No. ___

IN THE

Supreme Court of the United States

KAWA ORTHODONTICS, LLP.

Petitioner,

V.

SECRETARY, U.S. DEPARTMENT OF
THE TREASURY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By law, the "employer mandate" provisions of the Patient Protection and Affordable Care Act were set to take effect on January 1, 2014. As a responsible employer, Kawa Orthodontics, LLP ("Kawa Ortho") spent time and money in 2013 in anticipation of the mandate taking effect in 2014. It would not have expended resources on the mandate in 2013 if the law had not been scheduled to take effect in 2014. Like any rational employer, it would have waited and spent its time and money on more timely priorities. Defendants subsequently delayed the mandate until at least 2016. As a result of the delay, Kawa Ortho lost at least some of the value of the time and money it spent in 2013 preparing for the mandate to take effect in 2014. If the delay is set aside, Kawa Ortho's expenditures will not have been premature. It will regain some, if not all, of the value of the time and resources it expended, and the opportunity costs it incurred will not have been wasted.

Contrary to commonsense, basic business practices, and legal precedent, 2 judges for the Eleventh Circuit held that Kawa Ortho was not injured. The question presented is:

Whether an entity that loses the value of the substantial time and resources it prematurely expended and the time value of the money it spent on anticipatory compliance costs is sufficiently injured to confer Article III standing.

PARTIES TO THE PROCEEDINGS

Petitioner Kawa Ortho[1] – a responsible, "large employer" – sued 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 (collectively "Defendants").

[1] Petitioner is not a publicly-owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kawa Ortho respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. It does so because the court of appeals' ruling conflicts with precedent of both this Court and other courts of appeals and involves an important federal question:

> Whether an entity that loses the value of the substantial time and resources it prematurely expended and the time value of the money it spent on anticipatory compliance costs is sufficiently injured to confer Article III standing.

DECISIONS BELOW

The court of appeals ruled 2-1, affirming the lower court's judgment. The opinion of the court of appeals is reported at 773 F.3d 243. The panel's opinion is reproduced at App. 2a-10a, and the dissenting opinion is reproduced at App. 11a-20a. The unpublished ruling by the district court is reproduced at App. 21a-27a. The denial of the petitions for rehearing and rehearing *en banc* is reprinted at App. 28a-29a.

JURISDICTION

The court of appeals issued its opinion on December 2, 2014 and its denial of the petitions for rehearing and rehearing *en banc* on February 13, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

As the question presented is whether Kawa Ortho was sufficiently injured to confer standing, the only relevant constitutional or statutory provision is Article III, Section 2 of the U.S. Constitution: "The judicial power shall extend . . . to controversies to which the United States shall be a party."

STATEMENT OF THE CASE

The underlying issue is a single, straightforward legal question: does the Executive Branch have the authority to ignore a clear, congressionally-imposed deadline affecting hundreds of thousands of employers and millions of employees across the country on a matter of unquestionable importance? Neither the district court nor the court of appeals, however, answered this question because both courts incorrectly concluded that Kawa Ortho was not sufficiently injured to confer Article III standing.

I. Statutory Background.

Under the Patient Protection and Affordable Care Act ("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 obligations 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 4980H 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 agency the power to delay these requirements.

II. Factual Background.

Kawa Ortho is a "large employer" that employs more than 50 full-time equivalent employees. App. at 12a. 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" provisions. *Id.* Kawa Ortho incurred these costs in order to comply with the mandate. *Id.* 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. *Id.* It would have spent its time and money on other priorities instead. *Id.* Or it may not have spent the money at all and accrued interest on it.

On July 2, 2013, the U.S. Department of Treasury announced that the "employer mandate" was being delayed until 2015. *Id.* at 3a.

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 12a.

According to the White House's website, at least 200,000 employers in the United States employ more than 50 employees. The White House, "The Affordable Care Act Increases Choice and Sav[es] Money for Small Businesses" at 1. 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. Agency for Healthcare Research and Quality, Medical Expenditure Panel Survey, "Table I.A.1 - Number of private-sector establishments by firm size and selected characteristics: United States, 2012." In addition, the Congressional Budget Office predicted that the July 2, 2013 delay of the "employer mandate" would 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. Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to the Hon. Paul Ryan, Chairman, Committee on the Budget, U.S. House of Representatives, Re: Analysis of the Administration's Announced Delay of Certain Requirements under the Affordable Care Act, July 30, 2013, at 3-4.

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. Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015, U.S.

Department of the Treasury (Feb. 10, 2014) ("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."); 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."). This second delay also applies to Kawa Ortho, who at all relevant times has maintained between 50-60 employees. App. at 12a. And, Kawa Ortho is not alone. 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. Louise Randofsky and Theo Francis, Health-Law Mandate Put Off Again, The Wall Street Journal (Feb. 11, 2014).

III. The Course of Proceedings.

In October 2013, Kawa Ortho brought suit under the Administrative Procedure Act to set aside Defendants' delay of the "employer mandate" provisions of the ACA, which by law were scheduled to take effect on January 1, 2014, but have now been postponed until at least "2016." App. at 12a. Kawa Ortho pled that it was injured by this "agency action" because it lost at least some of the value of the substantial time and money it expended and the significant opportunity costs it incurred in anticipation of the mandate taking effect. *Id.* Defendants moved to dismiss for lack of standing, and in January 2014, the district court dismissed

Kawa Ortho's Complaint. *Id.* Kawa Ortho subsequently appealed. *Id.*

On December 2, 2014, by a 2-1 vote, a panel of the U.S. Court of Appeals for the Eleventh Circuit affirmed the lower court's ruling by concluding that Kawa Ortho lacked Article III standing. *See generally* App. at 2a-10a. The dissent concluded that Kawa Ortho had suffered a sufficient injury to confer standing because it lost the time value of the money it spent on anticipatory compliance costs. *See generally id.* at 11a-20a.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the panel's ruling conflicts with precedent of both this Court and other courts of appeals and involves an important federal question.

I. Whether Prematurely Incurring Compliance Costs Confers Article III Standing Is an Important Federal Question.

As required by the plain language of the ACA, the "employer mandate" provisions were set to take effect on January 1, 2014. Because Kawa Ortho employed more than 50 "full-time equivalent" employees, it had to comply with the mandate by January 1, 2014 or face substantial tax penalties. As a responsible employer, Kawa Ortho spent time and money in 2013 to comply with the mandate taking effect on January 1, 2014. It also incurred substantial opportunity costs. Defendants subsequently delayed the date for compliance until January 1, 2015. They then delayed it a second time. The mandate now purportedly takes effect in "2016."

As a rational employer as well as a reasonable one, Kawa Ortho would not have expended its time and money in 2013 if it had not been required to comply with the mandate until "2016." It would have spent its time on other priorities, including generating new patients and additional revenue for its practice. It would have saved its money and accrued interest on it, or put it to other uses.

"A dollar today is worth more than a dollar tomorrow." *Atlantic Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (quoting D. Herwitz & M. Barrett, Accounting for Lawyers 221 (2d ed. 1997)). "To put it simply, $4,000 today is worth more than $4,000 to be received 17 months from today because if received today, the $4,000 can be invested to start earning interest immediately." *Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004) (Thomas, J., dissenting) (citing Encyclopedia of Banking & Finance 1015 (9th ed. 1991)). Delay diminishes the time value of money.

Had the mandate taken effect on the date established by Congress, Kawa Ortho would have realized the full value of the time and money it spent in 2013 to comply with the mandate on January 1, 2014. Defendants' unlawful delay of the mandate by at least two years made Kawa Ortho's expenditures premature.

The panel failed to apply the basic economic principle that a dollar today is worth more than a dollar tomorrow. It also failed to take into account how businesses operate. In concluding that Kawa Ortho was not harmed, the panel stated, "Although Kawa [Ortho] asserts it would have waited to research its ACA obligations, Kawa [Ortho] has not alleged that its ACA research is objectively worth less, or that Kawa [Ortho] has been actually harmed in a concrete way." App. at 6a.

But Kawa Ortho alleged a different injury. As the dissent correctly noted, "[L]ooking only to the utility of Kawa [Ortho]'s legal expenditures ignores the fact that Kawa [Ortho] could have obtained that information two years later, and benefited from the use of interest earned on that money had it known of the delay." *Id.* at 16a. Kawa Ortho plainly alleged that because of the delay, it lost some, if not all, of the value of the substantial time and resources it expended at least two years early. It lost the time value of the money it spent on anticipatory compliance costs. *Id.* at 14a.

Because it misidentified the injury, the panel concluded that Kawa Ortho's injury was not traceable to Defendants. *Id.* at 8a-9a. As the dissent concluded, however:

> Were the alleged injury the fact that Kawa [Ortho] spent the money on

> compliance costs at all, the government would be correct that the statutory mandate — not the delay — brought about the need to make such expenditures. But since the injury is the lost time value of Kawa [Ortho]'s expenditures, not the expenditures themselves, the only reason for that loss is the delay in enforcement.

Id. at 16a-17a. Kawa Ortho's injury is directly traceable to Defendants' actions. Had Defendants not delayed the enforcement of the law, Kawa Ortho would not have lost the time value of the money it spent on anticipatory compliance costs.

In addition, Kawa Ortho's injury is redressable by a favorable ruling. If the delay is set aside, Kawa Ortho's 2013 expenditures will not have been premature. It will regain some, if not all, of the value of the time and resources it expended in 2013, and the opportunity costs it incurred will not have been wasted.

The lower courts simply got it wrong. The time value of money is important to any business, and losing the time value of money – such as by incurring opportunity costs prematurely or unnecessarily – constitutes an injury. A plaintiff has standing if it can demonstrate that a defendant's action caused the plaintiff to lose the time value of the money it spent on anticipatory compliance costs. Kawa Ortho spent money in 2013 it otherwise might not have spent until years later. Kawa Ortho can regain some, if not all, of the value of those expenditures if a court were to set aside the delay.

Contrary to the panel's ruling, Kawa Ortho has standing. It was injured by Defendants' delay of the enforcement of the "employer mandate" provisions of the ACA. Had Defendants not delayed enforcement, Kawa Ortho's spending would not have been premature. If the mandate was ordered to take effect, Kawa Ortho will regain at least some, if not all, of the time and money it spent unnecessarily.

Kawa Ortho's standing claim is just plain commonsense and the result of how businesses operate. Defendants' action caused it to spend money on compliance costs two years earlier than necessary. If the "employer mandate" provisions were ordered to take effect as required by statute, Kawa Ortho would not lose all of the value of the time and money that it spent prematurely. Whether a rational and reasonable business has the authority to regain some of the value of the anticipatory compliance costs it spent prematurely because of the actions of the federal government is an important federal question. For this reason, the Court should grant this petition.

II. The Panel's Decision Conflicts with this Court's Precedent.

Unlike all of the other ACA challenges submitted to the Court over the past few years, Kawa Ortho does not challenge the text of the law. Nor does it challenge the enforcement of the "employer mandate" provisions as applied to it. Instead, Kawa Ortho challenges Defendants' unlawful decision to disregard statutory requirements and unilaterally delay enforcement of the law for at least two years.

A pre-enforcement challenge therefore was not possible. Had Kawa Ortho not taken the steps necessary to comply with the mandate, it would not have been injured. The same is true if Defendants had not unlawfully delayed its enforcement of the mandate. Although the posture is admittedly different, the result should not be. Kawa Ortho has suffered an injury no different than other plaintiffs before it.

In *National Federation of Independent Businesses v. Sebelius*, __ U.S. __, 132 S. Ct. 2566 (2012), the Court resolved whether the individual mandate was constitutional. Although it did not address standing, by reaching a decision, it implicitly affirmed the court of appeals' analysis. In that case, the court of appeals 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). The individual 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, constituted an injury:

> 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 district court agreed that these anticipatory compliance costs not only constituted an injury, 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 contest the individual plaintiffs' standing. *Florida*, 648 F.3d at 1243. The court of appeals nonetheless considered the issue and determined that "it is beyond dispute that" the individual plaintiffs had standing to challenge the "individual mandate." *Id.* at 1244. In other words, this Court has already held that the expenditure of anticipatory compliance costs is an injury sufficient to confer standing.

This Court has also reached the same conclusion in non-ACA challenges. The question presented in *Virginia v. American Booksellers Association, Inc.* was whether a business that had to comply with a new statute was sufficiently injured to confer standing. 484 U.S. 383 (1988). The Court answered in the affirmative: "[T]he law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant costly compliance measures or risk criminal prosecution." *Id.* at 392.

Similarly, in *Havens Realty Corp. v. Coleman*, this Court was asked to decide whether an organization suffered an injury sufficient to confer standing when the organization was required to divert resources from its own projects. 455 U.S. 363 (1982). The Court concluded: "Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interest." *Id.* at 379.

Like the plaintiffs in these cases, Kawa Ortho spent money to comply with a law. It also diverted resources that it could have spent elsewhere. The only difference was that Kawa Ortho was injured because Defendant's unlawful action meant that it spent money prematurely. As the dissent succinctly explained, "It spent money on compliance costs two years earlier than necessary." App. at 14a. The delay caused Kawa Ortho to lose at least some of the time value of the money it spent on anticipatory compliance costs. *Id.* at 13. Kawa Ortho's injury is not unique. It is sufficient to confer Article III standing. The Court should grant this petition to reconcile the panel's ruling with this Court's clear precedent.

III. The Panel's Decision Conflicts With Decisions of Other Circuits.

Like this Court, other courts of appeals have concluded that incurring anticipatory compliance costs is a sufficient injury to confer Article III standing. In *Liberty University v. Sebelius*, 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 costs 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, 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).

In *Association of Private Sector Colleges & Universities. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012), the U.S. Court of Appeals for the District of Columbia Circuit concluded that the plaintiffs were sufficiently injured to confer standing because they faced increased compliance costs. In addition, the same court, in *State Farm Mut. Auto Insurance Company v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986), held that if a challenged rule "would reasonably prompt a regulated industry, unwilling to risk substantial penalties by defying the policy, to undertake costly compliance measures[,]" the regulated industry would be sufficiently injured. Similarly, the Second and Sixth Circuits have held that plaintiffs incurring compliance costs have standing. *See N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) and *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997) (finding standing based on compliance costs).

The question of whether incurring compliance costs may confer standing is not new. Other circuits have answered it in the affirmative. The panel did not. For that reason, the panel's decision conflicts with the decisions of those other circuits. This petition therefore should be granted.

IV. The Underlying Issue Is of Paramount Importance.

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 (1986) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, (1984)).

"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 4980H 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. 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 failed to respect the unambiguous textual limitations of the ACA "employer mandate."

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" until 2016 for some, but not all, "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; see also *Dimension Fin.*, 474 U.S. at 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.").

Of note, in *In re Aiken County*, another case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," the U.S. Court of Appeals for the D.C. Circuit 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 U.S. Court of Appeals for the D.C. Circuit explained:

> If 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 of appeals 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 – sometime in "2016." The constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress demands that Congress' policy choice prevail.

Therefore, whether Kawa Ortho, an entity that lost at least some of the value of the substantial time and resources it prematurely expended and the time value of the money it spent on anticipatory compliance costs, has been sufficiently injured to confer Article III standing is a question of utmost importance. Like many cases before it, this case presents another circumstance in which a responsible and rational business is injured by the Executive Branch refusing to adhere to the rule of law. In this case, Defendants caused harm to Kawa Ortho by unilaterally and unlawfully delaying the "employer mandate" provisions of the ACA. Kawa Ortho was only injured because it sought to comply with a newly enacted law. Had Defendants not ignored the law as written, Kawa Ortho would not have been injured. Therefore, the Court should grant this petition and ultimately reverse the panel's ruling to allow for the lower courts to provide the check on the Executive Branch which the Constitution requires.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 14-10296

District Court Docket No.
9:13-cv-80990-WPD

KAWA ORTHODONTICS, LLP,

Plaintiff - Appellant,

versus

SECRETARY, U.S. DEPARTMENT OF THE TREASURY, U.S. DEPARTMENT OF TREASURY, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE,

Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: December 02, 2014
For the Court: John Ley, Clerk of Court
By: Djuanna Clark

ISSUED AS MANDATE 02/23/2015

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10296

D.C. Docket No. 9:13-cv-80990-WPD

KAWA ORTHODONTICS, LLP,

Plaintiff – Appellant,

versus

SECRETARY, U.S. DEPARTMENT OF THE TREASURY, U.S. DEPARTMENT OF TREASURY, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE,

Defendants – Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 2, 2014)

Before MARTIN, JULIE CARNES and BLACK, Circuit Judges.

BLACK, Circuit Judge:

I. BACKGROUND

The "employer mandate" provisions of the Patient Protection and Affordable Care Act (ACA) require certain employers to offer their employees health insurance that meets statutorily-specified minimum requirements. The ACA imposes reporting obligations on those employers and provides for the assessment of a tax penalty if an employer fails to provide adequate insurance.

Between early 2013 and the end of June 2013, Kawa Orthodontics, LLP (Kawa) expended time and money to determine how to comply with the employer mandate. After Kawa incurred these expenses, on July 2, 2013, the U.S. Department of the Treasury (Treasury) announced it would not enforce the mandate for a transition period of one year—until the end of 2014. Treasury later extended the transition relief for certain employers, including Kawa, for a second year.

In October 2013, Kawa filed a complaint in federal district court challenging Treasury's decision to postpone enforcement of the employer mandate. Kawa did not seek the return of the money that Kawa paid to research its upcoming obligations under the ACA. Nor did it seek the return of any money attributable to the monetary value of the time that Kawa spent in this endeavor. Rather, Kawa sought a declaratory judgment and an injunction setting aside Treasury's transition relief. The district court dismissed the complaint, finding that Kawa lacked Article III standing. Kawa appeals.

II. STANDARD OF REVIEW

Whether a party has Article III standing is a jurisdictional issue, and therefore must be addressed before we may reach the merits. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 S. Ct. 1858, 1861 (2000); *see also Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) ("Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." (brackets and quotation omitted)). We review de novo whether plaintiffs have Article III standing. *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1257 (11th Cir. 2012). In assessing standing on a motion to dismiss, we presume the plaintiff's "general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992). Moreover, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206 (1975). We may affirm for any reason supported by the record, even if not relied upon by the district court. *United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008).

III. DISCUSSION

To establish Article III standing, a plaintiff must show "(1) an injury in fact that is concrete, particularized, and either actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable judicial decision will redress the injury." *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1145 (11th Cir. 2014). Applying this test, we conclude Kawa lacks Article III standing to challenge Treasury's delay of the mandate.[1]

We address each element in turn.

A. Injury

In its complaint Kawa alleges Treasury's delay in enforcing the employer mandate injured it because the delay caused Kawa 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." Kawa alleges it would not have spent its time and money researching the ACA in 2013 had it known the mandate would be delayed until 2015, "but instead would have spent its time, resources, and money on other priorities."

To satisfy the injury requirement, Kawa must show "an invasion of a legally protected interest that is sufficiently concrete and particularized rather than abstract and indefinite." *Ga. State Conference*

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[1] Because we conclude Kawa lacks Article III standing, we need not address whether Treasury's decision to postpone enforcement of the employer mandate is unreviewable under § 701(a)(2) of the Administrative Procedure Act (the APA), which precludes judicial review of an agency's action if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

of NAACP Branches v. Cox, 183 F.3d 1259, 1262 (11th Cir. 1999). "The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Natural Res.*, 529 U.S. at 772, 120 S. Ct. at 1862.

The allegations in Kawa's complaint do not state such a concrete and particularized injury. Although Kawa asserts it would have waited to research its ACA obligations, Kawa has not alleged that its ACA research is objectively worth less, or that Kawa has been actually harmed in a concrete way. *See GrassRoots Recycling Network, Inc. v. E.P.A.*, 429 F.3d 1109, 1112 (D.C. Cir. 2005) (holding a plaintiff failed to show an actual injury to challenge an EPA rule when the plaintiff alleged he "would not have purchased" a piece of property or "would have paid . . . less" because the plaintiff's allegations showed only that the property was "worth less to him," not that the property was "in fact worth less"). Therefore, as set out in its complaint, Kawa's bare allegation that it has lost the "value of the time and resources it expended in 2013" sets out an injury that is too abstract and indefinite to confer Article III standing, particularly because the substantive requirements for complying with the employer mandate remain unchanged and Kawa is still subject to them.

The dissent characterizes Kawa's alleged injury as the "lost two years of interest" Kawa could have accrued on the money spent in 2013 to comply with the employer mandate. However, as this appeal comes to us on a motion to dismiss, we must evaluate Kawa's standing "based on the facts alleged in the complaint." *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001). We may not hypothesize or speculate about the existence of an injury Kawa did not assert. *Id.* ("[W]e may not speculate concerning the existence of standing or piece together support for the plaintiff." (quotation omitted)). Kawa's complaint does not mention the word "interest," let alone allege that Kawa had specific plans to invest its money into an interest-bearing asset.[2] Therefore, Kawa's lost-interest argument is waived. *See Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) ("[A]bsent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal.").

In short, Kawa's complaint alleges only a subjective perception that Treasury's delay caused it harm, which is insufficient to establish Article III standing.[3]

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[2] Kawa's response to the motion to dismiss also makes no mention of lost interest. It was not until its initial brief before this Court that Kawa made a one-sentence passing reference to lost interest, stating only that "[a]t 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." Appellant Br. 16.

[3] Even if Kawa's complaint had alleged lost interest revenue as its injury, that would not confer standing on it to challenge Treasury's delay. First, as explained in our discussion of causation, it was the ACA itself, not Treasury's delay, which caused Kawa to spend money on legal research in 2013 and thereby forego the opportunity to earn interest on whatever money it spent. Second, as explained in our

B. Causation

Even if Kawa had established a concrete and particularized injury, Kawa's claim of standing fails on the causation requirement.

To establish causation, Kawa must demonstrate its alleged injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136 (quotation and alterations omitted). Kawa alleges its injury was caused by Treasury's delay of the mandate. Kawa has not demonstrated its purported injury is fairly traceable to Treasury's delay. Any injuries associated with the timing of Kawa's compliance expenses, including any opportunity costs, are attributable to the ACA itself. *Cf. Arcia v. Fla Sec'y of State*, No. 12-15738, 2014 WL 6235917, at *4 (11th Cir. Nov. 17, 2014) (plaintiffs who incurred costs because of Florida's voter-removal program had standing to challenge that particular program); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 456-57 (7th Cir. 2010) (plaintiff who incurred costs because of an order requiring it to post a bond had standing to challenge bond order). Treasury played no role in determining when or how Kawa allocated its resources in preparation for the employer mandate and reporting

discussion of redressability, the only remedy that could restore Kawa's lost interest is money, which Kawa does not seek.

requirements of the ACA. Therefore, Kawa cannot show causation.[4]

C. Redressability

Even if Kawa had met both the injury and causation requirements to establish standing, it cannot meet the redressability requirement. This is so because Kawa does not—and cannot[5]—seek money damages in this case, and money damages are the only relief that could redress Kawa's alleged injury. Kawa nevertheless requests a declaratory judgment that Treasury's transition relief violates the Administrative Procedure Act and an injunction prohibiting and setting aside the transition relief. Kawa argues an injunction would reinstate the original January 1, 2014, effective date of the mandate, and Kawa would thereby regain some or all of the value of its 2013 expenditures.

To establish redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136 (quotation omitted). In this case, granting the requested declaratory and injunctive relief would not redress Kawa's purported injury. Kawa would not recoup its compliance expenses or any value associated with the time and

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[4] The dissent does not cite any authority for its view that Kawa's alleged injury is fairly traceable to Treasury's actions, but instead relies only on its characterization of Kawa's injury.

[5] Damages are not available under the Administrative Procedure Act in this action. *See* 5 U.S.C. § 702 (authorizing actions seeking "relief other than money damages").

resources Kawa expended in 2013. The consequence of granting the requested relief would be to simply subject Kawa and other employers to the employer mandate tax penalties and reporting requirements. Kawa has not explained how Treasury's enforcement of tax penalties and reporting requirements would put Kawa in any different position than Kawa is currently in now, or how the requested relief will or could increase the value of the resources Kawa expended. *See DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1303 (11th Cir. 2008) (explaining a plaintiff lacked standing where the complaint did not "suggest in any way how [the] 'injury' could be redressed by a favorable judgment"). Therefore, Kawa has not shown redressability.[6]

IV. CONCLUSION

For the foregoing reasons, we conclude Kawa lacks Article III standing.

AFFIRMED.

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[6] The dissent argues that an injunction "would end the continued injury Kawa faces from each new day of unearned interest on the money" Kawa spent on compliance in 2013. But nothing short of monetary compensation that may be invested in an interest-bearing account could stop Kawa from continuing to lose the potential interest revenue Kawa gave up in 2013 when it paid for ACA research. As explained, Kawa does not seek and cannot obtain monetary damages. And neither a declaratory judgment nor an injunction could restore to Kawa its alleged loss of time and value.

MARTIN, Circuit Judge, dissenting:

Kawa Orthodontics, LLP (Kawa) filed suit in federal court challenging the Treasury Department's decision to delay enforcement of the "employer mandate" provisions of the Patient Protection and Affordable Care Act (ACA). Before us is the narrow question of whether Kawa has Article III standing to challenge that delay. Because I believe that Kawa has standing, I respectfully dissent.

I.

The ACA requires employers with more than fifty full-time employees to provide minimum essential health-insurance coverage to its employees and their dependents or pay a tax penalty. 26 U.S.C. § 4980H. According to the statute, these provisions (known as the "employer mandate") were scheduled to take effect on January 1, 2014. Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. However, on July 2, 2013, the Treasury Department announced a one-year delay in enforcement of the employer mandate. See IRS Notice 2013-45, Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions), IRB 2013-31, July 29, 2013, available at http://www.irs.gov/irb/2013-31_IRB/ar08.html. That delay has since been extended until the end of 2015 for employers with between fifty and ninety-nine employees. See 79 Fed. Reg. 8544 (Feb. 12, 2014).

In October 2013, Kawa filed suit in federal district court challenging Treasury's delay in enforcing the employer mandate. Kawa has more than fifty full-time employees and would therefore be subject to the provision. According to the complaint, prior to the announcement of delayed enforcement, Kawa incurred certain costs "including money spent on legal fees . . . in order to determine what options and obligations it ha[d] under the 'employer mandate' and how the coverage Plaintiff [then] offer[ed] to its employees w[ould] be affected by the mandate." Kawa alleged that had it known the employer mandate would not be enforced until well after January 1, 2014, it "would not have expended its time and resources and incurred these anticipatory costs in 2013 . . . but instead would have spent its time, resources, and money on other priorities." In short, Kawa alleged injury because it "los[t] 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." Kawa sought declaratory and injunctive relief under the Administrative Procedure Act (APA) setting aside the delay of the employer mandate. On January 13, 2014, the District Court dismissed Kawa's suit for lack of subject-matter jurisdiction, holding that Kawa lacked Article III standing. Kawa appeals that holding here.

II.

In order to show standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., __ U.S. __, 134 S. Ct. 1377 (2014). The "party invoking federal jurisdiction bears the burden of establishing these elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992). "We review issues of standing de novo." Hollywood Mobile Estates, Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1264 (11th Cir. 2011). After careful consideration, I believe that Kawa has alleged facts sufficient to meet each part of the three-pronged standing test.

A.

First, Kawa has shown that it has sustained an injury as a result of the government's decision to delay enforcement of the employer mandate. It spent money on compliance costs two years earlier than necessary, and therefore lost two years of interest on those expenditures. Under basic rules of accounting, "[a] dollar today is worth more than a dollar tomorrow." Atlanta Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 384, 118 S. Ct. 1413, 1415 (1998) (quoting D. Herwitz & M. Barrett, Accounting for Lawyers 221 (2d ed. 1997)); see also Till v. SCS Credit Corp., 541 U.S. 465, 487, 124 S. Ct. 1951, 1966 (2004)

(Thomas, J., concurring in the judgment) ("$4,000 today is worth more than $4,000 to be received 17 months from today because if received today, the $4,000 can be invested to start earning interest immediately." (footnote omitted)).

This is the "time value of money." See Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453, 459 (7th Cir. 2010). Here, had Kawa spent money to ensure its compliance with the employer mandate in 2015 instead of 2013, it could have earned an additional two years of interest on that money. Or, instead of earning interest, Kawa could have invested that money in other endeavors to generate two years' worth of added profits to the company. Cf. Arcia v. Florida Sec'y of State, 746 F.3d 1273, 1279 (11th Cir. 2014) ("Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response.").[1]

This loss of the time value of Kawa's money is a sufficient injury to meet the requirements of Article III standing. Recently, in Habitat Education Center, the Seventh Circuit addressed a similar question and held that the plaintiff had standing to

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[1] The owner of Kawa, Larry Kawa, also said in his declaration that he "spent approximately 100 hours researching and familiarizing [him]self with the ACA and the 'employer mandate.'" "Had [he] not spent [his] time researching the ACA and the 'employer mandate' and seeking and obtaining professional advice on how best to comply with the mandate, [he] would have spent this same time generating new patient referrals for Kawa Ortho."

challenge a deposit of $10,000 with the court, even though it was possible the plaintiff would eventually receive the full amount of money back if it won the case. Id. at 457. The Seventh Circuit reasoned:

> It could be argued that unless and until damages are assessed, Habitat has incurred no loss and therefore lacks standing to appeal. But it has incurred a loss—a loss of the use of $10,000. Every day that a sum of money is wrongfully withheld, its rightful owner loses the time value of the money. Suppose no damages are ever assessed against Habitat and so eventually the court returns the $10,000 that it is holding; there would be no procedural vehicle to enable Habitat to recover the loss of the time value of its money. Therefore it had standing to challenge the bond order on appeal from the final judgment.

Id.

The very same can be said here. Kawa alleged that it "spent [money] on legal fees . . . in order to determine what options and obligations it ha[d] under the [ACA]." And by paying lawyers to ensure that its health insurance program complied with the ACA in 2013 rather than 2015, Kawa lost two years of interest on those expenditures. Given that the Supreme Court has found an injury as small as "a $5 fine and costs" and a "$1.50 poll tax" sufficient to show standing, United States v. SCRAP, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 2417 (1973), I understand the lost interest on thousands of dollars of legal payments that were prematurely spent to meet the injury prong of standing. See also F. Andrew Hessick, Probabilistic Standing, 106 Nw. U. L. Rev. 55, 67–68 (2012) ("[S]tanding treats identically a plaintiff who alleges only 1¢ in harm and a plaintiff who alleges a $100,000 injury; both have a personal stake warranting invocation of the courts.").

Of course, I agree that the information Kawa obtained as a result of its legal expenditures will also be valuable in 2015 when the employer mandate goes into effect. However, looking only to the utility of Kawa's legal expenditures ignores the fact that Kawa could have obtained that information two years later, and benefited from the use of interest earned on that money had it known of the delay. Monetary loss—no matter how small—has been recognized as a cognizable injury for standing purposes. I would hold that Kawa has alleged facts that show an injury sufficient to demonstrate Article III standing.

B.

Second, Kawa has shown that its "injury [is] fairly traceable to the defendant's allegedly unlawful conduct," Allen, 468 U.S. at 751, 104 S. Ct. at 3324. The government argues that Kawa's asserted injury "did not result from the actions of the defendants in this case," but rather "from the enactment of the statute itself." Were the alleged injury the fact that

Kawa spent the money on compliance costs at all, the government would be correct that the statutory mandate—not the delay—brought about the need to make such expenditures. But since the injury is the lost time value of Kawa's expenditures, not the expenditures themselves, the only reason for that loss is the delay in enforcement. I would hold that Kawa has alleged causation sufficient to demonstrate Article III standing.

C.

Third, Kawa has shown that its injury is "likely to be redressed by the requested relief." Allen, 468 U.S. at 751, 104 S. Ct. at 3324. When determining redressibility, we simply inquire as to whether the plaintiff has shown that it would gain some relief in the event of a favorable ruling. See Hollywood Mobile Estates, 641 F.3d at 1266.

Here, Kawa sought relief under the APA for injunctive and declaratory relief—not monetary damages. I agree with the District Court that "[n]either a declaration that Defendants acted unlawfully nor an injunction requiring the immediate implementation of the employer mandate would compensate Plaintiff for its time and resources expended in 2013." However, compensation is not the only means of redress. Kawa may not be able to obtain redress for the interest it has lost between January 1, 2014, and now. But if a court required the government to enforce the employer mandate going forward, that decision would end the continued injury Kawa faces from each new day of unearned interest on the money it prematurely used for those legal expenditures. In other words, it would not have unnecessarily spent the money before it needed to. For this reason, I would hold that Kawa has met the redressibility prong for Article III standing.

III.

The majority says that because "Kawa's complaint does not mention the word 'interest,' let alone allege that Kawa had specific plans to invest its money into an interest-bearing asset . . . [its] lost-interest argument is waived." But I am mindful that "[w]hen the defendant challenges standing via a motion to dismiss, both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 806 (11th Cir. 1993) (quotation marks omitted). We may find standing "based on the facts alleged in the complaint." Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) (emphasis added). The plaintiffs' complaint here clearly says that "Plaintiff would not have expended its time and resources and incurred these anticipatory costs in 2013 if the mandate had not been schedule to take effect until 2015, but instead would have spent its time, resources, and money on other priorities." The complaint also states that the delay in enforcement of the "employer mandate" has "caus[ed] Plaintiff to lose some . . . of the value of the time and resources it expended in 2013." Applying the well-known principle of "the time value of money" means that spending money on other priorities in 2013—and reaping the benefits of those investments between 2013 and 2015—would financially benefit Kawa even if it eventually expends money in 2015 to comply with the mandate. Construing Kawa's complaint liberally, I understand Kawa to have easily alleged facts sufficient to demonstrate Article III standing in its complaint.[2]

Of course, my view on the issue of standing has nothing to do with the merits of Kawa's complaint challenging the employer mandate's delayed enforcement under the APA. In fact, any discussion of the merits here would be inappropriate. See, e.g., Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1294 (11th Cir. 2010) (holding, after we found standing following a district court's dismissal for lack of subject matter jurisdiction, that "[t]he merits will be for the district court to decide on remand"). However, I would hold that Kawa has alleged facts that demonstrate it has met the requirements of Article III standing, and would remand and allow the District Court to address the

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[2] I agree with the majority's suggestion that Kawa has poorly explained how expending funds in 2013 rather than in 2015 would injure it. However, a party's deficient enunciation of a legal argument does not strip us of our duty to view the complaint in the light most favorable to the plaintiff and determine whether it has alleged facts sufficient to show standing. See Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) ("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 for the purposes of the motion." (quotation marks omitted)).

merits of Kawa's claims. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-80990-CIV-DIMITROULEAS

KAWA ORTHODONTICS, LLP,

Plaintiff,

vs.

JACK LEW, in his official capacity as Secretary of the U.S. Department of the Treasury,
and
U.S. DEPARTMENT OF THE TREASURY,
and
DANIEL L. WERFEL, in his official capacity as the Acting Commissioner of the Internal Revenue Service,
and
INTERNAL REVENUE SERVICE,
Defendants.
_______________________________________/

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion") [DE 13], filed herein on December 9, 2013. The Court has considered the Motion [DE 13], the Response [DE 14], and the Reply [DE 22] and is otherwise fully advised in the premises.

I. BACKGROUND

The parties to this action are Plaintiff Kawa Orthodontics, LLP ("Plaintiff") and Defendants 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 (together, "Defendants"). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 500, et seq. (the "APA"), Plaintiff seeks declaratory and injunctive relief as to certain aspects of the Patient Protection and Affordable Care Act ("ACA").

Under the ACA, employers who have more than fifty (50) full-time employees face certain requirements (the "employer mandate"). First, these employers face tax penalties if they do not offer health insurance coverage that meets statutorily specified minimum requirements. Second, these employers must fulfill certain annual reporting obligations. The ACA specifies that the employer mandate—including these tax penalties and reporting requirements—would take effect at the beginning of 2014. However, as of July 2, 2013, Defendants announced that the tax penalties and reporting requirements would not begin until 2015.

Prior to July 2, 2013, Plaintiff had expended substantial time and resources in preparation for complying with the employer mandate as scheduled to take effect on January 1, 2014. Plaintiff would not have expended its time and resources on these issues if Plaintiff had known that the employer mandate would not take effect until January 1, 2015.

Plaintiff alleges that Defendants' action of delaying the implementation of the employer mandate exceeded Defendants' statutory authority, was arbitrary and capricious, and was contrary to law. Accordingly, Plaintiff seeks a declaratory judgment that Defendants' delay of the employer mandate violates the APA and an injunction prohibiting and setting aside Defendants' delay of the employer mandate. Through the instant Motion [DE 13], Defendants argue that this Court lacks subject matter jurisdiction because Plaintiff has failed to establish its standing.

II. DISCUSSION

A. Standard of Review

As a threshold matter, the Court must determine if jurisdiction exists before proceeding to the merits of the case. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp*, 127 S. Ct. 1184, 1191 (2007) ("Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purposes of deciding the merits of the case." (internal quotations omitted)). "The burden for establishing federal subject matter jurisdiction rests with the party bringing the claim." *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005).

"Federal courts cannot exercise jurisdiction over cases where the parties lack standing." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011). To establish standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)). "If at any point in the litigation the plaintiff ceases to meet all three requirements for constitutional standing, the case no longer presents a live case or controversy, and the federal court must dismiss the case for lack of subject matter jurisdiction." *Id.*

B. Analysis

Plaintiff has not established that it has standing. First, there is no concrete injury in fact. Second, even if there were a concrete injury in fact, Plaintiff has not shown that a favorable decision would redress that injury.

Plaintiff alleges that "[p]rior to July 2, 2013, [it] expended substantial time and resources, including money spent on legal fees and other costs, in preparation for the 'employer mandate' taking effect on January 1, 2014" and that it "would not have expended its time and resources and incurred these anticipatory costs in 2013 if the mandate had not been scheduled to take effect until 2015, but instead would have spent its time, resources, and money on other priorities." [DE 1 ¶ 13]. 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.

The Court can imagine circumstances where a plaintiff *might* have an injury based on a delayed implementation of the employer mandate. The employer mandate may require some employers to incur additional costs on a yearly basis. For example, some employers may have to upgrade to more expensive insurance coverage. An employer could have purchased the more expensive insurance or otherwise incurred the additional costs for the 2014 calendar year only to discover that those additional expenditures were no longer mandatory for that calendar year. Those additional and unnecessary costs for the 2014 calendar year could then arguably constitute an injury in fact.[1]

However, those facts are absent from this case. Plaintiff does not allege that, based on the employer mandate, it made an insurance purchase

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[1] Even under those facts, however, it is unclear whether the injury could be redressed through declaratory or injunctive relief.

or incurred any other expenses limited to the 2014 calendar year. Rather, Plaintiff expended time and resources to prepare for its eventual ongoing compliance with the employer mandate. Plaintiff must still comply with that mandate and, in so doing, may rely on the fruits of its previously expended time and resources. There is no allegation that Plaintiff's efforts are somehow valueless because they took place in the first half of 2013 rather than in the first of half of 2014. The knowledge that Plaintiff has gained will not lapse at the end of 2014. The benefits will continue through the initiation of the employer mandate in 2015. Thus, Plaintiff's early preparations for the employer mandate do not give rise to any concrete injury.

Furthermore, even if Plaintiff had a concrete injury in fact, the requested relief would not redress that injury. Neither a declaration that Defendants acted unlawfully nor an injunction requiring the immediate implementation of the employer mandate would compensate Plaintiff for its time and resources expended in 2013. Plaintiff's time and resources will remain expended regardless of the date of enforcement of the employer mandate.

Finally, Plaintiff does not cite to any binding authority indicating that a party who has taken steps to prepare for statutory requirements has standing to sue the government for delaying enforcement of those requirements. Thus, because Plaintiff has not established that it has standing, the Court does not have subject matter jurisdiction over this dispute.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Motion [DE 13] is hereby **GRANTED**;
2. This action is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction;[2]

and

3. The Clerk is directed to **CLOSE** this case and **DENY** any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of January, 2014.

WILLIAM P. DIMITROULEAS
United States District Judge

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[2] A dismissal for lack of subject matter jurisdiction should be without prejudice because the Court has no power to render a judgment on the merits. *See Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984); *Georgia Advocacy Office, Inc. v. Camp*, 172 F.3d 1294, 1299 (11th Cir. 1999).

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 14-10296

KAWA ORTHODONTICS, LLP,

Plaintiff – Appellant,

versus

SECRETARY, U.S. DEPARTMENT OF THE TREASURY, U.S. DEPARTMENT OF TREASURY, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE,

Defendants – Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION'S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, JULIE CARNES and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate

Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE