

11<sup>No.</sup> 701

DEC 2 - 2011

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In The  
**Supreme Court of the United States**

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DARREL GUSTAFSON,

*Petitioner,*

v.

ESTATE OF LEON POITRA  
AND LINUS POITRA,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The North Dakota Supreme Court**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Tribal courts are presumed to lack subject matter jurisdiction over claims between members and nonmembers on non-Indian fee land. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001). This Court identified two exceptions to the general rule in *Montana v. United States*, 450 U.S. 544, 565 (1981). The first exception pertains to control over consensual relationships between nonmembers and the tribe or members of the tribe. The second exception pertains to non-Indian activity which directly affects an Indian tribe's political integrity, economic security, health or welfare. *Montana*, 450 U.S. at 565-66. This Court has never upheld tribal court jurisdiction over a nonmember defendant on nonmember owned fee land. The issue of tribal court jurisdiction over a nonmember defendant was expressly left open by the court in *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Court has expressly held that a tribal court lacks jurisdiction over conduct on fee land that is owned by a non-Indian. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.* 554 U.S. 316, 328, 128 S.Ct. 2709, 2719 (2008).

The questions presented are:

1. Whether the State of North Dakota can supplant its own state case law, instead of federal law on jurisdictional disputes between state courts and tribal courts.
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**QUESTIONS PRESENTED** – Continued

2. Whether the State of North Dakota has subject matter jurisdiction over a contract dispute between a nonmember individual and a member of an Indian tribe arising from the ownership and use of a building located on non-Indian owned fee land on an Indian reservation.

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**LIST OF PARTIES TO THE PROCEEDINGS  
IN THE COURT BELOW AND CORPORATE  
DISCLOSURE STATEMENT**

The caption of the case in this Court contains the names of all parties to the proceedings in the North Dakota Supreme Court.

There are no corporations in this case.

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**PETITION FOR A WRIT OF CERTIORARI**

Gustafson respectfully petitions this Court for a writ of certiorari to review the August 10, 2011 Opinion of the North Dakota Supreme Court. The North Dakota Supreme Court reversed the North Dakota Northeast Judicial District's grant of default judgment in favor of Petitioner, holding that the State of North Dakota does not have subject matter jurisdiction over Petitioner's claims against Respondents because there is an available forum in the tribal court and under the infringement test, Petitioner entered into a consensual relationship with Respondents through a lease.

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**OPINIONS BELOW**

The North Dakota Supreme Court's August 10, 2011 Opinion, whose judgment is herein sought to be reviewed, is reported at 2011 ND 150, 800 N.W.2d 842. Its opinion and judgment is reprinted in the Appendix to this Petition, App. 1-App. 26. The denial of the Petition for Rehearing is unreported, and is reprinted in the Appendix to this Petition, App. 38-App. 39.

The Order Regarding Jurisdiction issued by the Northeast Judicial District of the State of North Dakota, case number 40-09-C-0074, entered October 19, 2009, is unreported, and is reprinted in the Appendix to this Petition, App. 35-App. 37. The Findings of Fact, Conclusions of Law, and Order for Judgment

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and Judgment issued by the Northeast Judicial District of the State of North Dakota, case number 40-09-C-0074, entered June 30, 2010, are unreported, and are reprinted in the Appendix to this Petition, App. 26-App. 34.



## JURISDICTION

The North Dakota Supreme Court issued its decision on August 10, 2011, and entered an order denying Petitioner's petition for rehearing on September 15, 2011 with the mandate being final on September 23, 2011. App. 1-App. 25; App. 38-App. 39. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the North Dakota Supreme Court's decision on a writ of certiorari. 28 U.S.C. § 1257(a) states:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.



**CONSTITUTIONAL PROVISIONS,  
TREATIES, STATUTES, RULES  
AND REGULATIONS INVOLVED**

Federal courts have jurisdiction to review tribal jurisdiction pursuant to 28 U.S.C. § 1331, which provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

*See Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).

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**STATEMENT OF THE CASE**

Petitioner Darrel Gustafson is a non-Indian and North Dakota resident. Respondents are members of the Turtle Mountain Band of Chippewa Indians and North Dakota residents. On May 12, 1993, Gustafson and Respondents entered into a lease of the One Stop Market building. The lease was amended on January 31, 1997. The building for One Stop Market is located on fee land and straddles the boundary line of two parcels of land, both of which are fee land. The land is located in Rolette County, State of North Dakota, within the boundaries of the Turtle Mountain Indian Reservation. One parcel is owned by Petitioner. The other parcel is owned by Respondents. Eighteen different lawsuits have been filed or are pending between these parties in State Court, Federal Court,

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and Tribal Court. Gustafson has always objected to tribal court jurisdiction over the ownership of his land and his actions on fee land.

The lease established rent, apportioned responsibility for payment of real estate taxes, among other provisions. The lease was renewed through an effective date of July 1, 2014. The lease is recorded with the Rolette County Recorder.

On November 17, 2008, Darrel Gustafson was issued a Sheriff's Deed for one parcel of the property upon which One Stop Market operates. Gustafson received the Sheriff's Deed for the property through a foreclosure venued in the Northeast Judicial District for the State of North Dakota – *Darrel Gustafson v. Raymond A. Poitra; Linus F. Poitra; United States of America; and all persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Complaint* (Civil No. 40-06-C-134). The Sheriff's Deed is reprinted in the Appendix to this Petition at App. 40-App. 45. This foreclosure was affirmed by the North Dakota Supreme Court in *Gustafson v. Poitra*, 2008 ND 159, 755 N.W.2d 479. The foreclosure action was duly noticed and published in accordance with North Dakota law. Respondents were a party to that action. As a result of the proceeding, Gustafson is a non-Indian and owner of the fee land where the One Stop Market operates within the Turtle Mountain Indian Reservation.

In order to determine the respective rights under the lease and the amount of rent owed for the building,

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which straddled the properties of Gustafson and the Respondents, Gustafson commenced an action in the Northeast Judicial District of the State of North Dakota, case number 40-09-C-0074. Respondents objected to jurisdiction and asserted that the Turtle Mountain Tribal Court had subject matter jurisdiction. A hearing and briefing was held on the jurisdiction of the Northeast Judicial District of the State of North Dakota over the matter. Respondents failed to file a brief as ordered by the Court. The Northeast Judicial District of the State of North Dakota determined that it had jurisdiction to proceed on October 19, 2009. App. 35-App. 37. The Northeast Judicial District of the State of North Dakota ordered default judgment in favor of Petitioner, after Respondents failed to file an Answer to Petitioner's Complaint on June 30, 2010. App. 26-App. 34.

Respondents appealed the default judgment to the North Dakota Supreme Court. The North Dakota Supreme Court reversed the Northeast Judicial District of the State of North Dakota and held that it did not have subject matter jurisdiction over the matter. The North Dakota Supreme Court's reasoning, in part, was as follows:

“Under the infringement test set forth by the United States Supreme court in *Williams v. Lee*, 358 U.S. 217, 223 (1959), state court jurisdiction over certain claims is prohibited if it would ‘undermine the authority of the tribal courts over Reservation affairs and

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hence would infringe on the right of the Indians to govern themselves.’”

App. 8.

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### **REASONS FOR GRANTING THE PETITION**

This Court should review the Opinion of the North Dakota Supreme Court because it supplanted its own case law regarding tribal court authority, misapplied federal law, expanding tribal-court jurisdiction over nonmember conduct on non-Indian owned fee land in a manner inconsistent with this Court’s precedents. Any exercise of jurisdiction by a tribal court cannot exceed the tribe’s regulatory power. A Tribe can only regulate what is necessary to protect tribal self-government or to control internal relations. Importantly, this land is non-Indian owned fee land, owned by Gustafson.

#### **I. THE NORTH DAKOTA SUPREME COURT’S HOLDING THAT THE STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER NON-INDIANS ON NON-INDIAN OWNED FEE LAND SUPPLANTED ITS OWN LAW WHICH CONFLICTS WITH FEDERAL LAW DOCTRINE THAT A TRIBE HAS NO AUTHORITY OVER NONMEMBERS.**

Tribal courts are not “courts of general jurisdiction.” *Nevada v. Hicks*, 533 U.S. 353, 367, 121 S.Ct. 2304 (2001). It is a long established precedent that

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Tribes have diminished sovereignty and have no right to govern anyone “except themselves.” *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201, 209, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (citing *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162 (1810)) (*superseded on other grounds by* 25 U.S.C. § 1301(2), (4) (1990) (emphasis added)). This Court established the general rule for jurisdiction over nonmembers in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). “The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status” of Indian tribes and cannot exist without express congressional action. *Montana*, 450 U.S. at 564.

*Montana v. United States* expresses the general rule that, in the absence of Congressional direction, Indian tribes lack civil authority over nonmember conduct on non-Indian land within an Indian reservation except for: 1) consensual relationships between nonmembers and the tribe or members of the tribe; and 2) non-Indian activity which directly affects an Indian tribe’s political integrity, economic security, health or welfare. *Montana*, 450 U.S. at 565-66 (citations omitted). “The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status” of Indian tribes and cannot survive without express congressional authority. *Montana*, 450 U.S. at 564; *Strate v. A-1 Contractors*, 520 U.S. 438, 446, 117 S.Ct. 1404 (1997). Tribal jurisdiction does not exist when the land at issue is owned by a

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non-Indian and is fee simple land. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328, 128 S.Ct. 2709, 2719 (2008).

In *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328, 128 S.Ct. 2709, 2719 (2008), this Court held that tribal jurisdiction over non-Indians is restricted when the land is owned by the non-Indian and is fee simple land. This is the most recent United States Supreme Court decision on the jurisdiction of tribal courts over non-Indians. “Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers’ activities on land over which the tribe could not “‘assert a landowner’s right to occupy and exclude.’” *Nevada v. Hicks*, 533 U.S. 353, 359, 121 S.Ct. 2304 (2001). The ownership status of land can “be a dispositive factor” in determining whether or not a Tribe can regulate the activities of a nonmember. *Hicks*, 533 U.S. at 360. “The absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, [the United States Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.” *Id.* The North Dakota Supreme Court’s decision is incompatible with this Court’s instructions in *Montana*, *Strate*, *Hicks*, and *Plains Commerce*. This is why the Court should grant review.

The land at issue in this case is non-Indian owned fee land. Gustafson, a non-Indian and North Dakota resident, sought relief for protection of his property in state court based upon an agreement recorded with

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the Rolette County Recorder. The North Dakota Supreme Court applied North Dakota's infringement test, not the *Montana* exceptions for a tribal court's authority over non-Indians. The North Dakota Supreme Court failed to recognize the limits of tribes over nonmembers. *Gustafson*, 2011 ND 150, ¶¶10-13.

The North Dakota Supreme Court cited several state cases in support of its holding that the district court lacked subject matter jurisdiction – *Rolette Cnty. Soc. Serv. Bd. v. B.E.*, 2005 ND 101, 697 N.W.2d 333 (child support); *Kelly v. Kelly*, 2009 ND 20, 759 N.W.2d 721 (divorce, child custody and support); and *Roe v. Doe*, 2002 ND 136, 649 N.W.2d 566 (paternity action); *Gustafson*, 2011 ND 150, ¶¶9-10. The cases cited by the North Dakota Supreme Court involved custody, child support or paternity. *Gustafson* does not dispute that a tribal court has the right to determine internal tribal domestic relations such as parentage, custody and support of its members under the second *Montana* exception. However, this case stems from the ownership of real property, including buildings attached to the land, and conduct of a non-Indian on non-Indian owned fee land.

The standard that the North Dakota Supreme Court should have used is that the tribal court lacks jurisdiction over nonmembers, unless one of the *Montana* exceptions apply. *Montana*, 450 U.S. at 565. Instead, the North Dakota Supreme Court began with “A state court does not have jurisdiction over a civil action if the state court jurisdiction undermines tribal authority.” *Gustafson*, 2011 ND 150, ¶10. This

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infringement test has been refined by *Montana*. The United States Supreme Court has repeatedly “approved the jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country.” *Three Affiliated Tribes v. Wold Engineering, Inc.*, 467 U.S. 138, 148, 104 S.Ct. 2267 (1984). The right of a Tribe “to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation.” *Hicks*, 533 U.S. at 361.

Tribal jurisdiction is restricted when affected land is owned by a non-Indian and is fee simple land. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328, 128 S.Ct. 2709, 2719 (2008). *Plains Commerce* is the most recent case decided by the United States Supreme Court involving the jurisdiction of tribal courts over non-Indians. 554 U.S. at 316. *Plains Commerce* and *Gustafson* are not distinguishable because *Gustafson* is a non-Indian and is protecting his rights on fee land that he owns. A tribe does not have jurisdiction over every use of fee land within the reservation unless the impact is so “demonstrably serious” that it “imperil[s] the political integrity, economic security or health and welfare of the tribe.” *Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994 (1989); see also *Plains Commerce*, 554 U.S. at 328.

Fee land is alienated land and “it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become

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subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.” *Montana*, 450 U.S. 544 at 560, n. 9. Generally speaking, “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565; *Strate*, 520 U.S. 438, 445 (stating “absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstance.”)

The North Dakota Supreme Court’s decision allows the exception to swallow the rule and expands tribal authority over nonmembers beyond the bounds set by this Court in *Montana* and its subsequent decisions.

## **II. THE NORTH DAKOTA SUPREME COURT’S MISREADING OF THE FIRST MONTANA EXCEPTION SUBJECTS NONMEMBERS TO TRIBAL COURT JURISDICTION IN WAYS NOT CONTEMPLATED BY THIS COURT’S PRECEDENTS.**

The North Dakota Supreme Court determined that Gustafson entered into a consensual relationship with the Poitras through a lease and therefore, the tribal court had jurisdiction. *Gustafson*, 2011 ND 150, ¶14. *Montana*’s first exception refers to consensual relationships between nonmembers and the tribe or members of the tribe and there must be a nexus between the regulation and “the consensual relationship.” *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S.

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645, 656, 121 S.Ct. 1825 (2001). “A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another – it is not ‘in for a penny, in for a Pound.’” *Id.*

The *Montana* exceptions are limited and are to be strictly construed to avoid the exceptions from swallowing the rule. *Plains Commerce*, 554 U.S. at 330. *Montana*’s first exception is limited to activities of a nonmember. *Id.* at 332. This exception allows a tribe to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.” *Montana* at 565. The *Montana* Court listed examples of cases that fit within this first exception to the rule. *Id.* at 565-66. The types of cases listed included on-reservation sales transactions, taxes on nonmember-owned livestock within the reservation boundaries, taxes on business conducted by nonmembers on the reservation, and taxes on cigarette sales to nonmembers. *Strate*, 520 U.S. 457. This case does not fit with these examples.

Since *Montana*, the United States Supreme Court has found civil jurisdiction over a non-Indian on non-Indian land only one time. *Plains Commerce*, 554 U.S. at 332. Tribal sovereignty is limited to managing tribal land, protecting tribal government and controlling internal relations. *Id.* at 334-35. Tribal law can be only enforced against non-Indians that have consented to tribal authority, expressly or by action. *Id.* at 337. “Even then, the regulation must stem from

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the tribe's inherent sovereign authority to set conditions on entry, preserve self-government, or control internal relations." *Id.* The burden of establishing the existence of tribal jurisdiction falls on the Respondents. *Red Mesa Unified School Dist. v. Yellowhair*, 2010 WL 3855183, \*2 (D.Ariz. 2010) (citing *Plains Commerce Bank*).

In this case, Gustafson, a non-Indian, is the owner of fee land. Gustafson has not willingly submitted to the jurisdiction of the Turtle Mountain Tribal Court by owning his property or by leasing a building on fee land. The Tribe is a stranger to Gustafson's property as it is fee land and the Turtle Mountain Band of Chippewa Indians has not "expressly reserved any right to exercise dominion or control over the" property. *Strate*, 520 U.S. at 455. The North Dakota Supreme Court's decision dictates tribal court jurisdiction over nonmembers whenever a consensual relationship is entered into between a nonmember and tribal member, no matter how remote it is from a tribe's authority to preserve self-government or control internal relations. This is not in line with this Court's instructions.

### **III. OWNERSHIP OF NON-INDIAN FEE LAND DOES NOT AFFECT THE TRIBE'S POLITICAL INTEGRITY, ECONOMIC SECURITY, OR HEALTH AND WELFARE.**

*Montana's* second exception is concerned with non-Indian activity that directly affects a Tribe's political

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integrity, economic security, or health and welfare. *Montana*, 450 U.S. at 565-66. In order to be regulated by a Tribe, the conduct must imperil the Tribe. *Plains Commerce*, 554 U.S. at 328. In this case, ownership of non-Indian fee land within the reservation or having a private agreement regarding a building attached to the real property does not affect or imperil the Tribe in any manner.

This case involves the regulation of non-Indian owned fee land, about ownership and use of a building that straddles non-Indian owned fee land and member owned fee land. The second *Montana* exception does not apply because tribal self-government and internal relations are not affected.

Since the land in this case is non-Indian fee land on a reservation, tribes lack the authority to exclude, occupy, and regulate the land. Gustafson, as a non-Indian and owner of non-Indian fee land, is not subject to tribal court jurisdiction or tribal law. *Plains Commerce* establishes that the Tribe lacks jurisdiction over the lease or the property because the Tribe has no gate-keeping rights to the property. The court below misapplied the applicable law regarding subject matter jurisdiction in this matter and the North Dakota trial court's judgment should be affirmed, reversing the North Dakota Supreme Court.



**CONCLUSION**

The North Dakota Supreme Court's decision in this case expands tribal court jurisdiction beyond the instructions of *Montana* and its successors. Gustafson is a non-Indian owning non-Indian fee land within a reservation. The existence or extent of jurisdiction of a tribal court over non-Indians on non-Indian fee land must be clarified. Gustafson, respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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