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David T. Tayloe Jr., M.D., FAAP  
President, American Academy of Pediatrics  
141 Northwest Point Boulevard  
Elk Grove Village, IL 60007-1098

Re: Is the AAP “Dedicated to the Health of All Children” or to  
Vaccine Industry Interests?

Dear Dr. Tayloe:

Your “Letter from the President”<sup>1</sup> published in the May edition of the American Academy of Pediatrics’ (“AAP”) newsletter misleads readers regarding the AAP’s position on children’s vaccine injury lawsuits. The AAP has taken a pro-industry position adverse to the rights of injured children in its *amicus curiae* brief submitted to the Supreme Court of the United States in *American Home Products Corporation, dba Wyeth, et al., v. Ferrari, et al.*, No. 08-1120.

You state that,

The Academy is writing an amicus brief for the U.S. Supreme Court concerning a vaccine-related injury lawsuit in Georgia that is being brought by plaintiffs in state court prior to a final ruling by the VICP on the merits of their claim. The viability of the VICP could be in jeopardy if the manufacturer is not successful in this case. ***The VICP must remain the first contact for all alleged vaccine-related injuries before plaintiffs are allowed to pursue legal action in civil court.*** Rolling the clock back to the early 1980s when many vaccine manufacturers exited the market secondary to massive vaccine-related injury lawsuits would significantly undermine our already fragile childhood immunization program.

(Emphasis added).

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Your statement misconstrues the issues presented in the case and utterly misrepresents the position taken by the AAP in its amicus brief.

As clearly set forth in Wyeth's brief, which the AAP explicitly endorses, the Ferraris fully complied with the requirements of the Vaccine Injury Compensation Program ("VICP" or "vaccine court") by filing their claim with VICP in the first instance before exercising their legal right to withdraw their vaccine court claim. The Ferraris then pursued their claim in the Georgia state trial courts. The Ferraris properly made the vaccine court their "first contact" in pursuing their claim that vaccines neurologically injured their infant son. Your suggestion to the contrary is factually incorrect.

Your statement shows that you fail to understand that the 1986 tort reform enactment was designed to protect vaccine manufacturers. Congress implemented a statutory scheme that required a vaccine injury claimant to first file his or her claim in the vaccine court. Congress explicitly permitted the claimant to remove the claim from the VICP so that the claim could be pursued in traditional tort forums. In no way does the Georgia Supreme Court decision in *Ferrari* represent a "rolling the clock back to the early 1980's", as you suggest. Instead it affirms the statutory scheme contemplated by Congress to address the perceived problems with the nation's vaccine program.

The position advocated by the AAP and its allies in the medical industry in support of Wyeth and the pharmaceutical industry is that the vaccine court should be the *only* remedy for vaccine-injured children. The AAP supports a prohibition of all design defect claims in civil courts, effectively limiting injured children to a remedy in the vaccine court. In addition to the explicit preemption of "failure to warn" claims already contained in the National Childhood Vaccine Injury Act, this would provide virtual complete immunity for all vaccine manufacturers. At the same time caps on damages, elimination of jury trials, and severe limits on discovery of vaccine industry information, among other legal limitations of the VICP, restrict the rights of vaccine-injured children.

Under the position you promote, the VICP program would be the only legal option for vaccine-injured children, not merely their "first contact."

Contrary to your assertion, the 1986 tort reform provision known as VICP has served to permit the vaccine industry to flourish; vaccines have become a major pharmaceutical industry profit sector with the introduction of financial "blockbuster" vaccines like Wyeth's Prevnar and Merck's Gardasil.<sup>2</sup> Indeed, your own AAP amicus brief asserts that the VICP has been a success, verifying that "[v]accine development has flourished since 1986 with the number of vaccine-preventable diseases having more than doubled."<sup>3</sup>

The AAP has requested the Supreme Court to erect a complete bar to vaccine injury lawsuits against manufacturers. This ignores the well-founded concern, articulated

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by the Georgia Supreme Court in *Ferrari*, that such a bar would leave an inadequate check on vaccine maker actions to insure safety for children for whom vaccination is mandatory.<sup>4</sup> The need for such draconian restriction of legal rights of children is dubious; your suggestion that the nation's childhood vaccine program is "fragile" is belied by historically high vaccination rates and mandates requiring more vaccines than ever before.<sup>5</sup>

The misrepresentations you have made in your letter suggest that the AAP is incapable of understanding the legal policy stance it has so vocally promoted. It is troubling that the AAP would adopt a position that would so completely – and unnecessarily – limit a vaccine-injured child's access to justice.

Ironically, the position taken by the AAP in the Supreme Court affirms the societal/legal judgment, reflected in the multiple judicial opinions, that vaccines are "unavoidably unsafe" and, when properly prepared, cannot be made safe.<sup>6</sup> In light of this damning judgment of vaccine safety, the AAP places priority on protecting vaccine manufacturers rather than protecting the safety of children from an "unavoidably unsafe" intervention. It would better serve our children and the nation's vaccine program if the AAP would focus on making vaccines safer rather than protecting manufacturers from the legal perils of vaccine dangers.

The AAP's position is not one that inspires parents' confidence in our nation's vaccine program. Parents must make individual choices that affect the health of their precious children. In light of the AAP's position in the *Ferrari* case – placing greater value on vaccine maker interests than children's safety – there exists profound doubt whether the AAP truly adheres to the legend that appears on its website, proclaiming that the AAP is "Dedicated to the Health of All Children."

Sincerely,



Robert J. Krakow

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<sup>1</sup> AAP News, Vol. 30, No. 5, May 2009, <http://aapnews.aappublications.org/cgi/content/full/30/5/6>.

<sup>2</sup> *Vaccine Makers Enjoy Immunity*, Wall Street Journal, 2/23/09, <http://online.wsj.com/article/SB123535050056344903.html>

<sup>3</sup> Brief Amici Curiae of the American Academy of Pediatrics and 10 Other Physician and Public Health Organizations in Support of Petitioners, *American Home Products Corp. v. Ferrari*, 2009 WL 979651 (U.S.) at p. 20.

<sup>4</sup> *American Home Products Corp. v. Ferrari*, 284 Ga. 384, 668 S.E.2d 236, 2008 WL 4452358 (Ga.)

<sup>5</sup> Reuters, *Child vaccination rates hit record levels*, 9/5/08, <http://www.reuters.com/article/healthNews/idUSCOL47185220080905>

<sup>6</sup> See, e.g., *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 297(V)(B) (E.D.Pa.2007); Restatement of Torts 2d § 402A, comment k.