

**Court of Appeals for the Federal Circuit
 Announces Equal Protection Exception for
 Customs Cases: *Totes-Isotoner v. United States***

By Claire Kelly

I. Introduction



The power to tax is the power to destroy, or at the very least, the power to make imports of men’s gloves more expensive than imports of women’s gloves. An international business person importing goods into the United States might think that a law which treated differently an identical men’s and women’s product would somehow run afoul of the

United States Constitution’s Equal Protection Clause. The Court of Appeals for the Federal Circuit (Federal Circuit) has held that it does not.

In *Totes-Isotoner Corp. v. United States*, an importer of men’s gloves made an equal protection challenge based on the different tariff rates on men’s gloves (14% ad valorem) and women’s gloves (12.6%) in the Harmonized Tariff Schedule of the United States (HTSUS).[1] Based on the case law of equal protection, in general, a plaintiff can base an equal protection claim on facial discrimination, or if a law is neutral on its face, the plaintiff can base the claim on the law’s disparate impact so long as it can also show that the law is motivated by a discriminatory intent. Alternatively, equal protection claims can be based on a discriminatory application of a law. Totes did not claim discriminatory intent or discriminatory application—only the difference in tariff rates.[2]

II. The Courts’ Analysis

Totes brought its claim to the U.S. court with jurisdiction over customs cases, the U.S. Court of International Trade in New York City (CIT). In response to the government’s motion to dismiss Totes’ complaint, the CIT found that there was subject matter jurisdiction, Totes had standing, and the case did not involve a non-justiciable political question—but that Totes had failed to state a claim. On appeal, the Federal Circuit affirmed the CIT’s finding but for different reasons.

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Both courts, to some extent, focus their analysis not on the likely user of the gloves, but on the importer and/or the purchaser. Because the importer or purchaser of men's gloves might be *either* a man or a woman, the higher tax on men's gloves does not discriminate against men. The Federal Circuit was willing to consider the possibility that the law might still have a disparate impact, but required Totes to demonstrate discriminatory intent as part of its claim. This heightened pleading standard for importers' equal protection claims regarding tariff classification has little practical significance—what matters is that a tariff classification distinction can only rise to the level of facial discrimination where it distinguishes between *actual users* or *purchasers* of a product, rather than the product itself.

The CIT found that the distinction in the HTSUS between men's gloves and women's gloves is not discrimination “on the basis of sex”^[3] as the HTSUS did not treat men and women differently; it just treated gloves differently. The CIT noted that “at worst,” the provisions fell somewhere in between “classifications that impose a facially discriminatory tax and classifications that are not facially discriminatory” and, therefore, Totes would have to at least include an allegation of disparate impact.^[4] And to the extent that the claim was not one of facial discrimination, “Plaintiff must include an allegation of some intent that renders plausible the claim that the discrimination at issue is invidious, arbitrary or unreasonable.”^[5] But Totes had not alleged any intent by the government or a discriminatory application of the tax.^[6]

The Federal Circuit rejected the CIT's reasoning, finding that the absence of facially different treatment between male and female glove users was not the end of the story. The Federal Circuit read Totes' claim as complaining of treatment directed at the glove user,^[7] but it stopped short of resurrecting the claim of facial invalidity. The majority read the facial invalidity claim as a disparate impact claim.^[8]

The Federal Circuit still found that Totes' arguments regarding tariff differences did not add up to a legal claim. The court specifically rejected the notion that disparate impact alone could establish a violation of equal protection in a tariff case at the pleading stage.^[9] Although the court acknowledged that in the context of jury selection, employment, and fair housing “an allegation of disparate impact may in fact be sufficient to make out a prima facie case of discrimination . . . a different approach is required in the tariff context.”^[10]

The court explained that tariff rates result from comprehensive and complex negotiations and that “the different tariff rates for men's and other gloves reflect the fact that such gloves are in fact different products, manufactured by different entities in different countries with differing impacts on domestic industry.”^[11] Therefore, one cannot assume that Congress intended to discriminate against men in the tariff schedule. Moreover, the power to tax gives the legislature broad power to create classifications and distinctions.

At first glance an equal protection exception (even at the pleading stage) for customs cases seems odd, and even unwise. But the exception (or heightened requirement) really matters little. Even if an importer survived the

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motion to dismiss, at trial it would face the task of demonstrating intent to discriminate on the basis of gender—a near-impossible task, for all the reasons the Federal Circuit gave, including the complexity of trade relations.

The Federal Circuit concurrence lamented the creation of an exception to the discrimination laws. Noting that Totes had merely claimed facial discrimination, the concurrence would have simply replied that the tax on its face did not treat men and women differently. Importers pay the tax, and male and female importers are treated alike.^[12]

III. Conclusion

For those who teach or practice equal protection law, *Totes-Isotoner* is important for the precedent it sets for requiring a higher pleading standard for equal protection claims in a tariff classification context. Pure disparate impact is never enough to prove an equal protection claim. But making out a prima facie case in the complaint has been enough to get a plaintiff into court in other issue areas, such as housing. The outcome in *Totes-Isotoner* appears to require a plaintiff in a tariff classification discrimination case to prove its claims in the pleadings.

Why should claims related to tariffs be different from those relating to housing? Is the court implying that discrimination through unequal tax rates is somehow less harmful or more acceptable? Still, if Totes got past the pleading stage, it is not clear how Totes would ever demonstrate that the government *intended* to discriminate against men by setting higher tariffs for gloves in men's sizes.

So when *can* a claim of tariff-based discrimination prevail? In a social climate in which anyone can wear *anything*, apparel may not be the best target for a tariff discrimination case—but one could envision hypotheticals involving gender-linked medicines or medical devices, or discrimination between products on the basis of links to religion. The Federal Circuit majority's reasoning is not entirely clear, but if its rejection of Totes' complaint is based on the lack of any allegation of facial discrimination, it is saying that facial discrimination in tariffs can only exist where there is a tariff classification explicitly based on characteristics of the buyer or consumer: for instance, "gloves used by women." The concurrence follows that line as well—and so, the CIT and Federal Circuit's holdings regarding Totes' facial challenges are ultimately what decide the case. And those holdings allow the tariff schedules to distinguish between products on bases not explicitly tied to the user or purchaser.

Totes has petitioned the Supreme Court for a writ of certiorari, indicating that a number of other cases involving gender-based tariff distinctions are also before the CIT.^[13]

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Endnotes

[1] The HTSUS is the U.S. schedule of customs tariffs on all products, classified in conformity with the Harmonized Commodity Description and Coding System (HS) tariff nomenclature developed and maintained by the World Customs Organization.

[2] *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1350 (Fed. Cir. 2010).

[3] *Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315, 1327 (Ct. Int'l Trade 2008).

[4] *Id.* at 1328.

[5] *Id.*

[6] *Id.*

[7] *Totes-Isotoner*, 594 F.3d 1346, 1355.

[8] *Id.* n.6.

[9] *Id.* at 1356.

[10] *Id.*

[11] *Id.* at 1357.

[12] *Id.* at 1358-59.

[13] *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010), *petition for cert filed*, (U.S. May 6, 2010) (No. 09-1360).