Fed Courts Weekly — November 3, 2026

Covering October 27 – November 3, 2026

An unusually rich week, and almost all of it procedural. The Ninth Circuit produced a three-day sequence on the appealability of district-court inaction and of ex parte TROs that could be taught as a standalone unit on § 1292(a)(1) and constructive denial, and the Supreme Court twice declined to intervene on the interim docket in one-sentence orders with no noted dissents. The term's substantive fed-courts docket also came into focus: two habeas arguments (one on § 2241's domain, one on AEDPA's "previously unavailable" exception), a January calendar carrying an EAJA-waiver question and an injunction-contempt question, and Chemerinsky arguing that *Bivens* itself may not survive the term.

SUPREME COURT — INTERIM DOCKET

Court denies the government's application to force California to segregate 20,000 mail ballots. *United States v. California*, No. 26A624 (U.S. Nov. 2, 2026). The order is one sentence: "The application for injunction pending appeal presented to Justice Kagan and by her referred to the Court is denied." No noted dissents, no reasoning, released shortly before 6 p.m. the night before Election Day. The government sought a *mandatory* injunction compelling a state to adopt a ballot-verification procedure it has never used, on an election already underway — which is to say it sought the *All Writs*-adjacent interim relief that *Purcell* most disfavors. **Doctrinal hook:** interim/injunctive relief pending appeal, the *Nken*/*Hollingsworth* standard for a mandatory injunction, and *Purcell* as a thumb on the equitable scale. **Classroom:** pair the unexplained denial with the Ninth Circuit opinions below (next section) to show students how much doctrinal work is happening one level down while the Court says nothing. Order · SCOTUSblog

Court lets a same-day consent vacatur of a federal rule stand, over claims of "egregious collusion." *Baltimore, Md. v. Texas*, No. 26A500 (U.S. Oct. 27, 2026) ("The application for stay presented to Justice Alito and by him referred to the Court is denied."). This is the week's best teaching item. Texas sued in the Wichita Falls division, drew Chief Judge O'Connor, and within hours of filing jointly moved with DOJ for final judgment vacating the 2024 EOIR administrative-closure rule and barring similar future rules; O'Connor granted it the same day. Baltimore, New Haven, Columbus, and Centro Legal de la Raza then moved to intervene to defend the rule on appeal and were denied for lack of standing; the Fifth Circuit refused to disturb the judgment. **Doctrinal hook:** a stack of them — Article III adverseness and the collusive-suit bar (*Lord v. Veazie*, *Muskrat*); intervention as of right and whether an

intervenor needs independent standing; and the post-*CASA* puzzle of how a two-party consent judgment produces universal vacatur with preclusive effect on nonparties. The challengers' argument — that this lets an agency repeal a rule by declining to defend it and consenting to nationwide relief — is precisely the structural objection to § 706 vacatur that *CASA* left unresolved. **Podcast-worthy:** the single-judge-division plus consent-vacatur combination is a reform argument that writes itself. Order · SCOTUSblog

Border-wall stay application still pending; jurisdiction-stripping carve-out in the background. *Mullin v. Friends of the Ruidosa Church*, No. 26A560. DOJ asks the Court to stay Judge Cardone's October preliminary injunction halting barrier construction in the Big Bend Sector. Cardone held that while Congress limited judicial review of border-barrier disputes, the limitation leaves room for constitutional challenges — and that the challenge to the environmental-law waiver raised one. **Doctrinal hook:** congressional control of jurisdiction and the constitutional-claim carve-out that courts read into review-stripping provisions (the *Webster v. Doe* move), plus the threshold question of what counts as an emergency. SCOTUSblog

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SUPREME COURT — ARGUMENTS & CALENDAR

Argued: the outer boundary of § 2241. *Maxwell v. Dinis*, No. 25-5930 (argued Nov. 2, 2026). Cert was granted limited to whether a First Step Act time-credits claim seeking accelerated transfer to a halfway house or home confinement may be brought in habeas under § 2241. The Fifth Circuit's bright-line rule — habeas only where success entails release — is now defended by nobody: the government abandoned it and the Court appointed Brian Barnes as amicus to support the judgment below. Maxwell leans on *Skinner v. Switzer*'s reference to claims reducing a prisoner's "level of custody," and on the absence of any alternative: § 1983 does not reach federal officers, *Bivens* is effectively closed, and 18 U.S.C. § 3625 likely bars APA review. **Doctrinal hook:** the *Preiser/Jones v. Hendrix* line on habeas's domain, with habeas as a residual remedy precisely because the damages and APA channels have been shut. **Classroom:** an unusually clean illustration that remedial doctrines are a system — close one valve and pressure appears in another. Reportedly several justices objected to the government's attempt to win on unexhausted alternative grounds after the Court had already limited the question. Preview · Docket

Argued tomorrow: what makes a rule "previously unavailable" under AEDPA. *Guerrero v. Johnson*, No. 25-1003 (argument Nov. 4, 2026). Whether a successive petition "relies on" a new, previously unavailable rule under § 2244(b)(2)(A) when the rule (*Atkins*) long predates the first petition but the diagnostic framework that makes it usable (DSM-5, 2013) did not. The Fifth Circuit said yes and denied rehearing en banc 9–7. Texas, the United States, and 21

states argue this collapses the statutory distinction between new law and new facts; Johnson argues availability means capacity for actual use, and separately urges a DIG on the ground that Texas has repeatedly shifted position. **Doctrinal hook:** AEDPA's successive-petition gatekeeping and the new-rule/new-fact line that § 2244(b)(2)(A) and (B) are built on. **Classroom:** the DIG request gives you a free unit on the Court's control over its own docket. Preview · Docket

January calendar released, with two fed-courts items. Announced Monday, Nov. 2. *Montoya Palacios v. Liggins*, No. 25-1223 (Jan. 11): whether a habeas petition challenging civil immigration detention is a "civil action" under the EAJA, so that a prevailing detainee can recover fees — a question of how strictly to construe a sovereign-immunity waiver, overlaid on the perennial problem of habeas's hybrid civil/criminal character. *Apple Inc. v. Epic Games, Inc.*, No. 25-1311 (Jan. 11): whether a litigant can be held in contempt for conduct an injunction does not clearly forbid. **Doctrinal hook:** waiver of sovereign immunity and strict construction of fee-shifting statutes; and, in *Apple*, the specificity a federal court's equitable decree must have before contempt attaches — a good companion to any post-*CASA* discussion of what an injunction actually is. SCOTUSblog

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COURTS OF APPEALS

Ninth Circuit: a district court's failure to rule by the movant's self-imposed deadline is not a constructive denial. *United States v. California*, No. 26-7070 (9th Cir. Oct. 26, 2026), published version at 2026 WL 3268272 (Oct. 30, 2026) (Bennett, Bumatay, Sanchez, JJ.). The United States filed a TRO application asking for a ruling by Nov. 3, then asked for a ruling by noon the next day, then treated the district court's silence as a constructive denial and appealed. The panel dismissed for want of jurisdiction, distinguishing *A.A.R.P. v. Trump*, 605 U.S. 91 (2025): the delay was "at least in part, the product of the United States's own decisions," so the "claimed emergency, at least in part, is a self-constructed one"; under the *Carson v. American Brands* factors the order could still be effectively reviewed later, since the district court's proceedings were continuing; and there was no risk of a lower court flouting a Supreme Court mandate. Bennett and Sanchez concurred on *Purcell* grounds; Bumatay dissented on both jurisdiction and the merits, and — this is the part worth assigning — set out a four-part theory of federal-government standing: that the United States is injured when a state facilitates alien voting, that California's conduct impedes enforcement of 18 U.S.C. § 611(a), that it forces the government to expend prosecutorial resources, and that the injury is traceable and redressable. **Doctrinal hook:** appealability of non-orders under § 1292(a)(1); *A.A.R.P./Carson* constructive denial; and sovereign standing of the United States to sue a state over the

administration of federal elections. **Classroom:** near-ideal. The self-constructed-emergency line is the doctrinal sentence of the week. Opinion

Ninth Circuit, in three days: panel stay, en banc vacatur, en banc reinstatement, 6–5. *Service Employees International Union v. Department of Justice*, No. 26-7303 (9th Cir.). Unions and civil-rights organizations sued DOJ and DHS under VRA § 11(b) and the Elections Clause over letters demanding that California and Washington officials "sequester" suspected noncitizens' ballots and warning that "knowingly facilitating" alien voting "is equally unlawful." The district court (N.D. Cal., No. 3:26-cv-12800) granted an ex parte TRO on Oct. 30. On Nov. 2 a divided panel (Bea, J.; Murguia, C.J., dissenting) asserted jurisdiction under § 1292(a)(1) and stayed it; the en banc court then granted rehearing and vacated that order; and on Nov. 3 a majority of the en banc court reinstated the panel order "[p]ending further order of the court," 6–5, with a concurrence by Judge Miller and dissents by Chief Judge Murguia and Judge Desai. Three hooks, each independently teachable. **(1) Appealability:** Murguia's footnote 1 flags that an ex parte TRO entered without a hearing is likely *not* appealable at all under *Bennett v. Medtronic* and *East Bay Sanctuary Covenant*, which treat a TRO as a preliminary injunction only "where an adversary hearing has been held, and the court's basis for issuing the order [is] strongly challenged." The panel asserted jurisdiction anyway. **(2) Cause of action:** the panel held the government likely to win because VRA § 11(b) has no express private right (enforcement is vested in the Attorney General, § 10308(d)), so the claim would require an implied private action *against the Executive* — barred by *Sandoval*, by *Abbasi*'s separation-of-powers caution, and by the *Return Mail/Franklin v. Massachusetts* presumption that "person" does not include the sovereign absent an express statement. That is a statutory-standing and implied-remedy holding doing all the merits work. **(3)** The panel also noted that the notice of appeal divested the district court of jurisdiction to shorten its own TRO from seventeen days to fourteen (*Davis v. United States*, 667 F.2d 822) — a nice illustration of how the appellate-jurisdiction rules interact with the fourteen-day limit that makes TROs unappealable in the first place. **Classroom and podcast:** both. An en banc court reinstating a previously vacated panel order on an interim motion, five days before a midterm, is also a case study in en banc procedure. En banc order and opinions · Rehearing grant

Fifth Circuit presses imminence in SB 17 challenge. At argument Monday, Nov. 2, the panel questioned whether two Chinese citizens living abroad have standing to challenge Texas's restrictions on real-property purchases by nonresident foreign nationals, pressing counsel on whether their stated plans to buy additional property — completed on visitor visas — are concrete enough. Judge Elrod asked how the court could redress the injury at all. The district court dismissed; the panel's earlier decision in *Wang v. Paxton*, No. 25-20354, found no standing on a domicile rationale that does not transfer cleanly to plaintiffs who do not live in Texas. **Doctrinal**

hook: pre-enforcement standing — injury-in-fact imminence for a planned future transaction, plus redressability. **Classroom:** useful as a live example of a statute insulated from merits review by successive standing rulings. Courthouse News

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LITIGATION

DOJ's Alaska Senate suit dismissed for want of redressability. Judge Sharon Gleason (D. Alaska) dismissed the United States' suit on Nov. 1, 2026. The government sought to block certification of the Alaska Senate race — but only if the incumbent lost — on the theory that a same-named candidate, Daniel J. Sullivan, confused voters. Gleason held the government failed the redressability prong: it offered no workable method of determining which ballots cast for one Sullivan were meant for the other without compromising ballot secrecy. She also noted the suit cut against the states' constitutional authority over election administration. DOJ has appealed to the Ninth Circuit. **Doctrinal hook:** redressability as an independent, and here dispositive, limit — the rare case where the remedial gap, not injury or causation, does the work. **Classroom:** a crisp redressability hypothetical that is also a real case; note the conditional framing, which has its own ripeness problem. Opinion · Bloomberg Law

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SCHOLARSHIP & COMMENTARY

Chemerinsky: *Bivens* may not survive the term. Erwin Chemerinsky, *Will an ability to hold federal officers accountable survive this term?*, SCOTUSblog (Nov. 3, 2026). Framed around *Nielsen v. Watanabe*, No. 25-417, in which a federal prisoner alleges deliberate indifference to a serious injury and the Ninth Circuit allowed the claim. Watanabe says *Carlson v. Green* controls directly; Nielsen asks the Court to overrule *Bivens*. Chemerinsky maps four exits — affirm under *Carlson*; confine *Carlson* to deaths; overrule *Carlson* but preserve *Bivens*; or overrule *Bivens* — and emphasizes that with no § 1983 analogue for federal officers and the FTCA's exceptions, *Bivens* is frequently the only channel. **Doctrinal hook:** implied constitutional remedies after *Egbert v. Boule*; the asymmetry between § 1983 and federal-officer liability. Worth noting that *Watanabe* is not a request to *extend Bivens* — it is squarely within *Carlson*'s Eighth Amendment holding, which is what makes it the vehicle. SCOTUSblog

García Hernández: the border-wall stay fails the Court's own emergency criteria. César Cuauhtémoc García Hernández, *The border wall dispute isn't fit for the emergency docket*, SCOTUSblog (Nov. 3, 2026). Takes Justice Kavanaugh's *Trump v. CASA* concurrence at its word — interim relief for major new statutes, rules, or executive orders — and argues No. 26A560 fits none of them: the statute is thirty years old and the environmental waivers are neither rules nor

executive orders. He adds that the government bypassed the Fifth Circuit, undercutting the triage rationale, and asks that if the Court grants the stay it explain how its own criteria are met. **Doctrinal hook:** interim-relief standards and whether the emergency docket has articulable criteria at all. **Podcast-worthy:** this is the recurring Divided Argument question in a concrete posture — the unexplained denials in 26A500 and 26A624 this same week make his point better than the essay does. SCOTUSblog

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No new legislative activity on jurisdiction-stripping or remedies legislation this week; H.R. 1526 and the Judicial Relief Clarification Act remain where they were. No opinions in argued cases have issued this term.