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

REPLY BRIEF FOR PETITIONERS

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Introduction

VELO products are subject to the Cigars and Tobacco Products Tax (the Tax) because they are "product[s] that [are] made of tobacco or a tobacco substitute." Tex. Tax Code § 155.001(15)(E). RJR Vapor's contrary arguments reflects a blinkered view of both ordinary English words and statutory context. But context illuminates the Tax's meaning, constitutionality, and purpose. That's why this Court does not ignore it. And that context reveals the flaws in RJR Vapor's arguments.

The court of appeals' decision warrants review. It affects the "construction or validity" of multiple Texas statutes, Tex. R. App. P. 56.1(a)(3), and is important for both Texas's tax revenues and its ability to enforce its own laws. The Court should grant the petition for review, reverse the court of appeals' judgment, and render judgment for the Comptroller.

Argument

I. VELO Products Are "[M]ade of [T]obacco or a [T]obacco [S]ubstitute."

RJR Vapor's products "[are] made of tobacco or a tobacco substitute." *Id.* RJR Vapor's contrary contentions miss the mark. And its hand-wringing about the reach of the Comptroller's arguments displays its myopic view of statutory context.

A. VELO products are "made of tobacco."

1. VELO products are "made of tobacco" under the statute's fair meaning.

VELO products are made of nicotine isolate that is produced by chemically processing tobacco. CR.310-11. They are thus "made of tobacco." Tex. Tax Code

§ 155.001(15)(E); Comptroller Br. 10-15. Whether "nicotine isolate can also be extracted from other[, non-tobacco] plants" therefore has no bearing on this case. Resp. Br. 17.

RJR Vapor concedes (at 25-26) that chemically processed tobacco can constitute a "tobacco product." But RJR Vapor tries to draw the line at nicotine isolate, which, it says, does not count because nicotine isolate does not take the form of tobacco leaves—an inference RJR Vapor derives from the statute's use of *made of* instead of *made from*. *See* Resp. Br. 13-15, 17. But the Comptroller has already explained (at 13-15) why that prepositional distinction does not bear the weight RJR Vapor places upon it. This Court "tether[s]" itself "'to the *fair meaning* of the text,' not 'the hyperliteral meaning of each word in the text.'" *In re Dallas County*, 697 S.W.3d 142, 158 (Tex. 2024) (orig. proceeding) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 356 (2012)). In other words, the Court opts for "the ordinary English meaning of the statutory text." *Ex parte K.T.*, 645 S.W.3d 198, 205 (Tex. 2022). *Contra* Resp. Br. 23-24. People naturally use *made of* interchangeably with *made from* even where RJR Vapor believes that the two terms do not overlap. For example, RJR Vapor maintains that wood undergoes a "fundamental transformation," Resp. Br. 28, "in the process of making paper," Resp. Br. 14. Yet a person naturally says that paper is *made of* wood. *E.g.*, Oliver Hogan, *From Tree to Paper: How Much Paper Does a Tree Produce?*, TenereTeam (Sept. 7, 2022), https://www.tenereteam.com/blogs/how-much-paper-does-a-tree-produce/ ("Even kids know paper is made of wood."). RJR Vapor's witness's testimony was unremarkable in this regard. *Contra* Resp. Br. 23-24.

That witness—who had "worked in the tobacco industry for over 25 years," CR.564; *see* Resp. Br. 23 (insisting that its witness was not an expert)—demonstrated the equivalence between *made of* and *made from*, Comptroller Br. 14. But RJR Vapor maintains (at 23) that the Comptroller has taken those statements out of context. Not so. The Comptroller's counsel asked the witness questions about the methods of making the tobacco products that the statute specifically enumerates. CR.564-74; *see* Tex. Tax Code § 155.001(15)(A)-(D). The witness testified that cigars are both "made of" and "made from" tobacco and that chewing tobacco is "made from" tobacco. Comptroller Br. 14. Because this testimony shows that normal English speakers use the phrases *made of* and *made from* interchangeably, Comptroller Br. 14-15, the Comptroller does not ask the Court to ignore traditional statutory-interpretation tools, *contra* Resp. Br. 23. And while RJR Vapor apparently believes that chemically processed tobacco like nicotine isolate qualifies as tobacco only if it still has the chemical properties of tobacco leaves, *see* Resp. Br. 25-27, RJR Vapor introduces a line-drawing problem when it does not identify the point at which a tobacco leaf has undergone sufficient chemical processing such that it no longer counts as a tobacco leaf.

2. RJR Vapor's counterarguments fail.

RJR Vapor maintains that the Comptroller's reading of the phrase "product made of tobacco" proves too much. Those arguments, though, ignore statutory context.

a. First, RJR Vapor protests (at 18-20) what it views as the breadth of the Comptroller's argument, insisting that the Comptroller's understanding of the

statute would embrace nicotine replacement therapies (NRTs). But context shows that the Tax does not apply to NRTs. Comptroller Br. 30-32. "Associated words bear on one another's meaning," and when they "are associated in a context suggesting that the words have something in common," they "should be given related meanings." Scalia & Garner, *supra*, at 195 (emphasis omitted) (quoting *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977)). The items that section 155.001(15) specifically names—cigars, chewing tobacco, smoking tobacco, and snuff—are not designed to help consumers become free of a nicotine addiction. *See* Tex. Tax Code § 155.001(15)(A)-(D); *see also* 21 C.F.R. § 1100.5(a) (explaining that the Food and Drug Administration (FDA) regulates products "intended for," among other things, "use in the cure or treatment of nicotine addiction" as drugs, not as "tobacco products"); *Quit Smoking Medicines*, U.S. Ctrs. for Disease Control & Prevention, https://perma.cc/3F5M-Q9JU (last updated Oct. 4, 2024) (listing NRTs that the FDA has approved). The Tax thus does not apply to an item that can help mitigate such an addiction. *Contra* Resp. Br. 19-20, 67.

RJR Vapor asserts (at 52) that "the very products at issue in this case would stop being tobacco products if they obtained FDA authorization as NRTs." But NRT authorizations are relevant to whether a product is designed to help someone stop smoking. *Cf.* 34 Tex. Admin. Code § 3.284(b)(2)-(3); *id.* § 3.284(a)(6); *cf. also* Tex. Tax Code § 151.313(a)(3). That kind of authorization would show that the product fell outside the Tax's purpose. *See, e.g.*, *Malouf v. State ex rel. Ellis*, 694 S.W.3d 712, 730 (Tex. 2024) (noting that this Court "must 'look to the statute's text to determine . . . policy choices that the Legislature made'" (quoting *Jaster v. Comet II*

Constr., Inc., 438 S.W.3d 556, 570 (Tex. 2014) (plurality op.)); *see also Hebner v. Reddy*, 498 S.W.3d 37, 45 (Tex. 2016) (Boyd, J., concurring) (noting that a "statute's purpose is to require what its language requires" and grounding statutory purpose in the statute's "actual written text").

The Legislature has many ways of expressing its will in statutory text. For example, it can expressly state that particular laws do not apply to a product that the FDA has approved "for use in the treatment of nicotine or smoking addiction." Tex. Health & Safety Code § 161.0815(1); *see also, e.g.*, Tex. Tax Code § 151.313(a)(3). Or it can make that clear through context, as it has done here. *See, e.g.*, *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) (explaining that terms "draw their meanings from context, so" this Court "look[s] not only to the words themselves but to the statute in its entirety to determine the Legislature's intent"). This Court does not consider the latter less textual than the former. *See, e.g.*, *id. Contra* Resp. Br. 20.

b. RJR Vapor next frets (at 53) that the Comptroller's understanding of the phrase "made of tobacco" will "sweep in pharmaceuticals and a wide range of other everyday products," but this too ignores statutory context. The Legislature has levied the Tax on tobacco products with particular uses: Namely, consumers use cigars, smoking tobacco, chewing tobacco, and snuff to imbibe nicotine recreationally. *See* Tex. Tax Code § 155.001(15)(A)-(D). Pharmaceuticals, vitamins, and fertilizers, *see* Resp. Br. 28-29, 53, on the other hand, do not bear a recreational use (at least, not lawfully). Because the products about which RJR Vapor worries do not have the same uses as the enumerated items, *see* Tex. Tax Code § 155.001(15)(A)-(D), those

products do not count as "tobacco products" subject to the Tax, *see* Scalia & Garner, *supra*, at 195-96; *supra* pp. 3-4. The Tax likewise will not apply to any "chemical transformation[]" that tobacco could potentially sustain. *Contra* Resp. Br. 28-30, 53. Nor, for the same reasons, does the Tax apply to an "enormous swathe of nicotine-containing products (such as eggplants, tomatoes, and potatoes)." *Contra* Resp. Br. 53.

c. RJR Vapor acknowledges (at 21), as it must, that the correct definition of the phrase "made of tobacco" cannot sweep in e-cigarettes. The Legislature excluded e-cigarettes from the Tax in 2019, Act of May 21, 2019, 86th Leg., R.S., ch. 894, § 1, 2019 Tex. Gen. Laws 2382, 2384 (codified at Tex. Tax Code § 155.001(15)(E)), before RJR Vapor filed this lawsuit, *see* CR.5. So, whether the Comptroller previously assessed this Tax against e-cigarettes is irrelevant. *Contra* Resp. Br. 21. RJR Vapor thus argues (at 21-22) that the Comptroller's reading of "made of tobacco" would result in taxing e-cigarettes—under a different tax. *See* Tex. Tax Code ch. 154 (Cigarette Tax). But RJR Vapor has not challenged that tax or its application.

Moreover, the Cigarette Tax's definition of *cigarette*, *id.* § 154.001(2), and the contested definition in this case, *id.* § 155.001(15)(E), do not match, *contra* Resp. Br. 21-22. As the Comptroller has explained (at 10-11), a "tobacco product" may be "made of" chemically processed tobacco because, among other things, section 155.001(15)(E) uses the word *product*. Tex. Tax Code § 155.001(15)(E). The definition of *cigarette* does not. *Id.* § 154.001(2), (2)(A)-(B). Interpreting the phrase "made of tobacco" in the definition of *cigarette* thus may not yield the same result as

interpreting the same phrase in this case. *See, e.g.*, *City of Austin v. Quinlan*, 669 S.W.3d 813, 821 (Tex. 2023) (noting that the Court does "not interpret statutes in strict isolation" but "with reference to the Legislature's broader statutory context"); Comptroller Br. 10-11. *Contra* Resp. Br. 21-22.

VELO products are made of chemically processed tobacco—which, as RJR Vapor concedes (at 25-26), is taxable. The Tax thus applies.

B. VELO products are "made of . . . a tobacco substitute."

At the very least, VELO products are "made of . . . a tobacco substitute," Tex. Tax Code § 155.001(15)(E), because nicotine isolate provides a way to consume nicotine without using tobacco, Comptroller Br. 16. RJR Vapor's contrary interpretations do not harmonize with statutory context.

1. RJR Vapor's proffered definitions do not accord with statutory context.

Specifically, RJR Vapor argues (at 30-33) that *tobacco substitute* is a term of art, so the Court should ignore its plain meaning. In RJR Vapor's view, the term means either reconstituted tobacco sheets or non-tobacco plants that lack nicotine. Resp. Br. 31-32. Neither is correct.

a. Reconstituted tobacco sheets are not tobacco substitutes, as RJR Vapor's witness admitted. He testified that this material "is not considered to be a tobacco substitute by those in the industry because it is made of and contains tobacco." CR.313-14. *Contra* Resp. Br. 33. RJR Vapor's position (at 40-41) that reconstituted tobacco sheets are *not* tobacco runs into not only this testimony, but also plain meaning. While RJR Vapor believes that only tobacco leaf counts as tobacco, *see* Resp.

Br. 40-41, the plain meaning of *tobacco* includes the whole plant, not just its leaves, *see, e.g.*, *Tobacco*, Webster's New International Dictionary (2d ed. 1959) (defining *tobacco* to include "[a]ny plant of the genus *Nicotiana*, esp[ecially] of the species cultivated for their leaves" or "[c]ollectively a crop of this plant, whether growing or harvested and cured"). RJR Vapor's sources (at 11-12) agree. *See Tobacco*, American Heritage Dictionary of the English Language (5th ed. 2011) (similar); *Tobacco*, Oxford English Dictionary, https://doi.org/10.1093/OED/8186109178 (last visited Apr. 14, 2025) (similar); *Tobacco*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014) (similar). RJR Vapor has not suggested that *tobacco* is a term of art, so its plain meaning includes both the larger plant and its leaves. *See* Tex. Gov't Code § 311.011(a) (providing for common usage of words and phrases). This means, as RJR Vapor's witness indicated, that cigarettes made of reconstituted tobacco sheets are "made of tobacco" and thus are not tobacco substitutes. CR.313-14.

Context points in the same direction. *See, e.g.*, *TGS-NOPEC*, 340 S.W.3d at 439. RJR Vapor has argued that when the Legislature enacted the Tax, some may have believed that the term *tobacco substitute* stood for reconstituted tobacco sheets. RPFR 16; *see also, e.g.*, CR.312-13. But less than ten years after the Legislature enacted section 155.001(15)'s predecessor, Act of July 30, 1959, 56th Leg., 3d C.S., ch. 1, § 1, art. 8.01, 1959 Tex. Gen. Laws 187, 235-36 (current version at Tex. Tax Code § 155.001), the Legislature demonstrated its understanding that *tobacco substitute* does not mean reconstituted tobacco sheets when it referred to "sheet wrapper, sheet binder, or sheet filler" in a nearby provision, Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 1, 1981 Tex. Gen. Laws 1490, 1668 (codified at Tex. Tax Code

§ 155.021(c)). If the Legislature had understood *tobacco substitute* to mean reconstituted tobacco sheets, it presumably would have used *tobacco substitute* in section 155.021(c) instead of "sheet wrapper, sheet binder, or sheet filler"—but it didn't. *Id.* And RJR Vapor has offered no other option for what *tobacco substitute* could have meant when the Legislature enacted the Tax. *See* RPFR 15-16.

"In a given statute, the same term usually has the same meaning and different terms usually have different meanings," particularly when the terms have "some heft and distinctiveness." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024); *see* Scalia & Garner, *supra*, at 172 ("The presumption of consistent usage applies also when different sections of an act or code are at issue."); *see also* Scalia & Garner, *supra*, at 170-71. And the Legislature "generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015). Indeed, courts "usually 'presume'" that "differences in language . . . convey differences in meaning." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 279 (2018) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017)). Because the Legislature did not refer to tobacco substitutes as "sheet wrapper, sheet binder, or sheet filler," the Court presumes that those terms have different meanings. *See Pulsifer*, 601 U.S. at 149. Thus, *tobacco substitute* cannot equal reconstituted tobacco sheets.

b. Non-tobacco plants that lack nicotine do not count, either. Statutory context shows that because all of the tobacco products that section 155.001(15) specifically lists contain nicotine, a tobacco substitute must, too. Comptroller Br. 16-17. RJR Vapor dismisses this argument because manufacturers can "blend" tobacco with these

nicotine-less plants in "cigarettes, cigars, or alternatives to chewing tobacco." Resp. Br. 33, 37 n.12 (emphasis omitted). It is unclear why this is problematic for the Comptroller. Products that "blend" tobacco with plants that lack nicotine would be "made of . . . a tobacco substitute" because they would still contain nicotine. *See* Comptroller Br. 16-18. But cigars and cigarettes "made of" non-tobacco plants and that do not contain nicotine do not fit within the Tax—because they lack nicotine. *See* Comptroller Br. 16-18.

RJR Vapor contends that *tobacco substitute* must mean those "non-tobacco plants . . . such as hemp, mugwort, and cloves," Resp. Br. 32, but this reads the statute out of context. RJR Vapor evidently assumes that the precept that courts should assign terms their technical definitions, Tex. Gov't Code § 311.011(b), trumps all other such canons of construction. But courts have many tools at their disposal to determine what a statute means, and "[n]o canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions." Scalia & Garner, *supra*, at 59. And the Legislature did not preclude all other interpretive tools. Quite the opposite: the Code Construction Act states that "[t]he rules provided in this chapter are not exclusive." Tex. Gov't Code § 311.003. The authority that RJR Vapor proffers does not say otherwise. For example, RJR Vapor insists (at 33-34) that other tools, like the canon against surplusage, fail in the face of technical terminology, but the cases it cites for that notion do not set up that rule. In those cases, the courts merely declined to apply the surplusage canon because of other interpretive rules in play *in those cases*—in other words, the cases turned on their specific circumstances. *See United States v. Alford*, 89 F.4th 943, 951-52 (D.C. Cir.

2024); *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471-72 (4th Cir. 2011).

Thus, interpretive provisions like Government Code section 311.011(b) do not oust contextual considerations from the interpretive endeavor, *e.g.*, Tex. Gov't Code § 311.003—indeed, context can and should inform even codified interpretive rules, Scalia & Garner, *supra*, at 232 (discussing *noscitur a sociis*); *see id.* at 230-32. Courts understand words in their ordinary, everyday sense "unless the context indicates that they bear a technical sense." *Id.* at 69 (emphasis omitted); *accord id.* at 73. Here, context shows that *tobacco substitute* does not bear that technical sense. The products in section 155.001(15)(A)-(D) all contain nicotine, Tex. Tax Code § 155.001(15)(A)-(D), so a "product that is made of . . . a tobacco substitute" should, too, *id.* § 155.001(15)(E); Comptroller Br. 16-17. History points the same direction: As RJR Vapor concedes (at 31-32), when the Legislature originally enacted the Tax, it likely did not contemplate that *tobacco substitute* would have embraced non-tobacco plants containing no nicotine. Indeed, even if lawmakers would have understood *tobacco substitute* to mean only reconstituted tobacco sheets when the Legislature enacted the Tax, RPFR 16; Resp. Br. 31-32; *but see supra* pp. 7-9, *tobacco substitute* would still not encompass non-tobacco plants without nicotine. Reconstituted tobacco sheets are made of tobacco, CR.312; *supra* pp. 7-9, which has nicotine in it. Thus, if the Legislature meant "reconstituted tobacco sheets" when it used the term *tobacco substitute*, statutory text would still show that a tobacco substitute should contain nicotine. *See* Scalia & Garner, *supra*, at 195-96.

RJR Vapor insists (at 39) that "there is no principle of statutory construction that suggests disregarding the undisputed settled meaning of a term simply because that meaning differs, in one respect, from other items in the same statutory list." As an initial matter, RJR Vapor's witness suggested that *tobacco substitute*'s meaning is not as "settled" as RJR Vapor would like to believe—even within the industry itself. CR.312-14; *see also* RPFR 16-17 (discussing RJR Vapor's views of the term's changing meanings over time). But RJR Vapor is wrong in any event. Such a principle does exist, and it's called *noscitur a sociis*. Scalia & Garner, *supra*, at 195-98; *see* Comptroller Br. 12, 16-17; *supra* pp. 3-5. RJR Vapor maintains (at 39) that "the Legislature is not obligated to include only similar items in lists." But the list (or other type of association) *implies* a link or similarity between the items in the list. *See, e.g.*, Scalia & Garner, *supra*, at 195. And the Court "presume[s]" that the Legislature enacts statutes "with complete knowledge of the existing law and with reference to it"—including the traditional statutory-interpretation tools. *See, e.g.*, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990).

RJR Vapor suggests that "sharing 'one material quality'" does not suffice, but the tobacco products in subparts (A) through (D) share more qualities than just nicotine: for example, recreational use without intent to help the consumer quit smoking. *Supra* pp. 3-6. Those kinds of context clues will knock any potential definitional outliers out of the running. *Contra* Resp. Br. 44-45. For the same reason, as well as for the reasons the Comptroller has already explained, *supra* pp. 5-6, text shows that tomatoes and eggplant do not count as tobacco products under this statute, *contra* Resp. Br. 45-46.

RJR Vapor insists (at 32) that courts have "recognized" that "non-tobacco plants" qualify as tobacco substitutes, but the cases it cites for that notion do not help it because those cases do not pass on the question of what *tobacco substitute* means. *See, e.g.*, *United States v. Castor*, 937 F.2d 293, 295 (7th Cir. 1991) (referring to a "chewing tobacco substitute made primarily from red clover" in the background section of the opinion). Indeed, some of them use the phrase "tobacco substitute" or "substitute for tobacco" colloquially—such as in determining whether a plant substance could "substitute" for tobacco in religious exercise—not as a term of art. *E.g.*, *Farrow v. Stanley*, No. Civ. 02-567-B, 2004 WL 224602, at *5 (D.N.H. Feb. 5, 2004) (deciding whether a particular plant-based smoking blend could count as an acceptable "substitute for tobacco *in religious practices*" (emphasis added)); *see also Cryer v. Clark*, No. 09-10238-PBS, 2009 WL 6345768, at *8 (D. Mass. July 9, 2009), *report and recommendation adopted sub nom. Cryer v. Mass. Dep't of Corr.*, No. 1:09-CV-10238, 2009 WL 6345769 (D. Mass July 31, 2009) (similar).

The Comptroller does not collect the Tax on products "made of" non-tobacco plants that do not contain nicotine and has not stated otherwise in this litigation. *Contra* Resp. Br. 38. Indeed, the Comptroller's representative pointed out that "nicotine is a big factor." 4.RR.2341. RJR Vapor notes (at 38) that the representative stated that, depending on a product's design, manufacture, and marketing, one could "conceiv[e]" that the product "could still be a tobacco product, even though it does not contain nicotine." 4.RR.2341. But the witness cited no examples of such a substance. And statutory context shows that non-tobacco plants that do not contain nicotine are not tobacco substitutes.

2. RJR Vapor's other arguments fail.

RJR Vapor attempts various other lines of argument; none work. It asserts (at 40) that "all the other . . . products subject to the Tax have something else in common" besides nicotine: "They contain particulate plant matter suitable for consumption via smoking, chewing, or being used as snuff." But nicotine isolate, it contends (at 43-44), "is not similar to tobacco leaves" and does not "serve the same purpose or function as tobacco leaves" because it "is a pure chemical" and "cannot be smoked, chewed, or used as snuff" or "used in place of tobacco leaf in the manufacture of products like cigarettes, cigars, or chewing tobacco."

But, again, RJR Vapor misses or outright ignores context. Section 155.001(15)(A)-(D)'s tobacco products are not *each* "consum[ed] via smoking" or via "chewing" or via use as snuff. *See* Tex. Tax Code § 155.001(15)(A)-(D). "The common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context." Scalia & Garner, *supra*, at 196. The tobacco products in subsections (A) through (D) do not have in common the methods by which one might consume them. *See* Tex. Tax Code § 155.001(15)(A)-(D); Comptroller Br. 18. But they do all share nicotine content—hence their similarity to nicotine isolate. Comptroller Br. 16-17. Likewise, the type of vehicle by which a person consumes nicotine (*e.g.*, cigars, snuff, chewing tobacco—or a pouch) is not the tobacco products' "least *common* denominator." *See* Scalia & Garner, *supra*, at 196 (emphasis added). RJR Vapor's insistence that a tobacco substitute consist of plant matter instead of a "chemical" merely varies its theme that an item cannot be "made of tobacco" unless it takes the form of tobacco leaves. *But*

see supra pp. 2-3. And it is hard to see how an item that allows a person to imbibe nicotine recreationally, as cigars, snuff, and the like do, does not "serve the same purpose or function as tobacco leaves" in the sense relevant to this Tax. *See* Tex. Tax Code § 155.001(15)(A)-(E). *Contra* Resp. Br. 44.

To combat the Comptroller's argument regarding surplusage, RJR Vapor insists (at 42) that "even if . . . RJR Vapor's definition of 'tobacco substitute' does not independently capture any currently existing products, it still would not be surplusage." This is so, in its view, "because [that definition] could be necessary to address products that will appear in the future." Resp. Br. 42. But RJR Vapor has cited no authority that courts read statutes in this futuristic way—especially when doing so here would mean that a statutory term has been meaningless for the past fifty years.

As its last resort, RJR Vapor asserts that, at most, the Comptroller has shown that "VELO is in some sense a substitute for traditional tobacco products," not that "nicotine isolate is a substitute for tobacco." Resp. Br. 45 (emphasis omitted). But RJR Vapor ignores "the most important . . . contextual factor": "the word actually being defined." Scalia & Garner, *supra*, at 228. Section 155.001(15)(E)'s tobacco product—for example, a VELO pouch—is to a tobacco substitute as a cigar (another type of tobacco product, Tex. Tax Code § 155.001(15)(A)) is to tobacco, *see id.* § 155.001(2). In other words, VELO products are "made of" nicotine isolate, which is a tobacco substitute.

II. The Challenged Provision Is Constitutional.

If the Court determines that the Tax does not apply to VELO products, it should not reach the constitutional questions. *See Phillips v. McNeill*, 635 S.W.3d 620, 630

(Tex. 2021) (explaining that the constitutional-avoidance rule "is not optional"); *see also RJR Vapor Co. v. Hegar*, 681 S.W.3d 867, 882-85 (Tex. App.—Austin 2023, pet. pending). RJR Vapor has not contended otherwise. *See* Comptroller Br. 22. But if the Court agrees that the Tax does apply to the challenged products, it can and should decide the constitutional challenges now. *Contra* Resp. Br. 2, 8, 50. Those claims involve no disputed facts, and judicial economy does not counsel remand for the lower courts to decide a pure legal question that this Court can decide itself. *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.*, 698 S.W.3d 198, 208 n.35 (Tex. 2024); *First Baptist Church of San Antonio v. Bexar Cnty. Appraisal Rev. Bd.*, 833 S.W.2d 108, 111 (Tex. 1992); Tex. R. App. P. 53.4. Indeed, this Court regularly disposes of cases on legal issues that a court of appeals has not considered below. *See, e.g.*, *Ammonite*, 698 S.W.3d at 208 n.35 (merits); *Jones v. Turner*, 646 S.W.3d 319, 325 (Tex. 2022) (immunity).

As both parties have "fully briefed" the constitutional questions, *Ammonite*, 698 S.W.3d at 208 n.35, the Court should conclude that RJR Vapor's constitutional claims fail. After all, the Court "presum[es]" the "constitutionality of an act of the Legislature." *Tex. Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985). RJR Vapor has all but abandoned its overbreadth challenge—and even if it had not, that challenge cannot get off the ground because overbreadth challenges do not apply to commercial speech. RJR Vapor's vagueness challenge founders because the Tax applies to VELO products. And its challenge to the Tax's equality and uniformity, which relies on its too-narrow reading of the statute, fails, too. Thus, the

Comptroller's statutory-interpretation arguments do not encounter constitutional problems. *Contra* Resp. Br. 48.

A. RJR Vapor's overbreadth challenge fails.

The U.S. Supreme Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment," *United States v. Salerno*, 481 U.S. 739, 745 (1987), and RJR Vapor has not raised a First Amendment claim, so its overbreadth challenge goes nowhere, Comptroller Br. 23-26. Indeed, RJR Vapor barely pursues its overbreadth claim in this Court. It merely insists in a footnote (at 64 n.17) that "First Amendment interests are . . . at issue here." But it does not argue that the Tax "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 (1982); *see also Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (noting that the "crucial question" in an overbreadth case is "whether the [challenged law] sweeps within its prohibitions what may not be punished under the First . . . Amendment[]"). It has thus effectively abandoned its overbreadth challenge.

But even if it hadn't, that challenge would fail. RJR Vapor has suggested (at 64 & n.17) that the Tax may impact "protected speech," Resp. Br. 58, because the Comptroller's representative testified that the Comptroller takes a product's marketing into account when determining whether that product counts as a taxable tobacco substitute, 4.RR.2332-34; *see infra* p. 22. Marketing is commercial speech. *See, e.g.*, *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (explaining that whether speech "'propose[s] a commercial transaction' . . . is the test for identifying commercial speech" (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer*

Council, Inc., 425 U.S. 748, 762 (1976)); *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (noting that "advertising pure and simple" counts as commercial speech); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). But "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates*, 455 U.S. at 497*; see also Fox*, 492 U.S. at 481 ("[C]ommercial speech . . . is less likely to be 'chilled'" and is "not in need of surrogate litigators."); *Cent. Hudson*, 447 U.S. at 565 n.8. Thus, even if the Tax regulated marketing, the overbreadth challenge would fall flat.

But the Tax doesn't regulate marketing—it taxes tobacco products. Tex. Tax Code §§ 155.001(15), 155.0211(a). True, the Comptroller may sometimes assess a product's marketing to determine whether that product counts as a tobacco substitute. 4.RR.2332-34. But if other evidence shows that the product falls within the meaning of *tobacco substitute*, marketing "is not going to be the determining factor" in the Comptroller's consideration of whether an item constitutes such a product. 4.RR.2339; Comptroller Br. 25. RJR Vapor contends (at 56-57) that the Comptroller has represented to this Court that marketing is "irrelevant" to whether a particular product qualifies as a tobacco product. But the Comptroller has merely maintained (at 25) that the Tax's "applicability [does not] turn on marketing," which just means, as his representative testified, that marketing alone is not dispositive. *See* 4.RR.2339. In other words, the Tax does not regulate marketing. Comptroller Br. 25. And even if it did, it would not be subject to an overbreadth challenge. *Village of Hoffman Estates*, 455 U.S. at 497.

B. The challenged provision is not unconstitutionally vague.

RJR Vapor's as-applied and facial vagueness challenges to section 155.001(15)(E) fail. Comptroller Br. 30-35. VELO products fall within the Tax's ambit. Comptroller Br. Part I; *supra* Part I. And "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates*, 455 U.S. at 495.

Moreover, RJR Vapor's arguments reveal that it has not brought a proper facial challenge. It complains (at 51-58, 63-67) largely about the Comptroller's enforcement of the Tax rather than about the statutory language. Generally, when a party challenges a law's enforcement but does not contend that the law is unconstitutional in all its applications, the party has not brought a facial challenge. *E.g.*, *Umphress v. Hall*, No. 20-11216, 2025 WL 1009058, at *5 (5th Cir. Apr. 4, 2025) (per curiam). Complaining about the way the Comptroller enforces the Tax is not the same thing as complaining that the *tobacco product* definition is vague "by its terms" or that it "always operates unconstitutionally." *E.g.*, *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 n.5 (Tex. 1997); *see Village of Hoffman Estates*, 455 U.S. at 494-95; *see also Comm'n for Law. Discipline v. Benton*, 980 S.W.2d 425, 438-39 (Tex. 1998) (examining only the text of a law in a facial vagueness challenge). RJR Vapor has not made that argument here.

But even if it had, that argument would fail because section 155.001(15)(E) is not "impermissibly vague in all of its applications." *Village of Hoffman Estates*, 455 U.S. at 494-95. For example, everyone in this litigation agrees that a cigar containing both tobacco and a non-tobacco plant would count as "a product that is made of . . . a

tobacco substitute." Tex. Tax Code § 155.001(15)(E); Resp. Br. 37 n.12; *supra* pp. 9-10. Because the parties concur that the statute clearly delineates at least this application of the statute, RJR Vapor's facial challenge misfires. *See Village of Hoffman Estates*, 455 U.S. at 494-95.

Because RJR Vapor has not argued a true facial challenge, its other vagueness contentions are irrelevant. Most of its objections relate to the way the Comptroller applies the Tax to others, not to RJR Vapor. For example, RJR Vapor mainly complains (at, *e.g.*, 51-52, 66) that the Tax should apply to NRTs—but VELO products are not NRTs, and RJR Vapor has not argued otherwise. RJR Vapor attacks the way the Comptroller has followed where the statute leads, enforced a completely separate (and inapplicable) tax, or enforced this Tax generally (without arguing that the Comptroller applied any of those enforcement mechanisms against RJR Vapor). These tactics are unavailing.

1. RJR Vapor argues (at, *e.g.*, 51-52, 66) that the Comptroller's enforcement of the Tax "[s]pawns . . . [v]agueness," Resp. Br. 62 (emphasis omitted), because the Comptroller does not assess the Tax against NRTs. But again, statutory context makes clear that the Tax does not apply to NRTs (which, for the reasons this brief has already explained, are not "materially identical" to other oral nicotine products that are not designed to help mitigate a nicotine addiction). *Supra* pp. 3-6. *Contra* Resp. Br. 65. Because the statute demonstrates this with at least reasonable clarity, *see supra* Part I, it is not unconstitutionally vague, *see Tex. Dep't of Ins. v. Stonewater Roofing, Ltd.*, 696 S.W.3d 646, 662-63 (Tex. 2024). The Comptroller's enforcement history accords, *see* Comptroller Br. 33-34, and RJR Vapor does not contend

otherwise. Nor has the Comptroller "express[ed] doubt" on this point in earlier briefing in this case. *See* Br. of Cross-Appellants at 41, *RJR Vapor*, 681 S.W.3d 867 (No. 03-22-00188-CV), 2022 WL 4237093 (noting that no court has yet decided "whether NRTs are 'tobacco products'" and assuming without deciding that the statute excludes NRTs and includes VELO products). In fact, the Comptroller's argument in the court of appeals resembles his argument here. Br. of Cross-Appellants, *supra*, at 41.

2. RJR Vapor next criticizes (at, *e.g.*, 53) the Comptroller's enforcement of a *different tax*, maintaining (at 53) that "the Comptroller has adopted" a different understanding of the phrase "made of tobacco" in the Cigarette Tax, *see* Tex. Tax Code ch. 154, than he has here. But RJR Vapor has challenged only the enforcement of *this* Tax. CR.2350-54 (live petition). And as RJR Vapor acknowledges (at 21), this Tax expressly excludes e-cigarettes. Tex. Tax Code § 155.001(15)(E).

3. Finally, RJR Vapor resorts to complaining broadly about the Comptroller's history and methods of enforcing the Tax. Again, these arguments lack relevance. *Supra* pp. 19-20. And they fail anyway.

RJR Vapor mostly focuses on the way the Comptroller determines what counts as a tobacco substitute. For example, it bemoans (at, *e.g.*, 54, 63) the Comptroller's practice of determining whether a product qualifies as a tobacco substitute "on a case-by-case basis." 4.RR.2331. But this just means that the Comptroller will determine whether a given "product[]," Resp. Br. 63, constitutes a tobacco substitute based on the specific facts surrounding that product, *see* 4.RR.2332-34, 2338 ("[d]epends on the facts"). Courts do the same thing every day. And enforcing the

Tax "on a case-by-case basis," 4.RR.2331, does not equal inconsistent or arbitrary enforcement, *see, e.g.*, *Grayned*, 408 U.S. at 108-09. The Comptroller's representative testified that "some criteria or factors" in determining whether an item counts as a tobacco substitute include "how the product is designed, how it is manufactured[,] and how it is marketed." 4.RR.2332; *see* 4.RR.2331-33. But RJR Vapor does not dispute that those types of criteria are relevant in determining what type of product something is. For example, whether a particular product is *designed* to help consumers stop smoking is relevant to whether it counts as a taxable "tobacco product." *Supra* pp. 3-5. That distinction has its foundation in statutory text, so the Tax is not vague. *See, e.g.*, *Stonewater*, 696 S.W.3d at 660.

RJR Vapor next contends (at 54-55) that these factors may not be exclusive and that it cannot tell "how much weight each factor receives." But it's hard to see how that differs from, say, the totality-of-the-circumstances tests that courts (including this one) regularly apply. *Cf., e.g.*, *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019) (explaining that a totality-of-the-circumstances test "is a 'case-by-case' approach"); *Perry Homes v. Cull*, 258 S.W.3d 580, 592-93 (Tex. 2008) ("We recognize . . . 'the difficulty of uniformly applying a test based on nothing more than the totality of the circumstances.' . . . [T]ests based on 'reasonableness' are never susceptible to mechanical application—'few answers will be written in black and white[;] [t]he greys are dominant and even among them the shades are innumerable.'" (alterations in original) (first quoting *R.R. St. & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 242-43 (Tex. 2005); and then quoting *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978))).

RJR Vapor's remaining objections merely take testimony out of context. For example, it complains (at 55) that the Comptroller's representative did not "explain" what constitutes an "ingestible quantity," 4.RR.2339, but the representative later clarified that "if the nicotine is . . . designed to be ingested, that is a factor that will increase the likelihood that . . . [the] product's going to be a tobacco substitute," 4.RR.2340. This tracks statutory context. *See* Tex. Tax Code § 155.001(15)(A)-(D) (specifically enumerating products that are designed to be ingested); *see also* Scalia & Garner, *supra*, at 195-96. And when one other witness testified that he didn't know what might qualify as a tobacco substitute, he did so in terms of developing science. CR.2200. Specifically, when RJR Vapor's counsel asked him about the criteria for a tobacco substitute, he acknowledged that science had reached such a state that many different items might count as a tobacco substitute. CR.2199-2200. That statement does not acknowledge that *tobacco substitute* is vague. *Contra* Resp. Br. 55-56. The Court should reject the vagueness claim.

C. The challenged provision provides equal and uniform taxation.

Section 155.001(15)(E) taxes similarly situated taxpayers similarly. Comptroller Br. 35-39. RJR Vapor does not argue that the legislative decision not to tax e-cigarettes violates the Equal and Uniform Clause—instead, it takes issue with the non-taxation of NRTs. *See* Resp. Br. 58-61. But as the Comptroller has explained (at 35-39), the statutory text classifies NRTs separately from oral nicotine products for the common-sense reason that NRTs help people become free of a nicotine addiction, while other oral nicotine products like VELO products are not designed or approved for this purpose. Comptroller Br. 37-38; *supra* pp. 3-5. RJR Vapor's

argument to the contrary blinks statutory text and ignores that "the Legislature retains full discretion when it 'attempt[s] to group similar things and differentiate dissimilar things'"—"subject, of course, to the general rule that the differences must be real, not fanciful." *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 786-87 (Tex. 2016). The differences between items that help a consumer to become free of a nicotine addiction and items that do not is a "real" one. *Id.*

RJR Vapor maintains that the Legislature unreasonably excluded NRTs from the Tax because, in RJR Vapor's view, whether the FDA has approved an item as an NRT "bear[s] 'no relation to' the purpose of the tax." Resp. Br. 61 (emphasis omitted) (quoting *In re Nestle USA, Inc.*, 387 S.W.3d 610, 622 (Tex. 2012) (orig. proceeding)). But as section 155.001(15)'s text reveals, the Tax aims to promote freedom from nicotine addiction by taxing items that will not help mitigate such an addiction. *Supra* pp. 3-5. Whether the FDA has approved a particular item as an NRT thus relates to the Tax's purpose. *Nestle*, 387 S.W.3d at 622; *see id.* ("The Legislature may pursue policy goals through tax legislation, but only goals related to the taxation."); *supra* pp. 3-5.

III. This Case Merits Review.

This case warrants the Court's review for all the reasons the Comptroller has previously explained (at 45-48). RJR Vapor's contrary arguments are misguided.

To begin, RJR Vapor asserts (at 67) that because only the court of appeals below "has addressed the issue" that this case presents, "there is no split in authority" among the intermediate courts. But that only one court of appeals "has addressed th[is] issue" makes sense, Resp. Br. 67, as Travis County trial courts have

"exclusive, original jurisdiction" over taxpayer protest suits, Tex. Tax Code § 112.001 (granting "exclusive, original jurisdiction" over suits "under this chapter"); *see id.* §§ 112.051-112.060 (Chapter 112, Subchapter B, "Suit After Protest Payment"). In other words, only one court of appeals could "address[] the issue" when RJR Vapor filed its notice of appeal, Resp. Br. 67; *see* Tex. Tax Code § 112.001, and, with the advent of the Fifteenth Court of Appeals, only one can "address[] the issue" now, *see* Tex. Gov't Code § 22.220(d), (d)(1). Under RJR Vapor's theory, this Court should not review cases arising out of the Fifteenth Court because only that court can now pass on the State's matters. *See id. See generally Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025) (per curiam). But that can't be right.

In any event, in deciding whether to grant review, this Court considers more than whether the courts of appeals have disagreed. *See* Tex. Gov't Code § 22.001(a); Tex. R. App. P. 56.1(a), (a)(3)-(6). While RJR Vapor says (at 70 n.18) that statutory construction and novel legal questions "do not in and of themselves justify review," this Court's rules indicate otherwise. Tex. R. App. P. 56.1(a)(3). RJR Vapor apparently believes that the Court grants review only for practical reasons, not for merits reasons, *see* Resp. Br. 70 n.18, 73-74, but nothing prohibits the Court from granting a case because the court of appeals was wrong, especially where that incorrect result is important to the State's jurisprudence. For example, the lower court's decision here implicates other statutes and will thus have wide-ranging effects. Comptroller Br. 3, 45-47.

RJR Vapor dismisses (at 71-75) that last argument, suggesting that the Comptroller overstates his concerns about the interpretation of Texas law. But as the

Comptroller has already explained (at 46), the State has an interest in the correct and clear interpretation, application, and enforcement of its own laws. *See, e.g.*, *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam) (explaining that ultra vires conduct harms the sovereign as a matter of law). Federal or local regulation of VELO products is thus irrelevant. *Contra* Resp. Br. 71-75. RJR Vapor does not respond to the State's unquestionable sovereign interest.

The court of appeals' decision will have a major impact on Texas's tax revenues at large, Comptroller Br. 45-46—not just Texas's tax assessment against RJR Vapor, *see* Resp. Br. 70-71. RJR Vapor dismisses (at 70-71) this concern, suggesting (at 70) that the Court should not credit it because the Comptroller's petition for review was less specific about it than RJR Vapor would have liked. But RJR Vapor challenged the Comptroller to identify such a concern if one existed, RPFR 20, and he did. RJR Vapor cannot now imply that he has fabricated that concern. *See Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam) (noting that the Court "presume[s] that public officials act in good faith"). Nor does this Court require a party seeking review to point out reasons to grant review only in the record on appeal, as opposed to the public record. *Contra* Resp. Br. 70. In fact, many factors that might warrant review look beyond the record. *See* Tex. R. App. P. 56.1(a).

RJR Vapor next implies (at 70) that the Comptroller's article about the harm that could result from the lower court's decision does not deserve credence. But this Court presumes that public officials act in good faith. *Anti-Defamation League*, 610

S.W.3d at 923. And RJR Vapor does not say whom it believes more qualified to opine on the impact to the State's tax revenues than the State's chief financial officer.

Finally, RJR Vapor contends (at 68-69) that the Court should deny review because the Legislature has recently considered bills on topics related to this case's subject matter. But attempting to read the tea leaves of failed or nascent legislation is generally a risky endeavor. After all, the Legislature may not have passed the bills that RJR Vapor references because the statute already encompasses products like VELO. *Supra* Part I. In any event, the Court need not defer review on the Legislature's account for the reasons the Comptroller has already explained (at 47-48)—and to which RJR Vapor makes no response.

Prayer

The Court should grant the petition for review, reverse the court of appeals' judgment affirming the trial court's partial summary judgment in RJR Vapor's favor, and render judgment for the Comptroller.

Respectfully submitted.

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Filing Description: 20250414 RJR Vapor Petr Reply v9_Final
Status as of 4/14/2025 3:44 PM CST

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