

**STATE OF FLORIDA
BOARD OF MEDICINE**

IN RE: Petition for Declaratory Statement of
 Dr. Gerald Applegate, M.D.

**PETITION FOR DECLARATORY STATEMENT
BEFORE THE BOARD OF MEDICINE**

Pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-105, Florida Administrative Code, Petitioner Gerald Applegate, M.D., in his individual capacity, petitions the Florida Board of Medicine for a Final Order setting forth a declaratory statement on the facts and law presented herein.

Background

1. Petitioner Gerald Applegate, M.D., is a physician licensed pursuant to Chapter 458, Florida Statutes.
2. Dr. Applegate has been licensed to practice medicine since 1983 and has been board-certified continuously in obstetrics and gynecology since 1988.
3. He is the medical director at Eve Medical of Miami, an abortion clinic, where he has been practicing for over twenty years and is an independent contractor. He is the only licensed physician practicing there.
4. Dr. Applegate's medical license number in Florida is ME 82602 and he maintains his license in good standing. He also currently holds medical licenses in New York, Pennsylvania, and Ohio.

5. For the purposes of this Petition, Dr. Applegate's authorized representatives are his undersigned counsel and qualified representatives, and Petitioner's contact information is that of his undersigned counsel and qualified representatives.¹

6. The agency affected by this Petition is the Board of Medicine of the State of Florida ("the Board").

7. The Board was established to "ensure that every physician practicing in this state meets minimum requirements for safe practice." Fla. Stat. § 458.301. The Board has authority over physician licensing and discipline. *See id.* §§ 458.311, 458.313, 458.331.

8. Dr. Applegate is licensed and regulated by the Board.

9. In his role as Medical Director of Eve Medical, Dr. Applegate primarily provides abortion care. He also occasionally provides well-women exams, pap smears, and contraception.

Statutory Basis

10. This Petition is based on Section 458.331, Florida Statutes, which provides the grounds for disciplinary action against physicians who are licensed to practice medicine in the state. The Board has the authority to interpret this statute and its related regulations because the Board is responsible for disciplining, licensing, and regulating physicians.

11. Specifically, Petitioner seeks clarification of Fla. Stat. § 458.331(z), which states that "[p]rocurring, or aiding or abetting in the procuring of, an unlawful termination of pregnancy" constitutes grounds for the Board to take disciplinary action against a physician.

¹ Pursuant to Fla. Admin. Code r. 28-106.106(2), Petitioner's written request to be represented by qualified representatives is pending.

12. The Board has promulgated disciplinary guidelines that shall be imposed upon licensees. *See* Fla. Admin. Code r. 64B8-8.001. The recommended penalty for a first offense under Fla. Stat. § 458.331(z) ranges from a one-year suspension to be followed by a period of probation to license revocation or denial and an administrative fine from \$5,000 to \$10,000. The penalties increase after additional offenses. Fla. Admin. Code r. 64B8-8.001.

13. This Petition is further based on Section 390.0111, Florida Statutes, entitled “Termination of pregnancies.” Defining the meaning of an “unlawful termination of pregnancy” pursuant to Fla. Stat. § 458.331(z) would require the Board to consult Florida’s laws on abortion, including Fla. Stat. § 390.0111. Given that the Board may discipline a provider for an “unlawful termination of pregnancy,” Fla. Stat. § 458.331(z), it follows that the Board may interpret Fla. Stat. § 390.0111 to determine what constitutes an “unlawful termination of pregnancy.”

14. Under Fla. Stat. § 390.0111, Florida law states: “A physician may not knowingly perform or induce a termination of pregnancy if the physician determines the gestational age of the fetus is more than 6 weeks” unless certain limited exceptions are met. Fla. Stat. § 390.0111(1) (“Six-Week Ban”). The Six-Week Ban went into effect on May 1, 2024.

15. The Six-Week Ban imposes criminal penalties on physicians who violate the ban. A physician need not first be criminally investigated or convicted under the Six-Week Ban before the Board can bring disciplinary action for an unlawful termination of pregnancy pursuant to Fla. Stat. § 458.331(z). *See Pendergraft v. Dep’t of Health, Bd. of Med.*, 19 So. 3d 392, 394 (Fla. Dist. Ct. App. 2009) (“[T]here is no explicit statutory requirement that a licensee be adjudicated guilty of the acts specified in the penal statutes before disciplinary action may be instituted.”). Thus, the Board may independently interpret what constitutes an

“unlawful termination of pregnancy,” without an investigation, prosecution, or conviction under the criminal penalties in the Six-Week Ban.

16. As an abortion provider in Florida, Dr. Applegate is substantially affected by the statutes at issue in this Petition and their related administrative regulations and could be subject to professional discipline by the Board. *See* Fla. Stat. § 120.565.

Requested Declaration

17. Dr. Applegate petitions the Board for a declaratory statement that states that he may provide abortion care through and including six weeks and six days of pregnancy.

Discussion

18. As stated, Florida law bans abortion when “the gestational age of the fetus is more than 6 weeks.” Fla. Stat. § 390.0111(1). “Gestational age” is not defined in the Six-Week Ban or elsewhere in Florida statutes. *See* Fla. Stat. § 390.011. To Petitioner’s knowledge, the term “gestational age” has not been defined by a Florida court or by the Board.

19. Florida law separately defines “gestation” as “the development of a human embryo or fetus as calculated from the first day of the pregnant woman’s last menstrual period.” Fla. Stat. § 390.011(7).

20. Out of an abundance of caution, Dr. Applegate currently provides abortion care only through six weeks and zero days of pregnancy.

21. But the most reasonable interpretation of the Six-Week Ban is that it allows him to provide abortion care through six weeks and six days of pregnancy. Dr. Applegate contends that providing care through six week and six days weeks does not constitute an “unlawful termination of pregnancy” under Fla. Stat. § 458.331(z). He petitions the Board for a final order to this effect.

22. The Six-Week Ban uses “weeks” as the unit of time, and not “days.” Because the statute uses weeks as the unit of time, what counts as “more” than six weeks should also be measured in weeks, not days. Therefore, he submits that “more than six weeks” allows lawful care up until, but not including, seven weeks, zero days (or said another way: through and including six weeks and six days).

23. Dr. Applegate has encountered a contrary view that the Six-Week Ban prohibits care after six weeks and zero days. Given this difference in interpretation, he has cautiously restricted his own practice to the most conservative approach—six weeks and zero days—even though he believes the law allows for care through and including six weeks and six days and asks the Board to clarify.

24. In support of his interpretation, Dr. Applegate submits that a given length of time may be described using “ordinal” or “cardinal” numbers. For example, “six” weeks is a cardinal number. The “sixth” week or the “seventh” week are ordinal numbers. If the Six-Week Ban stated that abortion is prohibited through “the end of the sixth week,” it would be clear that providing abortion care at the start of the seventh week, or beginning at six weeks and one day, would be unlawful. This is how Florida previously calculated trimesters when abortion was banned only in the third trimester. *See* Fla. Stat. § 390.011(14). If the statute stated that abortion was prohibited at “more than six weeks and zero days,” then six weeks and one day would be unlawful. However, because the Six-Week Ban provides that abortions are unlawful if performed when “the gestational age of the fetus is more than 6 weeks,” it is logical to conclude that “weeks” are the relevant unit of measurement and therefore, it is not until a full seven weeks of pregnancy that an abortion is unlawful.

25. A review of other state statutes further illustrates the lack of clarity in Florida's Six-Week Ban. Some other state statutes that regulate abortion based on a certain number of weeks are more precise than Florida's Six-Week Ban about when abortion becomes unlawful.

26. For example, North Carolina allows abortion "[d]uring the first 12 weeks of a woman's pregnancy." N.C. Gen. Stat. § 90-21.81B(2). It is also legal "after the twelfth week and through the twentieth week . . . when the woman's pregnancy is a result of rape or incest." N.C. Gen. Stat. § 90-21.81B(3). This language is clear that abortion is legal through twelve weeks and zero days and becomes illegal at twelve weeks and one day, except for in cases of rape or incest.

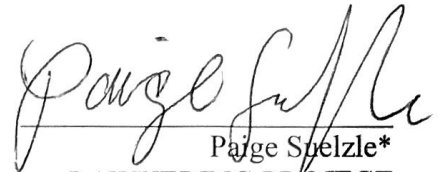
27. Another example is Pennsylvania. Pennsylvania prohibits abortion "when the gestational age of the unborn child is 24 or more weeks." 18 Pa. Cons. Stat. § 3211(a). This language is clear that abortion is legal in Pennsylvania through 23 weeks and six days and is banned at 24 weeks and zero days and beyond. In other words, Florida's Six-Week Ban does *not* say abortion is banned at "6 or more weeks."

28. The differences in how these statutes are worded as compared to Florida's Six-Week Ban help demonstrate that "more than 6 weeks" in Florida law means abortion care can be provided through six weeks and six days.

29. In sum, Dr. Applegate seeks clarification of Fla. Stat. § 458.331(z).

WHEREFORE, Petitioner respectfully requests that the Board issue a Final Order declaring that Dr. Applegate may provide abortion care through and including six weeks and six days of pregnancy.

Respectfully submitted this 6th day of December, 2024.



Paige Spelzle*
LAWYERING PROJECT
158 SW 148th Street #1198
Burien, WA 98166
Phone: (347) 515-6073
Fax: (646) 480-8622
pspelzle@lawyeringproject.org


Jamila Johnson*
LAWYERING PROJECT
3157 Gentilly Blvd. #2231
New Orleans, LA 70122
Phone: (347) 706-4981
Fax: (646) 480-8622
jjohnson@lawyeringproject.org

Erica Mallon
Fla. Bar No. 106315
Phone: (412) 496-0474
erica.c.mallon@gmail.com

**Request to serve as a qualified representative pending*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2024, a true and correct copy of the foregoing Petition for Declaratory Statement was mailed to the Department of Health, Board of Medicine, 4052 Bald Cypress Way, Bin C-03, Tallahassee, FL 32399-3253.


Paige Suelzle