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VIA HAND DELIVERY

Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
201 West 14th St., Room 104
Austin, Texas 78701

Re: *Methodist Healthcare Sys. of San Antonio v. Rankin*, No. 08-0316

Dear Mr. Hawthorne:

The State of Texas submits this letter brief as *amicus curiae* to defend the medical malpractice statute of repose provision of House Bill 4 (TEX. CIV. PRAC. & REM. CODE § 74.251(b)) against constitutional attack by Plaintiffs in this case. The State supports Petitioners but submits this letter brief in the hope of providing an even simpler basis for upholding House Bill 4 and reversing the judgment below. No fee has been paid for preparing this letter brief.

Please deliver this letter to the Court for its consideration. All counsel of record are being served with a copy of this letter as indicated below. Thank you for your assistance.

* * *

By definition, *every* case that is dismissed due to a statute of repose or limitation presents the risk that a plaintiff has suffered injury that may otherwise warrant judicial relief, yet will nevertheless go uncompensated. The absence of a legal remedy under such circumstances does not mean, however, that there has been a constitutional injury under the Open Courts provision of Article I, § 13 of the Texas Constitution. To the contrary, this Court has previously—and unanimously—upheld statutes of repose against Open Courts challenge. *See, e.g.*, *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259 (Tex. 1994) (upholding ten-year statute of repose against Open Courts challenge). (Justice Doggett concurred in the judgment only.)

This Court's overwhelming support for statutes of repose is no surprise. After all, the enforcement of rules governing the timing of suit is a centuries-old tradition under our legal

system. This tradition exists because our legal system does not remedy injuries in perpetuity. Evidence grows stale; eyewitnesses move; records become lost; and parties receive assurances that courts will not reexamine acts from the distant past that have long since faded from memory. The rule of law is served by clear rules—and that includes traditional rules governing the timing of suit.

Accordingly, the Legislature included a ten-year statute of repose in House Bill 4—a comprehensive tort reform measure aimed at combating a major health-care crisis in the State of Texas. In doing so, the Legislature struck a fair balance between the rights of plaintiffs to obtain redress for injuries and the rights of physicians and other health care providers from having to litigate stale claims. The Legislature concluded that indeterminate and unpredictable liability regimes drive up the cost of health care and reduce access to physicians who, because of rising medical malpractice insurance costs and demands to appear in court or in depositions, were choosing to retire or practice medicine in other States. The balance struck by the Legislature was reasonable—and constitutional.

Nothing in the Texas Constitution forbids the Legislature from concluding that ten years is too long for courts to litigate past disputes. The Open Courts provision of the Texas Constitution forbids arbitrary and unreasonable infringements on established common law rights—not reasonable conditions that promote traditional rule-of-law values. A decade is a long time to wait for a lawsuit to end—let alone for one to *begin*.

* * *

Common sense is confirmed by Texas Supreme Court precedent. Consider this Court's previous ruling in *Trinity River*. There, the Court unanimously upheld a ten-year statute of repose in suits for design defects against architects and engineers against an Open Courts challenge—despite the fact that the plaintiff there did not discover the defect until after the ten year period had elapsed. *See id.* at 261-63.

The Court upheld the statute of repose for one simple reason: Under the common law, only a *two-year* statute of limitations applied to such actions, and it applied *without regard to the timing of the plaintiff's discovery of the injury*—as this Court held in *Houston Water-Works Co. v. Kennedy*, 8 S.W. 36 (Tex. 1888). As a result, the ten-year statute of repose later enacted by the Legislature was actually *less* restrictive than the two-year statute of limitations under *Houston Water-Works*. *See Trinity River*, 889 S.W.2d at 262.

Precisely the same logic supports the statute of repose under House Bill 4. Under preexisting common law, only a two-year limitation period applied to medical malpractice

cases—including so-called "medical sponge cases"—again without regard to discovery of the injury—as this Court held in *Carrell v. Denton*, 157 S.W.2d 878 (Tex. 1942) (adopting the conclusion of the Commission of Appeals). Indeed, *Carrell*, like *Trinity River*, relied on the Court's earlier 1888 ruling in *Houston Water-Works* as evidence of the common law rule. The same logic thus applies here: The ten-year statute of repose later enacted by the Legislature as part of House Bill 4 is *less* restrictive than the two-year statute of limitations under *Carrell* and *Houston Water-Works*.

The proper resolution of this case is inescapable: The only way for Plaintiffs to be right is for this Court's unanimous ruling in *Trinity River* to be wrong.

* * *

There is, to be sure, one historical element of this case that did not exist in *Trinity River*. In *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967), the Court (over two vigorous dissents) expressly overruled *Carrell*, abrogated the common law rule, and held instead that, in medical sponge cases, the two-year statute of limitation would not begin to run until after the plaintiff discovers (or should have discovered) the injury. The Legislature later overruled *Gaddis*—and restored the original common law rule under *Carrell*—by statute in 1975.

This historical anomaly does not alter the force of *Trinity River*. As this Court explained in *Trinity River*, the Open Courts provision only prevents the Legislature from interfering with "historically" "well-established" common law rights. 889 S.W.2d at 261, 262. A constitutional question arises "*only* to the extent that [the common law right] *historically* could have been asserted ten years [later]." *Id.* at 262 (emphasis added).

There is no "historically" "well-established" common law right to commence a medical malpractice action more than ten years after the alleged misconduct took place. To the contrary, the original two-year statute of limitation, without regard to discovery, existed continuously in Texas law until 1967—nearly a century after the adoption of the 1876 Texas Constitution and this Court's 1888 decision in *Houston Water-Works*—and decades after *Carrell*. Moreover, the original common law rule was later restored and continued to exist for another decade—starting in 1975 when the Legislature enacted a statute overruling *Gaddis*, and lasting until this Court's subsequent rulings in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), and *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), discussed below.

In sum, of the 133 years that have passed since adoption of the 1876 Constitution, Texas law for over a century imposed a two-year statute of limitation, without regard to

discovery, on medical malpractice plaintiffs. Accordingly, the statute of repose of House Bill 4 interferes with no "historically" "well-established" common law right.

* * *

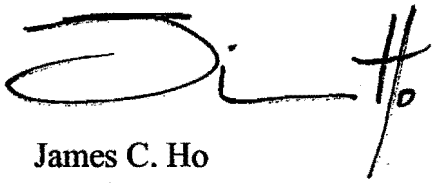
The existence of a "historically" "well-established" common law right is not only required under *Trinity River*—it is imminently sensible as a practical matter. Just imagine if it were otherwise. Obviously this Court could have overruled *Gaddis* itself at any time—just as *Gaddis* overruled *Carrell*. It is difficult to understand why the Legislature could not simply (re)enact into law what the judicial branch had long previously held.

Indeed, the rationale of *Trinity River*—taken to its logical conclusion—could be employed to authorize the Legislature to enact not only a ten-year statute of repose, but also a two-year statute of limitation without regard to the date of discovery. We recognize, of course, that such an extension of *Trinity River* could arguably conflict with this Court's earlier rulings in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), and *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985). But that does not change the fact that *Trinity River* supports the constitutionality of the statute of repose of House Bill 4—whatever that ruling may or may not mean for statutes of limitations. Neither *Nelson* nor *Neagle* stopped this Court from reaching its later, unanimous conclusion in *Trinity River*. That is presumably because ten-year statutes of repose (at issue here and in *Trinity River*) serve different (and stronger) interests than those served by two-year statutes of limitation (at issue in *Nelson* and *Neagle*)—namely, to provide some measure of finality to litigants at one temporal extreme. Accordingly, *Trinity River* (and not *Nelson* or *Neagle*) governs this case.

* * *

For these reasons, the Court should uphold the statute of repose under House Bill 4 and reverse the judgment of the court of appeals below.

Respectfully submitted,



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