Kirsten D. Gerbatsch (MT Bar No. 68806756)
Wesley James Furlong (MT Bar No. 42771409)
NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
gerbatsch@narf.org
wfurlong@narf.org

Jacqueline De León (*pro hac vice*)
Malia Gesuale (*pro hac vice*)
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
Boulder CO, 80302
Tel. (303) 447-8760
jdeleon@narf.org
gesuale@narf.org

Samantha Blencke (*pro hac vice*)
NATIVE AMERICAN RIGHTS FUND
950 F Street Northwest, Suite 1050
Washington, DC 20004
Tel. (202) 785-4166
blencke@narf.org

Theresa J. Lee (*pro hac vice*)
Sophia Lin Lakin (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
Tel. (212) 549-2500
tlee@aclu.org
slakin@aclu.org

Alex Rate (MT Bar No. 11226)
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806
Tel. (406) 224-1447
ratea@aclumontana.org

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CHIPPEWA CREE INDIANS OF THE ROCKY BOY'S RESERVATION *et al.*, Plaintiffs, v. CHOUTEAU COUNTY, MONTANA, *et al.*, Defendants.	Case No. 4:25-cv-00069-BMM **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN PART**

INTRODUCTION

The Court should deny Defendants' Motion to Dismiss Plaintiff Chippewa Cree Indians of the Rocky Boy's Reservation ("Chippewa Cree Tribe" or "the Tribe"). Defendants argue that Tribal Nations can never sue under 42 U.S.C. § 1983, but Defendants' Motion fails at the threshold. Defendants do not challenge the standing of the individual Plaintiffs, Tanya Schmockel and Ken Moresette. Accordingly, the Court does not need to consider the Tribe's standing.

Nevertheless, even if this Court were to agree with Defendants' interpretation of § 1983, that finding would be insufficient to dismiss the Chippewa Cree Tribe from this suit. Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, contains a private right of action that Tribal Nations can invoke on behalf of their citizens. Defendants do not address Section 2's private right of action in their Motion

to Dismiss and have thus forfeited any argument concerning it. The Court can—and should—deny the motion on that ground alone.

If the Court nonetheless reaches the merits of Defendants' Motion for Partial Dismissal, dismissal is still unwarranted because the Chippewa Cree Tribe may pursue its claims under § 1983 on behalf of its citizens. Defendants' Motion should be denied.

RELEVANT FACTS

On August 15, 2025, Plaintiffs—the Chippewa Cree Tribe, along with Ms. Schmockel and Mr. Morsette, enrolled Tribal citizens residing in Chouteau County—filed suit challenging the County's at-large election system. Plaintiffs allege the system unlawfully dilutes Native votes in violation of Section 2 of the VRA and § 1983. The Chippewa Cree Tribe brings suit as *parens patriae* to protect the statutory and constitutional rights of its citizens. Defendants now move to dismiss the Tribe's § 1983 claims, arguing that Tribal Nations may never sue under § 1983 and that *parens patriae* standing is unavailable as a matter of law. Defendants are incorrect.

STANDARD OF REVIEW

Motions to dismiss are disfavored, and doubts should be resolved in favor of the non-moving party. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976) (citing *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958); 5 Charles Alan Wright

& Arthur R. Miller, *Federal Practice and Procedure* § 1245 (1969)). A complaint survives dismissal under Federal Rule of Civil Procedure 12(b)(6) if it states a plausible claim for relief. In considering whether it does, the Court must accept the complaint's factual allegations as true and consider them, together with all reasonable inferences, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)), in the light most favorable to the non-moving party. *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004) (citing *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986)). Dismissal is only appropriate "'where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.'" L.A. Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795, 800 (9th Cir. 2017) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)). Under this standard, dismissal of the Chippewa Cree Tribe is not appropriate.

ARGUMENT

I. The Court does not need to address the Chippewa Cree Tribe's standing.

Whether the Chippewa Cree Tribe has standing, under either Section 2 or § 1983, is irrelevant because both individual Plaintiffs—Ms. Schmockel and Mr. Morsette—have standing. If any plaintiff has standing under Article III of the U.S. Constitution, the Court need not consider whether any other party has standing. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (citing *Sec'y of the Interior v.*

California, 464 U.S. 312, 319 n.3 (1984)); *Planned Parenthood Great Nw., Hawaii, Alaska, Ind., Ky. v. Labrador*, 122 F.4th 825, 836 (9th Cir. 2024).

Defendants do not challenge Ms. Schmockel's and Mr. Morsette's standing in their Motion to Dismiss. There is no serious question that both Ms. Schmockel and Mr. Morsette have standing to bring their claims under Section 2's private right of action, as well as under § 1983. Accordingly, the Court "need not consider the standing issue as to the" Chippewa Cree Tribe. *Bowsher*, 478 U.S. at 721.

Nevertheless, should the Court proceed, as set forth below, the Tribe has standing to bring its claims under both Section 2's private right of action and § 1983.

II. Section 2 of the VRA contains a private right of action that the Chippewa Cree Tribe can invoke on behalf of its citizens.

Section 2 of the VRA can be enforced by private parties without the use of § 1983 due to Section 2's implied private right of action. The Chippewa Cree Tribe can bring Section 2 claims on behalf of its citizens as *parens patriae*. Additionally, the Tribe has associational standing to bring Section 2 claims on behalf of its citizens (*viz*. members).

A. Section 2 of the VRA contains a private right of action.

The VRA's text and decades of binding precedent provide a private right of action under the VRA. In *Morse v. Republican Party of Virginia*, the Supreme Court concluded that "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." 517 U.S. 186, 232 (1996) (plurality

opinion) (quoting S. Rep. No. 97-417, at 30 (1982)) (ellipsis in original) (quotation marks omitted); *see id*. at 240 (Breyer, J., concurring) (same). Lower federal courts have repeatedly affirmed that Section 2 contains an implied private right of action. *See, e.g.*, *Ford v. Strange*, 580 F. App'x 701, 705 n.6 (11th Cir. 2014) (allowing private plaintiffs to bring Section 2 claim not pleaded under § 1983, reasoning that "[a] majority of the Supreme Court has indicated that section 2 of the Voting Rights Act contains an implied private right of action." (citing *Morse*, 517 U.S. at 232)).[1] Moreover, the Ninth Circuit has repeatedly affirmed individual plaintiffs' right to bring claims under Section 2's implied private right of action. *See, e.g.*, *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), *cert. denied*, 543 U.S. 984 (2004) (affirming district court's holding that individual incarcerated "Plaintiffs' claim of vote denial is cognizable under Section 2 of the VRA."); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989).

While a single out-of-circuit court has held to the contrary, *see Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1214 (8th Cir. 2023), that decision is contrary to decades of controlling precedent, including that of the

[1] *See also Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020); *Rural W. Tenn. African-Am. Affs. Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996); *Cane v. Worcester Cnty.*, 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Supreme Court. *See id*. at 1219 (Smith, J., dissenting); *see also Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 721 (8th Cir. 2025) (Colloton, C.J., dissenting) ("Consistent with all other courts to address the issue, I conclude that § 2 confers an individual right . . . ."). Indeed, less than two years ago, the Supreme Court affirmed a lower court decision where a Section 2 claim was brought by private plaintiffs. *See Allen v. Milligan*, 599 U.S. 1 (2023) (granting relief to private parties who brought suit under Section 2). Thus, the law of the Supreme Court and in all but one circuit, including the Ninth Circuit, is that Section 2 confers a private right of action, and the Supreme Court has given no indication that lower courts are to depart from that precedent. *See Morse*, 517 U.S. at 232; *Farrakhan*, 338 F.3d at 1016. In fact, the Supreme Court has implicitly, but clearly, signaled the opposite by granting a stay in *Turtle Mountain Band of Chippewa Indians v. Howe*, 145 S. Ct. 2876 (2025) (mem.), pending the resolution of the petition for certiorari. In short, Section 2's private right of action is firmly established and remains the law of the land.

B. The Chippewa Cree Tribe may bring its Section 2 claim as *parens patriae* on behalf of its citizens.

The Chippewa Cree Tribe has standing to bring claims under Section 2 as *parens patriae* on behalf of its Tribal citizens. *See Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1180 (N.D. Okla. 2009) (citing *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004)). *Parens patriae*—literally "parent of the

country"—refers to a sovereign's capacity to protect those unable to protect themselves. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 n.8 (1982). A sovereign has standing to challenge a violation of federal law based on harm to its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general" and its own "quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607; *see also Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1028 (D.S.D. 2014), *rev'd on other grounds sub nom. Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018).

Here, the Chippewa Cree Tribe has standing to challenge Defendants' Section 2 violations on behalf of its members, all of whom face some form of the social and historical conditions—such as official discrimination in voting or discrimination in education, employment, and health—that interact with the challenged voting system to cause an unequal opportunity for them to vote. Compl., ECF No. 1 at 19–28. These harms implicate the Tribe's quasi-sovereign interests because when "[t]he current electoral system robs Native American voters of a meaningful voice on the Chouteau County Commission by denying Native American voters the ability to elect a candidate of choice that is responsive to Tribal needs[, it] undermines the Tribe's political power and violates the rights of its members as citizens of Chouteau County and the United States." Compl., ECF No. 1 at 3.

Tribal Nations often exercise Section 2's implied right of action to bring vote dilution claims on behalf of their citizens. *See, e.g.*, *United States v. Blaine Cnty.*, 363 F.3d 897 (9th Cir. 2004) (allowing Tribal Nation to intervene); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010); *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1274 (10th Cir. 2019); *Lower Brule Sioux Tribe v. Lyman Cnty.*, 625 F. Supp. 3d 891 (D.S.D. 2022); *Winnebago Tribe of Neb. v. Thurston Cnty.*, No. 8:23CV20, 2023 WL 9111242 (D. Neb. Apr. 27, 2023). The Chippewa Cree Tribe seeks to protect its citizens' right to have a meaningful opportunity to elect their candidate of choice under Section 2 and therefore has asserted a sufficient interest to satisfy *parens patriae* standing. The alleged Section 2 violation affects all citizens of the Chippewa Cree Tribe who reside within Chouteau County. Therefore, the Tribe has *parens patriae* standing sufficient to vindicate the voting rights of its citizens.

C. The Chippewa Cree Tribe has associational standing to bring its Section 2 claims.

Alternatively, the Chippewa Cree Tribe has associational standing to bring Section 2 claims on behalf of its members (*viz.* citizens). It is well settled that organizations can sue to enforce Section 2. *See, e.g.*, *Milligan*, 599 U.S. at 16 (plaintiffs suing under Section 2 included Alabama NAACP and other organizations). An association has standing if (1) its "members would otherwise have standing to sue in their own right"; (2) the "interests" that the suit "seeks to

protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977). The Chippewa Cree Tribe easily meets this test.

First, individual members of the Chippewa Cree Tribe who live in Chouteau County plainly have standing on their own behalf, a point Defendants do not dispute. Second, as consistent *parens patriae* case law makes clear, Tribal Nations have clear interests in the health and welfare of their members by preventing future violations of their individual rights. Tribal Nations also have an interest in promoting and preserving their own wellbeing and sovereignty through the election of candidates fairly elected by their membership who are responsive to Tribal needs. Elected officials can dictate the nature of the relationship between themselves and Tribal officials and determine infrastructure projects, negotiate reservation access points, and the like, which may be dictated by a given official's attitude toward Tribal sovereignty.

Third, while the final prong of the *Hunt* test—that neither the claim asserted nor relief requested requires individual member participation—is prudential and not jurisdictional, *see Cent. Delta Water Agency v. United States*, 306 F.3d 938, 951 n.9 (9th Cir. 2002), the Chippewa Cree Tribe nonetheless satisfies it. Prospective injunctive relief, which is the relief sought here, does not require the participation of

individual members in the lawsuit. *See Hunt*, 432 U.S. at 344. In fact, it is often difficult for individual members to bring such suits. Denying Tribal Nations the ability to bring suits would gut enforcement in contexts where Tribal Nations are often the only entities with capacity and resources to challenge systemic discrimination against Native voters.

Numerous courts have determined that Tribal Nations are able to stand in the shoes of their members, whether that is expressly as a *parens patriae* representative suit or through associational standing. *See, e.g.*, *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1202–07 (D. Nev. 2009) (finding Tribal associational standing to file Religious Freedom Restoration Act claims against the United States), *aff'd in part, rev'd in part on other grounds* 588 F.3d 718 (9th Cir. 2009); *Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, No. CIV-05-445-C, 2007 WL 54835 at *4 (W.D. Okla. Jan. 8, 2007) (in which the court found it "unnecessary to untangle this knot of *parens patriae* and sovereignty" because the "Tribe may bring this action as it has associational standing").

* * *

Defendants' entire Motion to Dismiss engages only with the Chippewa Cree Tribe's ability to bring suit under § 1983. They offer no argument, and indeed there is none, that would prohibit the Tribe from bringing suit under the implied private right of action contained within Section 2 itself. Defendants' Motion addresses only

§ 1983 and is silent on Section 2's implied cause of action. Having failed to raise any such argument, Defendants have forfeited it. This Court can therefore deny Defendants' Motion without needing to engage with Defendants' arguments about the propriety of the Tribe bringing suit under § 1983.

III. The Chippewa Cree Tribe can bring this action to enforce Section 2 of the VRA under § 1983.

Even though the Chippewa Cree Tribe's presence in this suit must continue due to the implied private right of action under Section 2, Defendants are also incorrect that the Tribe cannot bring claims under § 1983. Defendants' reliance on the caselaw cited in their brief is misplaced.

Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony, 538 U.S. 701 (2003), does not control. In *Inyo County*, the Supreme Court issued a narrow ruling: when a Tribal Nation sought to vindicate its own sovereign right to resist state criminal processes, it was not a "person" entitled to bring a § 1983 claim. *Id.* at 708–09. The Court determined that sovereigns could not be considered persons under the statutory text when seeking to vindicate their own sovereign rights or interests, but that they could be persons under the statute when advancing other individual interests in relation to state governments. *Id.*

This case presents fundamentally different facts than were at issue in *Inyo County*. The Chippewa Cree Tribe does not assert sovereign immunity from state process. Rather, the Tribe invokes § 1983 to protect the individual rights of its

citizens against infringement by the county government. *See State Dep't of Health & Soc. Servs., Div. of Fam. & Youth Servs. v. Native Vill. of Curyung*, 151 P.3d 388 (Alaska 2006); *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981). As such, *Inyo County* does not bar the Tribe from using § 1983 as its alternative basis for advancing a claim under Section 2 of the VRA on behalf of its citizens.[2]

Chemehuevi Indian Tribe v. McMahon, 934 F.3d 1076 (9th Cir. 2019), is also distinguishable, as well as being wrongly decided. *Chemehuevi's* cursory conclusion that "quasi-sovereign interests are not individual rights," *id.* at 1082, may have made some sense under the particular facts of that case, but are distinguishable here. In *Chemehuevi*, four individuals were stopped for traffic violations on tribal land and brought claims under § 1983 "alleging violations of various federal statutory and constitutional rights" related to allegations of racial discrimination. *Id.* at 1079. These violations of individual rights did not relate to the Chemehuevi Indian Tribe's quasi-sovereign interests in maintaining the boundaries of its reservation. *See id*. at 1080–82.

Chemehuevi is distinguishable from this case, in which the Chippewa Cree Tribe's citizens' individual right to vote directly implicate the Tribe's quasi-

[2] *Skokomish Indian Tribe v. United States* is similarly distinguishable because there, the court rejected the Skokomish Indian Tribe's use of § 1983 to enforce communally held, treaty-reserved fishing rights that were inherently sovereign and collective, not individual. 410 F.3d 506, 514–16 (9th Cir. 2005) (en banc).

sovereign interest in its place in the federal system that is contingent on its own political power derived from the individual votes of its members. *Chemehuevi* is also wrongly decided because it overextends *Inyo County*'s limited holding. *See Curyung*, 151 P.3d at 398–402. As such, the Chippewa Cree Tribe can bring claims under § 1983 as *parens patriae*.

As discussed above, the cases relied upon by Defendants are distinguishable and do not bare on the precise issues raised in this case. In addressing the issues raised in the Complaint, the Court should look to the analysis of courts that have addressed similar issues and found that sovereign can bring 1983 actions on behalf of their citizens. *See, e.g.*, *Curyung*, 151 P.3d at 399–402; *Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford*, 799 F. Supp. 272 (N.D.N.Y. 1992) (permitting New York to sue *parens patriae* to address AIDS discrimination); *Pennsylvania v. Glickman*, 370 F. Supp 724, 728 (W.D. Penn. 1974) (allowing Pennsylvania to sue *parens patriae* to prevent racial discrimination in firefighter hiring); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) (allowing Hawai'i to sue *parens patriae* over antitrust violations affecting its citizens).

CONCLUSION

Defendants' Motion must be denied. Both individual Plaintiffs—Ms. Schmockel and Mr. Morsette—have standing. Accordingly, the Court need not address whether the Chippewa Cree Tribe has standing. Nevertheless, Section 2 of

the VRA contains an implied right of action that allows the Tribe's claims to proceed. The Chippewa Cree Tribe has both *parens patriae* and associational standing to bring its claims under Section 2. Alternatively and additionally, the Tribe can bring its claims under § 1983.

Dated: September 30, 2025

Respectfully submitted,

/s/ Samantha Blencke
Samantha Blencke (*pro hac vice*)
Kirsten D. Gerbatsch (MT Bar No. 68806756)
Wesley James Furlong (MT Bar No. 42771409)
Jacqueline De León (*pro hac vice*)
Malia Gesuale (*pro hac vice*)
NATIVE AMERICAN RIGHTS FUND

Theresa J. Lee (*pro hac vice*)
Sophia Lin Lakin (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

/s/ Alex Rate
Alex Rate (MT Bar No.11226)
ACLU OF MONTANA

Counsel for Plaintiffs