

1 BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
2 LESLEY R. FARBY
Assistant Branch Director
3 INDRANEEL SUR (D.C. Bar No. 978017)
Trial Attorney
4 United States Department of Justice
Civil Division, Federal Programs Branch
5 indraneel.sur@usdoj.gov
P.O. Box 883
6 Washington, D.C. 20044
Telephone: (202) 616-8488
7 Facsimile: (202) 616-8470

8 *Attorneys for the United States of America*

9
10 **IN THE UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11 **OAKLAND DIVISION**

12
13 JASON FYK,
14 *Plaintiff,*
15 vs.
16 FACEBOOK, INC.,
17 *Defendant.*

Case No. 4:18-cv-05159 (HSG)

**UNITED STATES OF AMERICA'S
ACKNOWLEDGMENT OF
NOTICE OF CONSTITUTIONAL
CHALLENGE**

FRCP 5.1 Notice Filed on ECF:
September 19, 2023
Hearing Date: none set

1 Plaintiff filed on September 19, 2023 a document that, albeit styled as a
2 “motion,” the United States construes as a notice of constitutional challenge
3 regarding 47 U.S.C. § 230(c) (Dkt. 66 (“Rule 5.1 Notice”). The Court has not
4 certified the constitutional question. *See* Fed. R. Civ. P. 5.1(b); 28 U.S.C. § 2403.
5 The Rule 5.1 Notice did not attach any pending “pleading, written motion, or other
6 paper . . . that raises” the constitutional challenge. *See* Fed. R. Civ. P. 5.1(a).

7 The Rule 5.1 Notice argues (at 8-9) that the District Court’s prior dismissal
8 of the action should be “overturned.” Thus, the Rule 5.1 Notice apparently relates
9 to Plaintiff’s second motion under Rule 60 for relief from the prior dismissal, Dkt.
10 61, briefing on which appears to have closed on July 7, 2023, when Plaintiff replied,
11 Dkt. 63.

12 In light of the pendency of Plaintiff’s second motion under Rule 60, and the
13 apparent absence of any pending “pleading, written motion, or other paper . . . that
14 raises” the constitutional challenge, the United States does not expect to make a
15 further filing concerning the Rule 5.1 Notice.

16 Additionally, the United States notes that the approval of the Solicitor
17 General would be required for the United States to intervene in response to a Rule
18 5.1 notice. *See* 28 C.F.R. § 0.21. Ordinarily, the process of obtaining a decision from
19 the Solicitor General regarding intervention takes at least several weeks, sometimes
20 longer. As such, if the Court were to call for a decision by the United States whether
21 to intervene in response to the Rule 5.1(a) Notice, the Department of Justice would
22 be required to request an extension of time sufficient to obtain such a decision from
23 the Solicitor General. That delay would be unnecessary if the Court were to decide
24 Plaintiff’s second motion under Rule 60 based on the existing briefs, Dkt. 61-63.

25 The United States respectfully submits that, following disposition of
26 Plaintiff’s second motion under Rule 60, if further proceedings resume in this Court,
27 and if Plaintiff then asserts a constitutional challenge, this Court should order
28 Plaintiff to file and serve a Rule 5.1 notice attaching the paper raising any such

1 challenge. Fed. R. Civ. P. 5.1(a)(2); *see also* Wright & Miller, 4B *Federal Practice*
2 *and Procedure* § 1154 (4th ed. Apr. 2023 update).

3
4 DATED: October 2, 2023

Respectfully submitted,

5 BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

6 LESLEY R. FARBY
Assistant Branch Director

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8 */s/ Indraneel Sur*
INDRANEEL SUR (D.C. Bar No. 978017)
Trial Attorney
9 United States Department of Justice
10 Civil Division, Federal Programs Branch
P.O. Box 883, Washington, D.C. 20044
11 Telephone: (202) 616-8488
indraneel.sur@usdoj.gov

12 *Attorneys for United States of America*