true and correct copy of the foregoing document was electronically filed with the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, causing it to also be served on Hamilton and Randle's following counsel of record:

Allie R. Booker
The Booker Law Firm
1200 Rothwell
Houston, Texas 77002
Fax: 713-583-3995
Email: booker@bookerlawfirm.com

Joseph K. Plumbar
Law Office of Joseph K. Plumbar
1200 Rothwell
Houston, Texas 77002
Fax: 866-252-3048
Email: jplumbar@plumbarlaw.com

By: /s/ Christopher Garza
Christopher Garza

CERTIFICATE OF COMPLIANCE

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By: /s/Christopher Garza
Assistant District Attorney
SBN: 24078543
FBN: 1670532
Email: chrisg@brazoria-county.com

ATTORNEY FOR APPELLANT
AARON KINDRED

Date: January 20, 2017

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fif h Circuit
FILED
January 12, 2017
Lyle W. Cayce
Clerk

No. 16-40611
Summary Calendar

BRANDY HAMILTON; ALEXANDRIA RANDLE,

Plaintiffs—Appellees,

v.

AARON KINDRED,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:13-CV-240

Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

Brazoria County Sheriff's Office Deputy Aaron Kindred appeals the district court's denial of qualified immunity in this case involving the roadside body cavity searches of two women during a traffic stop. This case arises from an investigatory traffic stop in 2012. Three officers were involved in the incident. The two Department of Public Safety ("DPS") officers, Nathaniel Turner and Amanda Bui, have reached settlement agreements with Plaintiffs Brandy Hamilton and Alexandria Randle. The question presented by this case is whether the third officer at the scene, Deputy Kindred, is liable under 42 U.S.C. § 1983 as a bystander for not intervening to prevent the body cavity

searches. Because material issues of fact remain, we do not have appellate jurisdiction over this interlocutory appeal. Accordingly, we DISMISS.

I. BACKGROUND

A. Factual Background

On Memorial Day weekend in 2012, Hamilton and Randle were pulled over by DPS Officer Turner for speeding. Turner smelled marijuana and asked the women to exit the vehicle. Hamilton was wearing a bikini bathing suit, and Randle was similarly dressed. Turner did not allow the women to cover themselves before exiting the vehicle. He used his radio to request help from local law enforcement and a female officer to conduct a search of the women. On the radio, Turner stated that the car smelled like marijuana and that one of the women "had the zipper open on her pants, or Daisy Duke shorts, whatever they are." Turner handcuffed and separated the women before ordering Hamilton to sit in the front passenger seat of his patrol car. He then conducted a search of the vehicle. When Kindred arrived, Turner asked him to identify the drivers of several other cars that had arrived near the scene. When Bui arrived, she parked next to Turner's patrol car. When he had completed the vehicle search, Turner informed Bui and Kindred that he had finished the search but wanted Bui to search the women. Bui asked the men if they had any gloves, and Turner gave her the gloves he had used to search the vehicle.

At that point, Kindred asked Turner, "Do you want me to make this easier and go in the back?" Turner agreed that Kindred should stand behind the car. Kindred stood behind Turner's patrol car and can be seen in that position in the video. Turner told Hamilton: "[Bui] is going to search you, I ain't going to do that . . . cause I ain't getting up close and personal with your women areas." Turner and Kindred stood together behind the car while Bui performed the body cavity search. During the search, Turner told Kindred: "I don't know if she stuck something in her crotch or this one did."

After the search, Turner asked Bui if Hamilton had "[n]othing on her," and then requested she search Randle because "she is the one who had the zipper open." Hamilton immediately asked, "Do you know how violated I feel?" and said she felt so embarrassed. Turner replied that if they "hadn't had weed in the car they wouldn't be in this situation." Randle, who had been standing by Hamilton's car, was escorted to Bui's patrol car. Kindred was still standing behind Turner's vehicle. When Bui performed the body cavity search on Randle, Randle began to scream: "That is so fucked up! I am so done!" Hamilton yelled at her a couple times to "calm down" and "be quiet." Randle sounded as if she was crying when she again said, "Man, this is so fucked up!" After the searches were complete, Hamilton stated to Turner that "it was going to the extreme" to have someone "put their fingers up your stuff." In their complaint, Hamilton and Randle describe Bui's actions as "forcibly search[ing] in their vaginas and anus[es] against protest," and explain that the search was "physically and emotionally painful."

B. Procedural Background

Hamilton and Randle filed their complaint on June 27, 2013, asserting § 1983 claims against the officers involved and their employers. They alleged that the invasive cavity searches violated their Fourth Amendment rights to be free from unreasonable searches and seizures. Kindred moved for summary judgment, arguing that he was entitled to qualified immunity because at the time of the incident, bystander liability was not clearly established in the Fifth Circuit in cases not involving excessive force. The district court denied Kindred's motion for summary judgment on April 28, 2016. The district court found that the Plaintiffs had asserted an excessive force claim and that it was clearly established that bystander liability would apply. Additionally, the district court held that there was a "serious dispute as to material facts" in the

case regarding the objective reasonableness of Kindred's actions. Kindred timely appealed.

II. DISCUSSION

We have jurisdiction to review a district court's denial of qualified immunity "only to the extent that the appeal concerns the purely legal question whether the defendants are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc). "[W]e lack the power to review the district court's decision that a genuine factual dispute exists" and "instead consider only whether the district court erred in assessing the legal significance of conduct that the district court deemed sufficiently supported." *Id.* at 348. We review the district court's conclusion de novo. *Id.* at 349.

A. Excessive Force

Kindred first argues that the district court erred in allowing the Plaintiffs to go forward on an excessive force theory of liability. He argues that the Plaintiffs never pleaded excessive force. In qualified immunity cases, plaintiffs must "rest their complaint on more than conclusions alone and plead their case with precision and factual specificity." *Nunez v. Simms*, 341 F.3d 385, 388 (5th Cir. 2003). "To bring a § 1983 excessive force claim under the Fourth Amendment, a plaintiff must first show that she was seized." *Flores v. Palacios*, 381 F.3d 391, 396 (5th Cir. 2004). The plaintiff must then "show that she suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Id.* We agree with the district court that Hamilton and Randle alleged facts in their complaint that meet this standard. The pleadings clearly stated that both Hamilton and Randle were seized during the course of the traffic stop when they were handcuffed and placed in patrol cars. They alleged

that they were detained for over thirty minutes and were subjected to invasive body cavity searches during that time in violation of the Fourth Amendment. The Plaintiffs asserted that there were no warrants or exigent circumstances allowing the searches. Furthermore, the Plaintiffs alleged injuries resulting directly from the cavity searches that took place during the detention.

Additionally, Kindred argues that excessive force does not apply to the facts of this case because "[e]xcessive force is a seizure, not a search." This argument is meritless. The Plaintiffs were clearly seized when they were placed in handcuffs and escorted to the patrol cars. Furthermore, excessive force applies because Hamilton and Randle have alleged that they were subjected to a use of force—the insertion of Bui's fingers into their vaginas and anuses—during the course of an investigatory stop. The Supreme Court has recognized that excessive force is unconstitutional during such a seizure. *Graham v. Connor*, 490 U.S. 386, 388 (1989) (holding that the Fourth Amendment protects against the use of excessive force during an "arrest, investigatory stop, or other 'seizure' of [the] person"). Likewise, "Fifth Circuit precedent [has] plainly established [that] . . . [a] strip or body cavity search raises serious Fourth Amendment concerns." *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 409 (5th Cir. 2002). *See also Martin*, No. SA-05-CA-0020, 2006 WL 2062283, at *5 (W.D. Tex. 2006) (cataloguing case law and finding no reasonable officer would have found a roadside body cavity search reasonable even if they "reasonably suspected that Plaintiff was concealing contraband in a body cavity" if "there were no exigent circumstances requiring the search to be conducted on the public roadside rather than at a medical facility"). Plaintiffs have alleged facts showing they were subjected to an unreasonable use of force excessive to its need. Therefore, the district court did not err in determining that excessive force was a viable theory in this case.

Finally, Kindred contends that even if excessive force applies, the Plaintiffs abandoned it as a theory of liability. In support, Kindred points to statements the Plaintiffs made that suggest they were not asserting an excessive force claim. In particular, in their response to Kindred's motion for summary judgment, the Plaintiffs stated that "'excessive force' is not an element of 'bystander liability' but a cause of action, and the Defendants cannot choose which causes of action for Plaintiffs to plead in a suit against Defendant." Additionally, when the Plaintiffs submitted proposed jury instructions, those instructions explicitly stated that "excessive force does not apply in this case."

Judge Hanks held a lengthy hearing on this issue on February 9, 2016. At that time, "counsel for Hamilton and Randle unequivocally stated that they [had] not abandoned their bystander liability claim under an excessive force theory." Kindred argued that the Plaintiffs' vague arguments "show an obvious intent to remove excessive force from this case," but he was unable to point to an exact document in the record evidencing waiver. After reviewing the pleadings and motions and hearing argument from the parties, the district court noted that the pleadings exhibited a lengthy and "rather confusing debate . . . as to whether excessive force is an essential element of a bystander liability claim or a separate cause of action, whether bystander liability can be based on theories other than excessive force, and whether Hamilton and Randle have a claim for 'direct' liability." But the district court concluded that the excessive force claim had not been waived.

After reviewing the record, we agree with the district court's determination. While the Plaintiffs never used the words "excessive force" in their complaint and were less than clear during the proceedings about exactly which theories they were advancing, the district court did not err in finding that excessive force had not been waived. Throughout the case, Plaintiffs have

clearly argued that they were subject to an unreasonable search and seizure in violation of the Fourth Amendment, and have alleged facts that support a claim for excessive force.

B. Bystander Liability

Kindred argues that the district court erred in denying summary judgment because even if bystander liability applied in this case, there is no genuine issue of material fact as to the elements of bystander liability. In *Whitley v. Hanna*, 726 F.3d 631 (5th Cir. 2013), this Court stated that "an officer may be liable under § 1983 under a theory of bystander liability where the officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Id.* at 646 (quoting *Randall v. Prince George's Cty.*, 302 F.3d 188, 204 (4th Cir. 2002)). At the time of the incident, it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm. *See Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995). And "[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Roe*, 299 F.3d at 409 (quoting *Hope v. Paltzer*, 536 U.S. 730, 741 (2002)).

The district court found that "there [was] a serious dispute as to the material facts" regarding each element of bystander liability. We lack jurisdiction to review the district court's determination that a genuine factual dispute exists. *Kinney*, 367 F.3d at 347–48. Because we find that excessive force applies in this case and disputes of material fact remain, Kindred's appeal is DISMISSED.