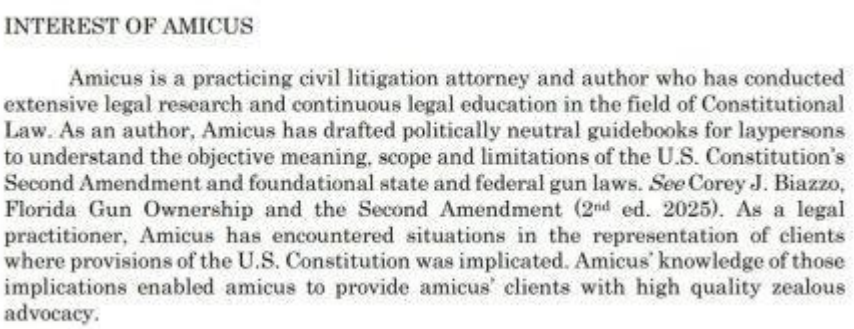
“Birthright Citizenship” and the Amicus Curiae

*by Joseph DeMaio, ©202*5

(May 2, 2025) — **Introduction**



INTEREST OF AMICUS

Amicus is a practicing civil litigation attorney and author who has conducted extensive legal research and continuous legal education in the field of Constitutional Law. As an author, Amicus has drafted politically neutral guidebooks for laypersons to understand the objective meaning, scope and limitations of the U.S. Constitution's Second Amendment and foundational state and federal gun laws. *See* Corey J. Biazzo, Florida Gun Ownership and the Second Amendment (2nd ed. 2025). As a legal practitioner, Amicus has encountered situations in the representation of clients where provisions of the U.S. Constitution was implicated. Amicus' knowledge of those implications enabled amicus to provide amicus' clients with high quality zealous advocacy.

“Biazzo” Amicus Brief, p. 5

In the law, there is a term known as *amicus curiae*. In English, the term translates from Latin to mean a “friend of the court.” Normally, the term refers to a legal brief prepared by people or organizations other than the actual party-litigants and purporting to be friends of the *court* articulating points that may assist the court in reaching a correct determination on the issue presented by the actual litigants.

In days long gone, a true “*amicus*” would present to the court matters or points that have not been brought to the court’s attention by the parties and/or which the *amicus* believed needed to be addressed in order to better inform the court in its task of reaching a “correct” decision.

In more recent times, however, the *amicus curiae* has become far more “interested” and “invested” in a particular result, such that instead of being merely an independent “friend of the court,” the *amicus* becomes more of a friend to one side or the other in a contested case. Stated otherwise, today’s *amicus* looks more like a *quasi* party, actually supporting one side or the other and making advocacy arguments in support of (or in opposition to) that party. It is akin to “lobbying” the court.

Federal Register

Such is the case with the matters now pending before SCOTUS in three docketed cases, *i.e.*, Docket Nos. 24A884; 24A885 and 24A886. Each case, with different parties, involves the "birthright citizenship" question which is the subject of President Trump's Executive Order 14160. That order draws into question the validity of that principle under the 14th Amendment. Your humble servant addressed the matter recently here.

Across those aggregated but related cases, a total of 69 – not a typo: *sixty-nine*, many in identical verbiage – *amicus curiae* briefs have been filed either (a) supporting President Trump's application for a partial stay against lower court injunctions or temporary restraining orders barring the operation of Executive Order 14160 or (b) seeking a denial of his application for a stay, thereby allowing lower district court "nationwide injunctions" to bar implementation of the Executive Order.

By far, the highest number of claimed *amici curiae "*friends of the court*"* signing on to an *amicus* brief is the "Amici Curiae Brief of Members of Congress" filed April 29, 2025, the last day ordered by the Court for filing *amicus* briefs. Signing on to that brief in opposition to President Trump are 183 (yes, one hundred eighty-three) Democrat members of the House of Representatives. *Zero* Republican House members signed it, since their own "GOP" *amicus* brief supporting President Trump had been prepared and timely filed on March 14, 2025.

Interestingly, "only" 183 of the House Democrats – out of a total of 213 Democrats (two vacancies currently exist) – signed on to the brief. They include: Minority Leader Hakeem Jeffries (no surprise there); Al Green (same no surprise); Alexandria Ocasio-Cortez (ditto); Ilhan Omar (ditto); and Henry "Hank" ("Guam-might-capsize-if-we-send-more-military-personnel-there") Johnson. Doing the math, 30 (thirty) Democrats declined to sign on to their own brief. Oddly, one prominent Democrat's name missing from the list of *amici curiae* opposing President Trump: Former Speaker of the House Nancy ("I-left-my-brain-in-San-Crapcisco") Pelosi. One must ask: Why?

Discussion and Analysis

Turning to text, there are many complex legal issues involved in the cases, ranging from litigant "standing" to "principles of equity" to the availability of "class actions." The following offering, however, will focus only on the role the multiple *amicus* briefs are playing with regard to what your servant calls "Gray's Anomaly" appearing in a case central to the birthright citizenship issue: *United States v. Wong Kim Ark.*

> Plainly, a cursory or casual reading of Justice Gray's claim, without examining its underlying veracity, could easily lead one to believe that Congress intended to preserve, rather than to jettison, the "natural born" modifier when enacting 1 Stat. 414, which conclusion, it is posited, would be wrong. While it is clear that Congress repealed 1 Stat. 103, unless one actually ***reads*** 1 Stat. 414 and confirms the opposite of what Justice Gray stated, the anomaly will go undetected. Justice Gray or one of his law clerks, seemingly, did not read 1 Stat. 414, or at minimum, did not read it closely enough.

https://www.thepostemail.com/2025/04/23/wong-kim-ark-and-grays-anomaly/

As your servant recently observed here, one of the issues as to which the Supreme Court – and in addition, ***all*** of the *amici curiae* – may not be aware relates to Gray's Anomaly. That issue focuses on the unexplained error committed by Associate Justice Horace Gray in the *WKA* majority opinion, which he authored. There, he mistakenly claimed that the "natural born" modifier of the word "citizens" in the 1790 Naturalization Act, 1 Stat. 103, was purportedly reenacted by Congress "in the same words" in 1795 in 1 Stat. 414.

That assertion, of course, is false. Likely realizing that it had mistakenly created a potential statutory end-around-run on the "natural born Citizen" clause of Art. 2, § 1, Cl. 5 of the Constitution, Congress corrected its 1790 mistake in 1795 by repealing 1 Stat. 103, and enacting instead 1 Stat. 414, which repealed and deleted, rather than "re-enacted, in the same words," the "natural born" modifier of "citizens" it had inadvertently placed in the 1790 statute.

The materiality of the error to the issue is simple: to the extent that Justice Gray's mistaken belief that the natural born citizen modifier *remained* in effect after its repeal in 1795 influenced the remainder of his thinking and analysis on the birthright citizenship or 14th amendment "subject to the jurisdiction" questions, the entire *WKA* majority opinion likely articulates a manifestly faulty conclusion. The dissenting opinion of Chief Justice Fuller, joined in by Associate Justice Harlan, makes this clear, but *without* referencing "Gray's Anomaly."

Stated otherwise, in the event that Justice Gray mistakenly believed that, since Congress had declared in 1790 that a child born "beyond sea" to U.S. citizen parents was "considered" to be a natural born citizen, surely Congress must have also believed *after 1795* that a child born into this world as a citizen at birth or a citizen by birth to U.S. citizen parents here was, at minimum, a "citizen," and that therefore, birthright citizenship of that person under the 14th Amendment would be entirely consistent with his mistaken belief.

Nowhere in the remainder of the *WKA* majority opinion *after* Gray's Anomaly was created, (*i.e.*, 169 U.S. at 672-73) does Justice Gray correct his prior error. Accordingly, it is far less than conjectural that his mistaken belief may have infected the entirety of his analysis of the birthright citizenship question presented. Stated otherwise, if he thought

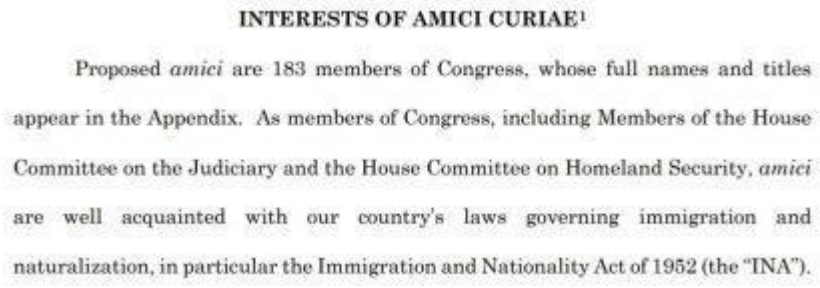
that the congressional statement regarding children born "beyond sea" to U.S. citizen parents as constituting natural born citizens was still operative, surely Congress must have also believed that children born here to citizen parents under the 14th amendment, were also, at minimum, citizens.

Through all of this legal maze, faithful *P&E* readers need only remember the Euler Diagram: while all natural born Citizens are also native-born citizens, not all native-born citizens are natural born Citizens. It is that simple.

This potential for confusion in Justice Gray's reasoning is not addressed in any of the 69 *amicus curiae* briefs filed in the cases now pending before the Court. Problematically as well, some of the *amicus* briefs actually articulate *misinformation* regarding what *WKA* actually held.

For example, the "Biazzo" *amicus* brief filed in opposition to President Trump actually states that the Court has impliedly held that anyone who is a 14th amendment citizen is also a natural born citizen. That, of course, is false. The Biazzo *amicus* brief claims (at 9) that the Court in *WKA* has "essentially recognized" that under the 14th Amendment, purportedly, "… individuals born within the physical territories of the United States, (who are not the children of foreign diplomats working in the United States on behalf of a foreign government and who are not the children of hostile foreign occupiers of the physical United States) ***are natural born American Citizens***. See United States v. Wong Kim Ark, 169 U.S. 649 (1898)." (Emphasis added)

This is categorical misinformation, and perhaps even mal-information. That said, the claimed "essentially recognized" conclusion can be extrapolated from the erroneous statement by Justice Gray already discussed.



INTERESTS OF AMICI CURIAE[1]

Proposed *amici* are 183 members of Congress, whose full names and titles appear in the Appendix. As members of Congress, including Members of the House Committee on the Judiciary and the House Committee on Homeland Security, *amici* are well acquainted with our country's laws governing immigration and naturalization, in particular the Immigration and Nationality Act of 1952 (the "INA").

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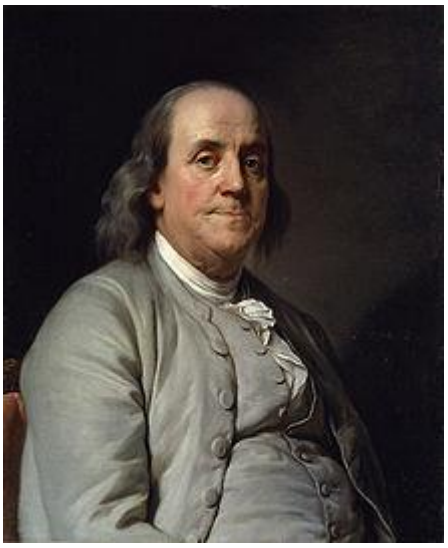
As another example, the Democrat House members' *amicus* brief states (at 1): "As members of Congress, including Members of the House Committee on the Judiciary and the House Committee on Homeland Security, ***amici are well acquainted with our country's laws governing immigration and naturalization***, in particular the Immigration and Nationality Act of 1952 (the "INA")." (Emphasis added)

Seriously? Really? That bold assertion by the 183 putative Democrat *amici curiae* demands closer analysis. If the claim that the *amici* Democrats signing onto the brief

were in reality "well-acquainted" with the Republic's laws "governing … naturalization…," Gray's Anomaly would long ago have been identified, taken into account and remembered by these representatives claiming to be "well acquainted" with the nation's naturalization laws, including that body of "laws" emanating from the Supreme Court. Accordingly, the Democrats' claim of being "well-acquainted" with the laws, including laws as interpreted by Supreme Court decisions such as *WKA*, rings a bit hollow.



(public domain)

With people who claim to be "well-acquainted" with the relevant laws, but include among their ranks elected legislators who fear that the island of Guam might capsize and tip over if too many people go there, the day seems to be fast approaching when Ben Franklin's admonition – "a republic, if you can keep it" – may become a reality instead of a mere latent warning.

Long story short, all of the *amicus curiae* briefs filed in the cases now pending before the Court – yes, including those supporting President Trump – are woefully deficient in that ***none*** of them addresses, even by way of distinguishing or rejecting, the materiality of Justice Gray's Anomaly, thereby depriving the Court of the benefit of historically true and legitimate *amicus curiae* assistance.

Moreover, to the extent that some *amici* have misinformed the Court, one is tempted to pose the hypothetical question: With *amicus* "*friends* of the court like these…, who needs enemies?"

And do not forget, faithful *P&E* readers, oral argument in the three cases will take place on May 15, 2025 starting at 10:00 AM EST.