RUIZ-DIAZ V. UNITED STATES: RFRA, SUBSTANTIAL BURDEN, AND THE NINTH CIRCUIT’S CAUSATION-NEXUS REQUIREMENT—A WRINKLE OR A ROADBLOCK FOR FUTURE IMMIGRATION-RELATED RELIGIOUS FREEDOM CHALLENGES?

Scott D. Pollock*

I. INTRODUCTION

In Ruiz-Diaz v. United States, \(^1\) the Ninth Circuit Court of Appeals turned back a direct Religious Freedom Restoration Act (“RFRA”) challenge to a United States Citizenship and Immigration Services’ (“USCIS”) regulation that makes it more difficult for non-citizen religious workers to obtain permanent resident status than other workers who apply to immigrate to the United States. \(^2\) The USCIS regulation determines when a religious worker can apply for permanent resident status—it requires religious employers to undergo a two-step process involving pre-approval of a visa petition before allowing the beneficiary of the petition to apply for a “green card.” \(^3\) Secular workers, by contrast, can concurrently file the visa petition and application for the green card, and thus complete their immigration process in one step without having to leave the United States at all. \(^4\) Coupled with administrative processing delays, this ensures that at least some religious workers who come to the United States on temporary visas will need to depart the United States and

---


\(^1\) Ruiz-Diaz v. United States, 703 F.3d 483 (9th Cir. 2012).

\(^2\) Id. at 485, 486.


\(^4\) See Ruiz-Diaz, 703 F.3d at 485; Ruiz-Diaz v. United States, 618 F.3d 1055, 1061 (9th Cir. 2010).

661
abandon their religious work here, temporarily or possibly permanently.\(^5\)

The Court rejected the plaintiffs’ challenge that this scheme burdened their religious exercise.\(^6\) It found that the statute imposes no duty on USCIS to decide religious worker visa petitions within any particular timeframe, and concluded that USCIS’s process did not impose a “substantial burden” on religious works within the Ninth Circuit’s definition of the term—specifically, it did not force the religious workers to choose between exercising their religion and obtaining a government benefit, nor did it compel the complainants to abandon their religious exercise as a way to avoid having a civil or criminal penalty imposed on them.”\(^7\) The Court further found that the burden of possibly having to leave the U.S. was not due to the plaintiffs’ religious exercise, but due to the fact that they would have violated the terms of their temporary status in the U.S. had they stayed.\(^8\)

As of the date of this publication, *Ruiz-Diaz* has only been cited once by another federal court since its publication in November 2012."\(^9\) But its implications loom large—recently the USCIS’s California Service Center relied on *Ruiz-Diaz* to deny a request for a religious exemption to a minister who applied for permanent resident status, but who was found to be inadmissible under the Immigration and Nationality Act due to past conduct unrelated to his ministry.\(^10\)

---

\(^5\) *Ruiz-Diaz*, 618 F.3d at 1061.

\(^6\) *Ruiz-Diaz*, 703 F.3d at 486. The Ninth Circuit had previously remanded with instructions to the district court to consider plaintiffs’ RFRA, equal protection, and due process challenges. *Ruiz-Diaz*, 618 F.3d at 1062.

\(^7\) *Ruiz-Diaz*, 703 F.3d at 486, 487. “We have held that the government imposes a substantial burden ‘only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.’” *Id.* at 486 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008)).

\(^8\) *Ruiz-Diaz*, 703 F.3d at 486.

\(^9\) Notably, however, that citation briefly references the Ninth Circuit’s interpretation on whether the government has, contrary to RFRA, substantially burdened a person’s exercise of religion. See United States v. Christie, No. 10-00384(02) LEK, 2013 U.S. Dist. LEXIS 71029, at *9 (D. Haw. May 20, 2013) (borrowing the Ninth Circuit’s definition of a “substantial burden”).

\(^10\) U.S. Dep’t of Homeland Sec., Citizenship and Immigration Servs., Decision Denying Application for Adjustment of Status in the Matter of [name redacted] (Oct. 13, 2015) [hereinafter USCIS Decision] (on file with author). Years before becoming a minister, the applicant failed to disclose a prior entry to the U.S. on a visa application, rendering himself inadmissible for a misrepresentation under 8 U.S.C. § 1182(a)(6)(C)(i). 8 U.S.C. § 1182(a)(6)(C)(i) (2014); see also USCIS Decision, supra. He was also found to have claimed to be a U.S. citizen to obtain prior employment, and was deemed inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii)(I). 8 U.S.C. § 1182(a)(6)(C)(ii)(I); see also USCIS Decision, supra. As described below in this article, these grounds of inadmissibility are subject to certain individual waivers.
It reasoned that the minister’s inadmissibility as an immigrant was not caused by his religious exercise, and therefore the denial of his lawful status did not impose a substantial burden on religion.\footnote{USCIS Decision, \textit{supra} note 10; see also \textit{Ruiz-Diaz}, 703 F.3d at 486 (holding that subjecting an immigrant-plaintiff subject to removal based on applicable laws governing his visa status and not because of his practice of religion, did not impose a substantial burden on plaintiff's religious exercise and was not in violation of the RFRA).} The USCIS found the minister’s plight to be analogous to that of the plaintiffs in \textit{Ruiz-Diaz} and denied his request for an exemption under RFRA.\footnote{USCIS Decision, \textit{supra} note 10.}

This article examines the \textit{Ruiz-Diaz} decision and its effect on the question of whether and when the refusal of immigration benefits, specifically to religious workers who are prima facie eligible as immigrants under the Immigration and Nationality Act (“INA”), violates RFRA or the Free Exercise Clause of the First Amendment if religious-based exceptions are not made available, even though the INA contains individualized exceptions for secular reasons. It also questions the continued jurisprudential viability of the \textit{Navajo Nation} case, relied on by the Ninth Circuit as the principal authority to determine when there is a substantial burden on religion. It argues that subsequent Supreme Court decisions point to a broader Congressional intent to protect religion than the Ninth Circuit recognized in \textit{Navajo Nation}, and that the Ninth Circuit could have come to the same result on narrower grounds. Finally, this article suggests substituting a different “but for” test that would apply to challenges to administrative actions that should trigger strict scrutiny when a statute, regulation, or agency action will result in the separation from religious employment of a non-U.S. citizen due to the application of U.S. immigration laws and procedures to non-religious conduct that do not expressly target religion but still burden it.

\section*{II. THE IMMIGRATION AND NATIONALITY ACT’S RELIGIOUS WORKER VISA PROGRAMS: CLASSIFYING A RELIGIOUS WORKER}

Ministers of religion, religious professionals, and other religious workers in a religious vocation or religious occupation may come to the United States to work for up to five years in temporary R-1 visa status, or permanently as special immigrants under the INA.\footnote{8 U.S.C. §§ 1101(a)(15)(R), 1101(a)(27), 1255(a), 1255(g) (2014); \textit{R-1 Temporary Nonimmigrant Religious Workers}, U.S. CITIZENS \& IMMIGRATION SERVS.,}
requirements to qualify a religious worker for both categories are very similar, though to qualify as a special immigrant, the worker must have been continuously engaged in the vocation or occupation for at least two years.\textsuperscript{14} It is not uncommon for a religious worker who is admitted temporarily to ask to remain in the United States for longer than five years or permanently.\textsuperscript{15} To accomplish this change in objective, a religious petitioner must file an I-360 Petition for Special Immigrant Religious Workers and, once that is approved, the foreign national religious worker may apply for adjustment of status in the United States or, if he or she is or will be outside of the United States, apply for an immigrant visa at a U.S. consulate.\textsuperscript{16}

Issues may arise over timing of the various applications. Given the time limits on the R-1 visa,\textsuperscript{17} if the I-360 petitioner waits too long or the USCIS processing is delayed, then the religious worker beneficiary of the petition may be forced to leave the United States. It was this situation that the plaintiffs in *Ruiz-Diaz* challenged.\textsuperscript{18}

\textsuperscript{14} 8 U.S.C. § 1101(a)(27)(C); *see also* Shalom Pentecostal Church *v.* Acting Sec’y, U.S. Dep’t of Homeland Sec., 783 F.3d 156, 167 (3d Cir. 2015) (striking as *ultra vires* regulations requiring “continuously engaged” experience to have been in lawful status and with employment authorization).

\textsuperscript{15} *See e.g.*, *Shalom Pentecostal Church*, 783 F.3d at 158–59; Hillcrest Baptist Church *v.* United States, 2007 U.S. Dist. LEXIS 12782, at *2–3, 5–6 (W.D. Wash. Feb. 23, 2007).


\textsuperscript{17} *See R-1 Temporary Nonimmigrant Religious Workers, supra* note 13.

\textsuperscript{18} *Ruiz-Diaz v.* United States, 703 F.3d 483, 487, 488 (9th Cir. 2012); *Ruiz-Diaz v.* United States, 819 F. Supp. 2d 1154, 1156, 1157 (W.D. Wash. 2011).
III. OTHER IMMIGRATION PROVISIONS AFFECTING FOREIGN NATIONAL RELIGIOUS WORKERS

In addition to the rules regarding classification as an R-1 or special immigrant minister or religious worker, the worker, like all other temporary visitors, workers, and immigrants, is subject to a variety of related substantive and procedural rules, including: inadmissibility grounds that may prevent an individual from entering the United States despite their qualifying in a particular visa category;\(^{19}\) removability grounds, which are similar but not identical to the inadmissibility grounds, that may require someone already in the United States to be deported;\(^{20}\) rules relating to admission, changes, and extensions of nonimmigrant status for persons in the United States on nonimmigrant visas in order to remain lawfully in the United States for additional temporary periods;\(^{21}\) and rules relating to adjustment of status for certain persons who were admitted or paroled into the United States, for whom an immigrant visa is immediately available, and who are admissible to the United States as immigrants.\(^{22}\)

IV. THE INA AS A SYSTEM OF EXEMPTIONS THROUGH SECULAR WAIVERS

Where there is a rule under the INA, there is usually an exception if not multiple exceptions to exceptions. Thus, the majority of rules governing religious workers including those relating to their admission or duration of stay; their applications to change, extend, or adjust their status; or their removal from the United States, are subject to exceptions to the rules in individual cases.\(^{23}\)

Congress included numerous waiver provisions in the INA.\(^{24}\) Many

---


\(^{23}\) Courts have repeatedly recognized the complexity of the immigration laws. See, e.g., Akram v. Holder, 721 F.3d 853, 854 (7th Cir. 2013) (“The Immigration and Nationality Act . . . is a bit of a beast. It is not known for being warm or cuddly; words like ‘intricate’ or ‘Byzantine’ come more readily to mind.” (citing Zeqiri v. Mukasey, 529 F.3d 364, 370 (7th Cir. 2008))(citation omitted); Drax v. Reno, 338 F.3d 98, 99–100 (2d Cir. 2003); Alanis-Bustamante v. Reno, 201 F.3d 1303, 1308 (11th Cir. 2000) (“It would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.”); Castro-O’Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987); Doug Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

of these are based on the existence of a family member in the United States who might experience the hardship of family separation or worse if the inadmissible or removable foreign national were not allowed to be in the United States. These waivers are necessary to mitigate some of the harsh consequences that otherwise attend to strict enforcement of the INA.

V. A CRITIQUE OF RUIZ-DIAZ AND ITS POTENTIAL TO UNDERMINE FUTURE IMMIGRATION-RELATED CHALLENGES OF SUBSTANTIAL BURDEN TO RELIGIOUS EXERCISE

The regulation challenged in Ruiz-Diaz bars concurrent filing of a Form I-360, Petition for Special Immigrant, and the beneficiary’s Form I-485, Application to Register Permanent Resident Status or Adjust Status. The Ninth Circuit, basing its result on the Navajo Nation case, reasoned that “[t]he fundamental flaw in the plaintiffs’ reliance on RFRA is that the challenged regulation does not affect their ability to practice their religion. They are subject to removal after five years because their visas have expired, not because they are practicing their religion.” In addition to the court’s prior articulation of “substantial burden” in Navajo Nation, this view inserts an additional, previously unstated, requirement: for government to impose a burden on religious exercise, the challenger’s exercise of religion itself must trigger that burden. The court attempts to reinforce its view that there is no substantial burden

25 See, e.g., 8 U.S.C. §§ 1182(a)(6)(C)(ii)(II) (2014) (making exception to certain persons inadmissible for false claims to U.S. citizenship to obtain a benefit); 1182(d)(11) (waiving most grounds of inadmissibility for nonimmigrants at the discretion of the Attorney General for such purposes as family unity or public interest); 1182(g)(1) (waiving medical grounds of inadmissibility based on the immigrant’s familial relations to U.S. citizens or lawfully admitted permanent residents); 1182(h)(1) (waiving inadmissibility due to fraud or misrepresentation based on the immigrant’s familial relations to U.S. citizens or lawfully admitted permanent residents); 1182(b) (waiving criminal grounds of inadmissibility based on the immigrant’s familial relations to U.S. citizens or lawfully admitted permanent residents); 1229b(a) (permitting the Attorney General to cancel removal for longtime lawful residents). There are many other exceptions to the rules in the INA under numerous circumstances.

26 See, e.g., Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (“[D]eportation [can be] ‘the equivalent of banishment or exile.’” (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947))); Bridges v. Wixon, 326 U.S. 135, 164 (1945) (Murphy, J., concurring) (“A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.”); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (“[E]nforcement] may result in loss of both property and life; or of all that makes life worth living.”).

27 Ruiz-Diaz v. United States, 618 F.3d 1055, 1057, 1058 (9th Cir. 2010).

28 Ruiz-Diaz v. United States, 703 F.3d 483, 486 (9th Cir. 2012).

29 See id.
imposed: “[the plaintiffs’] inability to file their applications concurrently with their employers’ petitions may well delay religious workers from adjusting status before their temporary visas expire, but it does not prevent them from practicing their religion.”

But this goes too far, as a matter of logic and law. The delay in adjusting status the court identifies may well constitute a denial of that benefit, resulting in the disruption or loss of religious employment. This actually happens. The rationale also purports to decide what a legitimate religious practice is with the implication that practicing one’s religion outside the United States is equal to practicing it in the United States. Not only is this a judgment that federal courts normally try to avoid, it also fails to consider the impact on the U.S. religious organizations that seek to employ the foreign religious workers. But the Ruiz-Diaz panel is nevertheless confident that religious practice in the United States delayed is not the same as religious practice denied:

Nor does the delay in their ability to file visa applications require plaintiffs to give up any tenet of their religion to access a government benefit, i.e., LPR status. As the district court observed, “[g]iving up one’s religious practices would not improve the chances of obtaining adjustment of status or help the alien avoid deportation: in fact, abandoning the religious work on which the alien’s admission was premised could preclude the requested relief.” Accordingly, the regulation does not impose a substantial burden on plaintiffs’ religious exercise and therefore does not violate RFRA.

In sum, the court’s reasoning relies first on the Navajo Nation premise that a “substantial burden” is limited to the Sherbert/Yoder line of cases and, second, that there should be a causal nexus between a particular religious exercise and a government imposed

30 Id.
34 Ruiz-Diaz, 703 F.3d at 486 (alteration in original).
consequence that would penalize that.\textsuperscript{35} The court’s understanding thus separates and isolates the substantial burden analysis from the actual ultimate consequence of upholding the regulation. A cause that is unrelated to the exercise of religion, such as an expired visa, cannot burden religion according to the Court.\textsuperscript{36} While this understanding may be supported generally by the facts of most cases in the \textit{Sherbert/Yoder pre-Smith} jurisprudence, it also favors a mechanical process, one that can safely restrict the substantial burden analysis in the religious immigration context. The problem with it is that it is blind to future impact, and ignores the religious exercise of denominations in the United States, many of which rely on uninterrupted ministry of foreign religious workers, which the INA itself promotes through its inclusion of the Religious Worker Visa Program.

VI. \textbf{DOES RUIZ-DIAZ PRESENT LIMITING FACTORS THAT MAY ENSURE IT WILL NOT SERVE AS A MODEL FOR FUTURE RELIGIOUS EXERCISE CHALLENGES?}

The particular context in which the \textit{Ruiz-Diaz} plaintiffs presented their challenges, and the courts’ responses to those challenges, may well preclude its wide-scale use by other courts.

A. \textit{As a Class Action Challenging a Particular Regulation, the Ruiz-Diaz Plaintiffs had to Meet the Commonality Requirement of the Federal Rules of Civil Procedure}

The Ninth Circuit may have been unwilling to deal with the inevitable burden placed on religion in individual cases because the named plaintiffs, as representatives of a class, necessarily had to frame the action to demonstrate that they pursued common claims.\textsuperscript{37} The specific details of the harm they faced individually may not have been the court’s focus. Having previously upheld the regulation against an Administrative Procedure Act attack based on the INA itself,\textsuperscript{38} the courts may have been less willing to strike it down on a different theory.

Individual actions brought under the Free Exercise Clause, RFRA, the Administrative Procedure Act, or the Mandamus Act, for

\textsuperscript{35} See id. at 485–86.
\textsuperscript{36} Id. at 486.
\textsuperscript{37} See id. at 484–85.
\textsuperscript{38} See Ruiz-Diaz v. United States, 618 F.3d 1055, 1060–61 (9th Cir. 2010).
example, challenging government action or inaction in a case involving only one or two litigants, may present a future court with more focused and compelling situations that might be easily distinguished from *Ruiz-Diaz*. And individuals may mount challenges not only to specific statutes or regulations, but also to any government action, which may include denials of benefits under law.

**B. The Court’s Treatment of Whether Delay Constitutes a Burden Assumes Less Than a Permanent Denial of an Immigrant Visa.**

The *Ruiz-Diaz* court regards the challenged regulation as potentially causing a delay in processing an immigrant visa, but not as requiring a denial of that visa.\(^{39}\) Thus, aside from the opinion’s reliance on the *Navajo Nation* pre-*Smith* jurisprudential straightjacket, it could have determined that, to the extent the regulation might burden religion, it did not *substantially* do so—it creates more of an inconvenience than a bar. But this can also be understood as the court kicking a can down the road in certain cases. If the delay does in fact result in a religious worker’s falling out of status in the United States, actual separation from a U.S.-based religious employer, or being denied an immigrant visa abroad, a future court may need to review challenges to those immediate burdens on religious exercise. Such a court will still need to grapple with the *Ruiz-Diaz* nexus requirement and determine if it is an adequate response to the question of whether government action places a burden on religion.\(^{40}\)

**C. Ruiz-Diaz Does Not Address a Specific Denial that Prevents Admission to the United States, Places Someone Out of Status, Threatens Deportation, or Would Result in a Permanent Separation of a Religious Worker from Employment in the United States**

While its ruling affirms the district court’s rejection of *Ruiz-Diaz’s* and others’ RFRA claims, and generally follows its reasoning, the Ninth Circuit, interestingly, did not engage in nearly the same level of analysis that the district court did to consider the religious freedom implications of the ruling.\(^{41}\) The district court also determined that,

\(^{39}\) *Ruiz-Diaz*, 703 F.3d at 486.

\(^{40}\) See id. 42 U.S.C. §2000cc-(2)(b) states that a “plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice . . . substantially burdens the plaintiff’s exercise of religion.” 42 U.S.C. §2000cc-(2)(b) (2014).

\(^{41}\) Compare *Ruiz-Diaz*, 703 F.3d at 485–86 (discussing briefly that removal is a result of expired visas rather than religious practice), with *Ruiz-Diaz* v. United States, 819 F. Supp. 2d
"[u]nder RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit”—the *Sherbert v. Verner*\textsuperscript{42} burden—“or coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions”—the *Wisconsin v. Yoder*\textsuperscript{43} burden. And the district court decided that the plaintiffs’ argument of a substantial burden imposed by not being able to file concurrent applications:

[Il]s based on a causal relationship that is tenuous at best. Plaintiffs are subject to detention, deportation, and statutory penalties not because they are following the dictates of their religion but because their visas have expired. . . . The bar against concurrent filing may make it more difficult for religious workers to obtain a timely adjustment of status, but it is not the reason plaintiffs face detention, deportation, and statutory penalties.\textsuperscript{45}

This reasoning that there is a causal break between religious exercise and the penalties that may be imposed is mirrored in the court of appeals determination that plaintiffs’ argument is fundamentally flawed.\textsuperscript{46} But the district court went on to consider the impact of such a ruling and recognized that a substantial burden may indeed still be imposed:

If plaintiffs’ argument is taken to its logical limits, whenever the government attempts to expel a religious worker from the country it imposes a “substantial burden” on the worker’s exercise of religion because expulsion would remove him from his religious community and interfere with his practice of religion. The Court is willing to assume, for purposes of this motion, that a government policy that effectively takes a religious worker out of his community or deprives a congregation of its choice of clergy imposes a “substantial burden” on the exercise of religion.\textsuperscript{47}

Although the court acknowledged this burden, which demonstrates the limited reach of *Ruiz-Diaz* as a precedent, the district court found

\textsuperscript{43} Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).
\textsuperscript{44} Ruiz-Diaz, 819 F. Supp. 2d at 1157 (citing Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008)).
\textsuperscript{45} Ruiz-Diaz, 819 F. Supp. at 1157–58.
\textsuperscript{46} Ruiz-Diaz, 703 F.3d at 486.
\textsuperscript{47} Ruiz-Diaz, 819 F. Supp. 2d at 1158.
that “at least in the immigration context, such removals further a compelling government interest.”\textsuperscript{48} Quoting the Supreme Court’s \textit{Kleindienst v. Mandel}\textsuperscript{49} case, stating that “the power to exclude aliens is inherent in sovereignty, necessary in maintaining normal international relations, and defending the country against foreign encroachments and dangers,”\textsuperscript{50} the district judge held that:

“[C]ontrolling admission to the United States and the circumstances under which aliens may reside here is a compelling governmental interest.” The use of visas to grant temporary admittance, authorize certain stateside activities, and establish a departure date furthers that interest, and there is no indication in the record that the visa process, including the power to deport aliens who overstay their visas, is an overly restrictive means of achieving the government’s purpose.\textsuperscript{51}

There is much to object to in the district court’s acceptance of deportation as serving a compelling government interest. First, while acknowledging that other foreign nationals may indeed extend or adjust their status in the United States, it ignores that such exceptions to the rules actually undermine the government’s argument that its interest is truly compelling.\textsuperscript{52} It also seeks to distinguish immigration law from other federal law, which RFRA does not appear to support.\textsuperscript{53} Finally, it applies an incorrect standard, that of whether a burden on religion constitutes “an overly restrictive means of achieving the government’s purpose” rather than applying the more rigorous statutory “least restrictive means” test.\textsuperscript{54}

There is one more objection to the district court’s view of deportation, and that is that the INA contains many individualized

\textsuperscript{48} Id.
\textsuperscript{49} Kleindienst v. Mandel, 408 U.S. 753 (1972).
\textsuperscript{50} \textit{Ruiz-Diaz}, 819 F. Supp. 2d at 1158 (quoting \textit{Kleindienst}, 408 U.S. at 765).
\textsuperscript{51} \textit{Ruiz-Diaz}, 819 F. Supp. 2d at 1158.
\textsuperscript{52} See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 433 (2006) (observing that where the statute contains a religious based exemption for one dangerous controlled substance, it is difficult for the government to argue how making another exception would disrupt the government’s claimed compelling interest).
\textsuperscript{53} 42 U.S.C. § 2000bb-3(a) (2014) (“This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”).
\textsuperscript{54} 42 U.S.C. § 2000bb-1(b) (2014) (“Exception: Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”); \textit{Ruiz-Diaz}, 819 F. Supp. 2d at 1158.
exceptions that would apply to secular situations, but not to religious situations. This should trigger strict scrutiny of the government’s action, as further discussed in the next section.

But at least the district court recognized that separating a minister or other religious worker from his or her community of believers in the United States could constitute a substantial burden, even though the causes leading to that separation might not stem specifically from the worker’s religious exercise, but rather from a violation of the immigration law, such as an overstay of their temporary visa.

The Ninth Circuit did not discuss this issue in its decision, and this absence leaves an open question as to whether, in a different case, it or other courts might not find a substantial burden of the type found by the district court. If courts were to adhere to the very strict nexus requirement in Ruiz-Diaz, it would allow the government to deport religious workers without subjecting government action to the compelling interest and least restrictive means analysis that RFRA requires in cases where government burdens religion. And that result, as found by the district court, would likely reduce the concept of substantial burden beyond what Congress intended when it passed RFRA.

D. The Ruiz-Diaz Court Does Not Address the Interests of Religious Organization Petitioners, or the Burden Imposed When They Must Lose a Religious Worker

The Ninth Circuit decision does not expressly discuss the interests of religious employers in the United States. The challenged regulation, by barring concurrent filing, would potentially interfere with a petitioning religious organization as much as the religious worker beneficiary. The district court, opined that “[t]he delay in plaintiffs’ ability to file a Form I-485 application does not compel plaintiffs to give up the tenets of their religion in order to receive the

---

55 See generally Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (“If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.” (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 542 (1993))).

56 See Ruiz-Diaz, 819 F. Supp. 2d at 1158.

57 See Ruiz-Diaz, 819 F. Supp. 2d at 1157, 1158–59; Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n, 545 F.3d 1207, 1214 (9th Cir. 2008); Navajo Nation v. U.S. Forest Serv. 535 F.3d 1058, 1069 (9th Cir. 2008).

58 See Ruiz-Diaz, 819 F. Supp. 2d at 1159 (citing Navajo Nation, 535 F.3d at 1069).

59 See Ruiz-Diaz, 819 F. Supp. 2d at 1158 & n.3.
desired approvals, nor does it coerce plaintiffs to act contrary to their religious beliefs or face civil or criminal sanctions,” then stated without further analysis in a footnote that “[t]he same can be said for the religious organizations that employ the individual plaintiffs.” 60

It is difficult to reconcile an apparent contradiction in the district court’s analysis. On the one hand, delay and a burden caused not by past or continued religious exercise but arguably by a non-religious cause, would not constitute a substantial burden to either the religious worker or a religious organization or employer; 61 conversely, “a government policy that effectively takes a religious worker out of his community or deprives a congregation of its choice of clergy imposes a ‘substantial burden’ on the exercise of religion.” 62

The Supreme Court has been more solicitous of religious organizations and employers than the Ninth Circuit’s Ruiz-Diaz decision, albeit not in a RFRA challenge. In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 63 the Court held that the First Amendment and the ministerial exception bars an employment discrimination claim against a religious entity by one of the religious denomination’s ministers. 64 The opinion by Chief Justice Roberts discusses the historical underpinnings of the First Amendment, and explains that:

By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own. 65

It is difficult to reconcile a First Amendment principle of non-interference with the selection of religious ministers and a lower court acceptance that the federal government may interfere with the organizations’ placement of those same ministers in the United States, simply by applying immigration standards that even the Ruiz-Diaz courts could see would result in delay and separation from employment. Selection and placement of ministers, arguably, are

---

60 Id.
61 See id.
62 Id. at 1158.
63 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).
64 See id. at 702, 705, 710.
65 Id. at 703 (emphasis added).
inseparable interests to a religious organization.  

E. Ruiz-Diaz Does Not Consider Whether Strict Scrutiny Might Be Required Under the Hybrid Rights or Individualized Exemption Exceptions in Employment Division v. Smith

The Ruiz-Diaz court was presented with arguments that the USCIS no-concurrent-filing regulation substantially burdened religion and thus violated RFRA. But plaintiffs might also have argued that the INA and its regulations burdened their religious exercise directly under the First Amendment as well in a way that should have triggered scrutiny. The Supreme Court acknowledged two possible exceptions to its holding in Employment Division v. Smith: where a plaintiff raises constitutional rights in addition to First Amendment challenges—a hybrid-rights exception—and where individualized exemptions to a general requirement are made available for secular, but not religious, challengers to a rule or practice.

As for a non-religious constitutional challenge, the plaintiffs in Ruiz-Diaz might have made a procedural due process challenge based on their property and liberty interests. This could have required the court to compare the procedures and exemptions provided for non-religious immigrant visa or adjustment applicants to those provided for religious workers. As one court noted:

There is a decent amount of support for the proposition that § 1154(b) creates an interest to which procedural due process rights attach. Supreme Court precedent makes clear that non-discretionary statutes create property interests for the purpose of procedural due process. Section 1154(b) states that the Attorney General, “shall . . . approve the petition [for immediate relative visa].” The D.C. circuit explicitly held that this language created a right protected by procedural due process. Additionally, Fifth Circuit dicta implied that it would uphold a due process claim under § 1154(b). In rejecting a substantive due process challenge to § 1154(h), the section at

---

67 See Ruiz-Diaz v. United States, 703 F.3d 483, 485 (9th Cir. 2012).
69 See id. at 881, 884 (citations omitted) accord Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 532, 537, 546 (1993); Blackhawk v. Pennsylvania, 381 F.3d 202, 207, 209 (3d Cir. 2004); Axson-Flynn v. Johnson, 356 F.3d 1277, 1294–95 (10th Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3rd Cir. 1999).
issue in *Almario*, the court stated, “certainly, if Congress had conditioned an alien's eligibility for a status adjustment on the existence of a bona fide marriage, procedural due process would require that the couple be given an opportunity to establish that fact before an adjustment could be denied.” 70

It is uncertain whether an I-360 petitioner’s arguable due process right in a nondiscretionary visa petition would then extend to a determination of a foreign national’s right to adjust his or her status in the United States, as the statute makes the grant of adjustment discretionary. 71 But that case has not yet been decided, and it may be that since the INA makes the two processes interdependent, this is the type of hybrid rights claim envisioned by the *Smith* court. 72

The second exception to *Smith* is the individualized-exemption exception. This seems to precisely describe the Immigration and Nationality Act: “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’” 73 The Third Circuit has stated that “a system that permits individualized, discretionary exemptions provides an opportunity for the decision maker to decide that ‘secular motivations are more important than religious motivations’ and thus to give disparate treatment to cases that are otherwise comparable.” 74 And “[i]f anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.” 75 The Third Circuit requires heightened scrutiny where a system provides secular but not religious exemptions from a particular rule: “[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions

---

70 Bangura v. Hansen, 434 F.3d 487, 496 n.2 (6th Cir. 2006) (alteration in original) (citations omitted); see also Ching v. Mayorkas, 725 F.3d 1149, 1156 (9th Cir. 2013) (holding that due process is required for a nondiscretionary visa petition).  
72 For a discussion of the relation between an I-360 for an out-of-status minister and an application for adjustment of status, see Shalom Pentecostal Church v. Acting Sec’y, U.S. Dep’t Homeland Sec., 783 F.3d 156, 159–61 (3d Cir. 2015).  
73 Church of Lukumi Babalu Aye, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884); see also Blackhawk, 381 F.3d at 207–08 (discussing precedent with respect to extending religious exemptions).  
74 Blackhawk, 381 F.3d at 208 (quoting *Fraternal Order of Police*, 170 F.3d at 365).  
75 *Fraternal Order of Police*, 170 F.3d at 365.
As described in a previous section, the Immigration and Nationality Act creates an extensive “chutes and ladders” game board type system by which Congress has legislated categories; bars; and discretionary, categorical but case-by-case individualized exceptions to the bars that allow some, but not all, players to reach the goal of obtaining permanent resident status. Most of the waivers are based on a preference for secular values such as family unity, humanitarian concerns, rehabilitation of the individual, or an acknowledgment of hardship to individuals and family members. But under Smith, Church of Lukumi Babalu Aye, and lower courts following them, adverse immigration actions by the Federal Government that burden religious exercise should be subject to scrutiny by the courts.77

F. The Ninth Circuit Decision in Ruiz-Diaz Is Factually Limited and Not Binding Outside that Judicial Circuit

Most obviously, the Ruiz-Diaz case only binds courts in the Ninth Circuit, as well as the litigants in that case, including the USCIS.78 So once the decision was rendered, the agency was free to apply the regulation without concern, which may continue to create problems for some religious workers. Future legal challenges of the type brought in Ruiz-Diaz are unlikely, but still possible outside of the Ninth Circuit. And different challenges to other restrictive immigration decisions or rules should not be considered foreclosed by the Ruiz-Diaz decision. It is not surprising that the USCIS would want to use and extend the court’s causation-nexus theory to other cases, but free exercise challenges are again not foreclosed. And other circuits may not decide this issue the same way as the Ninth Circuit, especially in light of recent Supreme Court case law undermining the Ninth Circuit’s rationale.

---

76 Id. at 366.
77 See Church of Lukumi Babalu Aye, 508 U.S. at 537, 546; Smith, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986); Blackhawk, 381 F.3d at 209; Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).
78 See Ruiz-Diaz v. United States, 703 F.3d 483, 488 (9th Cir. 2012); U.S. CITIZEN & IMMIGRATION SERVS., RAIO DIRECTORATE – OFFICER TRAINING: READING AND USING CASE LAW 10 (2012) (noting that circuit court’s decisions are binding on USCIS administrative decisions); Chad Flanders, Toward a Theory of Persuasive Authority, 62 OKLA. L. REV. 55, 59, 63 (2009) (noting the distinction between binding authority, which requires courts within a circuit to follow the circuit court’s decisions, and persuasive authority, which does not).
VII. SUBSEQUENT SUPREME COURT DECISIONS (Hobby Lobby, Holt v. Hobbs, and Hosanna-Tabor Lutheran School) HAVE SUBSTANTIALLY UNDERMINED THE Ruiz-Diaz AND Navajo Nation RATIONALES FOR RESTRICTING THE TERM “SUBSTANTIAL BURDEN” TO SITUATIONS DESCRIBED IN PRE-SMITH CASE LAW

Ruiz-Diaz relies almost entirely on the Ninth Circuit’s restrictive view, embodied in the Navajo Nation case, that a substantial burden can only be determined based on situations that fit within the Supreme Court’s pre-Smith cases. But subsequent rulings from the Supreme Court seem to undermine the courts’ reasoning and conclusion.

Navajo Nation involved a challenge to the federal government’s use of recycled wastewater to make artificial snow for a ski area that encompassed about one percent of the San Francisco Peaks, mountains in Northern Arizona, an area sacred to the plaintiffs’ religion. The district court found, and the court of appeals agreed that there was no physical impact to the plaintiffs’ religious exercise:

The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Thus, the sole effect of the artificial snow is on the Plaintiffs’ subjective spiritual experience.

Given the limited impact on the plaintiffs’ religious exercise, the court stated that:

Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs’ religious beliefs, there is no “substantial burden” on the exercise of their religion.

Navajo Nation noted that “RFRA does not specifically define the

---

79 See Ruiz-Diaz, 703 F.3d at 486 (citing Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067–69 (9th Cir. 2008)).
80 Navajo Nation, 535 F.3d at 1062–63.
81 Id. at 1063. The Court later stated that “the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings.” Id. at 1070 n.12.
82 Id. at 1063.
term 'substantial burden,’”83 so it looked to the statute that said its purpose was to “restore the compelling interest test as set forth in [Sherbert and Yoder] and to guarantee its application in all cases where free exercise of religion is substantially burdened.”84 The court then made something of a leap in logic:

The same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test . . . Therefore, the cases that RFRA expressly adopted and restored—Sherbert, Yoder, and federal court rulings prior to Smith—also control the “substantial burden” inquiry.85

The dissenting opinion in Navajo Nation argued to no avail that the Supreme Court’s pre-Smith cases did not restrict the definition of a “substantial burden,” and the majority’s limitation was too restrictive.86 But the court pointed out there is no Supreme Court authority finding a substantial burden “outside the Sherbert/Yoder framework. . . . Because Congress expressly restored pre-Smith cases in RFRA, we cannot conclude RFRA’s ‘substantial burden’ standard expands beyond the pre-Smith cases to . . . constitute a substantial burden on religious exercise.”87 The Ninth Circuit confidently concluded “[i]n sum, Congress’s statutory command in RFRA to restore the Supreme Court’s pre-Smith jurisprudence is crystal clear.”88

There is now reason to doubt the Ninth Circuit’s conclusions in Navajo Nation. Subsequent Supreme Court decisions point to a congressional intent that was not bound by its pre-Smith jurisprudence at all.89 Rather, “Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty.”90 To the Supreme Court, this means that Congress meant what it said when it enacted the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and included the provision that the exercise of religion “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”91

83 Id. at 1068.
84 Id. (citations omitted).
85 Id. at 1069.
86 Navajo Nation, 535 F.3d at 1086 (Fletcher, J., dissenting).
87 Id. at 1075 (majority opinion).
88 Id. at 1077.
90 Id. at 2760.
The *Burwell v. Hobby Lobby* Court noted that:

If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

The footnote accompanying this explication points out that by including the least restrictive means requirement, which was not part of the pre-*Smith* jurisprudence, “RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.” In direct contradiction with the *Navajo Nation* court’s supposition, the Supreme Court has now stated that “[e]ven if RFRA simply restored the status quo ante, there is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases.” The Court then reiterated that, from RFRA’s definition of “exercise of religion” and intent:

It is simply not possible to read these provisions as restricting the concept of the ‘exercise of religion’ to those practices specifically addressed in our pre-*Smith* decisions. . . . [T]he results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*.

In the *Hobby Lobby* decision, the Supreme Court also rejected the government’s argument, similar to the *Ruiz-Diaz* courts’ concern about a tenuous causal connection between the exercise of religion and an ultimate government-imposed burden. According to the Court, the government argued that “the connection between what the

---

92 *Hobby Lobby*, 134 S. Ct. at 2761.
93 Id. at 2761 n.3.
94 Id. at 2767 n.18; see also *Navajo Nation* v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (“Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a ‘substantial burden’ within the meaning of RFRA, and does not require the application of the compelling interest test set forth in these two cases.”).
95 *Hobby Lobby*, 134 S. Ct. at 2772, 2773.
96 See id. at 2777, 2779; *Ruiz-Diaz* v. United States, 819 F. Supp. 2d 1154, 1157 (W.D. Wash. 2011).
objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated.”

The crux of the argument was that providing insurance coverage to employees would not necessarily result in the destruction of an embryo, which is the ultimate religious objection the plaintiffs’ maintained. 

The Supreme Court said that:

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). 

The Supreme Court distinguishes, but does not create an iron curtain between its analysis of substantial burden and its analysis of an exercise of religion. The same logical flaw in the HHS argument in Hobby Lobby can be seen in the district court’s and court of appeals’ Ruiz-Diaz decisions. The Court instructs lower courts to look at how a particular government rule, mandate, or action, burdens religion, and demands that the focus be on the religious objector’s sincere religious objection and ultimate harms that stem from the government’s challenged action. 

The Supreme Court’s other post-Ruiz-Diaz religious freedom decisions, Holt v. Hobbs, which upheld a prisoner’s challenge under RLUIPA, and Hosanna-Tabor Evangelical Lutheran Church & School, which protected a religious denomination from a claim under the Americans with Disabilities Act, both support the argument that sincere religious objectors should be entitled to exemptions from rules that burden their religious exercise, and the three cases together stand for the proposition that religious exercise is to be vigorously protected by the courts. Ruiz-Diaz and Navajo Nations, by restricting their “substantial burden” analysis to pre-Smith case

97 Hobby Lobby, 134 S. Ct. at 2777.
98 Id. at 2778.
99 Id. at 2777.
100 Id. at 2779 (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).
102 Id. at 859.
103 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 701, 710 (2012).
104 Hobbs, 135 S. Ct. at 866, 867; Hobby Lobby, 134 S. Ct. at 2777; Hosanna, 132 S. Ct. at 706, 710.
law and imposing a nexus requirement that disregards ultimate harms to the religious objectors, are out of step with the Supreme Court’s contemporary religious freedom jurisprudence.¹⁰⁵

VIII. A PROPOSAL TO FIND SUBSTANTIAL BURDEN ON RELIGION WHEN A LAW, RULE, OR GOVERNMENT ACTION IMPEDES OR WILL FORESEEABLY BLOCK OR CHILL RELIGIOUS EXERCISE

To actualize RFRA’s intent and the Supreme Court’s understanding of Congress’s decision to broadly protect religious exercise, courts should allow for a wide range of challenges and should not use mechanistic formulae to defeat such claims. Where a religious objector can point to a statutory scheme or government action that chills or prevents the exercise of religion, courts should ask “but for the challenged government action, would the objector be free to exercise his or her religion?” The fact that the challenged action may be attenuated or not have a direct nexus to the burden imposed by government action should not determine that such government action is not the cause of a substantial burden. Courts should look forward to foreseeable impacts of the challenged action, rather than backward to the initial cause of a situation that will trigger the government action.

A substantial burden to religion in the immigration context would include the possibility that the government will delay the issuance of a statutory benefit, or impose civil or criminal sanctions on a person or entity that seeks to continue its religious exercise in the United States. A chilling effect may be caused by a law, a regulation, or a government practice.¹⁰⁶ The test for substantial burden should not be a nexus between past conduct triggering a penalty, but whether, but-for present or future government action, the person or organization would be free to continue the religious exercise in the United States.

IX. CONCLUSION

Ruiz-Diaz goes too far and adheres to a concept of “substantial burden” that is based on an overly restrictive and now discredited view that RFRA simply restored pre-Smith case law. It decides that

a rule allowing for government action that will certainly result in the
dismissal and possible removal of religious workers from the United
States, and may subject religious organizations to civil or criminal
penalties, does not substantially burden the religious exercise of the
workers or their religious employers. But delay by the agency and
the potential loss of the worker does in fact burden the religious
employer and employee if it threatens their continuing association.
The rationale that such a rule does not impact religious exercise
constitutes an impermissible judgment about what is a legitimate
religious belief or practice.

The Ruiz-Diaz court’s view that only religious exercise itself must
trigger the burden is akin to the argument rejected by the Supreme
Court in Hobby Lobby that the cause there (the contraceptive
mandate) was too attenuated to the complained of burden on religion
(the employee’s using her insurance coverage for an abortifacient) to
constitute a substantial burden on religion. But, like in Hobby Lobby,
requiring such a linkage would require courts to make religious
judgments of the kind that is not in their ken to do.

Instead, the courts should ask whether, but for the challenged
statute, rule, or government action, would the challengers be free to
engage in a sincere exercise of their religion as determined by them?
If so, the challenged action should be said to substantially burden
that exercise.

The courts utilizing a “but for” and “chilling effect” analysis would
not guarantee that every foreign born religious worker or
organization would win in court, only that the burden would shift to
the government to show that its burden was justified by a compelling
need and was imposed in the least restrictive manner. While this
may be difficult for the government to demonstrate in some cases due
to the INA’s numerous individualized waiver provisions exempting
foreign nationals from restrictive standards, religious workers should
not be burdened in their attempts to obtain lawful status any more
than other categories of immigrants and nonimmigrants.