

The Honorable Kyrsten Sinema
United States Senate
Washington, DC 20510

Dear Senator Sinema:

We are attorneys and law professors with decades of combined experience in constitutional law. We care deeply about our Constitution and our democracy, and so we write in support of efforts to modify the filibuster to enable passage of legislation protecting the right to vote. While we take no position in this letter on whether to abolish the filibuster altogether, we do write in support of a proposal that would create a “carve out” for legislation protecting the right to vote. Such a proposal is not only constitutional and permissible but is necessary to preserve the principles of self-government at the center of our constitutional system. Far from serving as a [democratic guardrail](#) or a tool that “[protects the democracy of our nation](#),” the current filibuster is a modern invention that is actively undermining the democratic system of government that our Framers designed, including current efforts to block the passage of federal legislation protecting the right to vote.

As you know, throughout the country, including in our home state of Arizona, there has been a concerted effort to erect barriers to voting – especially for people of color. Partisan legislators in recent years have [purged minorities](#) from voting rolls; targeted voting rights of [Native Americans](#); intentionally made it difficult for [persons with disabilities](#) to exercise the franchise; made [elderly and sick voters](#) risk their health (or lives) to vote in the middle of a pandemic; created [all-day lines](#) to vote; and targeted the rights of [young voters](#); among other attacks on the franchise.

All of these actions have undermined the very foundation of our republic – the right to vote and the ability of a majority of people (“We the People”) to choose who should govern. Alexander Hamilton, describing the principles at the heart of the Constitution, [wrote](#) that “the fundamental maxim of republican government . . . requires that the sense of the majority should prevail.” Yet, unless lawmakers can respond to attacks on our democracy, the right to vote will be irreparably degraded, and a partisan minority, unresponsive and often openly hostile to the will of the majority, will entrench itself in power.

Rather than harbor any concern that a carve out would undermine our constitutional system of government, we urge you to consider the opposite view: that the lack of a carve out is a present and growing threat to the most sacrosanct ideals of our nation. The fact is that when there is a conflict between the filibuster and the people’s ability to protect fundamental constitutional rights then it is those rights—and not the filibuster—that must win out. To allow otherwise would place the filibuster, a procedural mechanism, above the most important tenets of our democratic system. And while we do not argue here that the filibuster serves no purpose or must be abandoned altogether, we do believe it indisputable that the filibuster cannot be allowed to take precedence over the fundamental right to vote of all Americans.

Moreover, creating a carve out to protect our democracy, far from being unprecedented, stands squarely within the tradition of updating Senate rules as appropriate. Article I, section 5, clause 2

of the Constitution specifies that “Each House may determine the rules of its proceedings.” Under this provision, the Senate has repeatedly adjusted filibuster rules. For example, in 1975, the Senate [lowered the cloture threshold](#) from 67 to 60 votes.

Prohibiting the filibuster of legislation protecting the right to vote is not just constitutional but is also protective of our Constitution by ensuring Congress can do its job of ensuring fair elections and enforcing the Fifteenth Amendment. It does not deviate from tradition, but instead aligns with it, continuing the Senate’s practice of modifying its rules in order to operate effectively. We implore you, given the urgency and importance of this moment, to support a carve out that and ensures the Senate does not prioritize procedure over the nation’s Constitution and the fundamental rights of Arizonans.

Signed,

Paul Bender, Professor of Law and Dean Emeritus for the Sandra Day O'Connor College of Law
Stanley Feldman, Former AZ Supreme Court Justice

Toni Massaro

Marie Provine, Emeritus Professor of Justice and Social Inquiry for the School of Social
Transformation at Arizona State University

Please note, affiliations are listed for identification purposes only.