

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-13543

STEVEN W. HERNANDEZ,
DAVID DRWENCKE,

On behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

FLORIDA BOARD OF BAR EXAMINERS,
MICHELE A. GAVAGNI,

Executive Director of the Florida Board of Bar Examiners
in both her individual and official capacity as such,

Defendants-Appellees,

THE SUPREME COURT OF FLORIDA,

Defendant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00247-AW-MAF

Before JILL PRYOR, LUCK, and BRASHER, Circuit Judges.

LUCK, Circuit Judge:

Two experienced attorneys, Steven Hernandez (a New Jersey-licensed practitioner) and David Drwencke (a Michigan-licensed practitioner), sought admission to the Florida Bar. Florida has a rule that anyone who's been licensed to practice law for more than twelve months must pay more to apply for admission than inexperienced applicants. Viewing the rule as an unconstitutional facial and practical-effect burden on out-of-state applicants under the dormant Commerce Clause, Hernandez and Drwencke sued to enjoin the Florida Board of Bar Examiners and its executive director, Michele Gavagni, from enforcing the experienced-applicant rule. The district court dismissed the facial claim and granted summary judgment for Gavagni on the practical-effect claim, so they appealed.

We affirm. The board is an arm of the state of Florida, so the Eleventh Amendment bars the claim against it. And the claim against Gavagni fails on the merits. The experienced-applicant rule draws no line based on where an applicant is from, so it doesn't facially discriminate. And the undisputed evidence showed that the practical effect of the rule was to burden in-state and out-of-state applicants the same, and that the board proposed—and the Florida Supreme Court adopted—the rule for a valid purpose. The district court correctly brought this suit to an end.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Anyone seeking admission to the Florida Bar must pay a fee to the Board of Bar Examiners. Fla. Bar Admission R. 2-23. Those not admitted to any bar for more than twelve months pay \$700 to \$1,000—\$700 if they apply soon after starting law school, and more the longer they wait. *Id.* R. 2-23.1–3. “Experienced applicants,” who have been members of another bar for more than twelve months, pay \$1,600 to \$3,000, the amount increasing with their years of admission. *Id.* R. 2-23.4.

Hernandez and Drwencke have been admitted to the bars of New Jersey and Michigan since 2004 and 2016, respectively. When Hernandez applied to the Florida Bar in 2020, he paid the maximum fee of \$3,000. He postponed sitting for the bar exam and, instead, sued the board and Gavagni in her official and individual capacities. Drwencke wanted to apply to the Florida Bar in 2021, but balked when he learned that his fee would be \$2,000. Unwilling to pay the fee, Drwencke joined Hernandez’s lawsuit.

A. *The Complaints*

Hernandez and Drwencke’s first amended complaint alleged that the experienced-applicant rule violated the dormant Commerce Clause “either facially or in practical effect.” Through their single dormant Commerce Clause claim, they sought to enjoin the board and Gavagni from enforcing the rule. Hernandez also sought damages—a refund. But the district court dismissed the action. *Hernandez v. Fla. Bd. of Bar Exam’rs*, 640 F. Supp. 3d 1246,

1249–52 (N.D. Fla. 2022). Drwencke lacked standing to seek an injunction against either defendant because he hadn’t alleged a definite plan to apply to the Florida Bar, and he lacked standing to seek damages because he’d never paid the fee. *Id.* at 1249. Hernandez, for his part, lacked standing to seek an injunction against either defendant because he’d already paid the fee. *Id.* at 1249–50. And although he had standing to seek damages, the board and Gavagni in her official capacity had Eleventh Amendment immunity, while Gavagni in her individual capacity had qualified immunity. *Id.* at 1250–52.

Hernandez and Drwencke moved for leave to file a second amended complaint, with mixed success. *Hernandez v. Fla. Bd. of Bar Exam’rs*, No. 4:21-cv-247, 2022 WL 20288237, at *1–2, *10 (N.D. Fla. July 7, 2022). After reviewing the proposed second amended complaint, the district court again concluded that Hernandez didn’t have standing to seek an injunction against either defendant and that his claim for damages was barred by sovereign and qualified immunity. *Id.* at *2–5. Drwencke, however, had adequately pleaded his plan to apply to the bar, entitling him to seek prospective relief. *Id.* at *2. He still couldn’t obtain any relief against the board, which was immune under the Eleventh Amendment. *Id.* at *3–4. And, of course, he couldn’t obtain damages against Gavagni in her individual capacity because he’d never paid the fee. *Id.* at *2. Nevertheless, the district court ruled, if Drwencke’s dormant Commerce Clause claim succeeded—on either a facial or a practical-effect theory—then he could obtain an injunction against Gavagni in her official capacity. *See id.* at *4–5 (first citing *Pennhurst State Sch.*

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✂ *Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984); and then citing *Ex parte Young*, 209 U.S. 123 (1908)).

But the claim couldn’t succeed—at least not as pleaded. *Id.* at *5–8. The experienced-applicant rule wasn’t facially discriminatory, the district court explained, because it made no distinction “based on the geographic origin of [a] regulated activity (here, legal services).” *Id.* at *6. “An applicant living in Florida with a Wyoming bar license,” for instance, “would have to pay the [higher] fee[,] [b]ut an applicant living in Rhode Island with no prior bar admissions would not[.]” *Id.* (citing Fla. Bar Admission R. 2-23.4) (citation modified). And if the rule discriminated in practical effect, the complaint didn’t sufficiently allege how. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Still, the district court couldn’t say that “any” further amendment would be futile, so it granted leave to amend and gave Hernandez and Drwencke “one final opportunity . . . to state a dormant Commerce Clause claim.” *Id.* at *8.

That final opportunity did the trick. The third amended complaint pleaded “just barely” enough detail for Drwencke to state a practical-effect dormant Commerce Clause claim for injunctive relief against Gavagni in her official capacity. Otherwise, the district court’s previous rulings stood. Hernandez continued to lack standing to seek injunctive relief because he’d already paid the fee. He remained barred from seeking damages. And the facial dormant Commerce Clause theory remained foreclosed.

B. Summary Judgment

After discovery, Drwencke and Gavagni cross-moved for summary judgment on the remaining practical-effect dormant Commerce Clause claim. The district court denied Drwencke's motion and granted Gavagni's motion, looking to the three factors we set out in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011). *Hernandez v. Fla. Bd. of Bar Exam'rs* (*Hernandez IV*), No. 4:21-cv-247, 2024 WL 2156499, at *4–5 (N.D. Fla. Apr. 5, 2024) (denying Drwencke's motion for summary judgment); *Hernandez v. Fla. Bd. of Bar Exam'rs* (*Hernandez V*), 746 F. Supp. 3d 1310, 1314–18 (N.D. Fla. 2024) (granting Gavagni's motion for summary judgment).

The first two factors favored Gavagni, the court explained, because the board's undisputed data showed that between 2008 and 2022, around fifty-five percent of experienced applicants had out-of-state mailing addresses. *See Hernandez V*, 746 F. Supp. 3d at 1314–15 (citing record evidence). It was clear, then, that the experienced-applicant rule neither “eliminated” out-of-state applicants from the market—the first factor—nor “impose[d] costs” that they alone had to bear—the second factor. *Id.* (quoting *Locke*, 634 F.3d at 1193). Other undisputed evidence from the board showed that the rule hadn't been implemented to serve “protectionist purposes”—the third factor—but to offset the higher costs of investigating experienced applicants. *Id.* at 1315–16 (quoting *Locke*, 634 F.3d at 1193). Even drawing all inferences for Drwencke, the court concluded, it was undisputed that the experienced-applicant rule didn't discriminate in practical effect. *Hernandez V*, 746 F. Supp. 3d

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at 1314–18; *see also Hernandez IV*, 2024 WL 2156499, at *4–5 (denying Drwencke’s summary-judgment motion for the same reasons).

C. *The Final Amended Complaint*

With Drwencke’s practical-effect claim disposed of, the district court directed the parties to prepare for trial on any remaining claims. Hernandez and Drwencke instead amended their complaint one last time to “disavow” any claims not already adjudicated, clearing the way for the district court to enter final judgment for the defendants.

They then appealed. They contend that the experienced-applicant rule violates the dormant Commerce Clause both facially and in practical effect. Accordingly, they urge us to reverse the dismissal of their facial claim and reverse the summary judgment on their practical-effect claim.

II. STANDARD OF REVIEW

We review de novo a dismissal on Eleventh Amendment immunity grounds and for failure to state a claim. *Nichols v. Ala. State Bar*, 815 F.3d 726, 732 n.4 (11th Cir. 2016); *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009). We also review de novo a summary judgment, drawing all inferences for the non-movant. *Sutton v. Wal-Mart Stores E., LP*, 64 F.4th 1166, 1168 (11th Cir. 2023).

III. DISCUSSION

Hernandez and Drwencke’s dormant Commerce Clause claim can’t proceed against the board and fails against Gavagni.

The board, an arm of the state of Florida, is immune from suit entirely. And Gavagni faces no liability in either her official or individual capacity because the experienced-applicant rule doesn't discriminate facially or in practical effect.

A. *The Board's Eleventh Amendment Immunity*

The district court correctly concluded that Hernandez and Drwencke's claim against the board was barred by the Eleventh Amendment. The Eleventh Amendment bars federal suits against an "arm of the [s]tate," including the state's "agents and instrumentalities[.]" *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc) (first quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); and then citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–30 (1997)). "[W]hether an entity is an 'arm of the [s]tate' for Eleventh Amendment purposes is ultimately a question of federal law" to be "answered . . . [by] considering provisions of state law." *Id.* at 1309. Our analysis is "function specific," looking to the "particular function in which the defendant was engaged" when it allegedly wronged the plaintiff. *Freyre v. Chronister*, 910 F.3d 1371, 1380 (11th Cir. 2018) (quoting *Manders*, 338 F.3d at 1308).

"[F]our factors . . . determine whether an entity is an 'arm of the [s]tate' in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the [s]tate maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Manders*, 338 F.3d at 1309 (citing *Miccosukee Tribe of Indians of Fla. v. Fla. State*

Athletic Comm’n, 226 F.3d 1226, 1231–34 (11th Cir. 2000)). The first and fourth factors are the “most important,” *Monroe v. Fort Valley State Univ.*, 93 F.4th 1269, 1279 (11th Cir. 2024), but the fourth factor “is certainly not necessary for a finding of immunity” when the other three favor it, *Austin v. Glynn Cnty.*, 80 F.4th 1342, 1350 (11th Cir. 2023) (citation modified).

Hernandez and Drwencke contend that they can sue the board because it wasn’t acting as an “arm of the state” when it proposed the experienced-applicant rule, but they’re mistaken. The *Manders* factors amply support the board’s immunity.

First, Florida law defines the board as an arm of the state for all purposes, including proposing the experienced-applicant rule. The board is part of the Florida Supreme Court, which is a “department of the State of Florida” entitled to Eleventh Amendment immunity. *Uberoi v. Sup. Ct. of Fla.*, 819 F.3d 1311, 1313–14 (11th Cir. 2016). The Court possesses “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.” Fla. Const. Art. V, § 15. It exercises that jurisdiction through the Florida Bar and the board. Because the bar is “an official arm of the [C]ourt,” R. Regulating Fla. Bar pmbl., and the Court is an arm of the state, *Uberoi*, 819 F.3d at 1313–14, we’ve held that the bar is entitled to the same immunity as the Court, *Kaimowitz v. Fla. Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993).

The same logic applies to the board: it’s an “administrative agency of the Supreme Court of Florida created by the court to implement the rules relating to bar admission.” Fla. Bar Admission

R. 1-13. According to the Florida Supreme Court, the board is “an attach[é]” and “an arm of th[e] Court . . . answerable solely to [the Court].” *In re Fla. Bd. of Bar Exam’rs*, 353 So. 2d 98, 100 (Fla. 1977). Since the board is an arm of the Court, and the Court is an arm of the state, the board is entitled to Eleventh Amendment immunity just like the bar. The “most important” first factor favors the board. *See Monroe*, 93 F.4th at 1279.

Second, in proposing the experienced-applicant rule—the “particular function” Hernandez and Drwencke attack—the board is almost completely controlled by the Florida Supreme Court. As the text of the rule states, “[a]ll fees are set by order of the Supreme Court of Florida and are subject to change by published order of the court.” Fla. Bar Admission R. 2-23; *id.* R. 1-51.1 (“Subject to the approval of the court, the board may classify applicants and registrants, and fix the charges, fees, and expenses that will be paid by each.”). If the Court declines to approve a fee proposed by the board, the board has no recourse. *Cf. id.* R. 2-23; *id.* R. 1-51.1 (fees “[s]ubject to the approval of the court”).

Moreover, the structure of the board makes clear that it’s controlled by the Florida Supreme Court no matter what function it fulfills. The board exists only because the Court’s bar-admission rules say it does—rules that the Court “review[s], approve[s], and promulgate[s]” itself. Fla. Bar Admission R. 1-12. Those same rules determine the scope of the board’s single duty: to implement the bar-admission rules. *Id.* R. 1-13. And the board is “answerable solely to [the Court]” by virtue of “th[e] Court’s constitutionally

endowed power[.]” *In re Fla. Bd. of Bar Exam’rs*, 353 So. 2d at 100. The Court appoints all the board’s members, Fla. Bar Admission R. 1-20, approves the board’s budget, *id.* R. 1-51, and reviews the results of the board’s annual audit, *id.* R. 1-52. At every constitutional and regulatory turn, the board answers to the state.

Third, the board effectively derives its funds from the state. It’s true, of course, that applicant fees are the immediate source of the board’s funds. *Id.* R. 1-51.1. But that doesn’t “tip the balance against immunity” because the board’s authority to collect those fees—and its duty to pay its own expenses—come from the state. *See Ross v. Jefferson Cnty. Dep’t of Health*, 701 F.3d 655, 660 (11th Cir. 2012) (citation modified); *see also id.* (“[That the] [c]ounty fund[s] . . . the [defendant] does not ‘tip the balance’ against immunity because . . . state law requires it to do so.”). Even an entity that “raises its own funds to pay its expenses” is an “arm of the state [when] the state controls its fiscal life.” *Miccosukee Tribe*, 226 F.3d at 1233.

Critically, the indicia of the state’s control over an entity’s fiscal life include whether the state reviews and approves the entity’s budget. *Williams v. Dist. Bd. of Trs. of Edison Cmty. Coll.*, 421 F.3d 1190, 1194 (11th Cir. 2005) (“Although [the defendant community college] is not exclusively funded by the state, state approval of institutional budgets evidences state control.”); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985) (“Where the budget of an entity is submitted to the state for approval, this suggests that the entity is an agency of the state[.]”). In *Fouche*, for example, we held that

a self-funding and self-sufficient park authority was an “arm of the state” because the authority had to submit its budget to the state legislature and its financial records to the state auditor. *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520–22 (11th Cir. 1983).

Here, as we’ve explained, the Florida Supreme Court—an arm of the state—reviews and approves the board’s budget and the fees the board uses to generate income. Fla. Bar Admission R. 1-51. If the Court so desired, it could refuse to approve board budgets that do or don’t include funding for certain projects or employees, force the board to set all its fees to zero, and so on. *See id.* This is ample evidence that the state controls the board’s fiscal life.

Because the first three factors favor the board’s Eleventh Amendment immunity, it’s “certainly not necessary” to reach the fourth. *See Austin*, 80 F.4th at 1350. That’s because actual liability for the state “is not determinative of whether a governmental entity should enjoy Eleventh Amendment immunity,” *Ross*, 701 F.3d at 660, and the Supreme Court has “[n]ever” required it as a condition, *Lake v. Skelton*, 840 F.3d 1334, 1344 (11th Cir. 2016) (quoting *Manders*, 338 F.3d at 1327–28 & n.51). So, we won’t belabor the point: the board is an “arm of the state” and therefore enjoys Eleventh Amendment immunity from Hernandez and Drwencke’s suit.

B. *The Commerce Clause*

With the board shielded, Hernandez and Drwencke’s dormant Commerce Clause claim lies against Gavagni only.¹ It fails.

The Commerce Clause empowers Congress to regulate commerce among the several states. U.S. Const. Art. I, § 8, cl. 3. But the clause also restrains the states even when Congress hasn’t acted, imposing “an implicit or ‘dormant’ limitation” on the states’ power to regulate interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989). “[M]odern” dormant Commerce Clause doctrine is principally “concern[ed] about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citation modified). The doctrine polices that concern by asking whether a law “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.” *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 99

¹ Unlike a suit against the board, a suit against Gavagni in her official capacity for an injunction or in her individual capacity for damages isn’t barred by the Eleventh Amendment. See *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999) (explaining that *Ex parte Young* creates “a long and well-recognized exception” to Eleventh Amendment immunity “for suits against state officers seeking *prospective* equitable relief to end *continuing* violations of federal law” (citing *Ex parte Young*, 209 U.S. 123 (1908))); *Hobbs v. Roberts*, 999 F.2d 1526, 1528 (11th Cir. 1993) (“The Eleventh Amendment protects no personal assets in ‘individual’ or ‘personal’ capacity suits in federal court.” (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991))).

(1994) (citation modified). Discrimination “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Id.*

Dormant Commerce Clause challenges fall into two “tiers.” *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002) (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986)). If a challenged law discriminates facially or in practical effect, we usually deem it unconstitutional without “further inquiry.” *Id.* at 1109 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579). A law discriminates facially when it “discriminates against interstate commerce” by its plain text, *e.g.*, *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1243 (11th Cir. 2012), irrespective of its purpose or justification, *Or. Waste Sys., Inc.*, 511 U.S. at 100. It discriminates in practical effect when, despite neutral text, it still operates to favor in-state interests over out-of-state ones. *Locke*, 634 F.3d at 1192–93. If, however, the law “advances a legitimate local interest” and only indirectly burdens interstate commerce, then we move from the first tier to the second. *Fla. Transp. Servs., Inc.*, 703 F.3d at 1244. At the second tier, the challenged law is constitutional unless the burden it imposes “clearly exceeds the local benefits.” *Id.* (quoting *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008)); *see generally Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Because the dormant Commerce Clause “is not so rigid as to be controlled by the form by which a [s]tate erects barriers to commerce,” *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201

(1994), “‘no clear line’ separat[es] discriminatory from non-discriminatory state regulations,” *Fla. Transp. Servs., Inc.*, 703 F.3d at 1244 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579). For each challenged law, we perform a “sensitive, case-by-case analysis[.]” *West Lynn Creamery, Inc.*, 512 U.S. at 201. Generally, though, a discriminatory law acts against either out-of-state actors or out-of-state articles of commerce.

By actors, we mean the businesses that wish to compete in an in-state market. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (striking down a Florida statute that barred out-of-state bank holding and trust companies from the in-state investment-advisory market). And by articles of commerce, we mean the goods and services for which that in-state market exists. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978) (holding that a state may not discriminate against out-of-state articles of commerce based on their origin); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573–74, 577 n.10 (1997) (holding that services can be articles of commerce).

Whatever form the alleged discrimination takes, we wield our power to enforce the dormant Commerce Clause with “extreme caution[.]” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023) (citation modified). It isn’t a “roving license for federal courts to decide what activities are appropriate for state and local government to undertake[.]” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). Accordingly, we’ll hold a law unconstitutional “only ‘where the infraction

is clear.” *Nat’l Pork Producers Council*, 598 U.S. at 390 (quoting *Conway v. Taylor’s Executor*, 66 U.S. (1 Black) 603, 634 (1862)). A law isn’t necessarily nondiscriminatory simply because it “applies alike to the people of all the [s]tates,” but neither is it discriminatory simply because it has “incidental negative effects on *some* . . . out-of-state market participants[.]” *Fla. Transp. Servs., Inc.*, 703 F.3d at 1244, 1247 (citation modified).

Hernandez and Drwencke argue that the experienced-applicant rule discriminates both facially and in practical effect against out-of-state actors and articles alike. But, as the district court ruled, they didn’t state a facial claim and didn’t create a dispute of material fact on their practical-effect claim.

1. *The Facial Claim*

According to Hernandez and Drwencke, the experienced-applicant rule facially discriminates by targeting either out-of-state experienced applicants—an actor theory—or out-of-state law licenses—as they’d have it, an article-of-commerce theory. In most of their briefing to the district court, they argued only the former theory; now, they argue only the latter. Parties may not raise “entirely new categor[ies] of law” or a “wholly different legal framework” for the first time on appeal, *Gould v. Interface, Inc.*, 153 F.4th 1346, 1357 (11th Cir. 2025), but both theories fail anyway.

a. The Actor Theory

As the district court explained, Hernandez and Drwencke’s facial actor theory didn’t succeed because the text of the experi-

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enced-applicant rule doesn't distinguish between experienced applicants based on their state of origin. *Hernandez*, 2022 WL 20288237, at *6. Whether a law facially discriminates against out-of-state actors depends on whether it specifies different treatment for out-of-state actors.

For example, Florida's old regulatory scheme prohibiting out-of-state but not in-state wineries from delivering alcohol directly to consumers was facially discriminatory. *Bainbridge*, 311 F.3d at 1109. But a Florida statute "expressly regulat[ing] all and only 'business[es] operating in [Florida]—both local and out-of-state"—wasn't. *Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dep't of Health*, 50 F.4th 1126, 1142 (11th Cir. 2022); see *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 942–43 (11th Cir. 2013) (same). Likewise, in *Locke*, we held that Florida's "interior design license requirement" didn't facially discriminate because "[t]he statutory text provide[d] that both Florida and out-of-state interior designers need a Florida license to practice [interior design]." 634 F.3d at 1192.

The experienced-applicant rule works the same way as the statutes in *Norwegian Cruise Line Holdings* and *Locke*. By its terms, the rule demands a higher fee of all "[a]pplicants who have been admitted to the bar in any jurisdiction for a period in excess of [twelve] months"—in other words, all experienced applicants. Fla. Bar Admission R. 2-23.4. The rule doesn't make exceptions for Floridians. See generally Fla. Bar Admission R. 2-23. A Floridian barred

for two years in Wyoming would pay the higher fee; a new applicant from Rhode Island wouldn't. *Hernandez*, 2022 WL 20288237, at *6. The experienced-applicant rule therefore doesn't facially discriminate against out-of-state actors. *See Norwegian Cruise Line Holdings Ltd.*, 50 F.4th at 1142; *Locke*, 634 F.3d at 1192.

For the same reason, other circuits have rejected facial claims against analogous attorney-licensing rules. The Third Circuit, for instance, rejected a facial challenge to a Pennsylvania rule limiting admission by motion solely to attorneys barred in reciprocal states. *Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Castille*, 799 F.3d 216, 218–19, 225 (3d Cir. 2015). Two attorneys admitted in non-reciprocal states alleged that the rule facially violated the dormant Commerce Clause by excluding residents from those states. *Id.* That challenge failed, the Third Circuit explained, because the rule “does not classify attorneys based on residency, but rather, their state of bar admission[.]” *Id.* at 219, 225; *see also Heffner v. Murphy*, 745 F.3d 56, 73–74 (3d Cir. 2014) (holding that, since “[a]ny individual or entity [could] obtain the required license to operate a funeral home” without needing to satisfy any requirement of “state residency or citizenship,” a state statute imposing restrictions on funeral director licenses wasn't facially discriminatory). The Ninth Circuit reached the same conclusion with respect to a near-identical Arizona reciprocity rule:

If a citizen of Arizona is admitted to the bar in a state that does not share reciprocity with Arizona, then the attorney is not eligible to be admitted to the Arizona

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Bar on motion, irrespective of the attorney's residency or citizenship status.

[. . .]

[T]he . . . [r]ule does not discriminate against out-of-state interests and favor in-state interests. Arizona requires the same of its citizens as it does citizens of other states.

Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Berch, 773 F.3d 1037, 1046, 1049 (9th Cir. 2014).

Hernandez and Drwencke argue that the Pennsylvania and Arizona reciprocity rules “simply *classify* applicants by virtue of where they obtained their law license,” whereas the experienced-applicant rule “*taxes*” them. But that’s a distinction without a difference. Practically speaking, any state-created barrier to interstate commerce surmountable by payment is a surcharge or “tax.” A rule requiring an out-of-state attorney to either bar himself in a reciprocal state or retake the bar in the target state would certainly seem to “tax” that attorney. Yet that didn’t deter the Third and Ninth Circuits from concluding, as we do here, that an attorney-licensing rule doesn’t facially discriminate against out-of-state attorneys when the rule is, by its text, residency- and origin-neutral.

Floridian or out-of-stater, every experienced applicant pays the higher fee. The district court correctly determined that the actor theory can’t sustain Hernandez and Drwencke’s facial-discrimination claim.

b. The Article-of-Commerce Theory

On appeal, Hernandez and Drwencke recast the experienced-applicant rule as a surcharge on an article of commerce: the out-of-state law license itself. “Law licenses (and legal services provided pursuant to them),” they claim, “are quintessential ‘economic interests.’” Ostensibly, when experienced applicants seek to “bring” their out-of-state law licenses into Florida, they pay more under the experienced-applicant rule. So, Hernandez and Drwencke contend, the experienced-applicant rule unconstitutionally discriminates against those interests just like any law that “tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the [s]tate.” *Or. Waste Sys., Inc.*, 511 U.S. at 99 (quoting *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)).

The facial article-of-commerce theory fails to sustain a dormant Commerce Clause claim for two reasons. First, facial-discrimination theories depend on the plain text of the law. *E.g.*, *Fla. Transp. Servs., Inc.*, 703 F.3d at 1243. A facial article-of-commerce theory, then, hinges on whether the plain text picks out an article to favor or disfavor based on origin. In *Oregon Waste*, for instance, Oregon imposed a surcharge on the disposal of solid waste in its landfills. 511 U.S. at 99. That surcharge was “almost three times greater” per ton of out-of-state waste than per ton of in-state waste. *Id.* “The statutory determinant for which fee applie[d]” was “whether or not the waste was ‘generated out-of-state.’” *Id.* (quoting Or. Rev. Stat. § 459.297(1) (1991)).

Indeed, it appears that the Supreme Court has never held that a law facially discriminates against an article of commerce unless the law's plain text made it possible to identify the article favored (or disfavored) by origin. *See, e.g., Chem. Waste Mgmt., Inc.*, 504 U.S. at 342 (holding that Alabama's surcharge on the disposal of "hazardous waste generated in [s]tates other than Alabama" was facially discriminatory); *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (holding that an Oklahoma coal-supply law "on its face . . . discriminate[d] against interstate commerce" where "the [a]ct expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other [s]tates"). In all these cases, the challenged law named the article—waste, coal, and the like—and drew a line through it by origin, sparing the in-state article and burdening the out-of-state one.

The experienced-applicant rule doesn't mark any article for worse treatment based on its origin. It's triggered only when an experienced applicant asks Florida for something his out-of-state license never conferred: authorization to practice in Florida's legal market. That an experienced applicant pays more for that authorization is a consequence of his experience, not the origin of his existing license. A lawyer barred in Michigan for eleven months wouldn't pay the higher fee. *See* Fla. Bar Admission R. 2-23.4. He'd have to be barred for over another month for the higher fee to kick in. *Id.*

Nor does an out-of-state license lose its value once it crosses into Florida. Instead, an experienced applicant can keep using his

out-of-state license to practice his licensing state’s law—so long as he doesn’t practice Florida law. *Fla. Bar re Advisory Op.–Out-of-State Att’y Working Remotely from Fla. Home*, 318 So. 3d 538, 542 (Fla. 2021) (approving proposed advisory opinion). Neither the experienced-applicant rule nor any other Florida law requires the experienced applicant to pay the higher fee—or any fee—simply to have and use his out-of-state license within Florida. *See id.*

To get around these facts, Hernandez and Drwencke conflate out-of-state law licenses with out-of-state “law practice[s]” and “established business interests” writ large. The experienced-applicant rule, they complain, effectively taxes experienced applicants when they try to move their out-of-state “practices” or “business[es]” into Florida, facially discriminating against those things based on their origin. Hernandez and Drwencke were entitled to plead that the experienced-applicant rule has some downstream consequence, but that’s not a facial attack; the text of the rule doesn’t mention “practices” or “businesses.” That’s simply an attack on the practical effect of the rule, and must be treated as such.

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Hernandez and Drwencke’s facial article-of-commerce theory has a second problem. Law licenses aren’t articles of commerce because they’re insufficiently similar to each other. “[A]ny notion of discrimination assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). “This is so for the simple reason that [a] difference in products may mean that . . . different entities serve different markets, and would

continue to do so even if the supposedly discriminatory burden were removed.” *Id.* at 299. When there’s no competition between the “supposedly favored and disfavored entities in a single market,” there can be no discrimination. *Id.* at 300.

In the Supreme Court’s article-of-commerce cases, articles of commerce are very often more than substantially similar. They’re generally perfectly or near-perfectly fungible products and services; there’s effectively a single nationwide market for them. *See, e.g., Or. Waste Sys., Inc.*, 511 U.S. at 101 n.5 (solid waste); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (1994) (solid-waste disposal services); *Chem. Waste Mgmt., Inc.*, 504 U.S. at 342 (hazardous waste); *Wyoming*, 502 U.S. at 455 (coal). And that makes sense, especially with respect to facial claims. When two articles are materially different, there’s a “reason[] apart from [their] origin” why state law can treat them differently, *Or. Waste Sys., Inc.*, 511 U.S. at 101 n.5, and they probably serve different markets, *see Tracy*, 519 U.S. at 299. *Tracy*, for example, held that natural gas “bundled with . . . services and protections” was a different product from “unbundled” natural gas because bundled gas served the residential-consumer market and unbundled gas served the large-volume industrial market. *See id.* at 293–98, 301–04. The products were therefore insufficiently similar to ground a discrimination claim. *See id.*

The same is true of law licenses. Because “the licensing and regulation of lawyers has been left exclusively to the [s]tates . . . within their respective jurisdictions,” *Leis v. Flynt*,

439 U.S. 438, 442 (1979), a law license is never anything more than a state’s authorization to enter that state’s legal market. So, not only are law licenses not fungible or nearly fungible, they’re not tradable or transferable. Yes, lawyers themselves—actors, not articles of commerce—compete with each other in providing legal services. And a law license allows a lawyer to provide legal services in a single state’s market. But a law license isn’t an article or transaction that enables lawyers to compete in what is effectively a single nationwide market for legal services. *See Tracy*, 519 U.S. at 299. An out-of-state law license doesn’t allow a lawyer to compete in Florida, and vice versa.

Hernandez and Drwencke’s facial article-of-commerce theory thus fails. Not only does the experienced-applicant rule not draw lines between articles of commerce based on their origin, but it doesn’t concern articles of commerce.

2. *The Practical-Effect Claim*

Of course, the failure of Hernandez and Drwencke’s facial theories doesn’t alone doom their claim. A state law that doesn’t facially discriminate might nevertheless discriminate in practical effect. The experienced-applicant rule, however, does not.

Even “neutrally-worded statutes are unconstitutional under the [d]ormant Commerce Clause if they have a discriminatory [practical] effect on out-of-state residents[.]” *Locke*, 634 F.3d at 1192–93. But “[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim

of discrimination against interstate commerce.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). To “determin[e] whether a neutrally-worded state law has a discriminatory impact,” we generally consider three factors: (1) whether the state law “disproportionately” “exclude[s] a class of predominantly out-of-state [residents]’ from a particular market”; (2) whether it “imposes costs on out-of-state residents that in-state residents do not have to bear”; and (3) whether it was “motivated by protectionist purposes[.]” *Locke*, 634 F.3d at 1193–94 (first citing *Exxon Corp.*, 437 U.S. at 137 (Blackmun, J., concurring in part and dissenting in part); then citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 348–49, 351–53 (1977); and then citing *Granholm v. Heald*, 544 U.S. 460, 472 (2005)).²

None of the *Locke* factors favor Hernandez and Drwencke. Start with exclusion. The experienced-applicant rule doesn’t sufficiently “exclude” out-of-state experienced applicants from applying to the Florida Bar. *Locke* held that a law that “somewhat restrict[ed] [nonresident] entry” but “d[id] not block entry altogether” didn’t sufficiently exclude nonresidents. *Id.* at 1193. What this factor condemns is the “effective elimination” of out-of-state entrants to the market. See *Island Silver & Spice, Inc.*, 542 F.3d at 846–48. A law that merely makes entry costlier for some out-of-state actors falls well short. See *Exxon Corp.*, 437 U.S. at 126.

² *Locke* used both “disproportionately” and “predominantly,” but “disproportionately” was *Locke*’s own word and the decisional basis for that part of its analysis. See *Locke*, 634 F.3d at 1192–94.

The experienced-applicant rule doesn't "block [nonresident] entry altogether." *Locke*, 634 F.3d at 1193. The evidence adduced at summary judgment showed that, since the board began tracking experienced applicants' mailing addresses in 2008, over 7,600 experienced applicants have sought admission. *Hernandez IV*, 2024 WL 2156499, at *3 (collecting evidence). Fifty-five percent of them had out-of-state addresses. *Id.* The number of out-of-state applicants has even increased in recent years. *Id.* On this evidence, it's clear that experienced applicants—irrespective of origin—aren't excluded from applying. And since out-of-staters and Floridians make up nearly equal proportions of experienced applicants, the experienced-applicant rule doesn't even "disproportionately" impact out-of-state applicants. *Locke*, 634 F.3d at 1194.

Hernandez and Drwencke answer that *Locke* overstated the standard: complete exclusion isn't required. In support, they cite *Chemical Waste Management*, in which out-of-state hazardous waste was subjected to a higher fee but not excluded entirely from Alabama's disposal market, 504 U.S. at 342, and *Hunt*, in which the Court struck down a North Carolina law that prohibited all apple sellers from labeling apples with state-specific grades, even though that prohibition hurt but didn't fully exclude Washington apple sellers, 432 U.S. at 335. But they misread both cases. In *Chemical Waste Management*, Alabama applied the challenged surcharge to all—and only—out-of-state hazardous waste. 504 U.S. at 342. Since all out-of-state waste but no in-state waste was affected, it was necessarily true that the surcharge affected out-of-state waste

“disproportionately.” *See id.* Similarly, in *Hunt*, the label rule affected all Washington-based apple sellers, while North Carolina-based sellers were “unaffected.” 432 U.S. at 351. That’s another “disproportionate” impact on out-of-state economic interests. *See id.*

Next, the experienced-applicant rule doesn’t impose costs on out-of-state residents that Florida residents don’t have to bear. If slightly over half of experienced applicants were from out of state, then slightly under half were from Florida. So, from the proper perspective, the rule not only burdens in-state applicants, but it burdens them to roughly the same extent as out-of-staters. *See Locke*, 634 F.3d at 1193 (“Any cost imposed on out-of-state residents is one that Florida residents must also bear, because they too must obtain a license to practice interior design[.]”); *Fresenius*, 704 F.3d at 942–43 (“[B]ecause the law operates to burden in-state and out-of-state [market participants] alike, [a]ppellants fail to convince us that the [challenged law] has the practical effect of discriminating against interstate commerce.”).

In response, Hernandez and Drwencke ask us to scrutinize “the discrepancy between” the percentage of out-of-state experienced applicants (again, around fifty-five percent) and the percentage of in-state new applicants (around eighty-seven percent). “Because over [fifty-five] percent of experienced-attorney applicants—but just [thirteen] percent of new attorney applicants—live *outside* Florida,” they argue, the experienced-applicant rule “*burdens* more than *four times as many* non-Florida residents as it benefits.” Yet

that’s just the argument that “the statute is discriminatory because it will apply most often to out-of-state entities,” a sally that “avails [them] little” in substantiating a practical-effect claim. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (rebuffing this argument and holding that “[b]ecause nothing in the [challenged law] imposes a greater burden on out-of-state offerors than it does on similarly situated [in-state] offerors, we reject the contention that the [law] discriminates against interstate commerce”).

Finally, the third factor tips against Hernandez and Drwencke too. The third factor asks whether the experienced-applicant rule “was motivated by protectionist purposes.” *Locke*, 634 F.3d at 1193 (citing *Granholm*, 544 U.S. at 472). Protectionism, again, is regulation designed to benefit in-state economic interests by burdening out-of-state competitors. *Nat’l Pork Producers Council*, 598 U.S. at 369; *Davis*, 553 U.S. at 337–38.

Measured against that standard, the record discloses no protectionist motive. The summary-judgment evidence showed that the board proposed the rule, and later a fee increase, as part of an “ongoing effort to pass on costs to the specific applicants whose applications incur costs beyond the ordinary costs involved in the routine processing of a bar application.” *Hernandez V*, 746 F. Supp. 3d at 1316. There’s just more to investigate for experienced applicants than there is for new ones. The board must “obtain[] and review[] applications submitted in other jurisdictions and investigat[e] discrepancies, which may in turn require investigative

hearings,” on top of “investigating prior bar discipline and grievances, malpractice claims, and court sanctions.” *Id.*

Hernandez and Drwencke say that motive is pretextual. The fee brings in far more than the investigations cost, they point out, and the board uses the surplus to discount the fees of law students and new lawyers, who are mostly Floridians. But as we just explained, a rule that “will apply most often to out-of-state entities” isn’t discriminatory for that reason. *CTS Corp.*, 481 U.S. at 88. Neither is a discount that goes to every new applicant, resident or not. *See Fla. Bar Admission R. 2-23.1–3.* Nor does the experienced-applicant rule shield Florida lawyers from competition. After all, the experienced applicants pay the fee so that they can enter the Florida market for legal services.

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In short, there’s no dispute of material fact on any of the *Locke* factors. Applying the law to the undisputed evidence, the district court properly granted summary judgment on the practical-effect dormant Commerce Clause claim. Because the facial claim was likewise correctly dismissed, no part of the dormant Commerce Clause claim survives against Gavagni.

IV. CONCLUSION

Hernandez and Drwencke are barred by sovereign immunity from suing the board. And their dormant Commerce Clause claim against Gavagni fails on its merits. Accordingly, we affirm the judgment of the district court and deny all motions as moot.

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Opinion of the Court

24-13543

AFFIRMED.