No. 14-10296

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KAWA ORTHODONTICS, LLP.

Plaintiff-Appellant,

v.

SECRETARY, U.S. DEPARTMENT OF THE TREASURY, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

OPENING BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellant Kawa Orthodontics, LLP, Judicial Watch, Inc., certifies that the following is a complete list of the persons and entities who have an interest in the outcome of this case:

- Michael Bekesha – Counsel for Appellant.
- Hon. William P. Dimitrouleas – U.S. District Court Judge, U.S. District Court for the Southern District of Florida.
- Internal Revenue Service – Appellee.
- Kawa Orthodontics, LLP – Appellant. Kawa Orthodontics, LLP has no parent corporation, and no publicly held corporation owns 10% or more of Kawa Orthodontics, LLP.
- Jack Lew, Secretary of the U.S. Department of the Treasury – Appellee.
- Christopher B. Lunny – Counsel for Appellant.
- Paul J. Orfanedes – Counsel for Appellant.
- Dana J. Martin – Counsel for Appellees.
- James F. Peterson – Counsel for Appellant.
- Mark B. Stern – Counsel for Appellees.

- Harry O. Thomas – Counsel for Appellant.
- U.S. Department of the Treasury – Appellee.
- Daniel I. Werfel, Acting Commissioner of the Internal Revenue Service – Appellee.
- Caroline Lewis Wolverton – Counsel for Appellees.

Dated: February 27, 2014 s/ Michael Bekesha

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. The issue in this case – whether Appellant has standing to challenge Defendants' unlawful, unilateral delay of the "employer mandate" provisions of the Patient Protection and Affordable Care Act – is of considerable importance, and oral argument is likely to assist the Court in deciding this appeal.

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JURISDICTIONAL STATEMENT

Appellant Kawa Orthodontics, LLP ("Kawa Ortho") brought suit against Appellees Jack Lew, Secretary of the U.S. Department of the Treasury, the U.S. Department of the Treasury, Daniel I. Werfel, Acting Commissioner of the Internal Revenue Service, and the Internal Revenue Service ("Defendants") under the Administrative Procedure Act ("APA"). Appendix Document Number ("Doc. No.") 1. The U.S. District Court for the Southern District of Florida ("the District Court") had jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

On January 13, 2014, the District Court granted Defendants' Motion to Dismiss, which dismissed all of Kawa Ortho's claims. Doc. No. 27. Kawa Ortho filed a timely Notice of Appeal on January 21, 2014. Doc. No. 28. Appellate jurisdiction exists under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Kawa Ortho has standing to challenge Defendants' unlawful, unilateral delay of the "employer mandate" provisions of the Patient Protection and Affordable Care Act.

STATEMENT OF THE CASE

I. Nature of the Case.

Kawa Ortho brought suit under the APA to set aside Defendants' unlawful, unilateral delay of the "employer mandate" provisions of the Patient Protection and

Affordable Care Act ("ACA"), which by law were scheduled to take effect on January 1, 2014, but have now been postponed until at least "2016."[1] Doc. No. 1. Kawa Ortho was injured by Defendants' unlawful, unilateral agency action because it lost the value of the substantial time and money it expended and the significant opportunity costs it incurred in anticipation of the mandate taking effect on the date specified by Congress. *Id*.

II. The Course of Proceedings.

In response to Kawa Ortho's Complaint, Defendants moved to dismiss. Doc. No. 13. In their motion, Defendants argued that the District Court lacked subject matter jurisdiction because Kawa Ortho did not have Article III standing. *Id*.

III. The District Court's Ruling.

On January 13, 2014, the District Court dismissed Kawa Ortho's Complaint, finding that Kawa Ortho did not have standing to challenge Defendants' unlawful, unilateral delay of the employer mandate. Doc. No. 27. The Court therefore determined that it did not have subject matter jurisdiction and dismissed the action without prejudice. *Id*. at 6.

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[1] At the time Kawa Ortho filed its Complaint, Defendants had delayed the effective date of the mandate until "2015." On or about February 10, 2014, Defendants delayed the effective date of the mandate for a second time, until at least "2016."

IV. Statement of Facts.

A. Statutory Background.

Under the ACA, most "large employers," defined as employers who have more than 50 "full time equivalent" employees, incur tax penalties if they do not offer "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents. 26 U.S.C. § 4980H. In addition, "large employers" have annual reporting obligations under the ACA. 26 U.S.C. § 6056. These include having to certify whether they offer their full-time employees and their employees' dependents the opportunity to enroll in "affordable," "minimum essential" health insurance coverage under an employer-sponsored plan, the length of any waiting period, the months during which coverage was available, monthly premiums for the lowest-cost option, the employer plan's share of covered health care expenses, the number of full-time employees, and the name, address, and taxpayer identification number of each full-time employee. *Id.* Employers who "self-insure" have separate reporting obligations. 26 U.S.C. § 6055.

The ACA could not be any clearer: the obligation of employers with 50 or more "full time equivalent" employees to provide "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents under Section 4908H of Title 26 "shall apply to the months beginning

after December 31, 2013." Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. Similarly, the reporting obligations under Section 6055 of Title 26 "shall apply to calendar years beginning after 2013." Pub. L. No. 111-148, § 1502(e), 124 Stat. 119, 252. Likewise, the obligations under Section 6056 of Title 26 "shall apply to the periods beginning after December 31, 2013." Pub. L. No. 111-148, § 1514(d), 124 Stat. 119, 257. The ACA does not afford any implementing agency the power to delay these requirements.

B. Factual Background.[2]

Kawa Ortho is a "large employer" that employs more than 50 full-time equivalent employees. Doc. No. 1 at 4; *see also* Doc. No. 17 at 1-2. Prior to July 2, 2013, Kawa Ortho expended substantial time and resources, including money spent on legal fees and other costs, in anticipation of the "employer mandate" taking effect on January 1, 2014. Doc. No. 1 at 4; *see also* Doc. No. 17 at 2-3. Kawa Ortho incurred these costs in order to comply with the mandate. Doc. No. 1 at 4; *see also* Doc. No. 17 at 2-4. Kawa Ortho would not have expended its time and money preparing for the mandate in 2013 if the mandate had not been scheduled to take effect on January 1, 2014. Doc. No. 1 at 4; *see also* Doc. No. 17

[2] Kawa Ortho filed a motion for summary judgment on December 13, 2013. Because the District Court granted Defendants' motion to dismiss, it did not reach the merits of the summary judgment motion. Kawa Ortho had submitted a declaration of its principal, Larry Kawa, D.D.S., in support of the motion in which it further described the facts pled in the Complaint. The declaration is reproduced in its entirety as Document 17 of the Appendix.

at 2-4. It would have spent its time and money on other priorities instead. Doc. No. 1 at 4; *see also* Doc. No. 17 at 2-4.

On July 2, 2013, the U.S. Department of Treasury announced that the "employer mandate" was being delayed until 2015. Doc. No. 1 at 4; *see also* Doc. No. 17 at 4. This announcement was formalized on July 9, 2013 with the issuance of a "Notice 2013-45" by the Internal Revenue Service. Doc. No. 1 at 4.

Defendants' delay of the mandate diminished the value of the time and money expended by Kawa Ortho in anticipation of the mandate taking effect on January 1, 2014. *Id*. at 5; *see also* Doc No. 17 at 4.

According to the White House's website, at least 200,000 employers in the United States employ more than 50 employees. *Id*. Another government source, the Agency for Health Research and Quality of the U.S. Department of Health and Human Services, reports that the number of employers in the United States (like Kawa Ortho) having more than 50 employees is as high as 1.6 million. *Id*. In addition, the Congressional Budget Office predicted that the July 2, 2013 delay of the "employer mandate" will result in an estimated loss of $10 billion in penalty payments by employers and approximately 1 million fewer people are expected to be enrolled in employment-based coverage in 2014 than the number previously projected, primarily because of the delay in penalties on employers. *Id*. at 5-6.

After Kawa Ortho initiated this lawsuit and after the District Court granted Defendants' motion to dismiss, the U.S. Department of the Treasury yet again delayed the implementation date of the "employer mandate" until at least "2016" for certain "large employers" who employ between 50 and 99 full-time employees.[3] *See* Fact Sheet, *Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015*, U.S. Department of the Treasury (Feb. 10, 2014)[4] ("While the employer responsibility provisions will generally apply starting in 2015, they will not apply until 2016 to employers with at least 50 but fewer than 100 full-time employees."); *see also* 79 Fed. Reg. 8544, 8574 (Feb 12, 2014) ("To assist these employers in transitioning into compliance with section 4980H, the transition relief described below is provided for all of 2015."). According to the 2011 Census figures compiled by the Small Business Administration, employers with 50 to 99 full-time employees consist of 2% of all U.S. employers and include 7% of all employees, or 7.9 million people. *See* Louise Randofsky and Theo Francis, *Health-Law Mandate Put Off Again*, The Wall Street Journal (Feb. 11, 2014).[5]

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[3] For reference, Kawa Ortho has 54 full-time employees and falls within the subset of "large employers" that employ between 50 and 99 full-time employees.

[4] The press release is available online at http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf.

[5] The article is available at http://online.wsj.com/news/articles/

V. Standard of Review.

This Court reviews *de novo* a district court's determination on standing. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005). "[W]hen a question about standing is raised at the motion to dismiss stage, 'it may be sufficient to provide general factual allegations of injury resulting from the defendant's conduct.'" *Id*. (*quoting Bischoff v. Osceola Cnty.*, 222 F.3d 874, 878 (11th Cir. 2000)).

SUMMARY OF THE ARGUMENT

Kawa Ortho has standing to challenge Defendants' unlawful, unilateral delay of the "employer mandate" based on the well-established precedent of this Court and numerous other courts around the country. As a "large employer," Kawa Ortho is subject to the mandate. Being a responsible employer, Kawa Ortho spent substantial time and money preparing to comply with the mandate, which, under express provisions of the ACA, was scheduled to take effect on January 1, 2014. Kawa Ortho incurred both anticipatory compliance costs and significant opportunity costs, costs that are no different from those incurred by plaintiffs across the country that were found to have standing to challenge various provisions of the ACA.

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After Kawa Ortho incurred these costs, Defendants changed the effective date of the "employer mandate" despite the plain language of the ACA and without seeking approval from Congress. Defendants' unlawful, unilateral delay of the mandate diminished the value of the costs incurred by Kawa Ortho. If the Court were to set aside the unlawful delay and reinstate the effective date established by Congress, however, Kawa Ortho would regain some, if not all, of the value of the time and money it lost as a result of the delay. Kawa Ortho's injury will have been remedied. Kawa Ortho thus satisfies all three elements of standing under Article III of the Constitution.

ARGUMENT

I. The Three Familiar Requirements of Standing.

It is well-established that Article III standing must be determined as of the time at which the plaintiff's complaint is filed. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003). To establish standing under Article III of the Constitution, a plaintiff must demonstrate three familiar requirements: (1) "injury-in-fact;" (2) "a causal connection between the asserted injury-in-fact and the challenged action of the defendant;" and (3) "that the injury will be redressed by a favorable decision." *Houston v. Marod Supermarkets, Inc.*, 2013 U.S. App. LEXIS 22232, *10 (11th Cir. 2013); *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (*citing Lujan v. Defenders of Wildlife*,

504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)). "These requirements are the irreducible minimum required by the Constitution for a plaintiff to proceed in federal court." *Houston*, 2013 U.S. App. LEXIS at *10 (*citing Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 664, 113 S. Ct. 2297, 2302, (1993)).

II. Kawa Ortho Plainly Has Standing.

A. Injury-in-fact under *Florida v. U.S. Dep't of Health and Human Servs*.

Less than three years ago, this Court unequivocally held that private parties challenging the constitutionality of the ACA's "individual mandate" had standing to pursue their claims based on their need to incur "anticipatory compliance costs." *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1244 (11th Cir. 2011). In that case, the plaintiffs argued that the financial planning and other steps they needed to take in order to comply with the "individual mandate," scheduled to take effect on January 1, 2014,[6] constituted injury-in-fact:

> The individual plaintiffs, Ms. Brown in particular, have established that because of the financial expense they will definitely incur under the Act in 2013, ***they are needing to take investigatory steps and make financial arrangements now to ensure compliance then.***

Florida v. U.S. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256, 1271 (N.D. Fla. 2011) (emphasis added). The trial court agreed that these "anticipatory

[6] Unlike the "employer mandate," the "individual mandate" was not delayed, but took effect on the date established by Congress.

compliance costs" not only constituted injury-in-fact, but were sufficient to establish standing: "That is enough to show standing, as the clear majority of the district courts to consider legal challenges to the individual mandate have held." *Id*.

On appeal, the defendants in *Florida* did not even contest the individual plaintiffs' standing. *Florida*, 648 F.3d at 1243; *see also* Brief for Appellants, *Florida v. U.S. Dep't of Health and Human Servs.*, Case Nos. 11-11021 & 11-11067 (11th Cir., filed Apr. 1, 2011) ("Defendants do not dispute that plaintiff Brown's challenge to the minimum coverage provisions is justiciable."). This Court nonetheless considered whether the trial court's ruling on standing was correct because "standing is a threshold jurisdictional question" and the courts are "obliged to consider questions of standing regardless of whether the parties raised them." *Id*. (*quoting Bochese*, 405 F.3d at 975). After reviewing the record, the Court determined that "it is beyond dispute that" the individual plaintiffs had standing to challenge the "individual mandate." *Florida*, 648 F.3d at 1244.

In sum, this Court has clearly held that "anticipatory compliance costs" constitute injury-in-fact for purposes of standing.

B. Injury-in-fact under other, well-established case law.

As the lower court in *Florida* found, it was not the first court to hold that "anticipatory compliance costs" constitute injury-in-fact for purposes of standing.

Nor was it the last. At least three other courts considering legal challenges to the "employer mandate" have held that such costs constitute injury-in-fact for purposes of establishing standing. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 90 (4th Cir. 2013); *Hotze v. Sebelius*, 2014 U.S. Dist. LEXIS 3149, 16-17 (S.D. Tex. Jan. 10, 2014); *Oklahoma v. Sebelius*, 2013 U.S. Dist. LEXIS 113232, **27-30 (E.D. Okla. Aug. 12, 2013). In *Liberty Univ.*, the U.S. Court of Appeals for the Fourth Circuit held that the plaintiff-employer in that case, Liberty University, had standing to challenge the "employer mandate" because of the anticipatory compliance cost it had to incur in order to comply with the mandate:

> Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care. Moreover, Liberty's injury is imminent even though the employer mandate will not go into effect until January 1, 2015,[7] as Liberty must take measures to ensure compliance in advance of that date. Thus, Liberty has standing to challenge the employer mandate.

733 F.3d at 90 (internal citations and quotations omitted).

Similarly, in *Hotze*, the U.S. District Court for the Southern District of Texas also determined that the plaintiff-employer in that case, Braidwood Management, Inc., sufficiently alleged injury-in-fact and had standing to challenge the "employer

[7] *Liberty Univ.* was decided on July 11, 2013, after Defendants' first delay of the "employer mandate."

mandate" by reason of the anticipatory compliance costs it had to incur in order to comply with the mandate. The court held:

> The Court agrees with Braidwood that it has standing to contest the constitutionality of the ACA under the Origination and Takings Clauses. Braidwood has alleged an injury that is "concrete, particularized, and imminent." Braidwood is subject to the employer mandate as an "applicable large employer" since it "has approximately 73 full-time equivalent employees." Currently, Braidwood voluntarily offers its employees a high-deductible health coverage plan and the option to contribute money to Health Savings Accounts. Funding this plan costs Braidwood approximately $198,000 per year. Braidwood alleges that it "must make decisions soon about whether to incur the new penalties imposed by [the] ACA or switch to more expensive and less desirable health insurance coverage pursuant to [the] ACA requirements." ***Braidwood has plausibly asserted that it must take steps now to ensure compliance with the employer mandate in 2015 and that it imminently will accrue expenses in preparing for and implementing its plan***. These allegations are sufficient, on a motion to dismiss, to meet the concrete injury requirement.

Hotze, 2014 U.S. Dist. LEXIS at **16-17 (internal citations omitted) (emphasis added).

Numerous other federal courts – in fact a "clear majority of district courts" – have held that anticipatory compliance costs constitute injury-in-fact for purposes of standing in legal challenges to the "individual mandate" provisions of the ACA.[8] *Florida*, 780 F. Supp.2d at 1271 (collecting cases). One court declared, "It is established that the taking of current measures to ensure future compliance with a

[8] Of course, the individual mandate survived these and other legal challenges. *See generally National Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

statute can constitute an injury." *Mead v. Holder*, 76 F. Supp. 2d 16, 26 (D.D.C. 2011); s*ee also Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011) (finding standing where "[i]t may be reasonably inferred from Plaintiffs' allegations that they must take steps now in preparation for the imminent requirement of the Act that they purchase health insurance").

Other courts have held in other contexts that incurring anticipatory compliance costs constitute injury-in-fact for purposes of standing. *See e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (finding booksellers had standing because they "w[ould] have to take significant and costly compliance measures"); *Association of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (finding increased compliance costs constitute injury-in-fact sufficient to confer standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 131 (2d Cir. 2008); *State Farm Mut. Auto Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986) (finding suit ripe if challenged rule "would reasonably prompt a regulated industry, unwilling to risk substantial penalties by defying the policy, to undertake costly compliance measures"); *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997) (finding standing based on compliance costs).

C. Opportunity costs also constitute injury-in-fact.

The concept of an "opportunity cost" recognizes that part of the cost of an activity includes the opportunities given up to engage in that activity. *See Chronister Oil Co. v. Unocal Ref. and Mktg.*, 34 F.3d 462, 465 (7th Cir. 1994). Several courts that considered legal challenges to the "individual mandate" have found that plaintiffs suffered injuries-in-fact for purposes of standing because they incurred opportunity costs in order to comply with the mandate. *Roman Catholic Archdiocese v. Sebelius*, 907 F. Supp. 2d 310, 329 (E.D.N.Y. 2012) (finding standing because plaintiffs had to decide whether to purchase a new car, reduce spending, or divert money from other business goals in order to comply with the law); *Mead*, 76 F. Supp. 2d at 26 (finding standing based on the plaintiffs' "needing to rearrange their finances now in anticipation of" the individual mandate); *Gaudy-Bachman v. U.S. Dep't of Health and Human Servs.*, 764 F. Supp. 2d 684, 690-92 (M.D. Pa. 2011) (finding standing based on the plaintiffs' "financial planning and budgeting decisions [undertaken] in preparation for the implementation of the individual mandate"). Similarly, another court ruled:

> Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today.

Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 887-89 (E.D. Mich. 2010). In addition to anticipatory compliance costs, opportunity costs can constitute injury-in-fact for purposes of standing.

D. Kawa Ortho amply pled injury-in-fact.

Kawa Ortho plainly alleges that, prior to Defendants' July 2, 2013 delay of the "employer mandate," it expended substantial time and money, including money for legal fees and other costs, in preparation for the mandate taking effect on January 1, 2014. Doc. No. 1 at 4; *see also* Doc. No. 17 at 2-4. More specifically, between early 2013 and the end of June 2013, Kawa Ortho spent in excess of 100 hours of time and in excess of $5,000 in attorneys' fees and costs preparing for the mandate. Doc. No. 17 at 2-3. This 100 hours included time spent researching and becoming familiar with the law and seeking and obtaining professional advice. Doc. No. 17 at 3. It also included meetings and discussions with Kawa Ortho's regular Florida business lawyer and its insurance broker, as well as lawyers in Florida and the District of Columbia who specialize in health care law. *Id.* Kawa Ortho expressly alleges that it spent this time and money in order to comply with the mandate. Doc. No. 1 at 4; *see also* Doc. No. 17 at 2-4.

Kawa Ortho also alleges that it would not have expended this time or money in 2013 if the mandate had not been scheduled to take effect in 2014. Doc. No. 1 at 4; *see also* Doc. No 17 at 4. It would have spent its time and money on other

priorities, including generating new patients and additional revenue for its practice. Doc. No. 1 at 4; *see also* Doc. No. 17 at 3-4. At a minimum, Kawa Ortho could have saved its money and accrued interest on it rather than spending it on compliance with a mandate that never took effect.

Based on the plain language of the ACA, the "employer mandate" was set to take effect on January 1, 2014. There was no uncertainty or dilemma about when the mandate was to take effect. Nor was there any uncertainty or dilemma about whether the mandate applied to Kawa Ortho. Because Kawa Ortho employed more than 50 full-time employees, it had the obligation to offer "affordable," "minimum essential" health insurance coverage to its employees and its employees' dependents. If it failed to do so, it would face tax penalties. Being a responsible employer, Kawa Ortho spent its time and money planning for the mandate to take effect on January 1, 2014 and incurred opportunity costs in doing so. These anticipatory compliance costs and the opportunity costs were real and necessary, just like they were real and necessary for the plaintiffs in *Florida* and the numerous other cases cited herein. The delay of the mandate diminished the value to Kawa Ortho of the costs it had incurred.

In determining that Kawa Ortho did not have standing to challenge the delay, District Court found that the company had not lost anything of value. Specifically, the District Court held:

> These allegations do not show that Plaintiff has uselessly expended resources. Plaintiff has prepared to comply with imminent statutory requirements. The substance of those requirements has not changed. There is no basis to conclude that the fruits of Plaintiff's "time and resources" are any less valuable because of the one-year delay in the commencement of the employer mandate.

Doc. No. 27 at 5. Kawa Ortho had plainly pled otherwise:

> Defendants' delay of the 'employer mandate' injured Plaintiff by causing Plaintiff to lose some, if not all, of the value of the time and resources it expended in 2013 in anticipation of the mandate going into effect on January 1, 2014.

Doc. No. 1 at 5. This allegation could not be clearer. Kawa Ortho, in fact, did plead that the time and resources it expended were "less valuable because of the one-year delay in the commencement of the employer mandate."[9] The District Court's finding is directly contrary to Kawa Ortho's allegation in the Complaint. Instead of taking the allegation as true, the District Court disregarded it. *Bochese*, 405 F.3d at 976 ("'Facial attacks' on the complaint "require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true.") (internal quotation omitted). It should not have done so. Had it taken all of the allegations of the Complaint as true, it would have found that Kawa Ortho has amply alleged injury-in-fact.

[9] It is even less valuable now that the mandate has been delayed for a second time.

E. Kawa Ortho amply pled casual connection.

Kawa Ortho's injury is causally connected to Defendants' delay of the "employer mandate." It was directly, if not solely, caused by the delay. Were it not for the delay, Kawa Ortho plainly would not have lost some, if not all, of the value of the substantial time and resources it expended in 2013 in anticipation of the mandate taking effect on January 1, 2014. Nor would it have needlessly incurred any opportunity costs. Kawa Ortho has pled ample facts sufficient to establish a causal connection between its injury-in-fact and Defendants' delay.

F. Kawa Ortho amply pled redressability.

Under the APA, courts must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations," "contrary to constitutional right, power, [or] privilege," or "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and (C). Agency action also must be set aside if it is "arbitrary [and] capricious." 5 U.S.C. § 706(2)(B).

If Defendants' delay of the "employer mandate" is set aside, the effective date established by Congress will be reinstated. Kawa Ortho would not have incurred anticipatory compliance costs and opportunity costs preparing for a mandate that has not taken effect and has been delayed yet again. It will regain at least some, if not all, of the value of the time and resources it lost as a result of the unlawful delay and the opportunity costs it incurred will not have been for nothing.

In short, Kawa Ortho's injury will be redressed by the relief it has requested and to which it is entitled under the APA.

Although the District Court did not specifically rule on redressability, it suggested that the relief that Kawa Ortho seeks would not redress its injury because "time and resources will remain expended regardless of the date of enforcement of the employer mandate." Doc. No. 27 at 5. Kawa Ortho does not seek to recover its expenditures. It seeks to regain some, if not all, of the value of those expenditures. It will do so if the original effective date of the mandate is restored, relief to which Kawa Ortho is entitled if it prevails on its APA claim. Kawa Ortho's injury-in-fact is redressable by a favorable decision.

III. Defendants' Delay of the "Employer Mandate" Is Unlawful Under the APA.[10]

In considering the legality of an agency action, a court must measure the agency action against the statutory directive. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S. Ct. 681, 687 (1986) (*quoting Chevron U.S.A. Inc. v. Natural Res. Def.*

[10] Kawa Ortho recognizes that the District Court did not reach the merits of its APA claim, but has included this summary because this Court reviews a judgment for correctness, not for the soundness of the reasons for the judgment. *See*, *e.g.*, *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2782 (1984)); *see also Toro v. Sec'y*, 707 F.3d 1224, 1228 (11th Cir. 2013); *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs*., 701 F.3d 356, 361 (11th Cir. 2012); *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (reiterating that an agency may not exceed a statute's clear boundaries); *Financial Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481, 490 (D.C. Cir. 2007) (an agency's "failure to respect the unambiguous textual limitations" of a statutory provision is "fatal" to its regulatory efforts).

"Congress speaks through the laws it enacts" (*In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013)), and the text of the ACA is clear and unambiguous. The ACA plainly states that the obligation of employers with 50 or more "full time equivalent" employees to provide "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents under Section 4908H of Title 26 "shall apply to the months beginning after December 31, 2013." Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. Similarly, the reporting obligations under Section 6055 of Title 26 "shall apply to calendar years beginning after 2013." Pub. L. No. 111-148, § 1502(e), 124 Stat. 119, 252. Likewise, the obligations under Section 6056 of Title 26 "shall apply to the periods beginning after December 31, 2013." Pub. L. No. 111-148, § 1514(d), 124 Stat. 119, 257. As a result, it is indisputable that the plain language of the ACA

mandates that these obligations commence on January 1, 2014.[11] Defendants effectively conceded this fact when the U.S. Department of Treasury posted an announcement on its website stating that the "employer mandate" was being delayed originally until "2015" and now until at least "2016." If Defendants believed that the language was not "clear and unambiguous," then they would not have had to "delay" anything. By seeking to delay these clear statutory mandates, Defendants "fail[ed] to respect the unambiguous textual limitations" of the ACA "employer mandate." *Fin. Planning Ass'n*, 482 F.3d at 490. For that reason alone, Defendants' action is "in excess of statutory jurisdiction, authority, or limitations," is contrary to their "constitutional right, power, [or] privilege," and is "not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and (C). By simply picking alternative dates – on two separate occasions no less – Defendants also acted arbitrarily and capriciously. 5 U.S.C. § 706(2)(B).

When it enacted the ACA, Congress made a deliberate policy choice to have the "employer mandate" obligations commence on January 1, 2014. Defendants seek to replace Congress' policy choice with their own policy choice, purportedly by providing "transitional relief" for 2014, and now for 2016 for some, but not all,

[11] In addressing substantially similar language concerning the "individual mandate" provisions of the ACA, one court found, "[T]he date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty." *Florida. v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1145 (N.D. Fla. 2010).

"large employers." Defendants' action is not "transitional relief." It is a deliberate and unequivocal policy change with very real consequences for hundreds of thousands of businesses and millions of employees across the country. Defendants' unilateral postponement of the "employer mandate" is nothing short of a direct and deliberate disregard for the clear policy choice made by Congress, as reflected in the unambiguous language of the ACA.

Nor is Defendants' "transitional relief" entitled to any *Chevron* deference. Where, as here, Congress has "unambiguously expressed [its] intent" through the plain language of a statute, no deference is afforded to an agency. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781; *see also Dimension Fin.*, 474 U.S. at 368, 106 S. Ct. at 686 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). To determine whether Congress' intent is clear, courts employ the traditional tools of statutory construction. *Silva-Hernandez*, 701 F.3d at 361. Courts must "begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002) (*en banc*). They must also "presume that Congress said what it meant and meant what it said." *Id*. This Court has held, "Those who ask courts to give effect to perceived legislative intent by interpreting statutory language contrary to its plain and unambiguous meaning

are in effect asking courts to alter that language." *CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1228 (11th Cir. Fla. 2001).

In addition, in *In re Aiken County*, *supra*, another case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," the Court declared that, "[u]nder Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." 725 F.3d at 257, 259. At issue in *In re Aiken County* was a petition for writ of mandamus that sought to compel the Nuclear Regulatory Commission to adhere to a statutory deadline for completing the licensing process for approving or disapproving an application to store nuclear waste at Yucca Mountain in Nevada. As the Court explained,

> [i]f the President has a constitutional objection to a statutory mandate . . . the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate . . . simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates. These basic constitutional privileges apply to the President and subordinate executive agencies.

In re Aiken County, 725 F.3d at 259. In granting the petition, the Court concluded:

> It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to

> allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.

Id. at 267.

The same is true here. Defendants have not indicated that the President has a constitutional objection to the "employer mandate." Nor have Defendants suggested that they lack the funds necessary to implement the "employer mandate." Defendants simply seek to replace Congress' policy choice about when the "employer mandate" should take effect – January 1, 2014 – with their own policy choice – first, January 1, 2015 and now, January 1, 2016, maybe. The constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress demands that Congress' policy choice prevail. Defendants' attempt to delay the effective date of the "employer mandate" is "in excess" of their "statutory jurisdiction, authority, or limitations," "not in accordance with law," "contrary to constitutional right, power, [or] privilege," and "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A), (B), and (C).

CONCLUSION

For the foregoing reasons, Kawa Ortho respectfully requests that the Court reverse the District Court's order granting the motion to dismiss and remand this matter for further proceedings.

Dated: February 27, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5, 789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, namely, 14 point Times New Roman.

Dated: February 27, 2014 s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPENING BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on February 27, 2014. I also certify that I served an original and six copies of the foregoing **OPENING BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** on the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit via Federal Express, overnight delivery, on February 27, 2014.

I further certify that I served the foregoing **OPENING BRIEF OF APPELLANT KAWA ORTHODONTICS, LLP** via Federal Express, overnight delivery, on all counsel listed below on February 27, 2014.

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