No. 24-0052

IN THE
Supreme Court of Texas

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, THE OFFICE OF THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petitioners,

v.

RJR VAPOR CO., LLC

Respondent.

ON PETITION FOR REVIEW FROM THE
THIRD COURT OF APPEALS, AUSTIN
No. 03-22-00188-CV

RESPONSE TO THE PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE[1]

Nature of the Case:	RJR Vapor Co., LLC ("RJR Vapor") filed this case against Glenn Hegar, the Texas Comptroller of Public Accounts, his office, and the Attorney General (collectively, "the Comptroller"), after RJR Vapor paid taxes under protest on VELO oral nicotine products. SCR.8-9. It claimed VELO is not a taxable "tobacco product." CR.24; *see* Tex. Tax Code § 155.001(15)(E). It also claimed the statutory definition is unconstitutionally vague and had been applied unlawfully. CR.32. It sought a declaratory judgment, injunctive relief, and a tax refund. CR.39-40.
Trial Court:	250th Judicial District Court, Travis County The Honorable Amy Clark Meachum
Trial Court's Disposition:	The trial court held that VELO is not taxable and that RJR Vapor is entitled to a refund. CR.2225, 3990. It also declared that the statutory definition is unconstitutional both facially and as applied by the Comptroller, though it declined to issue permanent injunctive relief to RJR Vapor. SCR.9-10.
Court of Appeals:	Third Court of Appeals at Austin
Parties on Appeal:	RJR Vapor was the appellant and cross-appellee. The Comptroller was the appellee and cross-appellant.
Court of Appeals' Disposition:	The Court of Appeals affirmed the trial court's ruling that VELO products "are not taxable tobacco products" and that RJR Vapor is entitled to a refund. *RJR Vapor Co. v. Hegar*, 681 S.W.3d 867, 885 (Tex. App. – Austin 2023) (per Triana, J., joined by Baker and Kelly, JJ.). It also found the remaining issues moot, vacating the trial court's constitutional ruling and dismissing RJR Vapor's claims for further relief. *Id.*

[1] "CR" refers to the Clerk's Record. "SCR" refers to the Supplemental Clerk's Record.

ISSUES PRESENTED

Texas imposes a tax on certain "tobacco products." Tex. Tax Code § 155.0211(a). In relevant part, "[t]obacco product" means "an article or product that is made of tobacco or a tobacco substitute." *Id.* § 155.001(15)(E). The Comptroller has sought to tax RJR Vapor's VELO pouches and lozenges as "tobacco products" under this definition. Though these products contain pure nicotine chemically extracted from tobacco, it is undisputed that they do not contain tobacco leaf or any other tobacco plant matter.

The issues presented are:

1. Whether the trial court and the Court of Appeals correctly determined that VELO products are not "tobacco products" for purposes of § 155.0211(a) because they do not contain tobacco or a tobacco substitute.

2. Whether the trial court correctly held in the alternative that the definition of "tobacco products," as well as its application by the Comptroller, is unconstitutional (unbriefed issue).

INTRODUCTION

The Comptroller seeks review of the Court of Appeals' holding that RJR Vapor's VELO nicotine pouches and lozenges are not subject to the Tobacco Products Tax because they fall outside the statutory definition of "tobacco product." The Court should deny the petition.

First, the ruling is plainly correct. The tax applies to a "product that is made of tobacco or a tobacco substitute." VELO products are not "made of tobacco" because they contain no tobacco leaf. Instead, they contain nicotine isolate, a chemical that can be derived from any number of plants, including tobacco, tomatoes, or eggplants. VELO products also are not "made of … a tobacco substitute" because they contain no substitute for tobacco leaf (such as hemp or cloves). And if there were any doubt on these points, it would be resolved in RJR Vapor's favor under "the ancient presumption in favor of the taxpayer." *Hegar*, 681 S.W.3d at 876 (citing *TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns*, 397 S.W.3d 173, 182 (Tex. 2013)).

Second, this case does not merit review. Notably, the Comptroller never asserts that this tax dispute is significant as a matter of tax law or in terms of revenue implications for the State. Instead, he suggests in

passing that the ruling will have significant implications in *other* areas, because the Tax Code's definition of "tobacco product" is incorporated in other statutes.

This speculation is baseless. The Comptroller's central assertion is that the ruling makes it permissible to sell tobacco-free nicotine products to minors. But he overlooks (among other things) that federal law prohibits such sales and that the federal prohibition is vigorously enforced in Texas, including through contracts with Texas government entities.

More generally, the issue should be allowed to percolate. This was a question of first impression below, and no other Courts of Appeals have addressed it. If the Comptroller's cursory suggestion that this rule will affect other areas is correct, other courts will soon address the issue in non-tax cases, and this Court will benefit from their analysis. Moreover, the issue of taxing nicotine products has the attention of the Legislature, which has recently considered bills on the subject. It would not be an efficient use of judicial resources for this Court to address the question now, given that the Legislature may soon obviate it.

STATEMENT OF FACTS

I. THE TEXAS TAX CODE

The Tobacco Products Tax applies to certain "tobacco products." Tex. Tax Code § 155.0211. For purposes of the tax, a "[t]obacco product" is

> (A) a cigar;
>
> (B) smoking tobacco, including … any form of tobacco suitable for smoking in a pipe or as a cigarette;
>
> (C) chewing tobacco, including … any kind of tobacco suitable for chewing;
>
> (D) snuff or other preparations of pulverized tobacco; or
>
> (E) *an article or product that is made of tobacco or a tobacco substitute* and that is not a cigarette or an e-cigarette as defined [in the] Health and Safety Code.

Id. § 155.001(15) (emphasis added).

II. VELO PRODUCTS

RJR Vapor distributes VELO for sale in Texas. VELO is a brand of modern oral nicotine products that currently includes pouches and previously also included lozenges, as pictured below.[2]

[2] RJR Vapor no longer distributes VELO lozenges for sale in Texas.

CR.307-09. It is undisputed that the VELO pouches and lozenges at issue ("VELO") "do not contain tobacco leaf." CR.307; *see, e.g.*, *id.* at 317, 351, 441.

Among other ingredients, VELO contains nicotine isolate: pure nicotine that is extracted from plants through a complex chemical process. CR.310-11, 317-18. While the nicotine isolate in VELO is derived from tobacco plants, nicotine isolate can be derived from other plants, including tomatoes, potatoes, peppers, and eggplants. CR.310, 351, 355. It is undisputed that, "[o]nce the nicotine is extracted from tobacco, the [nicotine isolate] contains no tobacco leaf." CR.351; *see Hegar*, 681 S.W.3d at 879 (explaining that "the plant waste [is] discarded"). RJR Vapor purchases nicotine isolate from third-party vendors, and does not "handle tobacco at any point in the distribution of VELO." CR.310.

III. PROCEDURAL HISTORY

In 2019, the Comptroller announced that he viewed VELO as a taxable "tobacco product[]" because it "contains nicotine, which is an extract of the tobacco leaf." SCR.7. Notably, he applied this understanding selectively, taxing "some—but not all—products within the class of tobacco-free oral nicotine products." CR.3990; SCR.8.

RJR Vapor paid the tax under protest and sued to recover the payments. SCR.8-9. It argued that the definition of "tobacco product" does not apply to VELO and that, regardless, the definition is unconstitutional and the Comptroller's enforcement decisions violated RJR Vapor's constitutional right to uniform taxation. CR.24, 32-35.

The trial court agreed. It concluded that VELO is not a "tobacco product" under the Tax Code. CR.2225. It also ruled for RJR Vapor on both constitutional claims, though it denied injunctive relief. CR.3990.

On appeal, the Third Court of Appeals also agreed that VELO is not a taxable tobacco product. It concluded that VELO is not "made of tobacco" because nicotine isolate is "a chemically pure substance" that contains "no part or traces of the tobacco leaf." *Hegar*, 681 S.W.3d at 873, 879. It also concluded that VELO is not "made of … a tobacco substitute"

because nicotine isolate "does not have the same qualities as tobacco leaves." *Id.* at 881. Having ruled for RJR Vapor on this ground, the court held that it lacked jurisdiction to address the constitutional claims. *Id.* at 885.

The Comptroller seeks review in this Court.

SUMMARY OF ARGUMENT

This Court should deny the petition.

First, the ruling below is correct. The tax applies to products that are "made of tobacco or a tobacco substitute." VELO products do not qualify. They are not "made of tobacco" because they do not contain tobacco leaf, as the phrase "made of tobacco" requires. And they are not "made of … a tobacco substitute" because nicotine isolate is not a "tobacco substitute" under the term's technical or ordinary meaning.

Second, the ruling does not merit review. Notably, the Comptroller does not contend that this *tax* dispute involves important issues of tax law or has important revenue implications. And, contrary to the Comptroller's underdeveloped and speculative assertion, the ruling does not "effectively permit[]" sales of oral nicotine products to minors. Pet. 16. Rather, federal law prohibits such sales, and this federal-law

restriction is robustly enforced in Texas. RJR Vapor does not sell VELO to minors, and both RJR Vapor and the industry make significant efforts to prevent sales to minors. Moreover, the issue should be allowed to percolate. There is no split in authority among Courts of Appeals and the Legislature has recently considered this issue, counseling against judicial intervention at this stage.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT VELO PRODUCTS ARE NOT "TOBACCO PRODUCTS."

The Court of Appeals correctly held that VELO products do not qualify as "tobacco products" for tax purposes because they are neither "made of tobacco" nor "made of … a tobacco substitute." Tex. Tax Code § 155.001(15)(E). Both holdings are straightforwardly dictated by the statutory text. Moreover, any ambiguity on either point would be resolved in RJR Vapor's favor because "an ambiguous tax statute must be construed strictly against the taxing authority and liberally for the taxpayer." *TracFone Wireless*, 397 S.W.3d at 182 (quotation marks omitted).

A. VELO Products Are Not "Made of Tobacco."

1. VELO Products Do Not Contain Tobacco.

a. To qualify as a "[t]obacco product," VELO must be "made of tobacco." Tex. Tax Code § 155.001(15)(E). Here, "tobacco" means the leaves of the tobacco plant, as demonstrated by dictionaries and statutory context. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) (Courts read statutes "contextually" and "typically look first to dictionary definitions" to "determine a term's common, ordinary meaning.").

Dictionaries define "tobacco" primarily as a particular plant or as the leaves of that plant. *E.g.*, Merriam-Webster's Collegiate Dictionary 1312 (11th ed. 2012) (defining "tobacco" as "plants of the nightshade family" and "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff"); Oxford English Dictionary 1088 (3d ed. 2008) (defining "tobacco" as "the dried nicotine-rich leaves of an American plant"); American Heritage Dictionary 1827 (5th ed. 2011) (similar). The same held true during the period when the Legislature adopted the language in 1959. *E.g.*, Webster's New International Third 2402 (1961) (defining "tobacco" as "a plant of the genus *Nicotiana* esp. when

cultivated for its leaves"); Webster's New Twentieth Century Dictionary 1917 (2d ed. 1967) (similar).

The statutory context reinforces this conclusion. As the Court of Appeals recognized, all the other products covered by the tax contain "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff." 681 S.W.3d at 877; *see* Tex. Tax Code § 155.001(15)(A)-(D). It thus stands to reason that products captured by subpart (E) would share the same quality. *See Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015) (The meaning of a term in a list is "known by the words immediately surrounding it.").

b. VELO does not contain tobacco under that definition. It is undisputed that VELO does not contain tobacco leaves or other plant matter and is not prepared for use in smoking or chewing or as snuff. CR.310-12.

Though VELO contains nicotine isolate, nicotine isolate is not tobacco. As the Court of Appeals explained, "'tobacco' and 'nicotine' are not synonymous." 681 S.W.3d at 878. The nicotine isolate in VELO is a pure chemical that contains no tobacco leaves and no other part of the tobacco plant. *Id.* And although the nicotine isolate in VELO happens

to be extracted from tobacco, nicotine isolate can also be extracted from other plants, including tomatoes and eggplants. *E.g.*, CR.317.

A recent decision from an administrative tribunal in New York City reached the same conclusion. The tribunal considered whether VELO products are "tobacco products" under the city's regulations, which are limited to products that "contain[] tobacco." N.Y.C. Admin. Code § 17-713. The tribunal concluded that they are not, because they do "not contain tobacco leaf or other tobacco plant matter, but rather nicotine extracted from the tobacco plant." *Dep't of Consumer & Worker Prot. v. Four Nieces, LLC*, No. 22N00785, at 2-3 (N.Y.C. Off. of Admin. Trials & Hearings 2023), https://perma.cc/2AH6-PFNT. It is just the same here.

In sum, VELO does not contain tobacco. Indeed, even the Comptroller does not appear to dispute this.

2. Because VELO Products Do Not Contain Tobacco, They Are Not "Made Of" Tobacco

a. To be a taxable tobacco product under the first prong of the definition, a product must be "made of" tobacco—that is, it must be *made of* the leaves of cultivated tobacco plants. And that in turn means that it must *contain* the leaves of cultivated tobacco plants.

A product that is "made of" a substance must, at a minimum, contain that substance. Contrasting "made of" with "made from" illustrates the point. As multiple dictionaries show, and the court below recognized, those two phrases "convey different meanings." *Hegar*, 681 S.W.3d at 878. When "an object is 'made of' a substance, that substance stays fundamentally the same" in the final product. *Id.*; *see* Longman Dictionary of Common Errors 196 (1996) ("Use *made of* when the original materials have not been completely changed and you can still see them: 'Their dining table is made of solid oak.'"). By contrast, when an object is "made from" a substance, the substance is fundamentally "changed" in making the final product. *Hegar*, 681 S.W.3d at 878; *see* Longman, *supra*, at 196 ("Use *made from* when the original materials have been completely changed and cannot be recognized: 'Bread is made from flour and water.'"). In other words, made *of* refers to "the basic material or qualities of something." *Hegar*, 681 S.W.3d at 878 (quoting *Made from, made of*, Cambridge Dictionary, https://perma.cc/6Y9R-WEY4).

Meanwhile, made *from* refers to the origin or derivation of something. *Id.*[3]

Take wood as an example. A chair is made *of* wood because the wood remains fundamentally the same in the process of building the chair. A book, however, is not made *of* wood because the wood has been fundamentally changed in the process of making paper.

b. The Legislature here chose the more limited "made of" phrasing. There is every reason to think it did so "purposefully." *Id.* It could have adopted more expansive language like that used in the federal Tobacco Control Act, which defines "tobacco product" as "any product made *or derived from* tobacco, or *containing nicotine from any source*." 21 U.S.C. § 321(rr)(1) (emphasis added). Other Texas laws also offer salient examples of broader language. For example, hemp is defined as any part of the cannabis plant, including "all derivatives [and] extracts." Tex. Agric. Code § 121.001. And "[e]-cigarette" is defined as a device "to deliver nicotine … to the individual inhaling from the device." Tex.

[3] Other sources make the same distinction between made *of* and made *from*. *See Prepositions with make: "made of", "made from,"* SpeakSpeak, https://perma.cc/7EF4-EQ4V; *Difference between "made of" and "made from,"* eAge Tutor, https://perma.cc/3M99-22R5; *English Language & Usage*, StackExchange, https://perma.cc/CK6B-CA6H.

Health & Safety Code § 161.081(1-a)(A). The Legislature's failure to adopt such broader language here is telling. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

c. As a result, VELO is not "made of" tobacco for purposes of the statute because it contains no tobacco. As noted, "no part of the tobacco plant remains in the [nicotine] isolate." *Hegar*, 681 S.W.3d at 879. All the plant material is "discarded," leaving only a pure chemical. *Id.*; CR.311.

Indeed, the Comptroller himself has recognized this point in the e-cigarette context. Like VELO, e-cigarettes do not contain tobacco leaf but typically contain nicotine isolate extracted from tobacco. CR.312. Yet the Comptroller has stated that e-cigarettes are *not* "made of tobacco" because—even "though nicotine is a component of tobacco"—they "do not contain tobacco." CR.99. The same logic holds for VELO.

The Comptroller's only response is an argument he did not even raise in the Court of Appeals. He notes that one RJR Vapor witness—who explained that he "wouldn't consider [himself] an expert" on how cigars or chewing tobacco are produced, CR.564-67—said that cigars and chewing tobacco are both "made from" and "made of" tobacco, thus

supposedly demonstrating that the two terms can be used "interchangeably," Pet. 11. This argument fails for two reasons.

First, this was ordinary speech, not legislation. Legislative language is more precise than an individual's offhand usage during a deposition. The witness was not parsing the statute and he did not address—let alone reject—the distinction between "made of" and "made from." CR.564-65.

Second, this example could at most demonstrate only that some products with tobacco leaf (like cigars) can satisfy both the narrower definition ("made of" tobacco) and the broader one ("made from" tobacco). It does not follow that any product (like VELO) that arguably falls within the *broader* definition ("made from" tobacco) also satisfies the *narrower* one ("made of" tobacco). To return to an earlier analogy, it might be possible to say that a chair is both made *from* wood and made *of* wood. But it certainly is not possible to say that paper made *from* wood is also made *of* wood. And that is what the Comptroller would need to show.

3. The Comptroller's Contrary Arguments Are Meritless.

The Comptroller seeks to demonstrate—purportedly in contradiction to the Court of Appeals' holding—that tobacco products can

be made of chemically processed tobacco. Pet. 7-10. This is a red herring. The Court of Appeals did not deny that tobacco products could be "made of" chemically processed tobacco; it merely held that VELO does not contain tobacco at all.

Indeed, the court observed that the term "tobacco products" includes products that contain tobacco leaves that have been "prepared or processed *in some way*." 681 S.W.3d at 877 (emphasis added). And the examples the court used illustrate the point. For example, the court noted that "books are *made of* paper"—even if paper is chemically processed to make the books, as it surely is. *Id.* at 878. Same with jackets made of leather. *Id.*

In other words, the court did not rule in RJR Vapor's favor because VELO contains chemically processed tobacco; it did so because VELO does not contain tobacco at all. Similarly, the reason polyester is not "made of oil" is that it is devoid of oil, not that the oil was chemically processed to make it. *Id.* Thus, the Comptroller's affirmative arguments are irrelevant.

B. VELO is Not Made of a "Tobacco Substitute."

1. "Tobacco Substitute" is a Term of Art, Which Does Not Encompass Nicotine Isolate.

a. As the court below recognized, "[w]ords and phrases [that] have acquired a technical or particular meaning" must be construed accordingly. 681 S.W.3d at 881 (quoting Tex. Gov't Code § 311.011(b)). Undisputed expert evidence demonstrates that the phrase "tobacco substitute" has acquired just such a technical meaning through its long usage. Specifically, the phrase has had two related meanings within the industry, and neither of them encompasses nicotine isolate.

Originally, the industry used "tobacco substitute" to refer to recycled tobacco plant matter, such as stems, used in place of tobacco leaf. CR.313, 355, 437. These "reconstituted tobacco sheets" were used as filler, decreasing the amount of tobacco leaf in cigars and cigarettes. CR.312, 379, 420. They were commonly called a tobacco "substitute," CR.356, 379, 438, including in a congressional hearing shortly before the Legislature adopted its definition, 1959 Tex. Gen. Laws 236; *see* 102 Cong. Rec. 2834-35 (1956).

More recently, the industry has used the term "tobacco substitute" to refer to non-tobacco plants that replace tobacco leaf, such as hemp,

mugwort, and cloves. CR.313, 338, 438, 440; *see id.* at 380 (listing numerous plants used "as substitutes for tobacco"). These plants often possess "little or no nicotine," CR.440, "while maintaining the taste and sensory aspects of tobacco smoke," CR.313, 358-59. At bottom, then, both technical definitions describe plant material that either partially or completely replaces tobacco leaf in products like cigarettes or cigars.

Nicotine isolate does not qualify as a tobacco substitute under either technical definition. It is neither a reconstituted tobacco sheet nor a non-tobacco plant that replaces tobacco leaf. More generally, nicotine isolate contains no plant material and it cannot be smoked, chewed, or inhaled. CR.312. Thus, it is not a tobacco substitute.

b. The Comptroller responds that the technical definitions "do[] not make sense in context" because they refer to non-tobacco filler that is "usually used" in cigarettes, and cigarettes are exempt from the tax. Pet. 15. He suggests, in other words, that RJR Vapor's definition of "tobacco substitute" would create surplusage. This argument fails several times over.

First, as the Comptroller's use of "usually" betrays, these tobacco substitutes are not *always* used in cigarettes; they can also be used in other products subject to the tax, like cigars. CR.373-74, 437-38.

Second, only *tobacco* cigarettes fall beyond the scope of the tax. Tex. Tax Code § 154.001(2) (defining a "cigarette" as "a roll for smoking … that is made of tobacco or tobacco mixed with another ingredient"). Cigarettes completely comprised of tobacco substitutes like hemp, mugwort, and cloves are taxable under § 155.001. *See* Cross-Appellants' Reply 10, No. 03-22-00188-CV (Tex. App. – Austin 2023) (acknowledging that "alternative cigarettes made out of hemp, cloves, and lettuce" would "put the words 'tobacco substitute' to work" under RJR Vapor's interpretation). And the record establishes that such tobacco substitutes often completely replace tobacco in cigarettes. CR.359.

Also, of course, even if there were no products that met the definition, such products could appear later. In other words, the definition would have a purpose even if it did not apply to any existing product (although, as noted, it does).

In short, the Court of Appeals' interpretation does not remotely make the provision surplusage. And even if it did, that would not be

enough to displace the text's clear meaning. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (explaining that the Legislature sometimes "repeat[s]" itself).

2. Nicotine Isolate is Also Not a "Tobacco Substitute" Under the Term's Ordinary Meaning.

Even if "tobacco substitute" were not a term of art, the ordinary meaning of the phrase does not cover nicotine isolate.

A "substitute" is "a person or thing that takes the place or function of another." *Substitute*, Merriam-Webster, https://perma.cc/RJ36-5D9W; Bryan A. Garner, *Dictionary of Legal Usage* 858 (3d ed. 2009) (similar); Webster's New World Dictionary 1454 (coll. ed. 1966) (similar). A tobacco substitute, therefore, is a substance that could take the place or function of the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff.

Nicotine isolate does not fit that description. It is not similar to tobacco leaves, nor does it serve the same purpose or function as tobacco leaves. CR.318. It cannot be smoked, chewed, or inhaled. Simply put, it is not capable of replacing tobacco. As the Court of Appeals explained, "nicotine isolate cannot replace tobacco leaves in a product because

nicotine isolate does not have the same qualities as tobacco leaves." 681 S.W.3d at 881.

The Comptroller's response is unpersuasive. In essence, he argues that VELO is made of a "tobacco substitute" because it contains nicotine. Pet. 12. In particular, he argues that the other statutorily enumerated tobacco products contain nicotine, and so a person who wants nicotine can get it either through traditional tobacco products, or through non-tobacco products like VELO. But that argument at most goes to whether *VELO* is in some limited sense a *substitute for traditional tobacco products*, not to whether *nicotine isolate* is a *substitute for tobacco* (the relevant question under the statute).

The Comptroller's argument also proves too much. The only meaningful similarity between tobacco and nicotine isolate is that both contain nicotine. And if that were enough to make nicotine isolate a tobacco substitute, then tomatoes and eggplants would also be tobacco products. This cannot be—and is not—correct.

II. THIS CASE DOES NOT MERIT REVIEW.

Tellingly, the Comptroller never contends that the issue in this tax-protest suit is important as a matter of tax law or the State's revenues.

Instead, he offers only a cursory suggestion that the Court of Appeals' ruling will have significant consequences in *other* areas because the definition of "tobacco product" is incorporated in other statutes. Pet. 15-16. This contention is speculative at best and mistaken at worst.

The Comptroller's primary argument is that the ruling would make it permissible to sell nicotine pouches and lozenges to minors. But he fails to mention that such sales are federally prohibited to anyone under 21, 21 U.S.C. § 387f(d)(5), and the federal prohibition is vigorously enforced, including in Texas.[4] For example, the U.S. Food and Drug Administration logged nearly 2,800 inspections of Texas retailers between January 1, 2024, and May 31, 2024. *Compliance Inspections*, U.S. FDA, https://perma.cc/X3MA-LCD6. To facilitate inspections, FDA contracts with Texas government entities. *Tobacco Retail Inspection Contracts*, U.S. FDA (June 21, 2023), https://perma.cc/DF88-5KB8. Federal regulations also require ID checks and prohibit the provision of free samples of nicotine products. 21 C.F.R. § 1140.14(b)(2); *id.* § 1140.16(d)(1).

[4] Federal restrictions apply to VELO because federal legislation defines "tobacco product" expansively as "any product made or derived from tobacco, or containing nicotine from any source." 21 U.S.C. § 321(rr)(1); *see*, *supra*, Part I.A.2.b.

The Comptroller also ignores the uncontested record evidence that RJR Vapor does not sell VELO to minors. CR.309. Nor does it have any intention of doing so, as evidenced by the numerous company and industry-wide protocols that prevent individuals under 21 from acquiring nicotine products. The *We Card* Program, for example, trains retailers on best practices to prevent sales to minors. *About Us*, We Card, https://perma.cc/FM76-LYSK. Reynolds American, Inc. and its operating companies, including RJR Vapor (collectively, "Reynolds"), require affiliated retailers to participate in the program. *Retailer Compliance*, Reynolds American, https://perma.cc/FF8R-F7T6. Reynolds also sponsors TruAge, a resource that facilitates reliable age verification for in-person and online sales. *Id.* In addition, Reynolds carefully restricts its marketing to adult consumers. *Responsible Marketing*, Reynolds American, https://perma.cc/YA4D-FHWH.

The Comptroller also suggests that the ruling would allow individuals confined in correctional facilities to possess nicotine products. Again, not so: correctional facilities have a range of mechanisms for restricting the possession of goods. *E.g.*, Tex. Penal Code § 38.114(b)

(defining contraband as "any item not provided by or authorized by the operator of the correctional facility").

Having offered those two misguided examples, the Comptroller gestures at a variety of other statutes without individually discussing them. For example, he does not explain why it is important whether the Court of Appeals' interpretation of "tobacco product" is applied to the statute requiring annual reporting of tobacco products distributed in Texas. Pet. 3. And he continues to neglect overlapping federal regulation. For example, with respect to vending machines, federal law bans the sale of oral nicotine products like VELO in vending machines unless the machine is located in an adult-only facility. 21 C.F.R. § 1140.14(b)(3). Similarly, the Comptroller mentions state advertising rules, but ignores that federal regulations impose extensive limits on advertising for oral nicotine products. *E.g.*, 21 U.S.C. § 387k (prohibiting, absent FDA preapproval, representations that product presents less risk or contains a reduced level of or reduced exposure to a substance); 21 C.F.R. § 1143.3(b) (requiring a nicotine warning). In short, the Comptroller's one-paragraph analysis is not remotely sufficient to establish that this case merits review.

More generally, the question should be allowed to percolate. If the Comptroller is correct about the issue's broad import in other contexts, other Courts of Appeals will soon address it in non-tax cases, providing additional analysis. At the moment, there is no split between Courts of Appeals (because only one Court of Appeals has addressed the issue). It is also notable that the four judges who considered the issue in this case were unanimous on it. If no judicial disagreement ever emerges, this Court's involvement may never be necessary.

Moreover, the Legislature has recently considered legislation relating to the taxation of nicotine products. Tex. S.B. No. 1712, 87th Leg., R.S. (2021) (proposing a tax on "an item that contains nicotine and is not taxed under Chapter 154 or 155"); Tex. H.B. No. 211, 87th Leg., R.S. (2021) (proposing a tax on products that contain "a consumable nicotine liquid solution or other material containing nicotine suitable for use in an e-cigarette"); *Hegar*, 681 S.W.3d at 879 n.11 (explaining "that bills have been introduced in the Legislature to tax 'nicotine products'"). And the Legislature will have another opportunity to consider the issue when it reconvenes in January 2025.

It would not be an efficient use of judicial resources for this Court to take up an issue that may soon be transformed (or even obviated) by amended legislation. And the Legislature is "better suited" than this Court to evaluate the Comptroller's policy-centric arguments. *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 347-48 (Tex. 2019).

PRAYER

The Court should deny the petition.

Dated: June 27, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Christian G. Vergonis
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CERTIFICATE OF SERVICE

I certify that, on June 27, 2024, a true and correct copy of the foregoing was served on counsel for Petitioners via the e-filing system.

/s/ Christian G. Vergonis
Christian G. Vergonis

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