IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO Civil Action No. 18-cv-02393-RM-NRN ABEL RAMOS AVILA, Plaintiff, v. WILLIAM BARR, KEVIN K. MCALEENAN, and KRISTI BARROWS, Defendant.

REPORT AND RECOMMENDATION ON DEFENDANTS MOTION TO DISMISS AMENDED COMPLAINT

(DKT. #21)

N. REID NEUREITER United States Magistrate Judge This case is before the Court pursuant to an Order (Dkt. #36) issued by Judge Raymond P. Moore referring Defendants Barr, McAleenan, and Barrows (collectively Defendants or the Government) Motion to Dismiss Amended Complaint. Dkt. #21. I have carefully considered the motion, Plaintiff Abel Ramos Avila s response (Dkt. #31), and Defendants reply. Dkt. #85. I heard argument on the motion on October 28, 2019. See Dkt. #41. I have taken judicial notice of the Court s file and considered the applicable Federal Rules of Civil Procedure and case law. Now, being fully informed and for the reasons discussed below, I RECOMMEND that the motion be GRANTED, and the case be DISMISSED.

BACKGROUND The facts of this case, which the Court takes from Mr. Ramos s Amended Petition for Review of Application for Naturalization Pursuant to INA § 336(b) (the Amended Complaint) 1

(Dkt. #15-1) and are presumed to be true for the purposes of Defendants motion to dismiss, are straightforward. On June 26, 2017, the United States Citizenship and Immigration Service (USCIS) denied Mr. Ramos s application for naturalization (INS Form N 400) because it determined that Mr. Ramos, a native of Mexico, was not lawfully admitted for permanent residence. The USCIS found that Mr. Ramos had obtained his Lawful Permanent Resident (LPR) status by fraud because he failed to disclose (1) a prior 1984 deportation under a false name (Angel Rodriguez Avila); and (2) a prior 1986 arrest for Possession of Controlled Substance. Accordingly, Mr. Ramos was deemed ineligible for citizenship. His subsequent request for a hearing on the decision (INS Form N 336) was denied. In his Amended Complaint, Mr. Ramos alleges that he does not remember whether his prior deportation and/or arrest were discussed at the September 18, 1995 interview by which his status was adjusted to LPR and he received his Green Card, and that the Defendants cannot prove that they were not. He further claims that even if these facts were not disclosed, they were immaterial and

irrelevant to issue of inadmissibility. Mr. Ramos also alleges that the Government was aware of these incidences prior to his naturalization interview in December 2016 because the USCIS

1 This case was originally designated an Administrative Procedure (AP) but upon the filing of the Amended Complaint, the Defendants moved to terminate the AP case designation because Mr. Ramos no longer sought review under 8 U.S.C. § 1447(b), but rather 8 U.S.C. § 1421(c), which requires de novo review. Dkt. #20. Judge Robert E. Blackburn granted the motion on April 23, 2019. Dkt. #23. had terminated rescission proceedings that were initiated on identical facts in 2003, and his Green Card had been renewed on two subsequent occasions. He requests that the Court find him eligible for citizenship. Defendants now move to dismiss pursuant to Rule 12(b)(6).

RELEVENT LAW I. Rule 12(b)(6) In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff s favor. Brokers Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014); Mink v. Knox, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a plausible right to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007); see also id. at 555 (Factual allegations must be enough to raise a right to relief above the speculative level.). Conclusory allegations are insufficient, Cory v. Allstate Ins., 583 F.3d 1240, 1244 (10th Cir. 2009), and courts are not bound to accept as true a legal conclusion couched as a factual allegation, Twombly, 550 U.S. at 555 (quotation omitted). To determine whether a claim is plausible, a court considers the elements of the particular cause of action, keeping in mind that the Rule 12(b)(6) standard doesn t require a plaintiff to set forth a prima facie case for each element. George v. Urban Settlement Servs., 833 F.3d 1242, 1247 (10th Cir. 2016) (quotation omitted). However, if the allegations are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012) (quotation omitted). A complaint warrants dismissal if it fails in toto to render [plaintiff s] entitlement to relief plausible. Twombly, 550 U.S. at 569 n.14. II. The Naturalization Process and Judicial Review The naturalization process is governed by the Immigration and Nationality Act (INA) and its corresponding regulations. Under the applicable provisions of the INA, [n]o person . . . shall be naturalized unless he meets the following criteria: (1) the applicant must have been a lawful permanent resident residing within the United States for the five years preceding his application for naturalization; (2) the applicant must have resided continuously within the United States from the date of the application up to the time of admission to citizenship; and (3) during all the relevant time periods, the applicant must be a person of good moral character. 8 U.S.C. § 1427(a). See also id. § 1429 ([N]o person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter.) In addition, the applicant generally must demonstrate an understanding of the English language, including the ability to read, write, and speak words in ordinary usage, knowledge and understanding of the fundamentals of United States history, and of the principles and form of the United States government. 8 U.S.C. §§ 1423(a)(1) & (2). As part of the INA, Congress specifically granted

jurisdictional authority to the federal district courts to review the denial of an application for naturalization. INA § 310(c), codified at 8 U.S.C. § 1421(c). That section provides:

A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application. 8 U.S.C. § 1421(c). This grant of authority is unusual in its scope rarely does a district court review an agency decision de novo and make its own findings of fact. Nagahi v. I.N.S., 219 F.3d 1166, 1169 (10th Cir. 2000); Abghari v. Gonzales, 596 F. Supp.2d 1336, 1342 43 (C.D. Cal. 2009) (8 U.S.C. § 1421(c) represents a narrow and rather unique grant of jurisdiction to conduct de novo review of USCIS decisions); Mobin v. Taylor, 598 F. Supp. 2d 777 (E.D. Va. 2009) (de novo review is not deferential, and noting that judicial review in other immigration contexts, such as removal or asylum, is highly deferential and expressly limited by statute). It is settled law that no alien has the slightest right to naturalization unless all statutory requirements are met. Fedorenko v. United States, 449 U.S. 490, 506 (1981). [S]trict compliance is required. Id. A naturalization applicant bears the burden of showing his eligibility and compliance with all naturalization requirements. Berenyi v. Dist. Dir., INS, 385 U.S. 630, 637 (1967); 8 C.F.R. § 316.2(b). Any doubts about eligibility should be resolved in favor of the United States and against the applicant. Id.

ANALYSIS Defendants argue that the facts alleged in the Amended Complaint show that Mr. Ramos is not eligible for naturalization because he was not an LPR residing within the United States for the five years preceding his application for naturalization, as required by 8 U.S.C. §§ 1427 and 1429. Defendants assert that Mr. Ramos was inadmissible at the time of the 1995 adjustment proceedings due to his 1984 deportation, and the material misrepresentations he made regarding the deportation and his arrest history. Mr. Ramos, on the other hand, contends that his 1984 deportation was fundamentally defective and cannot be used as a basis to contest his LPR status. He also argues that he did not make any deliberate misrepresentations. Finally, Mr. Ramos states that the Government waived challenging his LPR status because it moved to terminate rescission proceedings in 2003, and it is estopped from making that argument here. The Court finds that Mr. Ramos s 1984 deportation rendered him inadmissible at the time of his adjustment of status. Therefore, he was not eligible for naturalization. The Court also finds that the Government did not waive the issue of inadmissibility, and res judicata and/or collateral estoppel do not prevent the Government from arguing that Mr. Ramos was not properly admitted as a lawful permanent resident. Accordingly, Mr. Ramos s Amended Complaint should be dismissed. At the time of Mr. Ramos s 1984 deportation, the INA provided that [a]liens who have been arrested and deported . . . and who seek admission within five years of the date of such deportation or removal were inadmissible. See 8 U.S.C. § 1182(a)(17) (1982), attached as an exhibit to Defendants motion and located at Dkt. #21-6. Moreover, both parties acknowledge that in 1995, an individual who had been arrested and deported and who [sought] admission within five years of such deportation or removal was ineligible for admission. See 8 U.S.C.

§ 1182(a)(6)(B) (1995); Dkt. #15-1 at 11 ¶ 4 (citing INA § 2l2(a)(6)(B)(i))). Pursuant to 8 C.F.R. § 212.2, the individual must remain[] outside the United States for five consecutive years since the date of deportation or removal to avoid application of the five-year rule on inadmissibility. 2 Although he claims that no record of it exists, Mr. Ramos does not dispute that he was arrested on August 5, 1986, in Denver, Colorado, for Unlawful Possession of a Controlled Substance. Therefore, Mr. Ramos did not remain outside the United States for the required five years after his 1984 deportation, and he was not admissible for LPR status in 1995. Mr. Ramos, tacitly conceding this point, 3

pivots to a different argument in his response. He states that [u]ntil now, the nature and circumstances of [Mr. Ramos] s arrest and deportation seemed not to have been questioned. Dkt. #31 at 4. He goes on to argue:

[I]f the circumstances surrounding the deportation were so fundamentally unfair, and resulted in a denial of fundamental guarantees of due process of law, it can hardly serve now as a predicate for invoking the five-year bar to re-entry after deportation without first establishing [five] years of continuous presence outside the United States and permission of the Attorney General to reenter the Untied States.

2 Defendants attach as exhibits to their motion the 1982 (Dkt. #21-9) and 1995 (Dkt. #21-10) versions of 8 C.F.R. § 212.2, which likewise require individuals to remain outside the United States for five successive years. 3 Mr. Ramos s response seems to abandon the contentions in his Amended Complaint that: (1) the USCIS mistakenly relied on a later version of 8 U.S.C. § 1182(a)(6)(B) that did not apply when he adjusted his status in 1995; (2) 8 U.S.C. § 1182(a)(6)(B) did not bar his adjustment of status in 1995 because he applied for adjustment from within the country; and (3) he filed for waiver for a prior deport. As to the last argument, specifically, the Court notes that Mr. Ramos does not allege that he was ever granted any waiver of inadmissibility, only that he was eligible to apply for a waiver and did so. This does not affect the Court s conclusion that Mr. Ramos has not shown that he strictly complied with the statutory requirements for citizenship. Id. at 4 5. He claims that his mass deportation deprived him of substantial due process. Id. at 7. Mr. Ramos states that he could not speak, read, or understand English at the time, and he cannot recall if a Spanish interpreter was provided or if he was informed that he could post bond. Id. As Defendants point out, Mr. Ramos s Amended Complaint does not contain these allegations, and a plaintiff may not effectively amend his complaint in his response to a motion to dismiss. See In re Qwest Commc ns Int l, Inc., 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004) (The plaintiffs may not effectively amend their Complaint by alleging new facts in their response to a motion to dismiss.). Moreover, even if the Court were inclined to grant him leave to amend his pleading, Mr. Ramos would plainly struggle to state a plausible claim for relief given that he cannot recall significant aspects of the proceeding, which is unsurprising given that it occurred 35 years ago. This huge gap in time provides another basis for rejecting Mr. Ramos s argument: 35 years is simply too long to wait to complain of procedural infirmities. Palma v. INS, 318 F.2d 645, 650 (6th Cir. 1963), cert. denied, 375 U.S. 958 (1963) (finding twenty-five years to long a period). See also United States v. Felix-Maciel, No. 3:10-CR-65, 2011 WL 3489690, at *4 (E.D.

Tenn. Aug. 9, 2011) (adopting magistrate judge recommendation that defendant was barred from collaterally attacking his 1986 deportation order). Finally, Mr. Ramos s reliance on United States v. Mendoza Lopez, 481 U.S. 828 (1987), for the proposition that due process deficiencies may render a deportation order a nullity is misplaced. There, the Supreme Court held that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense. 481 U.S. at 838. The Court specifically noted, however, that this rule would not create an opportunity for aliens to delay deportation, since the collateral challenge we recognize . . . is available only in criminal proceedings instituted after reentry. Garcia-Marrufo v. Ashcroft, 376 F.3d 1061, 1064 (10th Cir. 2004) (citing Mendoza Lopez, 481 U.S. at 838 n.17.). Mr. Ramos is not facing any criminal charges; thus, Mendoza Lopez provides him no help. See Id. (refusing to consider a challenge to the underlying order of removal where petitioner appealed reinstatement of order of removal). Accordingly, because he did not remain outside the United States for a period of five consecutive years after his 1984 deportation, Mr. Ramos was inadmissible at the time of the 1995 adjustment proceeding. Thus, Mr. Ramos is ineligible to naturalize. See, e.g., Saliba v. Attorney Gen. of United States, 828 F.3d 182, 192 (3d Cir. 2016) (Thus, an alien whose status has been adjusted to LPR but who is subsequently determined to have obtained that status adjustment through fraud has not been lawfully admitted for permanent residence because the alien is deemed, ab initio, never to have obtained [LPR] status.) (citation and quotation marks omitted). The Court, then, need not decide whether Mr. Ramos made deliberate and material misrepresentations during the 1995 adjustment proceedings. However, Mr. Ramos s contention that the Government cannot say that he was not lawfully admitted because it terminated rescission proceedings against him must be addressed. It also must be rejected. Mr. Ramos claims that the Government initiated proceedings to rescind his LPR status in the early-2000s on the same grounds that are now being used to deny him citizenship. However, the Government agreed to terminate rescission proceedings upon proof that no charges were filed related to his 1986 arrest, which Mr. Ramos provided. Mr. Ramos argues that the law of the case mandates the conclusion that Mr. Ramos is an LPR of the United States. Mr. Ramos first argues that the decision to terminate rescission proceedings amounts to [e]ffectively granting a waiver of inadmissibility based upon the prior deportation in 1986, defacto [sic]. Dkt. #31 at 14. He cites no authority for this position. The INA does not provide for any implied or de facto waivers of inadmissibility. Indeed, the formal waiver application process is the sole method for an otherwise inadmissible applicant . . . to obtain a waiver of inadmissibility. Saliba, 828 F.3d at 194 (emphasis added). See also Khan v. Johnson, No. 2:14 CV 06288 CAS(CWX), 2016 WL 429672, at *11 (C.D. Cal. Feb. 1, 2016) ([A]n applicant is required to submit a formal application requesting a waiver and pay a fee. . . . Unless an applicant complies with these regulations, USCIS is not permitted to waive the applicant s bar to admissibility.). Mr. Ramos does not allege that he was granted a formal waiver of inadmissibility. Accordingly, the Government s decision to stop rescission proceedings against Mr. Ramos does not act as a waiver. Next, Mr. Ramos claims that res judicata and collateral estoppel bar the denial of his application for naturalization. Mr. Ramos is imprecise in making this argument. He forgoes the use of the modern labels of claim preclusion and issue preclusion. The Supreme Court has clarified that under federal common law, res judicata is a term that encompasses

both claim and issue preclusion. Taylor v. Sturgell, 553 U.S. 880, (2008) (The preclusive effect of a [federal court] judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as res judicata.). It is unclear which doctrine Mr. Ramos relies on. In any event, neither apply to this case. The doctrine of res judicata, or claim preclusion, will prevent a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment. Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017) (internal quotation marks omitted). Claim preclusion has three elements: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits. Goodwin v. Hatch, 781 F. App x 754, 760 (10th Cir. 2019). Claim preclusion does not apply here. First, the Government s decision to voluntarily stop pursuing the rescission of Mr. Ramos s LPR status does not constitute a final judgment. Second, this lawsuit concerns naturalization, not rescission or removal. [R]escission, removal, and naturalization raise entirely distinct legal questions. Saliba v. Att y Gen. of U.S., 828 F.3d 182, 196 (3d Cir. 2016) (citation and quotation marks omitted). The Government is not seeking to rescind Mr. Ramos s LPR status or remove him from the country. If they should initiate such proceedings in the future, Mr. Ramos is free argue that such actions are precluded or subject to estoppel, judicial or equitable. He may not do so here. For similar reasons, collateral estoppel, or issue preclusion, also does not apply. Issue preclusion embodies the idea that [o]nce a court has decided an issue, it is forever settled as between the parties[.] B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1302 (2015) (quoting Baldwin v. Iowa State Traveling Men s Assn., 283 U.S. 522, 525 (1931)). The elements of issue preclusion are: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. Matosantos Commercial Corp. v. Applebee s Int l, Inc., 245 F.3d 1203, 1207 (10th Cir. 2001) (internal quotation marks omitted). Mr. Ramos cannot satisfy the first element. The question before the Court is not whether Mr. Ramos s LPR status should be rescinded, but whether he is entitled to be naturalized for citizenship. Accordingly, issue preclusion does not preclude the Government from asserting that Mr. Ramos is ineligible for naturalization. Finally, although the issue was not explicitly raised by Mr. Ramos, out of caution, the Court finds that equitable estoppel also has no application to the facts of this case. As Judge Moore recently explained:

[In Kowalczyk v. I.N.S., 245 F.3d 1143 (10th Cir. 2001)], the Tenth Circuit stated that the elements of estoppel against a private party are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party s conduct to his injury. Kowalczyk, 245 F.3d at 1149 (quotation omitted). In addition, when facing the government, a party must show some type of affirmative misconduct . Id. Moreover, in the immigration context, estoppel against the government has a particularly high bar. Id. at 1150. Fundamentally, [e]quitable estoppel allows one party to prevent another from taking a legal position

inconsistent with an earlier statement or action that places his adversary at a disadvantage. Id. at 1149. Borski v. Lynch, No. 16-CV-00924-RM, 2017 WL 1153997, at *9 (D. Colo. Mar. 27, 2017). Here, Mr. Ramos s allegations do not clear the particularly high bar for estoppel against Defendants in the immigration context. There are no allegations of governmental misconduct, or any indication that Defendants, by terminating rescission proceedings, intended to lead Mr. Ramos to believe that he would be eligible for naturalization. Furthermore, there are no plausible allegations that Mr. Ramos relied to his detriment on the belief that he would be eligible for citizenship. Accordingly, Mr. Ramos has not alleged a plausible claim of equitable estoppel against Defendants.

RECOMMENDATION It is hereby RECOMMENDED that Defendants Motion to Dismiss Amended Complaint (Dkt. #21) be GRANTED, and that Amended Petition for Review of Application for Naturalization Pursuant to INA § 336(b) (Dkt. #15-1) be DISMISSED.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party s objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party s failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148 53 (1985), and also waives appellate review of both factual and legal questions, Makin v. Colo. Dep t of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412 13 (10th Cir. 1996).

Dated: November 22, 2019 Denver, Colorado N. Reid. Neureiter United States Magistrate Judge