burden" standard was in fact likely to lead to a major curtailment of the right to obtain an abortion. In *Stenberg v. Carhart*,[608] the Court reviewed a Nebraska statute that forbade "partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery." Although the state argued that the statute was directed only at an infrequently used procedure referred to as an "intact dilation and excavation," the Court found that the statute could be interpreted to include the far more common procedure of "dilation and excavation."[609] The Court also noted that the prohibition appeared to apply to abortions performed by these procedures throughout a pregnancy, including before viability of the fetus, and that the sole exception in the statute was to allow an abortion that was necessary to preserve the life of the mother.[610] Thus, the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe* that provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman.[611] The Court, however, reaffirmed the central tenets of its previous abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad, and the exception for threats to the life of the mother was too narrow.[612]

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*,[613] which, although not formally overruling *Stenberg*, appeared to signal a change in how the Court would analyze limitations on abortion procedures. Of perhaps greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5–4 vote,[614] upheld a federal criminal statute that prohibited an overt act to "kill" a fetus where it had been intention-

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[608] 530 U.S. 914 (2000).

[609] 530 U.S. at 938–39.

[610] The Nebraska law provided that such procedures could be performed where "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1).

[611] Roe v. Wade, 410 U.S. 113, 164 (1973).

[612] As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, *see* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

[613] 550 U.S. 124 (2007).

[614] Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsberg authored a dissenting opinion, which was joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe*.