

[Intro Music]

Martín Macías: Welcome to Sidebar, a podcast from Courthouse News Service, bringing you legal and political news from around the country. I'm Martín Macías, one of the hosts and reporters for the podcast. This week reporter Nina Pullano chats with our colleague Nick Iovino about a federal trial over a mishap at a fertility lab that destroyed thousands of frozen embryos. Reporter Bianca Bruno brings us a story on the legal fight over California's ban on high-capacity magazines. The firearm component is frequently used in mass shootings and residents voted to ban them back in 2016. Before we dive into those stories, let's check in on the Lone Star State where Texas lawmakers recently closed a pretty dramatic legislative session.

[Music Break]

Over Memorial Day weekend, Texas lawmakers wrapped up their biennial legislative session. Some have called it the most conservative session in Texas history. Lawmakers passed bills barring transgender youth from participating in sports, allowing for permitless gun carrying and banning abortions at six weeks, among other measures. To get a better understanding of what went down, I spoke with Courthouse News reporter Erik De La Garza, who's based in San Antonio and covered the final hours of the session. Eric, welcome to Sidebar. Great to have you here.

De La Garza: Yeah, definitely. Thank you for having me.

Macías: So, what was the political context going into this session? We know that Texans experienced a lot this past year: the Covid-19 pandemic, a nasty winter storm that left millions without water and power, mass shootings. All of this was in the foreground as lawmakers went to work, right? And people had a lot of expectations for them to do something about it.

De La Garza: Well, Texas lawmakers meet in Austin every two years for a 140-day session. Since 2002 when Democrats lost control of the House of Representatives, all three branches of state government have been dominated by Republicans. And it seems like this session more than any other session in recent memory, Republicans in the Legislature have really become emboldened to push through these conservative policies with very little resistance from what's left of any moderate Republicans in the state. And of course, Democrats have very little say in terms of what pieces of legislation they'd like to see taken up as the minority party for going on almost 20 years now.

Macías: Talk about some of the bills that were passed. What did the parties have on their respective legislative agendas?

De La Garza: Obviously, with, you know, the insurrection in January and President Trump losing the election really emboldened Republicans to take up social issues. Before the voting bill failed in this past weekend, Republicans were calling the session the most conservative legislative session in a generation. And they point to key pieces of legislation that they passed, including a bill penalizing Texas cities that cut funding for police. They saw this as a build, you know, to support police following the George Floyd killing and the demonstrations that took place after the George Floyd killing. Also, they passed a near total ban on abortion. It's a law banning abortion at six weeks, it's known as the 'fetal heartbeat' bill. And that was, you know, staunchly opposed by abortion rights activists in the state. They also expanded gun rights here in Texas. It's a bill allowing Texans to carry a handgun without a permit. Previously,

Texans were forced to go through a Class A background check. Now Texans can go into a store, buy a handgun and walk around with that without a permit.

Macías: How should we expect the rest of the year to play out? And can we forecast what we'll see in the next legislative session?

De La Garza: So there are many items that are headed to Governor Greg Abbott's desk that he is, you know, he has indicated he will sign. He's called many bills, legislative priorities, that, you know, I expect to see a lot more bills on the conservative agenda being signed into law by Governor Greg Abbott in the coming weeks, then we expect him to call a special session and that coming really in the coming days any day now. He should indicate when and exactly what topics should be on that special session and look for a special session in September or October to be called, specifically on the you know, the very delicate once-in-a-decade, controversial process of redrawing the state's political maps, I would say expect more the same for the next legislative session unless democrats are able to make any substantial gains in either chamber of the Legislature.

Macías: Progressive groups have said that this session failed to address the social and economic problems that became apparent during the Covid-19 pandemic. They say lawmakers didn't deliver solutions on issues like gun control or fixing the state's electrical grid. I asked Sarah Labowitz, policy and advocacy director with ACLU of Texas for her thoughts on this session.

Labowitz: Their governor made promises to deal with the problem of gun violence. Similarly, after George Floyd's murder, the governor made promises to George Floyd's family to do policing reform in the Legislature. What Texans got instead was a constitutional carry bill that allows people to carry guns everywhere, really the total opposite of any attempt to deal with gun violence. There were some smaller provisions dealing with policing reform that passed, but the George Floyd Act that so many members had gotten behind, that really was a much more comprehensive policing reform package, didn't make it out of committee into a vote. There was a real disconnect between what Greg Abbott and other state leaders promised the victims of, of both gun violence and police violence, and what they deliver. And again, when you think about what people were looking for the Legislature to do, which is to do things like, you know, fix the electrical grid, provide relief for people who were really financially hurt by the blackout, fix health care, expand Medicaid, fund education, you know, there are a bunch of things that people are looking for the government to do. And instead, it was just this kind of session that was devoted to all kinds of culture war issues, and not really what government can and should be doing to help people. The end of the session and the success that Democrats had and killing the voting bill, at least for now, we shouldn't let that overshadow the fact that this was an extremely conservative session, you know, effectively trying to ban abortion in Texas is one of the most profound examples of that. I will say it doesn't go into effect until September. Abortion is still legal in Texas, so, we want to be clear that people know what their rights are, but you can still get an abortion in Texas.

Macías: The move by Texas Democrats to block the controversial voting bill made national headlines. To get more info on what happened and what the bill would do in practice, I spoke to Courthouse News reporter Kirk McDaniel, who's in Austin and covered the action for us. Kirk, thanks for joining us.

McDaniel: Thanks for having me.

Macías: So, tell us about Senate Bill 7. Progressives have called it a voter suppression bill while the GOP says it would protect the integrity of the ballot box.

McDaniel: I think the really important thing to understand and why Democrats took such strong action was because, and it was over, provisions that were added while in conference committee that were never talked about on the floor in either the Senate or the House version. It changed the time that polls could open for early voting on Sundays, instead of being from 6-9, it would move it all the way back to 1 p.m. And a lot of people, a lot of the civil rights groups pointed out and Democrats on the floor pointed out that it would affect those 'souls to the polls,' that tradition for a lot of African Americans who would go to church right after to vote. There was also a provision, which in my reporting, I have not seen this in any of the other bills across the states either in Georgia, Florida, Ohio, that there was it basically set the language for how an election could be overturned. And it was if the number of illegally cast votes was greater than or equal to the number of votes that would change the outcome of an election, then an election could be overthrown or overturned.

Macías: Critics have said the bill would lead to a less safe election process and longer lines at polling places. What do you make of that?

McDaniel: The lines, that's definitely something that we've had an issue here in Texas, I'll even point to the 2020 primary elections. We had a gentleman in Houston who waited until I believe 4 a.m. to cast his vote. And lines were incredibly long during that time. A lot of Democrats on the House floor drew upon a lot of historical context to say that these sort of provisions have a bit of a racist past, especially when it comes to voter intimidation, where you have white people coming from wealthier areas and they're going into communities of color just to poll watch.

Macías: Talk about what the Democrats did to stop this bill.

McDaniel: When Democrats walked out of the Texas House, they broke quorum, basically meaning that no legislative action can happen on the floor that is legitimate because there is not enough there's not two-thirds of the House there to be party to it. When they walked out, almost I'll say 20 minutes or so, Governor Greg Abbott put out a tweet saying that there's going to be a special session. So, we're not quite sure when we're going to get that special session, if he's just going to wait until the fall. I will say it's safe to say that the bill for right now is dead. I would be very surprised not to see it come back up, especially now since election integrity is such a popular rallying cry for conservatives and for the Republican party, across the state, across the country, especially here in the state.

Macías: Sarah Labowitz told me what it meant to see the GOP voting bill blocked for now.

Labowitz: It was just this feeling of disbelief that this really terrible bill that we had advocated so strongly against was dead.

[Music Break]

Macías: Big thanks to the Texas ACLU's Sarah Labowitz. Visit courthousenews.com to see coverage of Texas politics from our reporters Erik De La Garza and Kirk McDaniel. We'll have more for you after a quick break. You're listening to Sidebar from Courthouse News.

[Music Break]

Macías: A mechanical failure at a lab in San Francisco, Calif. triggered a federal lawsuit by people who had hoped the lab could help them have biological children. The lawsuit led to a federal jury trial. Courthouse News reporters Nina Pullano and Nicholas Iovino chatted about the case, which could establish how courts handle liability in these matters. A quick note, Nina recorded this interview while the trial was ongoing, so you'll hear about what testimony the jury heard and how each side argued its case. We do have an update on the verdict, which I'll share with you after this. Here's Nina's story.

[Music Break]

Pullano: Back in 2018, hundreds of people who had frozen their eggs and fertilized embryos at a San Francisco fertility lab got some devastating news. A cryogenic storage tank had failed, causing 3,500 eggs and embryos to thaw and leaving many of them destroyed or no longer viable. For some families, it took away the option of having a biological child. Now, three women and one married couple who were affected by the accident are suing the company, Chart Inc., that manufactured the storage tank. Chart says there wasn't a problem with their equipment, but that the staff at the fertility lab messed up when they were using it. These two sides of the story have been the subject of the federal trial in the Northern District of California. And as you can imagine, the testimony has been emotional.

Iovino: There are five plaintiffs, one married couple and three women. And I don't think one of them testified without some serious emotion in their voice or crying.

Pullano: That's reporter Nicholas Iovino, who's also a co-host of this podcast. He's been following the trial from the start. The plaintiffs also talked about the physical effects of harvesting eggs which can be pretty intense. The process involves daily injections and has some serious side effects.

Iovino: Several of them mentioned how hard it was to work while experiencing these side effects, which included weight gain, extreme mood swings that some described as being on an emotional roller coaster. Also pain, they would have physical pain, fatigue, nausea.

Pullano: The jury also heard a lot about what happened, technically speaking, that led up to the accident. Here's Nicholas breaking down some of that testimony.

Iovino: The plaintiffs say that the tank failure was caused by a manufacturing defect. They point to design specifications for the tank that say a certain kind of weld was supposed to be used: a full penetration weld, but in the actual manufacturing of it a seal weld was used. They say this is a weaker weld that comes with problems and that it's more susceptible to stressors such as the constant heating and cooling of the liquid nitrogen that is going into the tank to keep the frozen eggs and embryos cold. The tank manufacturer says that this tank failure was caused by a misuse of its product. The tech manufacturer has tried to point out a lot of things that they say the lab employees did wrong.

Pullano: For example, 17 days before the accident, a controller device on the tank started giving off the wrong readings on levels of liquid nitrogen.

Iovino: So, the lab director unplugged the controller device, and he started having the employees manually measure liquid nitrogen levels with a dipstick.

Pullano: So, while the lab says that Chart should have recalled the controller device, Chart argued that measuring liquid nitrogen levels by hand may have also given off faulty readings that lead to more problems. Chart also says the lab should have transferred the eggs and embryos to a backup tank as

soon as the problem started. We should note that the plaintiffs also did sue the fertility lab and those claims were sent to private arbitration. During the trial against Chart, the freezer tank was in the courtroom for the jury to see and there's of course been a lot of technical analysis. But testimony has also been strikingly personal.

lovino: What struck me the most is these people kind of putting their very personal lives in the public record to try to hold the tank manufacturer responsible. They have to talk about why they decided to freeze their eggs and what they went through, describe their own emotional pain. A few of them actually talked about kind of feelings of shame, and how well they described how it felt when they finally got their eggs frozen. It was a feeling of relief and hope but also sadness and shame that they were not at a point in their lives where they could have children, maybe not at a point in their lives where they thought they would be. And the psychologist who testified also discussed that and said that's very common. She said it's also common with men as well, who have fertility conditions.

Pullano: Ultimately, the plaintiffs want Chart to be held liable for the tank failure. Some of the plaintiffs paid more than \$10,000 out of pocket for fertility treatments and to freeze and store the eggs. So, they're seeking to recover that money.

lovino: But the plaintiffs say this property that they lost is priceless, and no amount of money is going to replace their being able to have children or make up for them no longer being able to have children as a result of this accident.

Macías: Here's that update on the verdict. The jury found the company that manufactured the tank 90% liable for the freezer tank failure. They awarded the plaintiffs \$13.5 million. This is a bellwether trial; more than 100 other suits are pending against the company and another trial is scheduled to start this fall. Be sure to visit us at courthousenews.com for more coverage. Also, head over to Twitter and follow us @CourthouseNews and on our podcast account @SidebarCNS. We'll be back in a moment.

[Music Break]

Macías: In 2016, California voters approved Proposition 63, a sweeping state initiative banning high-capacity gun magazines. In August 2020, a Ninth Circuit panel struck down the proposition saying it violated the Second Amendment. Bianca Bruno brings us this report on the latest chapter in the Golden State's battle for gun reform.

Bruno: Californians don't want the ammunition most frequently used in mass shootings available in the Golden State. In 2016, two-thirds of California voters enacted Proposition 63, the state's ban on large-capacity gun magazines (LCMs), which hold 10 or more rounds of ammunition. But the LCM ban and voters' will now hangs in the balance. An en banc panel of 11 judges on the Ninth Circuit Court of Appeals will consider next week the case *Duncan v. Becerra* and whether California's ban on large-capacity magazines is constitutional or if it violates the Second Amendment and Supreme Court precedent. The court hearing comes following a recent mass shooting in San Jose, where a transportation worker shot and killed nine of his colleagues before killing himself. At a press conference after the shooting, California Governor Gavin Newsom asked what the hell is wrong with us.

Newsom: And here we are in the United States of America. We're experiencing something that just is not actually experienced anywhere else in the world. There's a sameness to this. And that numbness, I think, is something we're all feeling. All of us gathered here today, looking at this scene, listening to

governors, mayors, chiefs speaking in similar tone and terms, expression of condolences, all the right emotions and perhaps the right words, but it begs the damn question: what the hell is going on in the United States of America? The hell's wrong with us? And when are we going to come to grips with this? When are we going to put down our arms literally and figuratively, our politics, stale rhetoric, finger-pointing?

Bruno: The gunman in San Jose shot 39 rounds, large-capacity magazines with more than 10 rounds were recovered at the crime scene. California isn't an outlier when it comes to regulating gun accessories. Eight other states and the District of Columbia also have LCM bans. In between 1994 and 2004, large-capacity magazines were banned throughout the country. But when the Violent Crime Control and Law Enforcement Act expired in 2004, formerly banned LCMs and weapons were legal to own again. Esther Sanchez-Gomez is an attorney at the Giffords Law Center to Prevent Gun Violence. She said the 10 years when LCMs were banned in the United States produced some jaw-dropping data.

Sanchez-Gomez: While the large capacity magazine ban was in place, the federal ban, deaths by mass shooting were 70% less likely to happen. That's a huge number. And when we look at just the number of high fatality mass shootings that occurred in that 10 years, they fell by 37% after the ban was in place, and then when it lapsed, they increased by 183%. And then the likelihood of death increased by 239%. So really, the takeaway message is that large-capacity magazines make mass shootings easier to carry out, and they make them significantly more deadly.

Bruno: In the absence of federal legislation, banning or regulating who can own LCMs, states like California wrote their own laws or strengthened what they already had on the books. But gun rights advocates have argued those state laws infringe their right to defend themselves in the home, as codified by the Supreme Court's *Heller* decision. Retired ER Dr. Bill Durston is president of Americans Against Gun Violence, a nonprofit which filed an amicus brief in favor of Proposition 63. He said the so-called Heller test used by judges when weighing whether state gun laws comply with the Second Amendment misrepresents the landmark Supreme Court decision.

Durston: Pro-gun judges have come up with what they call the Heller test, saying that if a gun or gun-related paraphernalia is not both dangerous, unused and unusual, then its constitutionally protected. Well, there's nothing in *Heller* that says that explicitly. And certainly there's nothing in the history of the writing and ratification of the Second Amendment that says that.

Bruno: That test has been used in court by U.S. District Judge Roger Benitez, who has been assigned several cases challenging California's gun laws. Just last week, Benitez blocked California's decades old ban of assault weapons. In that order he compared AR-15 assault rifles to the Swiss Army knife, saying they are good for both home and battle. Benitez also blocked California from enforcing Proposition 63. He said in a San Diego courtroom in 2018, women could be 'raped and dead' without access to large-capacity gun magazines to protect themselves at home. Sanchez-Gomez said stats on gun use for self-defense show that just isn't the case.

Sanchez-Gomez: Large-capacity magazines really only have utility for shooting a lot of rounds really quickly. The stats show that when people act in self-defense in their homes, they really only shoot a few rounds. The national average is 2.2 shots and the California average is two. So why would you ever need more than 10 rounds to defend yourself in your home when no one's actually acting that way.

Bruno: Gun rights groups have their own take.

Sam Paredes: You'll need what you need when you need it. And if you're limited by the government, with an arbitrary number, there will be more victims because they did not have the ability to use the maximum capacity that they felt they needed to defend themselves. Plain and simple. The number was picked out of a hat. At the time that the 10-round magazine was established there were very few firearms across the country that had only 10-round magazines.

Bruno: That's Sam Paredes, executive director of Gun Owners of California, a nonprofit Second Amendment lobbying group. Paredes said concerns about the potential lethal consequences of untrained shooters having access to LCMs don't hold up since California gun owners are filling up training classes to capacity.

Paredes: If we want people to use firearms accurately, wouldn't we want them to use the firearms that are the easiest to use, are the most accurate and can be configured to fit them, allow them to instinctively shoot well. Well, that is the definition of an AR-15. The government on the other side is arguing that oh, all of these attachments on ARs give criminals the ability to shoot them faster and more accurately. Well, they don't address the fact that law-abiding citizens need firearms that are more accurate and faster to shoot well and easily in order to defend themselves.

Bruno: Gun reform advocates want California's large-capacity magazine ban upheld to prevent deaths during mass shootings. While it's currently illegal in California to import or purchase LCMs, the state has paused enforcement of Proposition 63 as the *Duncan* case has made its way through court, and during a one-week gap between an injunction from judgment Benitez against the law, and the stay of his order pending appeal, hundreds of thousands of LCMs are believed to have been legally purchased by Californians. Paredes pegged that number at 1 million.

Paredes: We call that freedom week. Californians from the Oregon border to Southern California, the Pacific coast to the eastern border, ordered and purchased. Upwards of a million magazines were purchased by Californians legally. And that decision basically legalized all of the large-capacity magazines that were in private possession in California in that week.

Bruno: The *Duncan* case just isn't about mass shootings. It's become a lightning rod for how courts interpret states' gun reform measures to be consistent with the Second Amendment after the *Heller* decision. A decision gun reform advocates worry has undone their efforts to stop gun deaths. Here's Dr. Durston again.

Durston: The ban on large-capacity magazines is mainly to address mass shootings. And as horrific as they are, they account for a tiny fraction of day in and day out gun-related deaths in our state and in our country. So, in a way more important thing. And *Duncan v. Becerra* is stopping this trend towards a gross misrepresentation of the Second Amendment. It's actually probably more important for the public safety point of view that we put a stop to this magnification or extension of the harm done by *Heller*.

Macías: That was Courthouse News reporter Bianca Bruno. And that's our show. Please join us next time. Tell your friends about us and make sure to subscribe to Sidebar on Apple Podcasts, Spotify and follow us on Twitter @CourthouseNews. Thanks for tuning in.

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