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ONE LAST SHOT AT THE BYRD: *SKF USA, INC. V. U.S. CUSTOMS & BORDER PROTECTION* SHOULD NOT FORECLOSE AS-APPLIED CONSTITUTIONAL CHALLENGES TO THE BYRD AMENDMENT

Jessica M. Forton[+]

Upon signing into law the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA),[1] President William J. Clinton cautioned,

> [T]his bill will provide select U.S. industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies, while providing no comparable subsidy to other U.S. industries or to U.S. consumers, who are forced to pay higher prices on industrial inputs or consumer goods as a result of the anti-dumping and countervailing duties. I call on the Congress to override this provision, or amend it to be acceptable, before they adjourn.[2]

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1. Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 154–55. This Note uses various terms particular to international-trade law; thus, it is useful to provide initial definitions. "Dumping" occurs when a foreign imported product is sold in the United States for less than the product's fair value. 19 U.S.C. § 1677(34) (2006). An "antidumping duty" is a tax levied on the product when imported to counter the effects of dumping. *See* § 1673; BLACK'S LAW DICTIONARY 1593 (9th ed. 2009). A "countervailing duty" is a tax imposed on a foreign imported product to counter the effects of a foreign government subsidy. *See* § 1671(a); BLACK'S LAW DICTIONARY, *supra*, at 581. A "subsidy" is a monetary benefit provided by a foreign government to the producer of the foreign imported product. BLACK'S LAW DICTIONARY, *supra*, at 1565; *see also infra* Part I.A.1 (providing a more thorough explanation of these terms).

2. Presidential Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2001, 36 WEEKLY COMP. PRES. DOC. 2669, 2670 (Oct. 28, 2000) [hereinafter Presidential Statement]. The tone of President Clinton's statement indicates the suspicious conditions under which CDSOA was enacted. *See* JEANNE J. GRIMMETT & VIVIAN C. JONES, CONG. RESEARCH SERV., RL 33045, THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT ("BYRD AMENDMENT") 3 (2005) [hereinafter CRS REPORT, BYRD AMENDMENT]. In previous sessions of Congress, CDSOA legislation had been introduced but never made it out of committee. *Id.* Finally, Senator Robert Byrd—in his role as negotiator during conference negotiations—managed to slip the controversial legislation into the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001. *Id.*; *see also* 146 CONG. REC. 23,091 (2000) (statement of Sen. John McCain) ("[W]e should consider the effect of [CDSOA] very carefully. Instead, we will not consider it at all. No member, except those among the negotiators, will have any say about the

CDSOA—colloquially known as the Byrd Amendment[3]—is an obscure, yet controversial provision of U.S. international-trade law that has gone farther than any other remedial trade measure in protecting U.S. domestic industries against foreign competition.[4] Reviled by critics both abroad and at home, the Byrd Amendment was struck down as a violation of U.S. international legal commitments,[5] and now faces numerous constitutional challenges brought by adversely affected domestic companies.[6] Plaintiffs who have filed suit have objected to the Byrd Amendment's "affected domestic producer" provision, which conditions Byrd-money eligibility on whether the producer supported an

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effects of the policy."). Knowing that Congress and the President would have to reject the entire Agriculture Appropriations Bill to prevent CDSOA from passing, Senator Byrd helped to enact his amendment into law. *See* Michael M. Phillips, *Dumping Provision in Bill Puts Clinton at Odds with Union Voters Gore Needs*, WALL ST. J., Oct. 18, 2000, at A2 (reporting that the Clinton Administration "can't afford to veto the entire agriculture-funding bill" over CDSOA).

3. CDSOA is named after the late Senator Byrd of West Virginia, whose behind-the-scenes efforts were responsible for the statute's enactment. *See* CRS REPORT, BYRD AMENDMENT, *supra* note 2, at 3.

4. *See id.* at 2 ("Many find the measure controversial, therefore, because they believe that it adds a level of 'protection' on subject U.S. products *in addition to* the ameliorative action afforded by trade remedies."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-979, INTERNATIONAL TRADE: ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT 3 (2005) [hereinafter GAO REPORT] ("CDSOA operates differently from [other] trade remedies, such as AD/CV duties, which generally provide relief to all producers in an industry."). A survey of international-trade attorneys found that cases criticizing the Byrd Amendment were among the most influential trade cases of the decade because of the controversy surrounding the Amendment and Congress's rare decision to repeal the law in response to a World Trade Organization (WTO) ruling. Ryan Davis, *International Trade Cases of the Decade*, LAW 360 (Jan. 13, 2008), http://www.law360.com/print_article/141720. The WTO is an international organization that seeks to liberalize trade by providing a forum for its member states to negotiate agreements, and also provides a mechanism for settling trade disputes. WORLD TRADE ORG., UNDERSTANDING THE WTO 9 (2011), *available at* http://wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

5. The WTO dispute, reportedly concerning a record number of co-complainants, involved eleven WTO members that successfully challenged the legality of the Byrd Amendment. *See* Panel Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R (Sept. 16, 2002); *see also* CRS REPORT, BYRD AMENDMENT, *supra* note 2, at 9. The United States has not yet fully complied with the WTO's ruling to stop all distributions under the Byrd Amendment, and, as a result, the WTO authorized both the European Union and Japan to continue to impose retaliatory tariffs on U.S. imports. *EU Drastically Shrinks Byrd Amendment Retaliation to Three Products*, INSIDE U.S. TRADE, Apr. 29, 2011, at 3 (noting that EU retaliatory tariffs have dropped significantly from $95.83 million in 2010 to $9.96 million in 2011, due to the drop in Byrd distributions); *Japan To Extend, Reduce Retaliatory Tariffs on U.S. Exports in Byrd Fight*, INSIDE U.S. TRADE, Aug. 12, 2011, at 12 (reporting that Japan's retaliatory tariffs on U.S. imports will fall from 4.1 to 1.7 percent in 2011).

6. *See, e.g.*, SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1366 (Ct. Int'l Trade 2006) (upholding the equal-protection claim of plaintiff domestic producer who was denied Byrd Amendment distributions), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009); Second Amended Complaint at 4, Giorgio Foods Inc. v. United States, No. 03-00286 (Ct. Int'l Trade June 7, 2011) (claiming that the Byrd Amendment violates the plaintiff domestic producer's right to free speech).

antidumping or countervailing-duty order, thus excluding select domestic producers.[7]

The United States currently enforces legislation designed to combat foreign-trade practices that negatively impact its domestic industries.[8] Current domestic laws penalize the most common harmful practices—dumping and subsidization—by imposing antidumping and countervailing duty (AD/CVD) orders.[9] An antidumping duty is assessed when a foreign product is imported and sold in the U.S. domestic market for less than its fair value—an occurrence referred to as dumping.[10] A countervailing duty is assessed when a foreign producer receives monetary benefits—known as subsidies—from its government and the importation and sale of the subsidized product injures or threatens to injure the domestic industry.[11] Both dumping and subsidization allow foreign producers to compete unfairly in the U.S. market to the detriment of domestic industries.[12]

Members of a domestic industry threatened by dumping or subsidization can initiate an AD/CVD order by filing a petition with the appropriate government agencies.[13] These agencies review the petition and conduct an investigation to verify the occurrence of dumping or subsidization, and determine whether the

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7. *See* 19 U.S.C. § 1675c(b)(1)(A)–(B) (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 154–55 (2005) (defining an "affected domestic producer" as any producer that "(A) was a petitioner or interested party *in support* of the petition with respect to which an antidumping duty order . . . or a countervailing duty order has been entered, (B) and remains in operation" (emphasis added)). Support under this provision must be indicated "by letter or through questionnaire response." *Id.* § 1675c(d)(1).

8. VIVIAN C. JONES, CONG. RESEARCH SERV., RL 32371, TRADE REMEDIES: A PRIMER 1 (2008) [hereinafter CRS REPORT, TRADE REMEDIES]. American trade laws are generally divided into two categories: (1) laws designed to combat unfair, or illegal foreign trade practices (e.g., dumping, subsidization, or breach of international agreements), and (2) laws designed to combat the effects of fair or legal foreign trade practices that may nonetheless distort competition and harm U.S. industries. *See id.* Measures combating these practices are generally consistent with U.S. obligations under various international trade agreements. *See* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 752–53 (5th ed. 2008) (explaining that WTO rules "have always permitted countries to take actions to offset injury caused by dumped and subsidized goods").

9. *See* 19 U.S.C. §§ 1671, 1673 (2006).

10. *Id.* § 1673; *see supra* note 1; *infra* notes 47–51 and accompanying text.

11. 19 U.S.C. § 1671(a); *see supra* note 1; *infra* notes 52–58 and accompanying text.

12. *See* JACKSON ET AL., *supra* note 8, at 752 (noting that "the desire to create a level playing field" drives antidumping and countervailing-duty rules).

13. 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1). Under U.S. law, the Department of Commerce (Commerce), the International Trade Commission (ITC), and Customs and Border Protection (CBP) all play a role in investigating, issuing, and executing an AD/CVD order that allows for the imposition of duties on an imported product. JACKSON ET AL., *supra* note 8, at 763–66; *see also infra* Part I.A.1 (explaining the procedures for filing an AD/CVD petition).

practices affect a sufficient portion of the domestic industry.[14] A positive determination results in issuance of an AD/CVD order that instructs Customs and Border Protection (CBP) to collect duties on the product at issue.[15] Domestic producers that file or support a successful AD/CVD petition receive payouts from the imposed duties under the Byrd Amendment.[16]

Before the Byrd Amendment was enacted, monies collected from these duties went directly to the U.S. Treasury.[17] Although the duties were substantial, they did not appear to discourage the targeted unfair trade practices.[18] Thus, Congress passed the Byrd Amendment to provide monetary relief to those domestic producers that suffered harm both before and after the imposition of an AD/CVD order.[19] Proponents of the Byrd Amendment believed the legislation would strengthen AD/CVD laws and ensure "that the remedial purpose of those laws [was] achieved."[20] Despite this noble intention, opponents believe the detrimental effect of the Byrd Amendment on domestic and foreign trade outweighs any possible benefits.[21]

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14. *See* 19 U.S.C. §§ 1671(a)(1)–(2), 1673(1)–(2); *see also infra* Part I.A.2 (providing an in-depth look at the ITC's role in an injury assessment and explaining that the ITC determines which domestic producers are eligible for Byrd money).

15. 19 U.S.C. § 1673e.

16. 19 U.S.C. § 1675c ("[D]uties assessed pursuant to a countervailing duty order [or] an antidumping duty order . . . shall be distributed on an annual basis . . . to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the 'continued dumping and subsidy offset.'"); *see also infra* Part I.A.3.b (outlining procedures for obtaining a payout under the Byrd Amendment).

17. GAO REPORT, *supra* note 4, at 7. Domestic producers only benefited from the monetary burden imposed on their foreign competition and the expectancy that those foreign producers would comply with U.S. trade law. *See id.* at 6–7. Compliance with AD/CVD laws following an order is generally measured within five years in a "sunset review," in which Commerce and the ITC determine whether the harmful practice remains and whether it is still harming a sufficient scope of the domestic industry. 19 U.S.C. § 1675(c) (2006); *see also* GAO REPORT, *supra* note 4, at 6; U.S. INT'L TRADE COMM'N, IMPORT INJURY INVESTIGATIONS CASE STATISTICS (FY 1980–2008) (2010), *available at* http://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf (noting that half of 705 AD/CVD orders reviewed between the years 1998–2008 were not revoked).

18. *See* 146 CONG. REC. 23,117 (2000) (statement of Sen. Robert Byrd) (advocating for the Byrd Amendment and declaring that "[c]urrent law has simply not been strong enough to deter unfair trading practices"); *see also* U.S. INT'L TRADE COMM'N, *supra* note 17, at tbl. 1 (providing statistical support for the notion that AD/CVD duties alone do not encourage compliance with AD/CVD laws); *infra* note 71 and accompanying text (explaining the ineffectiveness of AD/CVD orders).

19. *See* Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, title X, § 1002(3), 114 Stat. 1549, 1549A-72 (2000) (referring to "the continued dumping or subsidization of imported products after the issuance of" AD/CVD orders).

20. *See* id. § 1002(5), 114 Stat. at 1549A-73; *see also* 146 CONG. REC. 23,117 (statement of Sen. Robert Byrd) ("Now, such a mechanism will be in place . . . [for] workers . . . to recover monetarily rather than simply having the right to file a complaint.").

21. *See* Presidential Statement, *supra* note 2, at 2670 (recommending that Congress repeal the Byrd Amendment because it would require consumers to face price increases on goods); Mark

In the most significant Byrd Amendment challenge to date, SKF USA, Inc. (SKF USA), a domestic producer of steel ball bearings, contested its ineligibility for Byrd benefits, while its eligible domestic competitors received millions in Byrd money.[22] In 2006, SKF USA brought suit in the U.S. Court of International Trade (CIT), which held the Byrd Amendment unconstitutional because it denied SKF USA equal protection under the law.[23] On appeal, a divided Court of Appeals for the Federal Circuit (CAFC) reversed and upheld the Byrd Amendment's constitutionality on free-speech and equal-protection grounds.[24] The Supreme Court subsequently denied certiorari.[25] Despite significant factual differences between the *SKF* plaintiffs and other Byrd Amendment challengers, the CAFC's holding will likely dictate the outcome of future Byrd Amendment challenges.[26]

R. Ludwikowski, *More May Seek Byrd Payments*, J. COM., Sept. 4, 2006, *available at* http://www.joc.com/more-may-seek-Byrd-payments (explaining how the Byrd Amendment hurts its intended beneficiaries). A review of key statistics supports the contention that the Byrd Amendment operates favorably for only a few domestic producers. *See* GAO REPORT, *supra* note 4, at 28–29 (noting that Byrd payments are concentrated in a small number of businesses). Byrd Amendment distributions totaled approximately $1 billion from fiscal years 2001 through 2004; yet, nearly half of that payment was distributed to only five eligible domestic producers. *Id.* Timken, a ball bearings producer, received the largest individual payout—about twenty percent of the distributions, which totaled near $205 million. *Id.*

22. *See* SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1356 (Ct. Int'l Trade 2006) (noting that SKF USA's domestic competitor, Timken U.S. Corporation, named as a defendant-intervenor, has received millions in Byrd money), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009); *see also supra* note 21 (detailing how Timken has received the majority of all payouts under the Byrd Amendment across all industries).

23. *SKF I*, 451 F. Supp. 2d at 1363. U.S. law bestows the CIT, a specialized federal court, with jurisdiction to hear all trade-related matters. *See* 28 U.S.C § 1581 (2006 & Supp. IV 2010).

24. *SKF II*, 556 F.3d at 1360. Decisions of the CIT are directly appealable to the CAFC, which the Supreme Court can ultimately review. 28 U.S.C. § 1295(a)(5) (2006); JACKSON ET AL., *supra* note 8, at 120. Byrd Amendment challenges in the CIT have been mostly successful; however, the CAFC has reversed the majority of these judgments. *See, e.g.*, *SKF II*, 556 F.3d at 1360; PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n, No. 2008-1526, 2010 U.S. App. LEXIS 22584, at *3 (Fed. Cir. Oct. 28, 2010), *rev'd* 558 F. Supp. 2d 1370 (Ct. Int'l Trade 2008).

25. SKF USA, Inc. v. Customs & Border Prot., 130 S. Ct. 3273 (2010). Traditionally, the Supreme Court has been extremely hesitant to hear trade-related cases, which leaves the CAFC's opinions as controlling authority in most of these cases. *See* Ryan Davis, *High Court Takes on First Anti-Dumping Case*, LAW 360 (Nov. 4, 2008), http://www.law360.com/web/artciles/75562 (noting that the Supreme Court only recently took on its first dumping case); *see also* United States v. Eurodif S.A., 555 U.S. 305, 308 (2009) (upholding the Commerce Department's interpretation of the antidumping statute to treat "low enriched uranium" as a good, rather than a service, thus subjecting it to duties).

26. *See PS Chez Sidney*, 2010 U.S. App. LEXIS 22584, at *3 ("*SKF* . . . control[s] with regard to all constitutional issues presented . . . ."). Although *PS Chez Sidney* is marked as "UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT," a circuit court may not restrict its citation except to limit its use as persuasive precedent. *See id.* at *1; *see also* FED. R. APP. P. 32.1(a).

Bowing to international and domestic pressures, Congress repealed the Byrd Amendment in 2006,[27] while leaving certain provisions effective for successful claims made before October 1, 2007.[28] Although Congress limited payout claims to a six-year period from October 2001 to October 2007,[29] a claims backlog has left approximately $1 billion in funds yet to be distributed.[30] This backlog resulted mainly because domestic producers seeking their fair share of Byrd money brought numerous legal challenges to the Byrd Amendment's validity, and these challenges were stayed pending the outcome of *SKF* and other test cases.[31] Many of the plaintiffs in these cases rely on the argument that to give only those producers that supported the original petition a monetary benefit while considering ineligible other producers that have similarly been affected by the foreign practice, but that did not support the petition, violates equal protection under the Fourteenth Amendment.[32] Unfortunately, the CAFC's holding in *SKF* and the Supreme Court's

27. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (repealing 19 U.S.C. § 1675c (2000)).

28. *Id.* § 7601(b).

29. *Compare* Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, title X, § 1003(c), 114 Stat. 1549, 1549A-75 (2000) ("The amendments made by this section shall apply with respect to all antidumping and countervailing duty assessments made on or after October 1, 2000."), *with* Deficit Reduction Act § 7601(b) ("All duties on entries of goods made and filed before October 1, 2007 . . . shall be distributed.").

30. Nick Brown, *SKF Looks to High Court to Nullify Byrd Amendment*, LAW 360 (Feb. 12, 2010), http://www/law360.com/print_article/149488; *see also infra* notes 60–61 and accompanying text (describing how potential Byrd payments reached $1 billion).

31. *Supreme Court Declines to Review Ruling in Byrd Amendment Case*, INSIDE U.S. TRADE, May 21, 2010, at 10. For a listing of over thirty cases that were stayed pending other Byrd challenges, see Letter from Gregory W. Carman, Judge, U.S. Court of Int'l Trade, to Counsel, Consol. Ct. No. 06-00290, et al. (Feb. 10, 2011) (on file with the CIT).

32. *See* SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1363, 1366 (Ct. Int'l Trade 2006) (holding the Byrd Amendment unconstitutional under an equal-protection analysis), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009). Claims of equal protection are not a new phenomenon in international-trade law. *See* Todd M. Hughes & Claudia Burke, *Constitutional Litigation and Its Jurisdictional Implications in the Court of International Trade*, 17 TUL. J. INT'L & COMP. L. 541, 541 (2009) (finding that constitutional issues, including equal-protection challenges, have "played a small but vital role" in international-trade litigation). However, the Byrd Amendment has created an interesting opportunity for domestic producers to make such a claim. *See id.* at 551–52. Previous equal-protection claims in trade law mostly stemmed from the tariff rates assigned to certain products over others. *See, e.g.*, Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1358 (Fed. Cir. 2010) (rejecting an equal-protection challenge to tariff rates for men's gloves and finding a lack of discriminatory intent). Another constitutional argument against the Byrd Amendment is based on the First Amendment right to free speech, and asserts that the government practices viewpoint discrimination by denying monetary benefits based solely on publicly expressed opposition to a governmental investigation during the course of an AD/CVD proceeding. *See SKF II*, 556 F.3d at 1360 (rejecting SKF USA's claim and upholding the Byrd Amendment as constitutional under the First Amendment right to free speech).

subsequent denial of certiorari appear to foreclose such claims by current and future Byrd Amendment challengers.[33]

However, because *SKF* and the other major Byrd Amendment cases only reviewed the law's facial constitutionality,[34] plaintiffs with strong factual cases argue that the Byrd Amendment should be deemed unconstitutional *as applied* to their individual circumstances.[35] For example, United Synthetics, Inc., a domestic producer of polyester staple fiber, did not exist at the time its domestic industry filed a petition with the government, and thus had no opportunity to show its support.[36] Giorgio Foods, Inc., a domestic producer of preserved mushrooms, took numerous actions to support its industry's petition, but did not produce a formal expression of support.[37] These cases require as-applied adjudication, which the Supreme Court increasingly prefers in individual-rights litigation, rather than review based on facial validity.[38] Furthermore, the Court has upheld as-applied challenges when a facial challenge has failed.[39]

Given this recent activity in the courts, the constitutionality of the Byrd Amendment must be reevaluated.[40] This Note argues that *SKF* should not foreclose the claims of other Byrd Amendment challengers; rather, the CIT and the CAFC should newly review the constitutionality of the Byrd Amendment

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33. *SKF II*, 556 F.3d at 1360; *see also Supreme Court Declines to Review Ruling in Byrd Amendment Case*, *supra* note 31, at 10 (stating that *SKF* was the test case for the nearly fifty similar Byrd Amendment cases).

34. *See, e.g.*, *SKF II*, 556 F.3d at 1349–50; Pat Huval Rest. & Oyster Bar Inc. v. United States, 547 F. Supp. 2d 1352, 1365 (Ct. Int'l Trade 2008) (per curiam) (describing plaintiff domestic producers' claims as "facial constitutional challenges" to the Byrd Amendment).

35. *See infra* notes 36–37 and accompanying text; *see also Shrimp Producers Raise Constitutional Claims on Application of Byrd Law*, INT'L TRADE DAILY, June 10, 2011 (noting that plaintiffs in *Tampa Bay Fisheries, Inc. v. United States, 2012 WL 934098,* distinguished their claims from *SKF* by "argu[ing] that its constitutional claims are 'fundamentally different' from those rejected in the *SKF* decision").

36. Amended Complaint at 7, United Synthetics, Inc. v. United States, No. 08-00139 (Ct. Int'l Trade Feb. 1, 2011).

37. Second Amended Complaint, *supra* note 6, at 8–18.

38. *See infra* Part I.B.2.

39. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (noting that as-applied challenges were "the proper means to consider exceptions," even in situations when "facial attacks should not have been entertained in the first instance").

40. Though repealed, the Byrd Amendment remains relevant as indicated by communications from Congress and other government representatives, emphasizing the law's international-trade implications and its impact on constitutional issues. *See, e.g.*, *Draft Senate Letter on Byrd Amendment*, INSIDE U.S. TRADE, July 4, 2008, at 15 (asking Senate colleagues to support the reinstatement of the Byrd Amendment); *Highlights From Written Responses by USTR Nominee Ron Kirk*, INSIDE U.S. TRADE, Mar. 13, 2009, at 7 (reporting that current U.S. Trade Representative Ron Kirk pledged to "formulate an administration position on reintroducing the Byrd Amendment"); *New Senate Finance Committee Features More Pro-Trade Dems*, INSIDE U.S. TRADE, Jan. 16, 2009, at 15 (commenting that two of the three pro-trade Democratic members of the Senate Finance Committee voted for the Byrd Amendment).

as applied to each plaintiff.[41] Part I.A provides a general background on the procedures for bringing an AD/CVD order, specifically focusing on the role of the International Trade Commission (ITC) in making an injury determination. This Part also analyzes the Byrd Amendment, and examines the support requirement of the controversial affected-domestic-producer provision. Part I.B reviews relevant Fourteenth Amendment equal-protection jurisprudence and discusses the Supreme Court's increasing preference for as-applied constitutional challenges. Part II discusses *SKF USA Inc. v. United States*, in which the CAFC ultimately upheld the Byrd Amendment as constitutional under free-speech and equal-protection analyses. Part II also examines differing court opinions regarding the Byrd Amendment's constitutionality and outlines the significant differences between the plaintiffs in *SKF* and other Byrd Amendment challengers. Part III argues that, in light of recent Supreme Court jurisprudence, *SKF* should not control other as-applied challenges to the constitutionality of the Byrd Amendment. Part III further analyzes how upcoming cases could serve as vehicles for sustaining a successful as-applied equal-protection claim against the Byrd Amendment. Finally, Part IV concludes and reiterates that courts should not be bound by previous rulings on the Byrd Amendment's facial validity, as determined in *SKF* because a court that conducts an as-applied challenge must consider a plaintiff's particular situation, and therefore could find the Byrd Amendment to violate the Equal Protection Clause.

I. THE BYRD AMENDMENT AND ISSUES SURROUNDING ITS CONSTITUTIONALITY

A. Relevant Provisions of U.S. Antidumping and Countervailing-Duty Laws Applicable to the Byrd Amendment[42]

1. General Purposes and Brief Overview of U.S. Antidumping and Countervailing-Duty Laws

U.S. AD/CVD laws seek to "create a level playing field" for domestic industries by combating the unfair trade practice known as dumping and subsidization through the imposition of antidumping and countervailing

41. *See infra* Part III. Generally, constitutional challenges to laws occur through either as-applied or facial challenges. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010). A facial constitutional challenge involves "a head-on attack on the legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007). In contrast, an as-applied constitutional challenge "concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *Id.*

42. This section seeks to provide only a basic introduction to the U.S. AD/CVD laws that have implications for a Byrd Amendment analysis. For a more thorough discussion of trade law, see CRS REPORT, TRADE REMEDIES *supra* note 8, at 1.

duties.[43] Domestic law and international agreements regulate dumping and subsidization;[44] under U.S. law, a domestic industry affected by these practices can initiate an AD/CVD investigation by filing a petition with Commerce and the ITC.[45] The petitioner—usually a U.S. domestic producer or group of producers—must allege that its industry is being unduly harmed as a result of dumping or subsidization.[46]

Dumping occurs when a foreign producer imports and sells its product on the U.S. market for "less than fair value": a lower price than what the product would sell for in its domestic market.[47] Under U.S. law, Commerce must determine if there is a material difference between these two prices, known as a "dumping margin."[48] If Commerce determines that a dumping margin exists, and the ITC finds that there is a material injury (or threat thereof)[49] to the domestic industry as a result of this dumping margin, an antidumping duty will be imposed on the merchandise.[50] When issuing an antidumping order,

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43. JACKSON ET AL., *supra* note 8, at 752 (discussing unfair trade regulations); *see also* 19 U.S.C. § 1671 (2006) (countervailing-duty laws); *id.* § 1673 (antidumping laws).

44. *See* CRS REPORT, TRADE REMEDIES, *supra* note 8, at 3–5 (detailing how AD/CVD investigations and remedial actions gain their statutory authority from the Tariff Act of 1930 as amended, and are discussed in international agreements like the General Agreement on Tariffs and Trade and the North American Free Trade Agreement); *see also* JACKSON ET AL., *supra* note 8, at 752–53.

45. 19 U.S.C. §§ 1671a(b)(1)–(2), 1673a(b)(1)–(2) (outlining the procedure for initiating petitions and by filing with the administrative authority and the Commission, which are defined by 19 U.S.C. § 1677(1)–(2) as the Secretary of Commerce and the International Trade Commission respectively). Alternatively, if Commerce believes that dumping or subsidization is occurring, it may bring an investigation of its own volition. *Id.* §§ 1671a(a), 1673a(a)(1).

46. *Id.* § 1677(9)(C)–(G) (defining an "interested party" for purposes of filing an AD/CVD petition).

47. *See id.* § 1677(34) ("The terms 'dumped' and 'dumping' refer to the sale or likely sale of goods at less than fair value."). Determining whether a product is sold at less than fair value begins by calculating the price of the good in the foreign producer's home market—the "normal value"—and comparing that to the price the foreign producer sells the good for in the U.S. market—the "export price." *Id.* §§ 1677a(a), 1677b(a). If the actual figures are unavailable (because, for instance, the good may not be sold in the foreign producer's home market, or the good may be sold in the United States through an affiliate), then a constructed normal value and export price will be used. *Id.* §§ 1677a(b), 1677b(a)(4). Additionally, a complex system of adjustments must be made to each figure to account for any differences in how the two products are produced and sold. *Id.* § 1677a(c)-(d), 1677b(a)(6)-(8); *see* JACKSON ET AL., *supra* note 8, at 770.

48. 19 U.S.C. § 1673 (explaining that Commerce determines if foreign merchandise "is being, or likely to be, sold in the United States for less than its fair value"); *id.* § 1677(35)(A) (defining "dumping margin" as "the amount by which the normal value exceeds the export price").

49. *Id.* § 1677(7)(A) (defining "material injury" as "harm which is not inconsequential, immaterial, or unimportant").

50. *Id.* § 1673. Throughout the investigative process, Commerce and the ITC must adhere to strict deadlines when making their respective determinations. *See* JACKSON ET AL., *supra* note 8, at 764–65 (providing an overview of the differing timetables for completing an AD/CVD investigation).

Commerce instructs CBP to collect duties on the incoming goods it determines to be injurious.[51]

Countervailing-duty laws, on the other hand, are aimed at combating certain subsidies[52] that foreign governments provide to their domestic producers that export products into the U.S. market.[53] By accepting a subsidy, the foreign producer can sell its product at a lower price on the U.S. market, thereby distorting fair competition.[54] Under U.S. law, certain subsidies are considered countervailable and subject to duties that attempt to neutralize their negative effect on the market.[55] Similar to an antidumping investigation, Commerce must determine that subsidization is occurring in the subject industry,[56] and the ITC must also determine that the subsidization has caused a material injury or threat of material injury to the U.S. domestic industry.[57] If both of these conditions are met, then Commerce will issue a countervailing-duty order instructing CBP to collect duties on the import in question.[58]

The AD/CVD order instructs CBP to collect duties on the product when it enters the United States in an amount sufficient to counteract the level of dumping or subsidization.[59] These initial duties are estimates; final duty assessments are completed a few years after the initial collection.[60] Final duty assessments are further prolonged if the AD/CVD order becomes the subject of

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51. 19 U.S.C. § 1673e.

52. *See* JACKSON ET AL., *supra* note 8, at 848 (explaining the difference between "'legitimate government' activities" and "trade-distorting subsidies"). These trade-distorting subsidies are divided into domestic subsidies and export subsidies. *Id.* A "domestic subsidy is granted to an industry on all of its production of a product, regardless of whether that product[] is exported." *Id.* By contrast, "an export subsidy . . . is paid to an industry only on products that are exported." *Id.* at 849. Under U.S. law, certain domestic and export subsidies are considered "countervailable subsidies," and are thus subject to duties. *Id.* at 848–49.

53. 19 U.S.C. § 1671(a).

54. JACKSON ET AL., *supra* note 8, at 849 (noting that both domestic and export subsidies "can distort resource allocation by inducing production and exportation that is otherwise uneconomic").

55. *Id.* at 848–49.

56. 19 U.S.C. § 1671(a).

57. *Id.*; *see* CRS REPORT, TRADE REMEDIES *supra* note 8, at 4–5 (explaining that unless the subsidy has been addressed by a trade agreement, any threat of material injury is sufficient).

58. 19 U.S.C. § 1671e.

59. *Id.* ("[Commerce] shall publish a countervailing duty order which—(1) directs customs officers to assess a countervailing duty equal to the amount of the net countervailable subsidy determined or estimated to exist . . . ."); *id.* § 1673e(a)(1) ("[Commerce] shall publish an antidumping duty order which—(1) directs customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price . . . .").

60. *See* CRS REPORT, TRADE REMEDIES, *supra* note 8, at 10–11 (providing an overview of different reviews of an order that may prolong final duty assessment); GAO REPORT, *supra* note 4, at 25 (describing the process of liquidation, which is a term used to describe the making of a final duty assessment).

litigation.[61] As a result, an estimated $1 billion in Byrd Amendment funds awaits distribution.[62]

2. Defining the Scope of the Industry Affected: A Closer Look at the ITC's Role in an AD/CVD Investigation

As noted above, the ITC must "*define the scope* of the industry that is affected by competition from imported goods and . . . determine whether the industry has suffered or been threatened with material injury as a result of dumped or subsidized imports."[63] As part of this determination, the ITC relies on AD/CVD petitions and questionnaires sent to potentially affected members of the domestic industry asking if they support, oppose, or take no position on the petition.[64] These surveys are taken throughout the course of an AD/CVD investigation and do not always reach every member of an industry.[65] The ITC may also rely on letters of support from domestic producers that did not receive a questionnaire, but that desire to take a position on the matter formally.[66]

Ideally, every member of a domestic industry would have an opportunity to express their support for the petition; however, this is not always the case and is not necessarily relevant when the determination is not intended to discern whether each domestic producer was injured by the dumping or subsidization.[67] Rather, the ITC seeks a representative portion of petition supporters to determine whether sufficient data exist for an investigation to proceed.[68] Determining the scope of the affected industry also helps determine

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61. *See* GAO REPORT, *supra* note 4, at 25.

62. *See supra* notes 30–31 and accompanying text.

63. GAO REPORT, *supra* note 4, at 11 (emphasis added); *see also* 19 U.S.C. § 1671(a)(2) (describing the role of the ITC in a countervailing-duty investigation); § 1673(2) (describing the role of the ITC in an antidumping investigation).

64. GAO REPORT, *supra* note 4, at 11–12; *see also* 19 C.F.R. § 207.8 (2011) (describing ITC regulations on the issuance of questionnaires in connection with an ongoing AD/CVD investigation). A domestic producer often has several reasons why it may choose either to oppose or to take no position on an AD/CVD petition. *See* CRS REPORT, BYRD AMENDMENT, *supra* note 2, at 20–21 (highlighting that, among other issues, producers may question the effectiveness of AD/CVD orders and find supporting petitions to be too costly, or not in the best interest of their businesses).

65. GAO REPORT, *supra* note 4, at 11–12.

66. *Id.* at 12 (noting that producers may indicate support via a letter); *see also* 19 C.F.R. § 207.26 (describing permissible brief, voluntary statements submitted by nonparties in an ongoing AD/CVD investigation).

67. *See* GAO REPORT, *supra* note 4, at 11–12 (finding that the ITC "generally strive[s] to cover 100 percent of [an] industry" but occasionally "surveys a sample of U.S. producers instead of the entire industry . . . account[ing] for 10 percent or less of production" (internal footnote omitted)).

68. *Id.* ("[T]he ITC's investigative process does not result in collecting information from all industry participants, because it is intended for purposes other than CDSOA.").

whether an individual producer qualifies as an "affected domestic producer" for purposes of the Byrd Amendment payouts.[69]

3. The Byrd Amendment: Providing Relief to a Continuously Injured Domestic Industry

Although Congress had established trade laws years before, these measures were not having the expected curative effect on unfair foreign trading practices.[70] The Byrd Amendment was enacted (1) to strengthen the remedial nature of previous AD/CVD laws, (2) bring about fair trade conditions, and (3) help domestic producers combat unfair foreign trade practices.[71] To accomplish these ends, Congress intended Byrd Amendment payouts to compensate producers for losses due to dumping and subsidization that occurred before and after the enactment of an AD/CVD order.[72]

Following the Byrd Amendment's contentious enactment,[73] critics from several policy areas called for a repeal, arguing that the provision was unnecessary, costly, and unfairly benefited only those producers that fit the narrow requirement of the "affected domestic producer" at the expense of their competitors, both foreign and domestic.[74] These select few producers would

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69. *See id.* (explaining that CDSOA eligibility is linked to the ITC's process of determining domestic-industry harm during AD/CVD investigations).

70. *See* JACKSON ET AL., *supra* note 8, at 784. There are several reasons why these measures were ineffective. Foreign producers discovered ways to get around AD/CVD orders as they were levied by either failing to pay duties or making slight adjustments to their importing routines. *Id.* Some foreign producers also found paying AD/CVD duties more cost effective than changing their business practices. 144 CONG. REC. 14,962 (1998) (statement of Sen. Michael DeWine). Furthermore, foreign countries accused of subsidizing would create new ways to maintain benefits for their producers. *Id.* Combined, these maneuvers continued to harm the U.S. domestic industries that had successfully lobbied for AD/CVD orders against their foreign competition. *Id.*

71. GAO REPORT, *supra* note 4, at 3 (summarizing these three specific purposes); *see* Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, title X § 1002(3) 114 Stat. 1549, 1549A-72 (2000).

72. Continued Dumping and Subsidy Offset Act, § 1002(3) (discussing the harmful effects of dumping and subsidization before and after AD/CVD orders). In support of his Amendment, Senator Byrd argued that although domestic producers had "legal remedies to challenge foreign actions . . . [they did not have] adequate means to recover from the losses resulting from those actions." 146 CONG. REC. 23,117 (2000) (statement of Sen. Robert Byrd). Senator Michael DeWine, the original sponsor of CDSOA, argued that this new measure would "compensate for damages" and effectively "discourage foreign companies from dumping and subsidization, since it would actually assist U.S. competitors at their expense." 144 CONG. REC. 14,962 (statement of Sen. Michael DeWine).

73. CRS REPORT, BYRD AMENDMENT, *supra* note 2, at 3 (noting that it was enacted "without committee or floor amendment in either House"); *see also supra* note 2 (providing background on the Byrd Amendment's troubled history).

74. *See* 146 CONG. REC. 23,092 (2000) (statement of Sen. John McCain) (voicing concern with the government's spending on the Byrd Amendment during a floor debate); GAO REPORT, *supra* note 4, at 44–45 (explaining how the Byrd Amendment works only to benefit a limited number of domestic producers while harming other domestic producers); Presidential Statement,

essentially receive a double benefit—the additional Byrd money *and* an advantage over their competition.[75]

a. The Byrd Amendment's Affected-Domestic-Producer Provision

The Byrd Amendment requires the ITC to compose an annual list of affected domestic producers for existing AD/CVD orders to send to CBP for Byrd distribution issuance.[76] The Byrd Amendment defines "affected domestic producer" as any producer that "was a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . or a countervailing duty order has been entered and . . . remains in operation."[77] This support can be demonstrated "by letter or through questionnaire response" to the ITC during the original investigation.[78] Thus, the only domestic producers considered affected domestic producers eligible for Byrd Amendment distribution are those that filed the petition and have demonstrated their support for the petition during the original investigation.[79]

Conversely, the producers that checked "no position" or "oppose" on the original petition questionnaires are ineligible for Byrd Amendment payouts.[80] The exclusion also applies to companies that did not send petition-support letters, and those that would have supported the petition but did not have knowledge of the pending investigation.[81] This provision similarly excludes

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supra note 2, at 2670 (expressing opposition to the Byrd Amendment's selective and excessive subsidies).

75. 114 CONG. REC. 14,962 (statement of Sen. Michael DeWine) (noting that CDSOA payouts gave producers a "double-hit" over foreign producers by subsidizing domestic products and discouraging foreign dumping); *see also* CRS REPORT, BYRD AMENDMENT, *supra* note 2, at 2 ("[M]any . . . believe that it adds a level of 'protection' on subject U.S. products *in addition to* the ameliorative action afforded by [prior] trade remedies.").

76. Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c(d)(1), (3) (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154–55.

77. *Id.* § 1675c(b)(1).

78. *Id.* § 1675c(d)(1); *see also supra* notes 45–46 and accompanying text (providing the ITC's procedures for questionnaires and letters of support during the original investigation). In some instances, those producers that supported an active AD/CVD order by making appearances at sunset reviews may also be eligible. 19 U.S.C. § 1675c(d)(1); *see also supra* note 17 (providing a short description of sunset reviews).

79. 19 U.S.C. § 1675c(b)(1).

80. *See, e.g.*, SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337, 1343, 1360 (Fed. Cir. 2009) (determining that SKF USA, a domestic producer who checked the "no support" box on the original petition, was correctly denied Byrd Amendment funds); PS Chez Sidney, L.L.C v. U.S. Int'l Trade Comm'n, 442 F. Supp. 2d 1329, 1331, 1333 (Ct. Int'l Trade 2006) (declaring the Byrd Amendment as applied to PS Chez Sidney, a domestic producer who checked the "take no position" box on the original petition, unconstitutional under the First Amendment's right to free speech), *rev'd,* 409 Fed. App'x 327, 329 (Fed. Cir. 2010) (overturning the CIT and upholding the Byrd Amendment as constitutional under the First Amendment).

81. *Frequently Asked Questions: Byrd Amendment/CDSOA*, U.S. INT'L TRADE COMM'N (Oct. 28, 2011), http://www.usitc.gov/trade_remedy/byrd_amendment.htm.

domestic companies that began production after the initial investigation, and did not have an opportunity to show support for the petition.[82]

b. Procedures for Obtaining a Byrd Amendment Payout

Under the Byrd Amendment, the Commissioner of CBP is responsible for providing annual fund distributions received under AD/CVD orders to affected domestic producers.[83] Before making distributions, CBP is required to deposit all collected AD/CVD duties into special accounts.[84] Upon receipt of the ITC's yearly list of affected domestic producers, CBP publishes in the Federal Register the list of affected domestic producers eligible to receive payouts.[85] Once this list is published, eligible parties must certify the following: their want of distributions; their eligibility as an affected domestic producer; and their qualifying expenditures.[86] Distributions under the Byrd Amendment are made to qualifying producers "on a pro rata basis," meaning the more a producer claims under qualifying expenditures, the more they are eligible to receive.[87] CBP then distributes the funds from the special accounts to affected domestic producers for their claimed qualifying expenditures.[88] Because of the Byrd Amendment's 2006 repeal, only those claims made between 2001 and 2007 are eligible for Byrd distributions.[89]

B. Relevant Supreme Court Jurisprudence: Equal Protection, Rational-Basis Review, and As-Applied Constitutional Challenges

1. Overview of Equal-Protection Challenges Under Rational-Basis Review

One of the myriad of challenges to the Byrd Amendment asserts that the Amendment violates the Fourteenth Amendment's Equal Protection Clause by awarding payouts to select domestic producers, while denying compensation to

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82. *See* GAO REPORT, *supra* note 4, at 3 ("[A]s a result [of the affected domestic producer provision], a number of U.S. companies, such as those that began production after orders covering their products came into effect, are ineligible."); *see also,* Amended Complaint, *supra* note 36, at 7.

83. 19 U.S.C. § 1675c(d)(3); *see also* CRS REPORT, BYRD AMENDMENT *supra* note 2, at 3–4 (explaining the CDSOA fund distribution process).

84. 19 U.S.C. § 1675c(e).

85. *Id.* § 1675c(c)–(d)(3).

86. *Id.* § 1675c(d)(2); *see id.* § 1675c(b)(4) (defining "qualifying expenditure" as any "expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order . . . .").

87. *Id.* § 1675c(d)(3); *see also* GAO REPORT, *supra* note 4, at 16 ("CDSOA uses a *pro rata* formula to allocate disbursements under a given order among the eligible companies filing claims, with percentages determined according to the claims of qualifying expenditures submitted. . . . This *pro rata* formula creates an incentive for producers to claim as many expenses as possible relative to other producers so that their share of the funds available under an order is as large as possible.").

88. 19 U.S.C. § 1675c(d)(3), (e)(1).

89. *See supra* note 29 and accompanying text.

other similarly situated domestic producers.[90] The Fourteenth Amendment declares that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[91] The Supreme Court has interpreted the Equal Protection Clause to mean that the law should treat all similarly situated persons alike.[92] Depending on what is at issue, equal-protection claims are subject to either a strict form of scrutiny, an intermediate form of scrutiny, or a rational-basis form of scrutiny.[93] Generally, the inquiry is the same for all three standards: is the law's classification or discrimination justified by some sufficient government purpose?[94]

a. Equal-Protection Cases Requiring a Heightened Standard of Scrutiny: Protection of Fundamental Rights and Suspect Classifications

The Supreme Court has identified two types of cases in which a law violates the Equal Protection Clause under a heightened standard of review: when it threatens (1) the protection of fundamental rights,[95] and (2) the protection of the rights of those who fall within suspect classifications.[96] Under strict

90. SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1363 (Ct. Int'l Trade 2006), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009).

91. U.S. CONST. amend. XIV, § 1; *see also* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding that the federal government is also subject to equal-protection requirements under the Fifth Amendment Due Process Clause).

92. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

93. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671–72 (3d ed. 2006) (briefly describing strict, intermediate, and rational-basis review).

94. *Id.* at 673.

95. Fundamental rights include any enumerated right expressly guaranteed within the text of the Constitution—including freedom of speech—and certain unenumerated rights, such as the right to privacy in family planning. *See* CHEMERINSKY *supra* note 93, at 675–76, 792 (discussing "liberties . . . so important that they are deemed to be 'fundamental rights'"); *see also* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (outlining an elevated level of review that courts can apply to laws that infringe on constitutional rights).

96. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (holding racially based school segregation unconstitutional under the auspices of equal protection); *see also* Graham v. Richardson, 403 U.S. 365, 376 (1971) (using a strict-scrutiny analysis to hold a state law that denied welfare benefits on the basis of national origin unconstitutional under equal-protection jurisprudence). Courts analyze gender classifications under an intermediate standard of scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that the Virginia Military Institute failed to demonstrate an "exceedingly persuasive justification" for its male-only admissions policy). Beyond these few suspect classes, the Supreme Court has refused to extend a heightened standard of scrutiny to other classifications. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (declaring that a Colorado constitutional amendment violated the equal protection guarantee by excluding homosexuals from protection, but refusing to declare homosexuals a suspect class); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442, 450 (1985) (refusing to find the mentally handicapped a suspect class, but nevertheless invalidating a law that precluded establishment of a group home for the mentally handicapped); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (ruling that age discrimination was not a violation of the Equal Protection

scrutiny—the most rigorous standard—laws must be narrowly tailored to fulfill a compelling government interest, and use the least restrictive means to accomplish that end.[97] Under the less stringent intermediate-scrutiny standard, there must be a substantial relation between the law and an important government interest.[98] Under both of these standards, the government bears the burden of proof.[99]

b. Rational-Basis Standard Under the Equal-Protection Clause: Presumption of Constitutionality

If a statute accused of violating the Equal Protection Clause does not infringe on a fundamental right, or discriminate against a member of a suspect class, then a court will employ a rational-basis standard of scrutiny.[100] Under this standard, courts must determine whether the alleged discriminatory effect of the law is rationally related to a legitimate government purpose.[101] Courts may accept *any* conceivable purpose for the law, which does not confine the inquiry solely to legislative text, history, or intent.[102] The challenger of the law, not the government, bears the burden of proof.[103]

The Supreme Court has also implicitly conducted rational-basis review for legislation specifically involving social or economic issues.[104] Furthermore, the Court has construed a constitutional presumption that, "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process" under a rational-basis review.[105] With such a low standard for the government to meet, the Supreme Court will generally uphold a statute as not violating equal protection under rational-basis review.[106]

Clause under a rational-basis review); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 532–33 (1973) (ruling that discrimination based on financial status was a violation of equal protection under rational-basis review).

97. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (applying the strict-scrutiny standard to racially based discrimination); CHEMERINSKY, *supra* note 93, at 541.

98. Craig v. Boren, 429 U.S. 190, 197 (1976) (applying the intermediate-scrutiny standard to gender-based discrimination).

99. CHEMERINSKY, *supra* note 93, at 541–42.

100. *See Romer*, 517 U.S. at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class . . . [it will be upheld] so long as it bears a rational relation to some legitimate end.").

101. *See* Heller v. Doe, 509 U.S. 312, 319–20 (1993) (using rational-basis review).

102. McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

103. *See* Madden v. Kentucky, 309 U.S. 83, 88 (1940) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (footnote omitted)).

104. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

105. Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted).

106. *See* FCC v. Beach Comm'ns, Inc., 508 U.S. 307, 314 (1993) (describing rational basis as "a paradigm of judicial restraint").

However, a presumption favoring constitutionality does not render a rational-basis inquiry completely moot. On numerous occasions the Supreme Court has found it appropriate to strike down a law using this standard.[107] In these circumstances, the Court found either a lack of legitimate government purpose behind the legislation, or determined that the classification made was not "reasonable in light of its purpose."[108] Stated another way, a court can strike down a law under rational-basis review if the law is "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment."[109]

In *United States Department of Agriculture v. Moreno*, the Court determined that no legitimate government interest was served by enacting legislation that promoted wealth discrimination.[110] In so doing, the Court held unconstitutional a 1971 amendment to the Food Stamp Act of 1964, which denied households that included unrelated individuals eligibility to the assistance program.[111] The Court found that this particular amended statutory classification was "clearly irrelevant to the stated purposes of the Act."[112] The Court searched for any other purported government interest that could justify the discriminatory classification, but found none; therefore, the Court held the amended provision unconstitutional under rational-basis review.[113]

2. Judicial Preference for As-Applied Constitutional Challenges in Individual-Rights Litigation

a. Facial and As-Applied Constitutional Challenges

Generally, plaintiffs may challenge a law's constitutionality in two distinct ways: by challenging the validity of the law on its face, or by challenging the validity of the law as applied to that plaintiff's individual circumstance.[114] The

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107. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633, 635 (1996) (finding that an amendment to the Colorado constitution prohibiting specialized state protection for homosexuals was unconstitutional under rational-basis scrutiny because it was "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government"); *Cleburne*, 473 U.S. at 446, 450 (holding that a city zoning ordinance requiring a special-use permit to establish a group home for the mentally challenged was unconstitutional under rational-basis scrutiny, and explaining that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

108. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

109. Mathews v. De Castro, 429 U.S. 181, 185 (1976) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).

110. 413 U.S. 528, 534 (1973).

111. *Id.* at 529, 538.

112. *Id.* at 534.

113. *Id.* at 534–35.

114. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) (providing a conventional summary of as-applied versus facial constitutional challenges); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*,

classic formulation of a facial challenge appears in *United States v. Salerno*, in which then-Chief Justice William Rehnquist stated "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[115] An as-applied challenge, on the other hand, "concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case."[116] The Supreme Court has repeatedly expressed its preference for as-applied challenges, which it calls "the basic building block[] of constitutional adjudication."[117] This preference flows from the constitutional requirement that courts only adjudicate those cases and controversies as they are properly presented to the court, and that courts do not unnecessarily invalidate legislation that has not been sufficiently challenged.[118]

b. The Roberts Supreme Court's Trend Toward As-Applied Constitutional Challenges in Individual-Rights Litigation

One of the hallmarks of Supreme Court jurisprudence under Chief Justice John Roberts' Court is an increasing preference for as-applied over facial constitutional challenges, especially in the context of individual-rights litigation.[119] The Roberts Court has exercised this trend in the context of

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113 HARV. L. REV. 1321, 1321–22 (2000) (providing a seminal account of facial and as-applied challenges); Kreit, *supra* note 41, at 657.

115. 481 U.S. 739, 745, 751 (1987) (holding that the challenged portion of the Bail Reform Act survived a facial constitutional attack), *rev'd on other grounds*, 505 U.S. 317 (1992); *see also* United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring) (defining a facial challenge as "a head-on attack on the legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications"), *vacated*, 552 U.S. 1306 (2008).

116. *Pruitt*, 502 F.3d at 1171 (McConnell, J., concurring).

117. Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (quoting Fallon, *supra* note 114, at 1328); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . .").

118. *See* U.S. CONST. art. III, § 2; United States v. Raines, 362 U.S. 17, 20 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them."); Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) (holding courts must "adjudge the legal rights of litigants in actual controversies").

119. Kreit, *supra* note 41, at 660 (noting the Court's shift in favor of as-applied challenges in abortion cases); Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1557–58 (2010) ("[T]he cases cited as evidence for the Roberts Court's preference for as-applied challenges all involve constitutional challenges which concede the legislative power to enact the provision but nevertheless argue for unconstitutionality because the statute intrudes upon rights or liberties protected by the Constitution." (footnote omitted)); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 784 (2009) ("This overview of the Roberts Court's recent jurisprudence establishes both the frequency with which

abortion rights and First Amendment rights.[120] In *Washington State Grange v. Washington State Republican Party*, the Court considered a facial challenge to a Washington state law that argued that the law violated associational rights protected by the First Amendment.[121] Finding that the law "does not on its face severely burden respondents' associational rights," the Court rejected the facial constitutional challenge.[122] Similarly, in *Gonzales v. Carhart*, the Court found that a facial challenge to the federal Partial-Birth Abortion Ban Act of 2003 "should not have been entertained in the first instance."[123] Rather, the Court held that "the proper means to consider exceptions [to the law] is by [an] as-applied challenge," which the Court defined as a "discrete and well-defined instance[] [that] has or is likely to occur."[124] Lower courts seemingly have taken notice of this trend, and appellate court decisions have increasingly distinguished between facial and as-applied constitutional challenges while noting a preference for the latter.[125]

II. *SKF* AND OTHER BYRD AMENDMENT CHALLENGES

A. SKF USA, Inc. v. U.S. Customs & Border Protection: *The Federal Circuit Holds the Byrd Amendment Constitutional Under Free-Speech and Equal-Protection Rubrics*

SKF USA is a domestic producer of antifriction steel bearings that opposed a 1988 dumping petition via a questionnaire.[126] As a result, when SKF USA requested affected-domestic-producer status in 2005, it was denied.[127] SKF USA subsequently challenged the Byrd Amendment in the CIT, alleging that

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that Court has emphasized the distinction between facial and as-applied challenges and its preference for the latter as a mode for constitutional rights litigation.").

120. Metzger, *supra* note 119, at 774 n.2 ("[T]he Roberts Court has rejected facial challenges asserting violations of abortion and First Amendment rights, two contexts in which facial challenges were previously often accepted."); *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444 (2008) (First Amendment rights); Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (abortion rights).

121. 552 U.S. at 444.

122. *Id.* at 458–59.

123. 550 U.S. at 167.

124. *Id.*

125. *See, e.g.*, Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1311 (Fed. Cir. 2008) ("A facial challenge to a statute or regulation is independent of the individual bringing the complaint and the circumstances surrounding his or her challenge. . . . In contrast, an as-applied challenge is specific to the facts of the particular individual involved in the suit." (citations omitted) (internal quotation marks omitted)); Warshak v. United States, 532 F.3d 521, 529–30 (6th Cir. 2008) (discussing the Supreme Court's preference for as-applied challenges in the context of a Fourth Amendment claim).

126. SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1357–58 (Ct. Int'l Trade 2006), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009).

127. *Id.* at 1358.

the Byrd Amendment was facially unconstitutional because it "discriminat[ed] between similarly situated domestic producers" in violation of the Equal Protection Clause.[128] Faced with an equal-protection challenge subject to rational-basis scrutiny,[129] the CIT first came to the determination that the Byrd Amendment discriminated between similarly situated domestic producers based on whether they supported the original AD/CVD petition.[130] Then, the court turned to whether there was any legitimate government purpose to support the discrimination.[131] Viewing the Byrd Amendment in light of its legislative history and intent,[132] the court concluded that the Byrd Amendment's purpose was to help domestic industries as a whole, and not each domestic producer as an individual entity.[133] Therefore, the court found the Byrd Amendment's distinction between individual producers "incongruous" with this purpose, and ultimately sustained SKF USA's facial equal-protection challenge.[134]

A divided U.S. Court of Appeals for the Federal Circuit reversed on appeal, and found the Byrd Amendment constitutional based on the First Amendment right to free speech.[135] In conducting the free-speech analysis, the court likened the Byrd Amendment's support provision to cases that involved commercial speech and necessitated an intermediate form of scrutiny requiring a "substantial government interest."[136] The court found that the government had a substantial interest in rewarding parties who promoted the government's policy of preventing dumping and subsidization.[137] Because the Byrd

128. *Id.*

129. *Id.* at 1360. The court noted that because the Byrd Amendment falls under "areas of social and economic policy" it is subject to this lower standard of scrutiny. *Id.*

130. *Id.* ("As the CDSOA is applied here, similarly situated entities, *i.e.* SKF and Timken, are treated differently and thus, do not stand equal before the law.").

131. *Id.* at 1361.

132. *Id.* The court also focused on the Byrd Amendment's congruence with previous trade laws. *Id.* at 1362 (noting that the Byrd Amendment altered previous trade laws and "should be read in congruity with the other provisions therein").

133. *Id.* at 1361–62 ("[CDSOA is] designed to ensure that domestic *industries*, not any individual *company* [can] compete in the marketplace.").

134. *Id.* at 1361, 1363.

135. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337, 1360 (Fed. Cir. 2009). On appeal, SKF USA advanced a First Amendment free speech theory, rather than equal protection, as its primary argument. *Id.* at 1349. Under this theory, for the law to be upheld under free-speech doctrines, the court would have to find that it was narrowly tailored to a substantial-government interest. *See* CHEMERINSKY, *supra* note 93, at 792.

136. *SKF II*, 556 F.3d at 1354–55 (noting that the Supreme Court's commercial-speech jurisprudence calls for an intermediate form of scrutiny, as opposed to strict scrutiny applied under a traditional free-speech analysis).

137. *Id.* at 1352. The CAFC's purpose determination is a substantial deviation from the CIT's earlier findings. *Compare id.* (finding that the purpose of the Byrd Amendment was to reward parties who reported unfair foreign-trade practices), *with SKF I*, 451 F. Supp. 2d at 1362 (finding that the purpose of the Byrd Amendment was to help domestic industries as a whole— not any individual producer—recover from unfair foreign-trade practices).

Amendment survived a facial First Amendment challenge, the court concluded that it easily survived a less rigorous rational-basis scrutiny under equal-protection analysis.[138] The Supreme Court denied certiorari; thus, the Federal Circuit's holding in *SKF* currently controls similar pending and future Byrd Amendment cases.[139]

However, the Federal Circuit has signaled its willingness to reconsider a constitutional challenge to the Byrd Amendment. For example, Judge Richard Linn's *SKF II* dissent strongly contested the majority's holding and explained that "[t]he majority errs by . . . graft[ing] its 'reward' purpose onto the statute, when that purpose is not apparent in the statutory text or legislative history and has been expressly disclaimed by the government in this case."[140] Even the *SKF II* majority left open the possibility that a future plaintiff that had shown support, but failed to make a formal expression, could be eligible for Byrd money under the court's construction of the affected-domestic-producer provision.[141] The court also indicated in *PS Chez Sidney* that *SKF* would control for the constitutional issues presented in that particular case, but that its opinion could not to be used as a precedential holding in future cases.[142] These factors suggest that the Federal Circuit may be willing to reconsider a future constitutional challenge to the Byrd Amendment.[143]

B. Survey of Other Byrd Amendment Challengers: Factually Distinguishable from SKF *Plaintiffs*

In the wake of *SKF*, remaining Byrd Amendment challengers whose cases were stayed pending the outcome of *SKF* and other test cases will now have an opportunity to be heard.[144] Challengers will undoubtedly focus on the strength of their factual case and attempt to distinguish themselves from the plaintiffs in

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138. *SKF II*, 556 F.3d at 1360.

139. SKF USA, Inc. v. Customs & Border Prot., 130 S. Ct. 3273, 3273 (2010); PS Chez Sidney, L.L.C. v. United States, No. 2008-1526, 2010 U.S. App. LEXIS 22584, at *3 (Fed. Cir. Oct. 28, 2010) ("*SKF* is controlling with regard to all constitutional issues presented in this appeal."); *see also Supreme Court Declines to Review Ruling in Byrd Amendment Case*, *supra* note 31, at 10 (stating that *SKF* was the test case for nearly fifty similar Byrd Amendment cases).

140. *SKF II*, 556 F.3d at 1361 (Linn, J., dissenting).

141. *Id.* at 1353 ("The language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views."); *see also infra* note 159 and accompanying text (advancing the argument of Giorgio Foods that this particular language supports their position).

142. *PS Chez Sidney*, 2010 U.S. App. LEXIS 22584, at *3. *But see id.* at *1 (noting that the decision "MAY NOT BE CITED AS PRECEDENT").

143. On rehearing en banc, a divided court again denied SKF USA's appeal; however, four members of the court, including now-Chief Judge Randall Rader and Judge Richard Linn, strongly dissented. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF III*), 583 F.3d 1340, 1341 (Fed. Cir. 2009).

144. *See supra* note 31 and accompanying text (explaining that many cases were stayed pending the outcomes of *SKF* and other Byrd test cases that have since been resolved).

SKF, who actively opposed the underlying antidumping petition.[145] *United Synthetics, Inc. v. United States*, involving a domestic producer of polyester staple fiber suing to get its share of collected duties under the Byrd Amendment,[146] is one example of the many cases in which a stay was recently lifted.[147] In 2000, Commerce issued an antidumping-duty order on polyester staple fiber from Korea and Taiwan after receiving a petition from certain domestic producers claiming injury.[148] Five days after Commerce issued the antidumping order, United Synthetics, Inc. (USI) began operating as a U.S. manufacturer of polyester staple fiber.[149] The Byrd Amendment came into effect months later.[150] In 2007, USI requested to be added to the list of affected domestic producers, but was subsequently denied "because it did not support the original petitions."[151] Unlike the plaintiffs in *SKF*, USI did not exist at the time that Commerce issued the original antidumping order; therefore, USI lacked the opportunity to show the requisite support for the petition.[152]

Another plaintiff, Giorgio Foods, Inc., is a domestic producer of preserved mushrooms that "took no position with respect to the petition," on the ITC's questionnaire, but did take "numerous actions to support the petition and its filing."[153] In the aftermath of *SKF*, Giorgio's arguments have relied on dicta in the Federal Circuit's decision, which indicate that a producer who showed support outside of a support letter or questionnaire could be eligible for Byrd money.[154] In comparison, SKF USA and similar Byrd Amendment challengers were mostly producers that demonstrated actual opposition to AD/CVD petitions by checking the "no support" or "take no position" boxes on ITC

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145. *See* SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1357–58 (Ct. Int'l Trade 2006), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009); Rossella Brevetti, *Shrimp Producers Raise Constitutional Claims on Application of Byrd Law*, INT'L TRADE DAILY, June 10, 2011 (discussing a post-*SKF* claim in which the plaintiffs argued "that its constitutional claims [were] 'fundamentally different' from those rejected in the *SKF* decision").

146. Amended Complaint, *supra* note 36, at 1–4.

147. *See* Letter from Gregory W. Carman, *supra* note 31 ("[T]he Court will entertain questions pertaining to scheduling resulting from the lifting of the stays in these cases.").

148. Amended Complaint, *supra* note 36, at 7–8.

149. *Id.*

150. *Id.* at 8.

151. *Id.* at 9–10.

152. *Id.* at 4, 7–8.

153. Second Amended Complaint, *supra* note 6, at 8, 13.

154. *Id.* at 4 ("Under SKF, to avoid First Amendment free speech problems that otherwise would exist, the petition support requirement must be construed such that eligibility for distributions is based on 'actions (litigation support) rather than the expression of particular views.'" (citations omitted)).

questionnaires.[155] Therefore, plaintiffs who have a more favorable factual situation argue that their claim should not be foreclosed by the outcome in *SKF*.

III. *SKF* SHOULD NOT FORECLOSE FUTURE AS-APPLIED EQUAL-PROTECTION CHALLENGES TO THE BYRD AMENDMENT

A. SKF *Bars Only Facial Challenges to the Byrd Amendment*

SKF appears to foreclose any facial constitutional challenge to the Byrd Amendment both with regard to equal protection and free speech, which requires pending challengers to rely on as-applied arguments to procure possible distributions.[156] The Byrd Amendment's affected-domestic-producer provision requires that a domestic producer show support for the underlying AD/CVD petition in order to receive payouts from the duties imposed.[157] When analyzing SKF USA's challenge, the Federal Circuit considered whether the Byrd Amendment's discrimination against a producer who actively opposed the petition was related to a substantial government interest.[158] Despite its holding that the Byrd Amendment survived a facial constitutional challenge, both under free-speech and equal-protection doctrines, the Federal Circuit has signaled that it may reconsider a constitutional challenge to the Byrd Amendment.[159] In considering an as-applied analysis, the Federal Circuit must take note of the Supreme Court's increasing preference for as-applied challenges in individual-rights litigation.[160] Specifically, the Supreme Court has held that an as-applied challenge may be sustained where a facial challenge has failed.[161] With this guidance, the Federal Circuit should reconsider a future Byrd Amendment challenger's equal-protection claim as applied to that individual producer.[162] These challengers, whose factual situations differ

155. SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1355, 1357–58, 1363 (Ct. Int'l Trade 2006) (describing SKF USA as a domestic producer that opposed the original petition, and was therefore denied Byrd Amendment funds), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009); *see also* PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n, 442 F. Supp. 2d 1329, 1331, 1333–34 (Ct. Int'l Trade 2006) (describing PS Chez Sidney as a domestic producer that checked the "[t]ake no position" box on the final petition, and was therefore denied Byrd money), *rev'd*, No. 2008-1526, 2010 U.S. App. LEXIS 22584 (Fed. Cir. Oct. 28, 2010).

156. *See* Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (finding that an as-applied constitutional challenge may be upheld where a previous facial challenge has failed); *supra* Part I.B.2.b (describing the increasing preference of the Roberts Court for as-applied challenges in individual-rights litigation).

157. *See supra* Part I.A.3.a.

158. *See SKF II*, 556 F.3d at 1355.

159. *See supra* notes 138–41 and accompanying text.

160. *See supra* Part I.B.2.

161. *See supra* Part I.B.2.b.

162. *See supra* Part II.B.

significantly from SKF USA's, have a stronger claim that could survive rational-basis scrutiny.[163]

As a test case, SKF USA's claim was arguably easy to defeat; the plaintiffs did not support the underlying petition, rather, they clearly opposed the petition by checking the "no support" box on the ITC's questionnaire.[164] Plaintiffs that have supported the petition by other means, but failed to express outright support—such as Giorgio Foods—have a stronger claim than SKF USA.[165] Similarly, plaintiffs that were denied an opportunity to show support because they were not in existence at the filing of the original petition—such as USI—have a stronger claim than SKF USA.[166] As these differences are extremely significant, future Byrd Amendment challengers should not be bound by the CAFC's *SKF* holding.[167]

B. Equal-Protection Challenges Should Be Reconsidered

Many previously stayed Byrd Amendment cases are currently pending before the CIT.[168] In light of the Supreme Court jurisprudence noted above, these cases should not be controlled by *SKF*, and instead could be vehicles for sustaining successful as-applied equal-protection claims against the Byrd Amendment. In analyzing an as-applied equal-protection challenge to the Byrd Amendment, the court must undertake several steps to determine: (1) the appropriate level of scrutiny to apply—strict, intermediate, or rational basis, 2) the purpose of the Byrd Amendment and its effect on a particular producer, and 3) whether the appropriate level of scrutiny is met.[169]

The CIT will likely find that an as-applied equal-protection claim is reviewable under a rational-basis standard because there is no violation of a fundamental right or discrimination of some suspect class; this would trigger a heightened form of scrutiny.[170] In addition, because the Byrd Amendment falls under the scope of economic policy—albeit international—it is subject to a

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163. *See supra* Part II.B.

164. SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1335, 1357–58 (Ct. Int'l Trade 2006), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009).

165. *See* Second Amended Complaint, *supra* note 6, at 8, 13.

166. *See* Amended Complaint, *supra* note 36, at 6–7.

167. *See supra* Part II.B.

168. *See supra* note 31 and accompanying text.

169. *See* CHEMERINSKY, *supra* note 93, at 674 (outlining steps taken by a court in an equal protection analysis); *supra* Part I.B.1.b.

170. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that a statute that burdens a fundamental right or targets a suspect class requires some heightened form of scrutiny); SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1335, 1357–58 (Ct. Int'l Trade 2006) (reviewing SKF USA's equal-protection claim under rational-basis scrutiny), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009).

lower standard of scrutiny.[171] Under rational-basis review, the court must determine whether the alleged discrimination caused by the Byrd Amendment is rationally related to the purpose of the law.[172] In discerning a purpose, the court may accept any conceivable justification for the law, and therefore does not confine the inquiry to the Byrd Amendment's text, legislative history, or intent alone.[173]

With such a low standard of review, the court must acknowledge the tremendous burden any plaintiff must overcome to prove the Byrd Amendment unconstitutional on equal-protection grounds.[174] As noted previously, there is a constitutional presumption that even the most "improvident decisions will eventually be rectified by the democratic process."[175] Arguably, in this instance, the democratic process played its intended role as the legislation was repealed in 2006.[176] However, this presumption does not render a rational-basis review completely moot; numerous courts have found laws unconstitutional under equal protection using this standard.[177]

As in *SKF*, there is no question before the court that the Byrd Amendment's affected-domestic-producer provision as applied to certain plaintiffs discriminates between similarly situated domestic producers.[178] For example, USI is a domestic producer in an industry that is currently experiencing negative effects from continued dumping, despite a long-standing antidumping

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171. *See Cleburne*, 473 U.S. at 440 ("When social or economic legislation is at issue, the Equal Protection Clause allows the [government] wide latitude." (citations omitted)); *SKF I*, 451 F. Supp. 2d at 1360 (noting that the Byrd Amendment falls under the scope of social and economic policy and should be reviewed under a lower, rational-basis standard).

172. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (citing that under a rational-basis review, the alleged discrimination must be rationally related to some legitimate government purpose).

173. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

174. *See*, *e.g.*, *SKF I*, 451 F. Supp. 2d at 1362 (acknowledging the burden in establishing that the Byrd Amendment unconstitutionally violates the Equal Protection Clause under rational-basis scrutiny).

175. Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted); *see also supra* Part I.B.1.b. (outlining this presumption toward constitutionality under a rational-basis review).

176. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (2005) (repealing Continued Dumping and Subsidy Offset Act of 2000, § 1675c).

177. *See, e.g.*, *Romer*, 517 U.S. at 635 (finding that a state constitutional amendment denying homosexuals protection violated equal-protection principles under rational-basis scrutiny); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (finding that a law denying permission for the establishment of a group home for the mentally handicapped violated equal-protection doctrines under rational-basis scrutiny).

178. *See* Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c, *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 154–55 (2005) (explaining that only domestic producers that affirmatively demonstrated specific support for a petition are considered affected domestic producers eligible for Byrd Amendment distributions); *SKF I*, 451 F. Supp. 2d at 1363 (noting the affected-domestic-producer provision treats similarly situated domestic producers differently); *supra* Part I.A.3.a (exploring the details of the affected-domestic-producer provision).

order.[179] Some of USI's domestic competitors that supported the original antidumping petition are eligible for Byrd Amendment distributions.[180] And yet, because USI was not in existence at the time of the original petition, it is deemed ineligible.[181] Similarly, Giorgio Foods checked the "take no position" box on the ITC questionnaire, although it did support the petition by other means.[182] Thus, Giorgio was deemed ineligible for Byrd money, while its domestic competitors that did not provide as much support, but did check the "support" box were eligible.[183] Therefore, because challengers can easily establish discrimination, the court must also consider whether there is any legitimate purpose rationally related this injury.[184]

In determining a legitimate government purpose behind the Byrd Amendment, the CIT could potentially repeat its finding from *SKF I*.[185] According to the CIT in that case, congressional statements and findings—when read in congruence with previous trade laws—indicate that the Byrd Amendment was meant to assist the whole domestic industry in recovering from unfair foreign-trade practices.[186] In its analysis, the court could highlight that the Byrd Amendment expands traditional trade-remedy law, by seeking to remedy not only past harm to a domestic industry, but also injury from *continued* dumping or subsidization past the date of an order's imposition.[187] To promote this purpose, it follows that distributions under the Byrd Amendment should be made to every member of an affected domestic industry that claims injury due to continued dumping or subsidization—not just those individual producers that happened to support the original order.

With this purpose in mind, the court must then ask if the discrimination effectuated by the Byrd Amendment is rationally related to that purpose.[188] In USI's case, the distinguishing factor that renders it ineligible for Byrd Amendment distributions is its lack of existence at the time of the original

179. Amended Complaint, *supra* note 36, at 6–7.

180. *Id.* at 7–10.

181. *Id.* at 6–7.

182. Second Amended Complaint, *supra* note 6, at 8, 13.

183. *Id.* at 2–5.

184. *See* Romer v. Evans, 517 U.S. 620, 640 (1996*)* (Scalia, J., dissenting) (discussing the existence of discrimination before turning to whether a legitimate basis existed under a rational-basis review).

185. *See* SKF USA, Inc. v. United States (*SKF I*), 451 F. Supp. 2d 1335, 1361 (Ct. Int'l Trade 2006) (finding that the Byrd Amendment is not rationally related to a legitimate government purpose), *rev'd sub nom*. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337 (Fed. Cir. 2009).

186. *Id.* at 1361–62.

187. *See* Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, title X, § 1002(3), 114 Stat. 1549, 1549A-72 (2005).

188. *See supra* notes 111–25 and accompanying text (discussing the test for rational-basis review).

petition.[189] In line with previous equal-protection jurisprudence, this arbitrary distinction is irrational in relation to the overall purposes of the Byrd Amendment, especially when read in conjunction with previous trade laws.[190] In support of this conclusion, the CIT would have to look no further than the Supreme Court's landmark holding in *Moreno*—one of the few times the Court has held that a law violates equal-protection principles under a rational-basis review.[191] In *Moreno*, the Court found that a later-in-time provision of the Food Stamp Act that discriminated against the indigent population was "clearly irrelevant" to the stated purposes of the Act in its entirety—to provide relief to that particular subgroup.[192] Likewise, the Byrd Amendment discriminates against the very population that trade laws seek to protect and compensate: injured domestic industries.[193] By viewing the Byrd Amendment as an amendment to these previous laws, the CIT could find that aiding certain domestic producers that were in existence at the time of the original petition—over other similarly situated domestic producers that were not in existence—is in direct opposition to the overall purpose of those laws.[194] Thus, the Byrd Amendment is not rationally related to this legitimate government purpose, and so violates USI's right to equal protection under a rational-basis review.

The CIT could also look to the Federal Circuit's holding in *SKF II*, which determined that the Byrd Amendment's legitimate purpose was to reward parties who promoted the government's policy interest in preventing dumping.[195] The Federal Circuit may have been averse to rewarding SKF USA because SKF USA originally opposed the dumping petition, which had been supported by other domestic producers.[196] Unlike SKF USA, USI did not exist at the time of the petition.[197] Producers like USI, therefore, have an even more compelling case than SKF USA—they never had the opportunity to

189. Amended Complaint, *supra* note 36, at 6–7.

190. *SKF I*, 451 F. Supp. 2d at 1363 (holding that reading the Byrd Amendment in congruence with previous trade laws shows that discrimination was not rationally related to a legitimate government purpose); *see also* McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (finding if a law is "[un]reasonable in light of its purpose," it may be struck down under a rational-basis review).

191. 413 U.S. 528, 538 (1973); *see also* CHEMERINSKY, *supra* note 93, at 679.

192. *Moreno*, 413 U.S. at 533–34.

193. Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, title X, § 1002(3)(5), 114 Stat. 1549, 1549A72–73 (2000) ("[I]njurious dumping . . . which cause[s] injury to *domestic industries* must be effectively neutralized . . . [therefore,] trade laws should [be] strengthened to see that the remedial purpose of those laws is achieved." (emphasis added)); *SKF I*, 451 F. Supp. 2d at 1363 (declaring that the Byrd Amendment's classification was "not rationally connected" to the purpose of assisting domestic industries).

194. *See* Amended Complaint, *supra* note 36, at 6–7.

195. SKF USA, Inc. v. U.S. Customs & Border Prot. (*SKF II*), 556 F.3d 1337, 1359–60 (Fed. Cir. 2009).

196. *Id.*

197. *Id.* at 1360; Amended Complaint, *supra* note 36, at 6–7.

support the petition, much less "promote the government's policy interest against dumping." Thus, the "reward" purpose has no bearing on producers that were not yet in existence at the time the original petition was at issue.[198] Because of this and other critical fact differences, the CIT could distinguish the Federal Circuit's holding in *SKF*, and find that the Byrd Amendment is a violation of a future plaintiff's right to equal protection under the law.

IV. CONCLUSION

Despite its repeal in 2006, the Byrd Amendment continues to attract criticism for its international trade implications and constitutional effects. Although the Federal Circuit found the Byrd Amendment survived a facial constitutional challenge under free-speech and equal-protection challenges, this should not foreclose future Byrd Amendment challenges. Rather, courts should review the constitutionality of the Byrd Amendment as applied to each new plaintiff. The Supreme Court's recent preference for adjudicating challenges as applied rather than facially in individual-rights litigation supports this policy. Furthermore, significant factual differences between SKF USA and future plaintiffs compel an individual assessment of constitutionality as applied to the plaintiff's particular circumstances. Therefore, despite facial validity, a court reviewing an as-applied equal-protection claim could find the Byrd Amendment unconstitutional as a violation of the Fourteenth Amendment's right to equal protection.

198. *See SKF II*, 556 F.3d at 1360; Amended Complaint, *supra* note 36, at 6–7.