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SUPREME COURT OF TEXAS
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No. 24-0052

In the

Supreme Court
of
Texas

KELLY HANCOCK, ACTING 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

Brief of Various Medical, Public Health, and Community Organizations as *Amici Curiae* in Support of Petitioners

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Introduction

Nicotine pouches—small pouches filled with powder comprised of nicotine, flavorings, and other ingredients[1]—are both an emerging and rapidly growing category of tobacco products.[2] From January 2023 to April 2025, the last date for which data is available, nicotine pouch sales in the United States increased an astonishing 207%, from $145.5 million to $446.8 million.[3] The rapid growth of this category has implications for agencies responsible for collecting tax revenue from tobacco products, like the Texas Comptroller of Public Accounts. It also has significant implications for public health, as according to the United States Centers for Disease Control and Prevention: "There are no safe tobacco products, including nicotine pouches."[4]

When placed between the lip and gum, the powder within a nicotine pouch dissolves and its nicotine—an addictive chemical—is

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[1] CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), *Nicotine Pouches* (Jan. 31, 2025), https://www.cdc.gov/tobacco/nicotine-pouches/ (last visited Sept. 16, 2025).
[2] Tobacco companies introduce "Tobacco-Free" Nicotine Pouches, *Tob. Control* https://tobaccocontrol.bmj.com/content/29/e1/e145 (last visited Aug. 21, 2025).
[3] CDC Found., *Nicotine Pouch Data Brief* (Apr. 20, 2025), https://tobaccomonitoring.org/wp-content/uploads/2025/07/Nicotine-Pouch-Brief-4.20.2025.pdf.
[4] CDC, *Nicotine Pouches*, supra note 1.

absorbed into the bloodstream.[5] With repeated use, an individual's brain "gets used to having nicotine" to the point that it needs it "just to feel okay,"[6] and a nicotine addiction can develop. Nicotine addiction can cause stress and harm mental health.[7] However, overcoming an addiction to nicotine is difficult, and people often need to make multiple quit attempts before succeeding.[8] Nicotine withdrawal can be accompanied by irritability, negative moods, sleep disruptions, concentration issues, hunger, and nicotine cravings.

Nicotine use also poses other health risks. Nicotine is toxic to fetuses and presents a danger to those pregnant.[9] Adolescents are particularly vulnerable to the addictive effects of nicotine because the

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[5] CDC, *Nicotine Pouches*, supra note 1.

[6] CTRS. FOR DISEASE CONTROL & PREVENTION, *E-Cigarettes: Health Effects*, https://www.cdc.gov/tobacco/e-cigarettes/health-effects.html#cdc_generic_section_10-nicotine-addiction-and-withdrawal (last visited Aug. 21, 2025).

[7] CTRS. FOR DISEASE CONTROL & PREVENTION, *E-Cigarettes: Health Effects,* https://www.cdc.gov/tobacco/e-cigarettes/health-effects.html#cdc_generic_section_11-nicotine-addiction-and-mental-health (last visited Aug. 21, 2025).

[8] B. VanFrank, et al., Adult Smoking Cessation — United States, 2022, 73 *Morbidity & Morality Wkly*. Rep. 633, (2024); Geoffrey T. Fong et al., The Near-Universal Experience of Regret Among Smokers in Four Countries: Findings from the International Tobacco Control Policy Evaluation Survey, 6 Nicotine & Tobacco Res. S341 (Sept. 3, 2004).

[9] U.S. DEP'T OF HEALTH & HUMAN SERVS., How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-attributable Disease: A Report of the Surgeon General (2010), https://www.ncbi.nlm.nih.gov/books/NBK53017/ (last visited Sept. 16, 2025).

brain continues to develop until about age 25.[10] Exposure to nicotine during this time may have lasting, adverse consequences on brain development.[11] Nicotine use can harm the parts of the adolescent brain responsible for attention, learning, mood and impulse control.[12] In addition, adolescents who use nicotine products may be at an increased risk for future addiction to other drugs.[13] Hence, the United States Surgeon General warns: "The use of products containing nicotine in any form among youth . . . is unsafe."[14]

Regrettably, tobacco product use almost always begins during adolescence,[15] and nicotine pouches are no exception. Today, they are the second most used type of tobacco product among youth nationally,

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[10] U.S. DEP'T OF HEALTH & HUMAN SERVS., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012).

[11] U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General* (2014); Institute of Medicine, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, Washington, DC: The National Academies Press (2015), https://www.hhs.gov/sites/default/files/consequences-smoking-exec-summary.pdf.

[12] U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General,* CDC, Office of Smoking and Health (OSH) (2014), http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html.

[13] U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, OFFICE ON SMOKING & HEALTH, *E-Cigarette Use Among Youth and Young Adults. A Report of the Surgeon General* (2016).

[14] *Id.*

[15] U.S. DEP'T OF HEALTH & HUMAN SERVS., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012).

exceeded only by e-cigarettes. According to the most recent data, more than 480,000 youth reported using nicotine pouches in the previous 30 days.[16] Even more concerning, while youth use of e-cigarettes decreased significantly between 2023 and 2024, nicotine pouches are the only category of tobacco product that saw any increase in youth use during this period.[17] Given data from the United States Census Bureau estimating that 24.8 percent of the State—nearly 8 million Texans—are under the age of 18,[18] nicotine pouch use has the potential to present a widespread health problem in Texas.

Interest of the *Amici Curiae*

Amici are the Texas Academy of Family Physicians; Texas Medical Association; Texas Pediatric Society, the Texas Chapter of the American Academy of Pediatrics; American Cancer Society Cancer Action Network; American Heart Association; American Lung Association; Campaign for Tobacco-Free Kids; Parents Against Vaping

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[16] E. Lee, et al., E-Cigarette and Nicotine Pouch Use Among Middle and High School Students — United States, 2024, *Morbidity and Mortality Wkly. Rep.* 774 (Sept. 5, 2024), https://www.cdc.gov/mmwr/volumes/73/wr/pdfs/mm7335a3-H.pdf.
[17] *Id.*
[18] U.S. CENSUS BUREAU, QuickFacts: Texas, https://www.census.gov/quickfacts/fact/table/TX/AGE295223#AGE295223 (last visited Aug. 21, 2025).

E-cigarettes; Preventing Tobacco Addiction Foundation; and Truth Initiative. They are non-profit organizations that have worked for decades to protect the public from the devastating harms caused by tobacco products, the leading cause of preventable death in the United States, claiming over 490,000 lives every year. *Amici* include organizations of physicians who counsel their young patients about the hazards of tobacco use, organizations with formal programs to urge users to quit, and groups representing parents and families struggling to free young people from nicotine addiction. They share a strong interest in ensuring that Texans—particularly young Texans—are sufficiently protected from the adverse short and long-term public health effects of tobacco products, including nicotine pouches.

Summary of the Argument

At issue in this case is whether Respondent's VELO products are "made of tobacco or a tobacco substitute," and therefore subject to Texas tobacco product taxes and various health and safety statutes. Because the products are "made of tobacco," or at the very least, "made of … a tobacco substitute," and because the Texas Constitution presents no barriers to enforcement of these laws, this Court should reverse the Court of Appeals and enter judgment for the Comptroller.

Argument

I. VELO Products Are "Made of Tobacco" Because They Are Made of Tobacco's Essential Constituent—Nicotine—and, as a Recreational Vice Product, Accord with the Type of Products Enumerated in § 155.001(15)

Interpretation of the statute should reflect the tobacco industry's own understanding of its business: that it, first and foremost, sells nicotine. This interpretation is consistent with the statutory history, including the Texas Legislature's clear intent to broadly tax tobacco products and to protect youth from the harms of tobacco products. Respondents advance an interpretation of "tobacco" that defies basic plant biology and "made of" that is contrary to established jurisprudence. When those terms are properly construed, VELO products facially satisfy the statute. Moreover, because VELO are the type of product covered by the statute—recreational vice products—they are "made of tobacco."

a. The Tobacco Industry Has Long Recognized That the Tobacco Business Is the Nicotine Business

According to the United States Surgeon General, "[n]icotine is the drug in tobacco that causes addiction."[19] Nicotine is "critical in the transition of smokers from experimentation to sustained smoking and, subsequently, in the maintenance of smoking. . ."[20] As a Philip Morris researcher in 1972 bluntly stated: "No one has ever become a cigarette smoker by smoking cigarettes without nicotine."[21]

The tobacco industry has long known that nicotine is the key to its business. *See generally United States* v. *Philip Morris USA, Inc. et al.,* 449 F.Supp.2d 1, 307 (D.D.C. 2006), *aff'd in relevant part,* 566 F.3d 1095 (D.C. Cir. 2009). In a historic case brought by the United States Department of Justice under the federal Racketeer Influenced and Corrupt Organization Act (RICO) that resulted in a 1,683-page opinion,

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[19] U. S. DEPARTMENT OF HEALTH & HUMAN SERVS., *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010), https://www.ncbi.nlm.nih.gov/books/NBK53017/pdf/Bookshelf_NBK53017.pdf at 105.

[20] U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Health Consequences of Smoking—50 Years of Progress, A Report of the Surgeon General* (2014). *See also* U.S. DEP'T OF HEALTH & HUMAN SERVS., *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010), http://www.ncbi.nlm.nih.gov/books/NBK53017/.

[21] W. Dunn, Jr., *Motives And Incentives In Cigarette Smoking* (Phillip Morris 1972), https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/jspf0085.

the United States District Court for the District of Columbia made extensive findings of fact concerning the tobacco industry's knowledge of nicotine's indispensability to its sales. Respondent's corporate sibling, R.J. Reynolds Tobacco Company, was a defendant in that civil action and was found to have violated RICO.[22] According to the court, it and other Defendants "researched and recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices." *Id.* at 208.

In 1972, the lead nicotine researcher for R.J. Reynolds Tobacco wrote in an internal report that "[t]obacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects," and that "a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form." *Id.* at 232. The report determined that the tobacco "industry is [] based upon design, manufacture, and sale of

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[22] R.J. Reynolds Vapor Company and R.J. Reynolds Tobacco Company, along with Modoral Brands, Inc.; Santa Fe Natural Tobacco Company, Inc.; and American Snuff Company, LLC; are all operating companies of Reynolds American. *See Our Operating Companies*, REYNOLDS AM. INC., https://www.reynoldsamerican.com/building-brands/ (last visited Aug. 21, 2025).

attractive dosage forms of nicotine" and that R.J. Reynolds' "position in [this] Industry is determined by our ability to produce dosage forms of nicotine which have more overall value, tangible or intangible, to the consumer than those of our competitors." *Id.* The tobacco leaf itself had little effect on product usage, company research found. To the contrary, a smoker's "choice of product and pattern of usage are primarily determined by his individual nicotine dosage requirements" and only "secondarily by a variety of other considerations including flavor and irritancy of the product, social patterns and needs, physical and manipulative gratifications, convenience, cost, health considerations and the like." *Id.* The report described nicotine as the "*sine qua non* of smoking." *Id.* at 233. A later R.J. Reynolds Tobacco report similarly described a cigarette as "a system for delivery of nicotine to the smoker in attractive, useful form." *Id.* And a 1991 research report concluded: "We are basically in the nicotine business." *Id.* at 237.[23]

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[23] Despite this internal recognition, RJR Reynolds, like other companies, would later deny the addictiveness of nicotine and cigarettes. In a televised hearing before the United States House of Representatives in 1994, RJR Reynolds Chairman and Chief Executive Officer James Johnston testified as follows:

> Q: Let me ask you.... Do you believe that nicotine is not addictive?
>
> A: Congressman, cigarettes and nicotine clearly do not meet the classic definitions of addiction. There is no intoxication.

Id. at 275.

Other major companies in the tobacco industry share this view. As early as 1940, American Tobacco Company internal documents described "[t]he presence of nicotine as a universal constituent of tobacco leaf [that] differentiates it from other plant material." *Id.* at 269. In a 1963 letter, American Tobacco Company's future president described nicotine as "the characteristic and essential element in tobacco and tobacco smoke." *Id.* at 270. That same year, a Brown & Williamson scientist observed that "nicotine is by far the most characteristic single constituent in tobacco," *id.* at 259, and Brown & Williamson's Executive Vice President and General Counsel concluded that "nicotine is addictive" and "[w]e are, then, in the business of selling nicotine…" *Id.* at 259. A 1969 British American Tobacco internal report acknowledged that "the major part of the satisfaction of smoking is derived from nicotine."[24] *Id.* at 245. A draft 1969 Philip Morris annual report similarly stated that "the primary motivation for smoking is to obtain the pharmacological effect of nicotine." *Id.* at 259. A 1976 British American Tobacco report concluded that "the majority of

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[24] Reynolds American is now a subsidiary of British American Tobacco. *See* Press Release, BRITISH AM. TOBACCO, *BAT Completes Acquisition of Reynolds* (July 25, 2017), https://www.bat.com/media/press-releases/_2017/july/Jul_25-BAT_Completes_Acquisition_of_Reynolds (last visited Sept. 16, 2025).

smokers who actually buy cigarettes and smoke them regularly are directly or indirectly seeking the effects of the nicotine content of the smoke…" *Id.* at 248. And in 1980, Lorillard concluded that, "[u]ndoubtedly, nicotine serves a primary role in cigarette smoking." *Id.* at 268.

Indeed, a 1972 Philip Morris confidential research report "urged the industry" to "[t]hink of the cigarette pack as a storage container for a day's supply of nicotine" and to "[t]hink of the cigarette as a dispenser for a dose unit of nicotine…" *Id.* at 222. The researcher summarized his report as concluding that "nicotine, specially packed, is the cigarette industry's product." *Id.* Tobacco industry product considerations reflected this reality. A 1972 R.J. Reynolds report concluded that there would be no interest in cigarettes without nicotine: "[I]f we … move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business." *Id.* at 233. A 1966 Philip Morris research report similarly concluded that "[a] cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation, and therefore would almost certainly fail." *Id.* at 220. Thus, for good reason, American Tobacco Company's Director of

Research tellingly wrote in 1940 that "[t]obacco substitutes, devoid of nicotine, have not been accepted…" *Id.* at 269.

This and other evidence—far too extensive to summarize here—caused the United States District Court to conclude that the R.J. Reynolds and other tobacco industry defendants had defrauded by, among other things, "concealing what Defendants openly recognized internally – that smoking is an addiction driven primarily by the pharmacological effects of nicotine." *Id.* at 856. The court found that industry "documents consistently reflect that Defendants considered themselves to be in the 'nicotine business'…" *Id.* at 858.

b. An Interpretation of "Made of Tobacco" That Fails to Acknowledge That the Tobacco Business Is the Nicotine Business Is Flawed

Fundamentally, Respondent RJR's argument is that the tobacco from which its nicotine is derived has been so fundamentally transformed that it is no longer "tobacco." *See generally* Resp. Br. 10-30. Quite the opposite has happened. As detailed *supra*, tobacco and its nicotine are inseparably linked. The tobacco business *is* the "nicotine business." *See Philip Morris*, 449 F.Supp.2d at 858. The VELO product line demonstrates as much: Nicotine is so essential to tobacco that it is the *only* component of tobacco that RJR extracts from it to produce VELO. RJR's processing takes "the characteristic and essential element in tobacco"—the "universal constituent of tobacco leaf [that] differentiates it from other plant material"—*see id.* at 269-70, and concentrates it. If anything, this processing makes a product like RJR's *more* "made of tobacco," pound for pound, than other tobacco products—not *less*. And because statutory interpretation "use[s] definitions prescribed by the Legislature and any technical or particular meaning the words have acquired," *see Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234, 253 (Tex. 2023), (*quoting City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008)), the Court's analysis can end here.

c. Statutory History and Context Support This Commonsense Reading

Nevertheless, statutory history, or "how the law changed," "can help clarify what the law means." *Brown v. City of Houston*, 660 S.W.3d 749, 755 (Tex. 2023). This examination can include a "statute's larger history and broader context." *Id.*

Texas has a long history of taxing "sin" products – taxes that the State levies in part "to deter people from activities considered detrimental to their health or to society."[25] Today, the Legislature imposes "sin" taxes on a wide array of products and services, including alcoholic beverages, gambling, and sexually oriented businesses. *See generally* Tex. Tax Code Ann. Ch. 183 (alcohol taxes); Tex. Occ. Code Ann. § 2028.101 (pari-mutuel taxes); Tex. Bus. & Com. Code Ann. § 102.052 (sexually oriented business tax). And for nearly a century, beginning in 1931 when the Legislature first imposed a 3-cent tax on each pack of cigarettes, the State has taxed tobacco products.[26] Over the years, the cigarette tax has been raised ten times to its current $1.41 per pack. *See* Tex. Tax Code Ann. § 154.021(b)(1). Tobacco taxes have been applied to more and more products over the years, too. In 1959, for instance, the Texas Legislature established a separate tax for cigars and other tobacco products.[27] And in 1984, snuff was expressly added.[28]

Throughout, the Legislature has always been explicit when it sought to withhold certain tobacco products from its broad tax. By

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[25] Texas Comptroller of Public Accounts, *How Texas Taxes "Sin"* (Nov. 2015), https://comptroller.texas.gov/economy/fiscal-notes/archive/2015/november/sintax.php.
[26] Texas Comptroller, *How Texas Taxes "Sin,"* supra note 25.
[27] Texas Comptroller, *How Texas Taxes "Sin,"* supra note 25.
[28] *Id.*

1984, it imposed taxes on "certain" tobacco products, specifically, statutorily defined cigarettes, cigars, and "tobacco products *other than* cigars, cheroots, or stogies." Tex. Tax Code Ann. §§ 154.021, 155.021, and 155.0211 (West 1984) (emphasis added). In 1991, it amended § 155.0211 so that that provision applied simply to "tobacco products *other* than cigars…" Act of May 27, 1991, 72d Leg., R.S., ch. 409, § 1, 1991 Tex. Gen. Laws 1479 (S.B. 689) (emphasis added).

RJR is correct to presume that the Legislature "purposefully omit[s] words not chosen," Resp. Br. at 15 (*quoting TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)), but focuses on the omission of phrases that are wholly unnecessary, like "derived from" or "containing nicotine from any source." The Legislature need not use such phrases because it employed a broad definition of "tobacco products" that, on its face, already encompasses products made from tobacco-derived nicotine. *See supra* Argument § I.b.

For two reasons, a more appropriate examination of statutory intent would focus on the omission of any reference to nicotine pouches. First, the Legislature has demonstrated that it knows how to tax different tobacco products differently. *See* Tex. Tax Code Ann.

§ 154.021(a) (imposing a tax on cigarettes); Tex. Tax Code Ann. § 155.021(a) (imposing a tax on cigars); Tex. Tax Code Ann. § 155.0211 (imposing a tax on "tobacco products" other than cigars). Indeed, the Legislature knows how to tax tobacco products within a particular class of tobacco products differently. *See, e.g.,* Tex. Tax Code Ann. § 154.021(b) (levying one of two cigarettes tax rates depending on weight); Tex. Tax Code Ann. § 154.021(b) (levying one of four cigar tax rates depending on weight and ingredients); Tex. Tax Code Ann. § 155.0211 (levying one of two tax rates on tobacco products other than cigars depending on weight). Second, the Legislature has demonstrated that it knows how to exempt specific tobacco products from taxation altogether. *See* Tex. Tax Code Ann. § 155.001(15)(E) (defining "tobacco product" to exclude "an e-cigarette…").

Here, the Legislature has failed to provide different treatment of, or carve-out an exception for, nicotine pouches. It could have easily exempted nicotine pouches from taxation by having Tex. Tax Code Ann. § 155.0211(a) impose a tax on "tobacco products other than cigars *or nicotine pouches*." It also could have easily exempted nicotine pouches from taxation by having Tex. Tax Code Ann. § 155.001(15)(E) define "tobacco product" as "an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette *or nicotine pouch*…" It did neither. The Court should therefore not read in an exemption from taxation that does not otherwise exist. *See generally Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 848 (Tex. 2024) ("Statutory exemptions from taxation are subject to strict construction because they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally.").

Further, the Legislature has elected to define "tobacco products" once for the purposes of both taxation *and* health and safety. *See* Tex. Health & Safety Code § 161.081(5) ("'Tobacco product' has the meaning assigned by Section 155.001, Tax Code."); Tex. Health & Safety Code Ann.§ 161.121(5); Tex. Health & Safety Code Ann.§ 161.251(2); Tex. Health & Safety Code Ann. § 161.351(3). Accordingly, significant laws that protect the health and safety of Texans—particularly young Texans—are implicated by the Tax Code's definition. These include laws prohibiting: advertising "tobacco products" within 1,000 feet of a church or school, Tex. Health & Safety Code Ann. § 161.122; selling or distributing "tobacco products" to those under 21 years of age, Tex. Health & Safety Code Ann. § 161.082, selling "tobacco products" in vending machines that are accessible to youth, Tex. Health & Safety Code Ann. § 161.086; giving free samples of "tobacco products"; Tex. Health & Safety Code Ann. § 161.087(a)(1)-(2); and giving discount coupons to those under 21 years of age, Tex. Health & Safety Code Ann. § 161.087(a-1). And it includes a law requiring each manufacturer of a "tobacco product" distributed in Texas to annually file an ingredient report with the state. Tex. Health & Safety Code Ann. § 161.352. Because "[t]he use of products containing nicotine in any form among youth . . . is unsafe,"[29] absent a clear indication to the contrary, there is no reason to presume the Legislature set forth a definition for health and safety purposes that was intended to exclude nicotine pouches. *See Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017) (statutes are interpreted to avoid "absurd or nonsensical results").[30]

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[29] U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, OFFICE ON SMOKING & HEALTH, E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: *Report of the Surgeon General*, 2016.

[30] While the Court does not typically consider *legislative* history, to the extent the Court finds it helpful, the legislative history here also supports this interpretation.

d. RJR Misinterprets "Tobacco" and "Made Of"

Ignoring nicotine's indispensability to the tobacco industry and the industry's near-century-long understanding that it is in the "nicotine business," RJR instead seeks to dissect each word of the statutory phrase "made of tobacco." But even putting this crucial context aside, its arguments still fail, as RJR misinterprets and misconstrues each component of that phrase.

First, RJR argues that there is no "tobacco" in its product, suggesting there is "plant material" and, separately, nicotine. *See, e.g.,* Resp. Br. 17 ("[N]o part of the tobacco plant remains in the nicotine isolate."); *Id.* ("All the plant material is discarded."). But this argument misrepresents what "tobacco" is. Nicotine does not merely sit on a tobacco plant waiting to be brushed off or otherwise collected: nicotine is part of the plant material. It is "produced primarily in the roots of tobacco plants and transported via the xylem to the leaves, where it is

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In 2019, the Texas Legislature amended the Health and Safety Code to increase the minimum age to purchase "tobacco products" for those not in military service from 18 to 21. *See* Tex. S.B. 21, 86th Leg., Reg. Sess (2019). The bill analysis demonstrates that the State's concern was not just tobacco leaf products, but "nicotine products" generally. *See* Texas Bill Analysis, Tex. S.B. 21, 86th Leg., Reg. Sess. (May 30, 2019).

stored in vacuoles."[31] And nicotine is not merely a gratuitous feature. It serves an important function for the plant: providing a defense against predators.[32] From a biological standpoint, tobacco-derived nicotine *is* tobacco—regardless of whether, in isolation, it looks like a plant. This Court's statutory interpretation should reflect this reality. Construing this term otherwise would simply run counter to the Court's "'primary objective'": "'to determine the Legislature's intent which, when possible,'" is "'discern[ed] from the plain meaning of the words chosen.'" *Mosaic Baybrook One, L.P. v, Simien* 674 S.W.3d at 253 (Tex. 2023), (*quoting In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007)).

RJR's arguments concerning the phrase "made of" are, likewise, unavailing. RJR insists the Legislature's use of the term "made of," as opposed to "made from" is of great significance, *see* Resp. Br. 13-16, but fails to cite a single case delineating a distinction between these terms. In fact, trade courts—courts that regularly deal with the classification of products for taxation—that have considered this issue have found

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[31] Tsubasa Shoji et al., *Genetic regulation and manipulation of nicotine biosynthesis in tobacco: strategies to eliminate addictive alkaloids*, Journal of Experimental Botany, Vol. 75, No. 6, https://pmc.ncbi.nlm.nih.gov/articles/PMC10938045/ (last visited Aug. 21, 2025).

[32] *Id.*

there to be no distinction. *See Am. Shipping Co. v. United States*, 22 C.C.P.A. 72, 74 (1934) ("We do not think there is any distinction, in a tariff sense, between the terms 'made of' and 'made from,'…"); *Bryant & Heffernan, Inc. v. United States*, 32 Cust. Ct. 192, 201 (Cust. Ct. 1954) (noting that "the language 'made of'" is "the equivalent of 'made from'"). As Petitioners correctly state, "made of" and "made from" are synonymous. *See* Opening Br. 14. Indeed, a processed all-beef hot dog may not look like cow, but it is undoubtedly "made of cow," even if the cow hide is discarded and the final product does not moo.

Therefore, in Tex. Tax Code Ann. § 155.001(15), the condition that a product be "made of tobacco" is not particularly exacting. A product that is made from tobacco, including tobacco that has been reduced to its nicotine, facially satisfies this definition.

e. VELO Products Are Made by Extracting the Essential Constituent of Tobacco: Its Nicotine

The fundamental facts that presumptively establish RJR's tax liability are undisputed. RJR acknowledges that "VELO contains nicotine isolate: pure nicotine that is extracted from plants…," and that the specific plants from which it extracts its nicotine are "tobacco plants." Resp. Br. 4. VELO is therefore presumptively subject to the tax.

Only by defining "tobacco" to mean just the leafy part can RJR state that "there is no tobacco plant matter in the final product at all" and that it does not "handle tobacco at any point in the distribution of VELO." Resp. Br. 5. But these statements do not hold true when the term "made of tobacco" is properly understood to include products made from nicotine extracted from the tobacco plant. VELO *does* have tobacco-derived nicotine in the final product, and, so, the distribution of VELO necessarily requires RJR to handle tobacco-derived nicotine.

While RJR suggests that, theoretically, it might be able to extract its nicotine from "tomatoes, potatoes, peppers, and eggplants," *see* Resp. Br. 5, the fact remains that RJR does not do so, and for good reason. Eggplant, which has the highest nicotine concentration of any produce, contains a maximum of 100 nanograms of nicotine per gram.[33] VELO's lowest-concentration nicotine pouch is 2 milligrams, and VELO's smallest tin contains 15 nicotine pouches. In other words, assuming it

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[33] Edward F. Domino, M.D., et al., *The Nicotine Content of Common Vegetables*, NEW ENGLAND JOURNAL OF MEDICINE (Aug. 5, 1993), https://www.nejm.org/doi/full/10.1056/NEJM199308053290619 (last visited Aug. 21, 2025).

is even possible to extract nicotine from eggplant, it would take at least 300,000 grams (more than 661 pounds) of eggplant to make VELO's smallest, lowest strength tin. In the long history of tobacco use in the United States, it is clear that tobacco companies have never seriously considered eggplant or any other plant sources for nicotine for human consumption because they found only tobacco, with its much higher concentrations of nicotine, suitable for that purpose. The Court therefore need not consider whether eggplant-derived nicotine or the like would satisfy the statutory definition.[34]

f. When Placed in Context, "Made of Tobacco or a Tobacco Substitute" Is Plainly Limited to Recreational Vice Products

The "tobacco product" definition enumerates many specific qualifying products, followed by the provision most at issue in this case. The enumerated products are: "a cigar"; "smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed"; "any form of tobacco suitable for smoking in a pipe or as a cigarette"; "chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco

[34] For the same reason, the Court need not be concerned about developing an addiction to eggplant parmesan.

suitable for chewing"; and "snuff or other preparations of pulverized tobacco." Tax Code § 155.001(15). The following provision, which expands the definition to also include "an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette…," is a phrase of general nature. Accordingly, the Court should apply "the rule of *ejusdem generis*, which provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *Hilco Elec. Co-op., Inc. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) (citing cases); *see also Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction, the general words are confined to the class and may not be used to enlarge it."). Hence, in *Hilco*, this Court found that a statute granting electric cooperatives the power necessary or appropriate to effectuate enumerated activities and "other or additional purposes … described in Section A, Article 2.01, Texas Non-Profit Corporation Act," did not mean the cooperatives had power to engage in "any lawful purpose," even though the cited provision of the Non-Profit Act allowed the organization of non-profits for “any lawful purpose.” Rather, the cooperatives powers were “limited to purposes similar in kind or class to the twenty-one identified categories.” *Id.* at 81.

The same reasoning applies here. The phrase “article or product that is made of tobacco or a tobacco substitute” is limited to types of products similar in kind or class to the fifteen types and subtypes of identified products. Cigars, ready-rubbed smoking tobacco, scrap chewing tobacco, and the others are all recreational vice products, and as such, products that present public health risks. Read in proper context, that provision plainly excludes products where nicotine is included for therapeutic purposes, like nicotine replacement therapies (NRTs).[35]

The larger statutory context supports this reading, too. Subtitle E of the Texas Tax Code (Chapters 151-163), which houses the disputed tax provision at issue, concerns sales, excise, and use taxes. Chapter 151 imposes sales and use taxes on “taxable item[s].” Tex. Tax Code Ann. §§ 151.051, 151.101 (West 2024). Various health care products are

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[35] Umesh Wadgave & L. Nagesh, *Nicotine Replacement Therapy: An Overview*, https://pmc.ncbi.nlm.nih.gov/articles/PMC5003586/ (last visited Aug. 21, 2025).

specifically exempt from "the taxes imposed by this chapter," including "a drug or medicine, other than insulin, if prescribed or dispensed for a human or animal by a licensed practitioner of the healing arts," and "a drug or medicine that is required to be labeled with a 'Drug Facts' panel in accordance with regulations of the federal Food and Drug Administration, without regard to whether it is prescribed or dispensed by a licensed practitioner of the healing arts." Tex Tax Code Ann. § 151.313(a)(1),(3). Through this provision, which plainly applies to FDA-approved NRT products, the Legislature has demonstrated its clear intent to make medical products more affordable and accessible. Chapter 151, and Chapters 154 and 155, "should be interpreted in a way that renders them compatible rather than contradictory." *Pub. Util. Comm'n of Texas v. Luminant Energy Co. LLC*, 691 S.W.3d 448, 462 (Tex. 2024). Even e-cigarettes, which the Legislature expressly excluded from taxation in Chapter 154, are nonetheless subject to taxes under Chapter 151. It is nonsensible to conclude that the Legislature went to pains to exempt medical products like NRTs from taxation in Chapter 151 only to tax them in Chapter 155.

g. VELO Products Are Recreational Vice Products

A cursory examination of VELO products is enough to demonstrate that they are recreational vice products. As an initial matter, RJR makes "no health, reduced harm, or cessation claims" regarding its VELO products.[36] Nor could they. As the FDA makes clear: "To legally market a new tobacco product in the United States, a company must receive a written marketing order from FDA."[37] VELO has *not* been authorized by the FDA, and as such, is not permitted under federal law to even enter Texas commerce. *See* 21 U.S.C. § 387j(a)(2) (requiring premarket review of a new tobacco product); *id.* § 387b(6) (deeming a tobacco product "adulterated" if it lacks premarket approval); *id.* § 331(a) (prohibiting the introduction into interstate commerce of "adulterated" products); *id.* § 333 (establishing penalties, including imprisonment, for violations).[38] And, of course, as a new

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[36] Velo, Frequently Asked Questions, https://www.velo.com/us/secure/footer-links/faq.html (last visited August 21, 2025).

[37] FOOD AND DRUG ADMIN. (FDA), *Tobacco Products Marketing Orders*, https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-products-marketing-orders (last visited Aug. 21, 2025).

[38] In addition, as FDA's former Center for Tobacco Products' (CTP) Director Dr. Brian King recently testified before the United States Congress, "there's no safe harbor for simply submitting an application . . ." , *Evaluating FDA's Human Foods and Tobacco Program Before the Subcomm. on Health of the H. Comm. on Energy and Com.*, 118th Cong. (Sept. 10, 2024), https://www.youtube.com/watch?v=yK8y5bO-2ik (at 42:24).

tobacco product without a written marketing order, VELO has not been determined by FDA to be "appropriate for the protection of public health." *See id.* § 387j(c)(2)(A). Nor has FDA authorized any claims of reduced risk for VELO, see *id.* § 387k(g)(2)(a), nor any therapeutic claims that would cause VELO to be classified as a "drug" under the Food, Drug, and Cosmetic Act, *see generally* 21 U.S.C. § 355.

Lack of any demonstrated benefit aside, VELO also has all the hallmarks of a recreational vice product. VELO is sold in a variety of flavors, including mint flavors: wintergreen, spearmint, and peppermint; fruity flavors: black cherry, dragon fruit, and "citrus burst"; and in cinnamon and coffee.[39] VELO describes its dragon fruit flavor akin to a wine, telling prospective consumers that it provides "notes of kiwi and pear," and describes its spearmint flavor as offering a "refreshing, subtle cooling mint flavor experience."[40] VELO is sold in brightly colored, modern packaging.[41] And VELO attempts to reach consumers in "new, exciting and engaging ways," such as through its

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[39] *Velo, Products Page*, https://www.velo.com/us/secure/products/velo.html (last visited August 21, 2025).
[40] *Velo, Frequently Asked Questions*, https://www.velo.com/us/secure/footer-links/faq.html (last visited August 21, 2025).
[41] *See supra* note 3.

sponsorship with McLaren Racing, which includes sponsored "esports" competitions with "top celebrities."[42]

II. At The Very Least, VELO Products Are "Tobacco Substitutes" Because They Are Recreational Vice Products That Contain the Essence of Tobacco—Its Nicotine

Even if the Court accepts RJR's argument that its VELO products are not "made of tobacco," the Court should nonetheless find that its VELO products are "made of … tobacco substitute."

A "substitute," Respondent argues, is "a person or thing that takes the place or function of another." Resp. Br. 43. Respondent incorrectly concludes, however, that sharing "one material quality" is insufficient. *See* Resp. Br. 43-46. While in some cases that might be true, nicotine alone is what "differentiates [tobacco] from other plant material." *See United States v. Philip Morris USA Inc.,* 449 F.Supp.2d 1, 269 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009). It is why "[t]obacco substitutes, devoid of nicotine, have not been accepted…" *Id*. RJR's argument therefore gives grossly insufficient weight to the

[42] *McLaren Racing, British American Tobacco and VELO Launch New Esports Series*, https://www.mclaren.com/racing/partners/british-american-tobacco/mclaren-racing-and-velo-launch-new-esports-series/ (last visited Aug. 21, 2025).

primary reason that users of tobacco products use tobacco products: its nicotine.

VELO and other nicotine pouches are, at a minimum, a "substitute" for tobacco by taking the place or function of tobacco—namely, by providing the nicotine that users of tobacco products seek from tobacco. Indeed, RJR's sister company has explicitly recognized as much. R.J. Reynolds Tobacco and its researchers have described nicotine as the "*sine qua non* of smoking," described "a tobacco product [as], in essence, a vehicle for delivery of nicotine" and concluded that they are "basically in the nicotine business." *Philip Morris,* 449 F.Supp.2d at 232-237. The tobacco industry at large shares this view. *See generally id*. at 237-38.

This includes the industry subset that manufactures nicotine pouches. In fact, federal premarket review of a new tobacco product is statutorily required to consider whether individuals who currently smoke cigarettes and other combustible tobacco products will switch to the proposed product—and demonstrating its substitutability *helps* the product obtain authorization. *See* 21 U.S.C. § 387j(c)(4)(A). For new tobacco products that receive marketing authorization, additional federal authorization is needed to make specific claims regarding relative health risks. *See generally id.* § 387k. Zyn, an FDA-authorized product line of nicotine pouches that competes with VELO in Texas, is currently seeking FDA authorization to market its product with a claim that directly compares other tobacco products with its nicotine pouches: "Using Zyn *instead of cigarettes* puts you at a lower risk of mouth cancer, heart disease, lung cancer, stroke, emphysema, and chronic bronchitis."[43]

Perhaps most tellingly, RJR states, on its website, that VELO is for "consumers who have made the decision to use tobacco or other nicotine products and are looking for an alternative."[44] Like the maker of Zyn, RJR is directly inviting a comparison between VELO and other tobacco products, and it is asking the consumer to substitute VELO for other tobacco products. VELO is therefore, at a minimum, a "tobacco substitute."

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[43] *Modified Risk Tobacco Product Application: Applications for ZYN Products Submitted by Swedish Match U.S.A., Inc.*, 90 Fed. Reg. 26,053 (proposed May 6, 2025).

[44] *Velo, Frequently Asked Questions*, https://www.velo.com/us/secure/footer-links/faq.html (last visited August 21, 2025).

III. RJR Vapor's Constitutional Arguments Lack Merit

When the Tax Code's tobacco provisions are properly interpreted, there can be no real suggestion of unequal or arbitrary taxation. Tex. Tax Code Ann. § 155.001(15) broadly applies to most recreational vice tobacco products, including cigarettes, cigars, chewing tobacco, and nicotine pouches. It does not apply to tobacco cessation products containing nicotine which, unlike VELO products, promote public health by providing a path to tobacco cessation. And while Texas currently opts not to tax e-cigarettes, products which present their own health risks, legislatures "need not address all problems 'in one fell swoop.'" *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 101 (D.D.C. 2007) (*quoting U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001)). As the United States Supreme Court has long observed, legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) (*citing Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935)). "The legislature may select one phase of one field and apply a remedy there, neglecting the others."

Williamson, 348 U.S. at 489 (*citing A.F. of L. v. American Sash Co.*, 335 U.S. 538 (1949)). The Legislature's failure to comprehensively tax and regulate all tobacco products has no bearing on the legitimacy of its existing taxes and regulations.

Prayer

For the reasons above, the judgment of the court of appeals should be reversed, and the Court should render judgment for the Comptroller.

Respectfully submitted,

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