

1 Sarah R. Gonski (Bar No. 032567)
2 **PERKINS COIE LLP**
3 2901 North Central Avenue, Suite 2000
4 Phoenix, Arizona 85012-2788
5 Telephone: 602.351.8000
6 Facsimile: 602.648.7000
7 Email: SGonski@perkinscoie.com

8 *Attorney for Plaintiff*

9 ARIZONA SUPERIOR COURT

10 PIMA COUNTY

11 Mark Kelly; Mark Kelly for Senate;

No.

12 Plaintiffs,

COMPLAINT

13 v.

14 Flyover Media LLC d/b/a National File;
15 Tom Pappert; Patrick Howley;

(Assigned to Hon. _____)

16 Defendants.

17 Plaintiffs Mark Kelly and Mark Kelly for Senate bring this action against Defendants
18 Flyover Media LLC d/b/a National File (“National File”), Tom Pappert, and Patrick Howley
19 (collectively, “Defendants”) for defamation and false light. Plaintiffs allege as follows:

20 1. Plaintiff Mark Kelly is a retired Naval Aviator and Astronaut, and is a
21 candidate for U.S. Senate in Arizona. In an attempt to disparage his reputation and harm his
22 chances at winning the upcoming November election, Defendants have crossed a line.
23 Specifically, they published an article and video on their website and social media stating
24 that a 1986 yearbook photograph shows Mr. Kelly dressed as Adolf Hitler—one of the most
25 evil and notorious villains in history. This is a lie, and Defendants know it is a lie. Mr. Kelly
26 never dressed as Hitler and does not even recall attending the event where the photograph
27 was taken. Defendants have been clearly advised that the assertions they make on their
28 website and in their social media posts are not true. They have been provided with
statements by the Kelly Campaign itself, but also others, who have verified that the
individual in the photographs is not Mr. Kelly. At least two independent fact checking
organizations have confirmed that the individual in the photographs who Defendants claim

1 to be Mr. Kelly is not him at all. Yet, Defendants recklessly published (and continue to
2 publish and publicize) their article and video in the face of clear, express evidence of its
3 falsity. The injury to Mr. Kelly and his Senate campaign is serious, and they bring this
4 lawsuit to set things right.

5 **PARTIES, JURISDICTION, AND VENUE**

6 2. Mr. Kelly is an individual who at all relevant times was a resident of Pima
7 County, Arizona.

8 3. Mark Kelly for Senate (“Kelly Campaign”) is the principal campaign
9 committee for Mr. Kelly, who is a candidate for the U.S. Senate in the 2020 general election.

10 4. Flyover Media LLC d/b/a National File (“National File”) is a Wyoming
11 corporation with principle places of business in Sheridan, Wyoming and Wichita, Kansas.

12 5. National File publishes articles and other material online, including
13 information about political candidates.

14 6. National File is known for peddling in conspiracy theories, such as whether
15 the terrorist attacks of September 11, 2001 were a hoax and about the Clintons’ supposed
16 connections to child sex trafficking rings.

17 7. Defendant Tom Pappert is a manager, employee, and/or agent of National
18 File. At all relevant times, he was acting within the course and scope of his employment as
19 Editor-in-Chief of National File. Upon information and belief, he is a resident of Kansas.

20 8. Upon information and belief, at all relevant times, Mr. Pappert’s conduct as
21 the editor-in-chief of National File was the type of conduct he was engaged by National File
22 to perform, occurred within the time and/or place National File authorized him to perform
23 the conduct, and furthered National File’s business interests.

24 9. Defendant Patrick Howley is a manager, employee, and/or agent of National
25 File. At all relevant times, he was acting within the course and scope of his employment as
26 a reporter with National File. Upon information and belief, he is a resident of Kansas.

27 10. Upon information and belief, at all relevant times, Mr. Howley’s conduct as
28 a reporter relating to Mr. Kelly was the type of conduct he was engaged by National File to

1 perform, occurred within the time and/or place National File authorized him to perform the
2 conduct, and furthered National File's business interests.

3 11. Upon information and belief, at all relevant times, National File and
4 Mr. Pappert were aware of Mr. Howley's conduct, exercised control over his actions, and
5 had final authority to determine whether or not to publish the article and video in question.

6 12. This Court has jurisdiction over this matter because Defendants caused acts
7 to occur within the state of Arizona, with the intent to injure Mark Kelly, an Arizona
8 resident, and to injure the Kelly Campaign in order to influence the election of an Arizona
9 Senator. Plaintiffs' claims thus arise out of Defendants' Arizona-directed acts. Upon
10 information and belief, Defendants intentionally published false, misleading, and
11 defamatory content online with the intent that the content be expressly aimed at Arizona
12 residents and voters. Defendants' conduct, as they intended, has injured Plaintiffs'
13 reputation in Arizona and nationwide, and has impacted his candidacy for the election for
14 Arizona's next United States senator.

15 13. Venue is proper pursuant to A.R.S. § 12-401(1) because all Defendants reside
16 outside the State of Arizona and Plaintiff Mark Kelly resides in Pima County.

17 **BACKGROUND**

18 14. Mr. Kelly is a candidate to represent Arizona in the United States Senate. The
19 general election will be held November 3, 2020, and early voting began in mid-October.

20 15. Prior to his candidacy, Mr. Kelly was an entrepreneur.

21 16. Mr. Kelly graduated in 1986 from the United States Merchant Marine
22 Academy.

23 17. The Merchant Marine Academy published a yearbook in 1986 detailing
24 activities of the then-current students. The yearbook is available online at
25 <http://online.fliphtml5.com/fbipx/trke/#p=1>.

26 18. On page 513 of the yearbook, there are details and photos of a Halloween
27 party that took place among Merchant Marine Academy students in October 1985.

28 19. Mr. Kelly does not recall attending the Halloween party in question.

1 20. The yearbook contains pictures of an unidentified man dressed in a costume
2 as Adolf Hitler, the former dictator of Nazi Germany.

3 21. Mr. Kelly is not the man dressed as Adolf Hitler in the picture.

4 22. Indeed, none of the pages of the yearbook with the person dressed as Hitler
5 list Mr. Kelly’s name in any caption or otherwise state that Mr. Kelly is in any of the pictures
6 with the man dressed as Hitler.

7 **DEFENDANTS’ DEFAMATORY AND FALSE LIGHT PUBLICATION**

8 **I. Defendants learn that Mr. Kelly was not the person dressed as Hitler in the**
9 **1986 yearbook photograph.**

10 23. On September 10, 2020, one of Mr. Kelly’s Merchant Marine Academy
11 classmates, Peter Lindsey, was contacted by Karim Addetia, who claimed to be a research
12 and communications intern at the Center for Responsible Enterprise and Trade. Mr. Addetia
13 sent Mr. Lindsey a screenshot of a yearbook photo of the same unidentified man pictured
14 in the Hitler costume and asked Mr. Lindsey if the man was Mr. Kelly. Mr. Lindsey told
15 Mr. Addetia that he “highly doubt[ed]” that the man in the photograph was Mr. Kelly.

16 24. According to Federal Election Commission filings, at the time Mr. Addetia
17 was a consultant with the Senate Leadership Fund, a super PAC dedicated to electing
18 Republican candidates to the U.S. Senate. Public records show that the Senate Leadership
19 Fund, along with their Arizona counterpart Defend Arizona, has spent more than \$31
20 million to influence Arizona’s voters to vote for Mr. Kelly’s Republican opponent in the
21 Senate campaign.

22 25. On information and belief, Mr. Addetia and the Senate Leadership Fund
23 communicated about the photographs of the man in the Hitler costume with Defendants,
24 and Defendants were on notice that at least one classmate had stated that the man dressed
25 as Hitler was not Mr. Kelly.

26 26. On October 23, 2020, at 3:14 p.m., Mr. Howley emailed the Kelly Campaign
27 and asked “[d]id Mark dress up as Hitler during his time at the Merchant Marine Academy?”

28 Ex. 1.

1 27. At 4:41 p.m., a representative of the Kelly Campaign responded to
2 Mr. Howley and stated that the photos “are not of Mark.” The email provided a statement
3 from the Campaign Manager stating “These aren’t pictures of Mark and he never dressed
4 up in such a costume. The story is false and should be retracted immediately . . .” *Id.*

5 28. The 4:41 p.m. email from the Kelly Campaign additionally contained a
6 separate statement from Jennifer Boykin, a classmate of Mr. Kelly’s at the Merchant Marine
7 Academy, who stated: “I attended the Merchant Marine Academy with Mark. I attended
8 this event. This is not Mark in any of these photos.” *Id.*

9 29. The yearbook on its face does not state that Mr. Kelly is in the photograph at
10 all, much less that he is the person dressed as Hitler.

11 30. On the pages including photographs of the person dressed as Hitler, none of
12 the captions list Mr. Kelly as being in the photographs.

13 31. Further, Defendants had clear visual indicia that the man dressed as Hitler
14 was not Mr. Kelly. Contemporaneous photos of the man and Mr. Kelly show little
15 resemblance. The haircut and style, jawline, and other facial features of the man dressed as
16 Hitler are plainly different from those of Mr. Kelly. To attribute the photos to Mr. Kelly,
17 despite clear physical evidence to the contrary, demonstrates, at a minimum, a reckless
18 disregard for the truth.

19 **II. Defendants chose to publish their false story about Mr. Kelly anyway.**

20 32. At approximately 3:15 p.m. on October 23, 2020, the National File published
21 an article titled “EXCLUSIVE: Democrat Senate Candidate Mark Kelly’s Yearbook Shows
22 Him Dressed As Hitler” (the “Article”). The Article as it appeared on Friday, October 23 at
23 approximately 11:45 p.m. is attached as Exhibit 2.¹

24 33. The National File published the Article within minutes after it first emailed
25 the Kelly Campaign, without awaiting a response.

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¹ The article is publicly posted at <https://nationalfile.com/exclusive-democrat-senate-candidate-mark-kellys-yearbook-shows-him-dressed-as-hitler/>.

1 34. In the Article, which was authored by Mr. Howley and approved for
2 publication by Mr. Pappert, the National File falsely claims that it obtained yearbook photos
3 of Mr. Kelly dressed up as Adolf Hitler during his time at the Merchant Marine Academy.

4 35. The Article includes a number of photographs from the 1986 Academy
5 yearbook and asserts that the photographs “show [Mr. Kelly] dressed as Nazi dictator Adolf
6 Hitler for a Halloween party.”

7 36. The Article is false. The man in the Adolf Hitler costume is not Mr. Kelly.

8 37. The Article also includes a copy of a yearbook page containing various
9 photographs clearly marked and identifiable as Mr. Kelly. None of those photographs
10 appear similar to the photographs of the person dressed as Hitler in other yearbook photos.
11 Ex. 2.

12 38. One picture shows Mr. Kelly wearing a pair of sunglasses. The Article states
13 that he is “wearing what appear to be the same pair of sunglasses used in the Hitler
14 costume.” Ex. 2.

15 39. That statement is also false. The sunglasses in both photographs are not the
16 same shape nor lens finish.

17 40. Before publishing the Article, Defendants ignored clear visual indicia that
18 Mr. Kelly was not the man dressed as Hitler, as well as the Kelly Campaign’s and
19 Ms. Boykin’s statements confirming that Mr. Kelly was not dressed as Hitler. Defendants
20 thus published the Article with knowledge of its falsity and/or with a conscious and reckless
21 disregard for the truth.

22 41. But upon information and belief, Defendants thought it was more important
23 to publish the Article because they knew it would generate attention and could devastate
24 Mr. Kelly’s and the Kelly Campaign’s chances in the upcoming election. So they proceeded
25 to publish the Article despite the repeated warning signs that the Article was false and
26 misleading.

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1 42. After the Kelly Campaign responded with its statement that the Article was
2 false, the National File updated the Article to include additional photos. None of the photos
3 in the updated article show Mr. Kelly dressed as Hitler. Ex. 4.

4 43. Further, around 4 p.m. on October 23, Defendants published a video online
5 on “National File TV” containing a faux news segment (the “Video”).² During the segment,
6 Mr. Pappert and Mr. Howley displayed screenshots of the article and the relevant
7 photographs and again falsely asserted that the man dressed as Hitler was Mr. Kelly. Mr.
8 Howley stated, “Mark Kelly, Democrat[ic] candidate in the state of Arizona, we have
9 learned did, in fact, dress as Adolf Hitler during his time at the Merchant Marine Academy.”

10 44. During the Video, Mr. Pappert additionally stated “we know for a fact that he
11 was there at this party ... there is a very, very specific photo of Adolf Hitler that [Mr. Kelly]
12 is very clearly trying to create in his Halloween costume.” Mr. Pappert additionally claimed
13 that the Halloween party was Mr. Kelly’s “brainchild” and he “thought it was a wonderful
14 idea to show up to his brainchild dressed as Hitler.”

15 45. Throughout the 19-minute Video, Mr. Pappert and Mr. Howley continue to
16 falsely assert that the man dressed as Hitler is Mr. Kelly.

17 46. During the segment, Mr. Howley states that “Mark Kelly, I mean, he put
18 together an entire Hitler costume, he got into it, he got into character, he was going all in.”

19 47. As of the time of filing, the Video has been viewed approximately 1,100
20 times.

21 **III. Defendants received additional corroborating evidence after publication that**
22 **the story was false, yet continued to publish and republish the same and**
23 **similar defamatory content.**

24 48. Shortly after Mr. Howley asked the Kelly Campaign to comment on the story,
25 a Kelly Campaign representative informed Mr. Howley that the picture was not of Mr. Kelly
26 and including the corroborating statement of Ms. Boykin. The correspondence is attached

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28 ² The video is available for viewing at <https://www.pscp.tv/w/1dRJZZEmnndJB> and
also at <https://twitter.com/barrettmarson/status/1319782167828787>.

1 as Exhibit 1. In addition to the Kelly Campaign's own statements, Ms. Boykin's statement
2 again put Mr. Howley and National File on notice that the Article and Video were false.

3 49. Nonetheless, Defendants continued to publish the story while knowing it was
4 false.

5 50. On the night of October 23—just hours after publication—counsel for
6 Mr. Kelly sent a letter to Defendants alerting them that the Article was false and defamatory.
7 The letter is attached as Exhibit 3. In the letter, counsel advised Defendants that the Article
8 was false and defamatory and that a lawsuit would result if the Article was not publicly
9 retracted by midnight on Saturday, October 24, 2020. Defendants did not respond to the
10 letter and did not remove or retract the defamatory statements.

11 51. Despite being on notice that the Article was false, Defendants continued to
12 update the Article with fresh content. On October 24 and 25th, Defendants edited the Article
13 to remove one of the pictures and add additional photographs. *See Ex. 4* (screenshot
14 showing changes to article from original Friday night version).

15 52. Since the publication of the Article and Video, other Merchant Marine
16 classmates have come forward and further confirmed that the man in the Hitler costume is
17 not Mr. Kelly.

18 53. Peter Lindsey, a fellow 1986 classmate at the Merchant Marine Academy,
19 publicly stated:

20 Weeks ago, I received a message on LinkedIn from an
21 individual who said he was working on a research project about
22 my former classmate at the Merchant Marine Academy. They
23 shared these photos and asked if the person in the costume was
24 Mark Kelly. I told them no, and want to say again, Mark is not
in those photos. I have spoken to numerous classmates about
this this evening, and they concur that he is not in any of these
pictures. The people spreading these lies should stop.

25 Mr. Lindsey's statement was reported in Fox News as well as other news outlets.

26 54. Ed McDonald, another classmate, publicly stated: "I attended the Merchant
27 Marine Academy with Mark. I attended this event as well and am in this photo. This is a
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1 group from 2nd Company. Mark was not in 2nd Company, and that is not him in these
2 photos.” The statement was reported in Fox News as well as other news outlets.

3 55. Mark Baden, another classmate and Mr. Kelly’s former roommate, publicly
4 stated: “I was Mark’s roommate at the Merchant Marine Academy. I was the First Rotation
5 Regimental Commander. These photos are absolutely not Mark Kelly and anyone saying
6 that is lying.” The statement was reported in Fox News as well as other news outlets.

7 56. On information and belief, at least five other Merchant Marine Academy
8 classmates have publicly confirmed that the person dressed as Hitler is not Mr. Kelly.

9 57. Despite the confirmation of numerous witnesses that the Article and Video
10 false, Defendants continue to publish the defamatory statements. As of the time of filing
11 this Complaint, the Article and Video are still publicly available.

12 58. The reputable fact-checking website PolitiFact conducted its own
13 independent investigation, including phone interviews with two classmates from the
14 Merchant Marine Academy, and declared the Article “false.”³

15 59. Another reputable website, FactCheck.org, likewise conducted its own
16 independent investigation, which drew information from over a dozen sources, and
17 concluded that the Article was “baseless.”⁴

18 60. The fact that Defendants insist on continuing to publish the Article and Video,
19 despite confirmation that it is false from the Kelly Campaign itself, numerous corroborating
20 witnesses, and two independently conducted investigations, demonstrates actual malice and
21 reckless disregard for the truth.

22 61. Additionally, despite the fact that the Kelly Campaign’s representative
23 provided a prompt response to Mr. Howley’s request for comment, the Article continues to
24 falsely imply that the Kelly Campaign has not responded to the National File’s request for
25 comment. *See* Ex. 4 (three days after publications, still stating only that “National File has

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27 ³ [https://www.politifact.com/factchecks/2020/oct/25/blog-posting/no-mark-kelly-
did-not-dress-hitler/#sources](https://www.politifact.com/factchecks/2020/oct/25/blog-posting/no-mark-kelly-did-not-dress-hitler/#sources)

28 ⁴ [https://www.factcheck.org/2020/10/photo-of-man-in-halloween-costume-isnt-
mark-kelly/](https://www.factcheck.org/2020/10/photo-of-man-in-halloween-costume-isnt-mark-kelly/)

1 contacted Mark Kelly's Senate campaign for comment and did not receive an immediate
2 reply.").

3 62. Despite being on notice that the information is false, Mr. Howley has used his
4 personal Twitter account multiple times to continue to falsely assert that Mr. Kelly is the
5 man dressed as Hitler in the photograph. Ex. 5.

6 **IV. Defendants' conduct has injured Plaintiffs.**

7 63. The statement or implication that Mr. Kelly dressed like Hitler causes
8 ongoing injury to Mr. Kelly's reputation. Affiliation with Hitler or a suggestion that a
9 person would choose to dress as Hitler is patently and objectively injurious to Mr. Kelly's
10 personal and professional reputation.

11 64. The injuries are exacerbated because Mr. Kelly is a candidate for U.S. Senate,
12 in a race in which negative information or perceptions about a candidate could sway the
13 election and harm his electoral chances.

14 65. Regardless of whether Mr. Kelly wins the election, his reputation among
15 voters, his constituents, and the American public generally directly relate to his ability to
16 perform his job duties as a U.S. Senator and/or entrepreneur.

17 66. Defendants' publication has caused injury far beyond the National File's,
18 Pappert's, or Howley's readership or viewership because the false statements have been
19 repeated thousands of times in retweets, including a retweet by Donald Trump, Jr., and on
20 numerous websites and national news organizations.

21 **CAUSES OF ACTION**

22 **COUNT I**
23 **(Defamation)**

24 67. Plaintiffs reallege all other paragraphs in this Complaint as though fully stated
25 herein.

26 68. Defendants published multiple false and defamatory statements concerning
27 Mr. Kelly, including statements that Mr. Kelly is the individual dressed as Hitler in the
28

1 yearbook photos published in the Article and Video, and a statement that the Kelly
2 Campaign did not send an immediate reply.

3 69. The false and defamatory statements clearly identified Mr. Kelly as a Senate
4 candidate and thus also implicate the Kelly Campaign.

5 70. The false and defamatory statements have been disseminated to third parties
6 by virtue of Defendants' publication in online articles.

7 71. The false and defamatory statements have brought Mr. Kelly and the Kelly
8 Campaign into disrepute, contempt, and/or ridicule, and/or have impeached their honesty,
9 integrity, virtue, or reputation.

10 72. Defendants acted with actual malice in defaming Plaintiffs.

11 73. Defendants knew the statements were false and/or consciously and recklessly
12 disregarded their falsity.

13 74. Defendants' actions were willful, wanton, and malicious, and specifically
14 calculated to cause harm to Plaintiffs without regard for the consequences of their conduct.
15 Accordingly, Plaintiffs are entitled to an award of punitive damages and requests such an
16 award in an amount to be determined by a jury as sufficient to punish Defendants and to
17 deter others from engaging in such conduct.

18 75. As a direct and proximate result of Defendants' defamatory statements,
19 without limitation, Plaintiffs have suffered and continues to suffer presumed and actual
20 damages in an amount to be proved at trial.

21
22 **COUNT II**
(False Light)

23 76. Plaintiffs reallege all other paragraphs in this Complaint as though fully stated
24 herein.

25 77. Upon information and belief, Defendants intentionally or recklessly placed
26 Plaintiffs in a false light.

1 78. A false light claim arises when untrue information has been published about
2 an individual or when true information has been published about an individual that creates
3 a false implication about the individual.

4 79. Defendants placed Plaintiffs in a false light by publishing, in the Article and
5 Video, photos of an unidentified man dressed as Hitler and indicating that the man was Mr.
6 Kelly. The photos create the false implication that Mr. Kelly is sympathetic to Hitler or to
7 Nazi Germany, and/or that Mr. Kelly is so lacking in good judgment that he did not realize
8 that the costume would create that impression.

9 80. Mr. Kelly is not the individual in the photos and does not recall being present
10 at the party where the photos were taken.

11 81. Defendants' actions were highly offensive to Mr. Kelly and would be highly
12 offensive to any reasonable person because they deliberately and for personal gain falsely
13 portrayed Mr. Kelly as a supporter of Hitler and thus jeopardized both his personal and
14 professional reputation, as well as his electoral chances.

15 82. Defendants' actions were also highly offensive to the Kelly Campaign. The
16 Kelly Campaign's chances of electoral success are harmed by the false impression that
17 Mr. Kelly is a candidate so lacking in judgment that he either supports Hitler or is willing
18 to wear a costume that suggests as much.

19 83. Upon information and belief, Defendants acted with actual malice in
20 portraying Plaintiffs in a false light.

21 84. Defendants' actions have impeached and continue to impeach Mr. Kelly's
22 personal and professional reputation and integrity and have subjected him to ridicule in the
23 eyes of the general public.

24 85. Defendants' actions were willful, wanton, and malicious, and specifically
25 calculated to cause harm to Mr. Kelly and to the Kelly Campaign without regard for the
26 consequences of their conduct. Accordingly, Plaintiffs are entitled to an award of punitive
27 damages and requests such an award in an amount to be determined by a jury as sufficient
28 to punish Defendants and to deter others from engaging in such conduct.

