can make little or no repayment and can use its provisions without limitation and can discharge all of their debts. Debtors whose annual income is below the national mean of about $50,000 per year are also untouched by the provisions of this reform. They can make full use of chapter 7 and discharge all of their debts even if they could afford to make a substantial debt repayment.

And so, Mr. Speaker, the financially unfortunate and middle-income consumers are not affected at all by this reform. Continued to the bankruptcy laws as they can under current law. But upper-income consumers who can make substantial repayments will be expected to enter into court-supervised repayment plans under chapter 13. This modest requirement of personal financial responsibility is appropriate, and I am pleased today to urge approval of this well-justified reform which is contained within the conference agreement.

Mr. Speaker, I am pleased today to urge approval of the rule that brings that conference agreement to the floor as well as the conference agreement itself.

Mr. SESSIONS. Mr. Speaker, I yield 2 minutes to the gentleman from Pennsylvania (Mr. PITTS). (Mr. PITTS asked and was given permission to revise and extend his remarks.)

Mr. PITTS. Mr. Speaker, I want to rise in opposition to this rule and make it clear that I support bankruptcy reform laws very much. But not this version, not with these words that have been inserted by the conference. They didn't take the reference to the FACE Act, standing for Free Access to Clinic Entrances, meaning an abortion clinic, that was passed in 1994; and we have the FACE language here in white and the identical words are in the bankruptcy reform bill. They did change "rental property" to "lawful goods or services." That is the one change. The key words are "interferes with" or "physical obstruction." Under FACE, peaceful pro-life protestors are being arrested and sentenced to jail for just praying on a sidewalk outside an abortion clinic, or handing a leaflet to a woman as an alternative. One man was even successfully sued for leaving his business card on the clinic's door.

Mr. Speaker, under FACE, people are being fined hundreds of thousands of dollars. What we are doing in this bill is taking the identical language and putting it in the bankruptcy bill so now they cannot even file for bankruptcy, unfair bankruptcy. So we are condemning peaceful, innocent people who have a conscience to protest just to try to save the life of an unborn to a life of financial ruin.

I have a couple of letters, one from Harvard law professor Mary Ann Glendon, a good analyst of the bill, but let me just read the last paragraph: "A large and nondischargeable debt, beyond one's capacity to pay, especially in the hands of a hostile and motivated creditor, is a financial death sentence. That is what even peaceful pro-life protesters have to fear if the proposed language is added to the existing aggressive judicial interpretation of FACE and similar laws."

Mr. Speaker, I will submit the other letter from the Catholic Bishops for the RECORD.

BANKRUPTCY CONFERENCE REPORT H.R. 333:

SEC. 330. Nondischargeability of debts incurred through violations of law relating to the provision of lawful goods and services

(a) Debts incurred through violations of law relating to the provision of lawful goods and services—(Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

(1) in paragraph (18) by striking "or" at the end;

(2) in paragraph (19) by striking the period at the end and inserting ";"; and

(3) by adding at the end the following:

(20) that results from any judgment, order, consent, or agreement entered into by any Federal or State court, or contained in any settlement agreement entered into by the debtor (including any court-ordered damages, fine, penalty, security bond, or cost owned by the debtor), that arises from—

(A) the violation by the debtor of any Federal or State statutory law, including but not limited to violations of title 18, that results from intentional actions of the debtor or that—

(i) by force or threat of force or by physical obstruction, intentionally injure, intimidate or interfere with any person because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

(ii) by force or threat of force or by physical obstruction, intentionally injure, intimidate or interfere with any person because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship;

(iii) intentionally damage or destroy the property of a facility, or attempt to do so, because such facility provides lawful goods or services, or intentionally damage or destroy the property of a place of religious worship; or

(B) a violation of a court order or injunction that protects access to a facility that or a person who provides lawful goods or services or the provision of lawful goods or services if—

(i) such violation is intentional or knowing;

(ii) such violation occurs after a court has found that the debtor previously violated—

(i) such court order or such injunction;

(ii) any other court order or injunction that protects access to the same facility or the same person; except that nothing in this paragraph shall be construed to affect any expressive conduct (including peaceful picketing, peaceful prayer, or other peaceful demonstration) protected from legal prohibition by the first amendment to the Constitution of the United States.

(b) RESTRICTION.—Section 523(a)(15) of title 11, United States Code, is amended by inserting "or under the criminal law of a State" after "title 18".

FACED (Freedom of access to [abortion] clinic entrances)

Signed by President Clinton in 1994—Introduced in the House by Rep. Chuck Schumer (D-NY)

Roll Call: http://clerk.house.gov/cgi-bin/vote.exe?year=1994&rollnumber=70

18 USC Sec. 248

Sec. 248. Freedom of access to clinic entrances.

(a) PROHIBITED ACTIVITIES. Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.

(d) Nothing in this section shall be construed to prohibit conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

HARVARD LAW SCHOOL,

Cambridge, MA, November 12, 2002.

HON. CHRISTOPHER SMITH, House of Representatives, Washington, DC

DEAR CONGRESSMAN SMITH: I am taking the liberty of writing to you today because I am deeply concerned about the application of H.R. 333 to peaceful pro-life protestors. I hope the following opinion letter will be helpful to you.

The proposed legislation would create a new 11 U.S.C. §523(a)(20), denying discharge for and judgments under the Freedom of Access to Clinic Entrances Act (FACE), §248, (2000), or under similar state laws, or under injunctions restricting protest at abortion clinics.

The impact of the provision on peaceful pro-life protestors would be grave. Existing law substantially restricts protest at abortion clinics, and in their zeal to eliminate violent protests and obstruction protests, courts and legislators have forbidden much protest that is peaceful and nonobstructive. Proposed §523(a)(20) would add an additional sanction to all this existing law: money judgments for abortions protest would follow protestors to the ends of their lives. No matter their financial circumstances, no matter the size of the judgment or the nature of the protest, these judgments could never be discharged in bankruptcy.

1. THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT (FACE)

Proposed §523(a)(20)(A) precisely tracks the key substantive language of FACE. FACE prohibits conduct that: "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with" access to "reproductive health services," or attempts to do so. 18 U.S.C. §248(a)(1) (2000).
by physical obstruction, intentionally in-
jure, intimidate, or interfere with” access to
lawful goods or services. The key language
in the two block quotes is obviously identical
save for the alteration of the plural verb “whoever” in
the second, and it is followed by the singular noun “the subject
in proposed §523(a)(2)).

The changed language is sub-
stantially identical to FACE, it will be read
in light of existing decisions under FACE.
Existing decisions of FACE support that
clause certainly be read into §523(a)(20). Worse,
abortion clinics and their supporters will like-
ably argue that by re-enacting the same statu-
tory language, Congress has approved chang-
ing decisions and thus confirmed their status as
valid and appropriate interpretations of
FACE itself. This is a critical point, because
existing interpretations of FACE in the lower
courts, extraordinarily favorable to
the abortion clinics and their supporters,
have not yet been accepted or rejected by the
Supreme Court of the United States. Con-
gressional passage of proposed §523(a)(20)
could figure prominently in eventual Su-
preme Court arguments on the interpreta-
tion of the statute and the plausibility of support to
the worst interpretations of the statute.

I will not consider in this opinion letter
the interpretations of “force or threat of
force, intimidation, or intimidate” Some interpreta-
tions of those provisions have been surprisingly expansive,
but those forms of protest are not the forms
for making the reasonable case for FACE, and
of proposed §523(a)(20), is in the provi-
sions that target anyone who “by physical
defense of others interferes with * * * or at-
tempts * * * interfere with” access to a
clinic. Each of these terms has been con-
strued or defined to mean more than first ap-
nears. No actual interference, and no actual physical
force, was necessary for first interpreta-
tion. Courts have found violations in peace-
ful protest that did not actually prevent
access to clinics.

“Physical obstruction” is defined in U.S.C.
§248(e)(4) to mean making ingress or
gress “impassable * * * or unreasonably
difficult or hazardous.” What is “unreasonably
difficult” has, in the lower federal courts,
sometimes turned out to be remote from
physical obstruction.

Thus, in Bart v. States v. Mahoney, 247 F.3d
790 (D.C. Cir. 2001), the court found
physical obstruction and interference with access from a single protestor kneeling in
prayer outside the locked door to an abortion
clinic. Id. at 283–84. The door was a “rarely
used” emergency exit. The court said that
someone might have used the door, and that
the law does not distinguish frequently and
infrequently used doors. More remarkable
still, the court held that a single person
keeling in prayer rendered use of that door “un-
reasonably difficult” and forced patients to
use a different entrance. Id. at 284.

Mahoney also held that six other defend-
ant protestors did not block access and
were not charged with obstruction. The court of ap-
peals’ entire discussion of this holding is
that five protestors “knelt or sat within five
feet of the front door,” that the sixth defend-
ant “was pacing just behind them,” and that
they offered passive resistance and had to
be carried away.” Id. at 283. The court does
not even say whether they were arrested
across the sidewalk or along the sidewalk,
whether they left a passage open, or any
other fact that might go to a plain meaning
under traditional obstruction statutes has approved
with preserving a reasonable right to protest.
It was enough for a violation that they were
near the door.

Both Bart v. States v. Mahoney and proposed §523(a)(20) are limited to “intentional” violations, but
mahoney shows that protection to be illu-
sory. The court found specific intent to
interfere with access to the clinic, even in
the case of the lone protestor praying before
the locked door. It relied on the fact that
the protestors were screening patients and
the clinic would change their minds about
getting an abortion; the court quoted his
prayer as evidence of criminal intent. 247
F.3d 790, 797 (D.C. Cir. 2001). id.

Section 1962(e) of the United States v.
Gregg, 32 F. Supp. 2d 151, 157 (D.N.J.
1999), affirmed aff’d 226 F.3d 253 (3d Cir.
2000), cert. den., 523 U.S. 971 (2001). Gregg had much more evidence of criminal intent than
Mahoney. Even so, the Gregg court relied on
defendants’ “anti-abortion statements, in-
cluding impeding women not to go into the
clinic or not to kill their babies.” The court
found that the fact that defendants “carried anti-abortion signs,” as evidence of forbidden intent. The
government in this cases has offered evi-
dence of opposition to abortion as evidence
of specific intent to obstruct access, and the
courts have relied on this evidence for that
purpose. Clinics and their supporters would
have argued that Congress has codified these
holdings if it enacts proposed §523(a)(20).

Courts have emphasized that FACE plaint-
fiffs need not prove actual obstruction. “It is
not necessary to show that a clinic was shut
down, that people could not get into a clinic
at all for a period of time, or that anyone
injected was actually confined. People v.
Kraeger, 160 F.Supp. 2d 360, 373 (N.D.N.Y.
2001). Plaintiffs need not “show that any particular person was interfered
with by the defendants’ obstruction.” United
States v. Wilson, 2 F. Supp. 2d 1170, 1171 n.1
(E.D. Wis.). aff’d as United States v. Bain, 201
F.3d 928 (7th Cir. 2000).

To sum up, proposed §523(a)(20) would
restate statutory language that has been
interpreted not to require actual obstruction,
has been read into §523(a)(20), and there
would be a serious argument that Congress
had confirmed these interpretations in FACE
itself.

2. INJUNCTIONS

Proposed §523(a)(20)(B) makes non-
dischargeable any debt arising from viola-
tion of an “injunction that protects access to lawful goods or services. Nothing in proposed §523(a)(20)(B) even purports to conflate this subsection to violent or obstructive protest.

Under Federal and other sources of law,
courts have issued injunctions estab-
lishing buffer zones and bubble zones, forbid-
ing protestors from coming within stated
distances of the property line of abortion
clinics or within stated distances of persons
approaching abortion clinics. In Madsen v.
Women’s Health Center, Inc., 512 U.S. 783
1995), the Court upheld the constitu-
tionality of an injunction forbidding protestors to step onto clinic property, or onto public property within 36 feet of the clinic’s entrances, to contact fine protestors to the other side of the
street. The Court also affirmed an injunction
against making any noise audible within the
clinic. In Schenck v. Pro-Choice Network, 519
U.S. 357 (1997), the Court upheld an in-
junction against any defendant “demonstrating
within fifteen feet” of any doorway or drive-
way. It did not consider any way to
Western District of New York. The injunction in that
case also prohibited any defendant from
“trespassing” on any clinic’s parking lot.
(The injunction is set out and discussed in
 Face, supra.)

Since Madsen, the lower courts have be-
come more aggressive about issuing buffer
zone injunctions without first attempting to
control alleged obstruction with less intru-
sive means. Examples include the buffer zone
injunction issued on remand after the lim-
itation was remanded in the Ninth Circuit
under the case name United States v. Alaw, 180 F. Supp. 2d 197 (D.D.C. 2002), and the pre-
liminary injunction confining a single
protestor to the other side of the street in
United States v. McMillan, 946 F. Supp. 1254
(S.D. Miss. 1996).

Many forms of protest inside such buffer
zones have been protected. Others have been
prohibited. The First Amendment, no doubt, allows anything. A single picketer with a pro-life
sign, held in contempt of court for standing quietly inside a buffer zone, would be covered by a
First Amendment exception to the statute.

Compensation, or attorneys’ fees awarded
would be nondischargeable. The protection for peaceful protest in proposed §523(a)(20)(B) would
not apply to the clinic holding protest protected by the First Amend-
ment. But given Madsen and Schenck,
this protection means little; much protest that is
guaranteed protection will be banned. Protests
will be banned. Protests will be ban-
nditioning law and litigation whether §523(a)(20)(A) denies dis-
charge for other state laws imposing more
expansive restrictions on pro-life protest.

For example, in Hill v. Cody, 530 U.S. 703
(2000), the Supreme Court upheld Colo. Rev.
Stat. §18–123(3) (West 1999), which makes it
illegal to approach within eight feet of an-
other person without that person’s consent,
for any form of “protest, education, or coun-
seling’ ” within one hundred feet of the
entrance to a health care facility. The Court
suggested, in Hill v. Cody, that the statute
was a reasonable prophylactic means to
prevent physical obstruction that interferes
with clinic access, and that any violation of
the statute amounts to such physical ob-
struction and interference. Prospective pa-
tients would prefer to enter the clinic with-
out being offered a leaflet, and they may
think the offer of the leaflet made their
entrance unreasonably difficult. If any of
these arguments were accepted, judgments
for violating state bubble-zone statutes
could also be nondischargeable under proposed §523(a)(20).

I do not think that would be a correct
interpretation of proposed §523(a)(20). But after
this judicial interpretation of FACE, I
think there is a substantial risk that some
courts would reach this interpretation. If

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these arguments were accepted, judgments
for violating state bubble-zone statutes
could also be nondischargeable under proposed §523(a)(20).

I do not think that would be a correct
interpretation of proposed §523(a)(20). But after
this judicial interpretation of FACE, I
think there is a substantial risk that some
courts would reach this interpretation. If
judgments for violating buffer-zone and bubble-zone injunctions are nondischargeable, it would likely seem a small step to hold that judgments for violating bubble-zone statutes are also nondischargeable, inter alia.

4. THE MAGNITUDE AND NATURE OF THE JUDGMENTS AT ISSUE

Proposed § 523(a)(20) is not confined to compensatory damages. The statutes at issue authorize punitive damages, liquidated statutory damages, civil penalties, attorneys’ fees, expert witness fees, and criminal fines. Their purpose is to deter and punish, not just—to compensate for any harm done. In fact, awards of actual damages are quite rare. The plaintiffs’ preference for liquidated damages and punitive damages is especially important in the cases in which there is no obstruction in the ordinary meaning of the word, or only brief and marginal obstruction. In such cases, there is little or no actual damage, but there still can be substantial monetary judgments. FACE authorizes $5,000 per violation in statutory damages, at the election of plaintiffs, either private or governmental, 18 U.S.C. § 248(c)(1)(B) (2000). In actions by the United States or by any State, it authorizes a civil penalty of $10,000 per protestor for the first non-violent physical obstruction, and $15,000 per protester for each subsequent non-violent physical obstruction. 18 U.S.C. §§ 248(c)(2)(A) and 248(c)(3)(B) (2000).

The lower federal courts have held that the statutory damages are per violation, not per protester. So if ten people combine to block a clinic entrance, a single judgment of $5,000 would likely seem a small step to hold that judgments against four members of a single group protesting would never end.

A large and nondischargeable debt, beyond one’s capacity to pay, especially in the hands of a hostile and motivated creditor, is a financial death sentence. That is what even peaceful pro-life protestors have to fear if they are subjected to the existing administrative, aggressive judicial interpretation of FACE and similar laws. I believe that any more optimistic interpretation of the bill is wishful thinking.

Very truly yours,

MARY ANN GLENDON,
Harvard Law Professor.

SECRETARIAT FOR PRO-LIFE ACTIVITIES,
Washington DC, November 12, 2002.

DEAR MEMBER OF CONGRESS:

Disagreements have arisen in Congress over the conference report on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, particularly over Section 390 on the dischargability of debts arising from sit-ins at abortion clinics. A legal analysis of this provision by our Office of General Counsel is enclosed on this analysis, we have a serious concern about the form in which the bankruptcy bill is being presented for final passage.

The bishops’ conference has always strongly condemned any resort to violence in the pro-life struggle. We have never endorsed, or taken a position on, the practice of conducting sit-ins or other forms of nonviolent civil disobedience at abortion clinics. However, we have strongly opposed the Freedom of Access to Clinic Entrances Act (FACE) as unconstitutionally overbroad and as a discriminatory and ideologically motivated attack on the rights of peaceful pro-life demonstrators. The current language on /protesters in the bankruptcy bill closely parallels the language of FACE, and will be used to impose another layer of penalties upon protesters whose only offense was to place their bodies in the path of those who take innocent children’s lives.

The discriminatory nature of this provision seems clear. It could be used to take away the property and earning capacity of low- or middle-income peaceful protesters to pay fines and the attorneys’ fees of their opponents—a form of punishment now regarded as constitutionally impermissible, and therefore out of the scope of section 523(a)(6).

We hope the House will reject the Rule on the Conference Report so this unfair and discriminatory provision can be removed.

Sincerely,

GAIL QUINN,
Executive Director,
OFFICE OF THE GENERAL COUNSEL,

MEMORANDUM

We have been asked for an analysis of the Schummer amendment to the Bankruptcy Abuse Prevention and Consumer Protection Act, H.R. 333.

SUMMARY

Under existing law, a pro-life demonstrator seeking bankruptcy protection may not discharge a debt arising from injuries he or she intentionally causes. The Schummer amendment would expand the law by preventing a demonstrator from discharging a debt based on lesser degrees of culpability, i.e., when the debtor did not intend or cause injury to person or property, and (b) when the demonstrator, regardless of his or her state of mind, commits a second violation of a court order protecting a clinic, even if the violation was not intended to, and did not, interfere with access.

An exception in the amendment for express conduct protected from legal prohibition by the First Amendment does not change this analysis. Obviously, Congress lacks the power to prohibit the First Amendment. Therefore, Congress lacks the power to prohibit conduct protected from prohibition by the First Amendment.

The amendment is not limited to violent or even criminal conduct. For reasons discussed below, it seems likely that the amendment will have a disproportionate impact on pro-life demonstrators.

ANALYSIS

Among the debts that may not be discharged in bankruptcy is any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). The word “willful” in section 523(a)(6) “modifies the word ‘injury,’ indicating that nondischargeability takes effect where there is an intentional injury, not merely a deliberate or intentional act that leads to injury.” Kwaauahau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis added).

Section 523(a)(6) bars the discharge of debts resulting from judgments against pro-life activists arising from intentional injuries that they cause. In re Tresman, 238 B.R. 613 (Bankr. D. Md. 2001) (debts for intentional injury resulting from violation of Freedom of Access to Clinic Entrances Act was not dischargeable in bankruptcy); In re Bray, 256 B.R. 708 (Bankr. D. Md. 2000) (debts for intentional injury resulting from violation of Freedom of Access to Clinic Entrances Act was not dischargeable in bankruptcy); In re Behn, 242 B.R. 229 (Bankr. W.D. N.Y. 1999) (debt for intentional injury resulting from pro-life demonstrator’s violation of temporary restraining order, which was not dischargeable in bankruptcy).

There is some authority that an injury is ipso facto intentional when it results from violation of a court order directed specifically at a particular debtor. Behn, 242 B.R. at 238, but the same court left “to another day the question of the applicability of § 523(a)(6) in other fact patterns, such as if there had been no court order directed specifically at the debtor, and instead the debt arose out of a judgment for trespass or menacing.” Id. at 239 n.6. Criminal trespass statutes generally do not require injury in the sense of actual damage to property or an intent to cause such damage; unauthorized entry or remaining unlawfully on property is usually sufficient. See 75 Am.Jur.2d Trespass § 164.

The Schummer amendment can be divided into two parts. It prevents the discharge in bankruptcy of any debt from a judgment, order, consensus order, decree, or settlement agreement arising from—

Intentionally injures any person;

Intentionally intimidates any person;

Intentionally injures any person;

Intentionally interferes with anyone; and

Intentionally interferes with anyone.

For the debtors view, none of these actions falling under any of the following reasons.