The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington, DC 20510

The Honorable Bernie Sanders
United States Senate
332 Dirksen Senate Office Building
Washington, DC 20510

May 2, 2019

Dear Senators Warren and Sanders,

I have carefully read and considered the text of the United States Territorial Relief Act of 2019. In my opinion, the U.S. Territorial Relief Act is constitutionally sound. I hope that the bill is taken seriously by Congress and that debate can focus on its merits as public policy rather than being diverted by made-up constitutional objections.

Title I of the bill invokes the U.S. Constitution's Commerce Clause, Bankruptcy Power, and Territorial Power. Title II invokes the Spending Power and the Territorial Power.

Puerto Rico's unsustainable economic situation has sufficiently direct and dire consequences on trade between the island and the continental United States, and between the two and other nations, to justify viewing this proposal as an integral part of regulating interstate and foreign commerce so as to encourage investment and economic development. Meanwhile, the congressional power of the purse – the power of Congress under Art. I, §8, Cl.1 to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States," often simply called the Spending Power – provides a stable pillar of support for the fiscal expenditures imposed on the U.S. Treasury by Title II.

Likely constitutional lines of attack against this bill fall short.

There is no Due Process Clause issue because the U.S. Territorial Relief Act does not deprive any person of property unless and until the unsecured creditor had an adequate opportunity to be heard. Nor is there a Takings Clause (or separation of powers) problem, under *Winstar* or any other controlling precedent, for unsecured creditors whose debt is eliminated by Congress. Unsecured creditors whose claims have not proceeded to judgment do not enjoy the kind of "vested" rights that are immune from legislative adjustment subject to the same deferential due process review that economic regulation generally has received in the federal courts since the mid-1930s.

The Impairment of Contracts Clause, which at first blush might seem to provide greater protection than substantive due process, has been watered down to the point where it is roughly equivalent to substantive due process and, in any event, that Article I, §10 clause applies to states but not to Congress. Indeed, it has always been recognized that the Framers made a deliberate

determination to give Congress maximum latitude in adjusting debtor-creditor relations, confining their suspicion of confiscatory readjustment to the states and localities. The upshot, especially for federal laws, is straightforward: "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

To make clear that my defense of this proposed federal statute's constitutional validity notwithstanding its impact on pre-existing contracts reflects no casual attitude toward government's freedom to impair contractual obligations generally, I would emphasize that, when a *state* government is involved, I have been considerably *more* protective of contract rights than the modern Supreme Court and indeed than every sitting justice with the exception of Justice Gorsuch. See, e.g., *Sveen v. Melin*, 584 U.S. ___ (2018), slip op. at 8 (Gorsuch, J., dissenting alone from the majority's decision to uphold the retroactive application of a *state's* revision in its laws regarding divorce settlements) (quoting L. Tribe, American Constitutional Law §9–8, p. 613 (2d ed. 1988)).

Separation of powers principles of course impose an added layer of limits on the power of Congress to interfere in ongoing adjudication, but those limits roughly parallel Takings Clause principles in that they leave Congress free to change the underlying substantive law even as cases proceed through the courts, and to do so in ways that target particular clusters of cases and alter their probable outcome – as long as the legislation at issue doesn't simply change the results of already adjudicated matters, leaving the underlying legal rules in place. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Nothing has happened in the more than two decades since *Plaut* to alter these basic constitutional principles.

The U.S. Territorial Relief Act is on solid constitutional footing. Let any debate about the legislation focus on its policy merits.

Sincerely,

Laurence H. Tribe
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Professor of Constitutional Law
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**University affiliation noted for identification purposes only.*