

**BILL EMERSON’S MAKEOVER: REFORMING THE BILL  
EMERSON GOOD SAMARITAN  
FOOD DONATION ACT**

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## INTRODUCTION

A rotting two-pound bag of pre-peeled butternut squash bought as the result of sudden culinary inspiration; milk gone bad because buying a gallon made more economic sense than the quart; chicken spaghetti intended for lunch but woefully forgotten. Despite my best intentions, I had to throw away each of these items, and in doing so, I contributed to the food waste epidemic in the United States.

The exact amount of food waste in the United States is unknown, and the last time the United States Department of Agriculture (USDA) measured the amount of food loss in the United States was in 2010.<sup>1</sup> Then, the United States wasted an estimated 133 billion pounds of its food supply.<sup>2</sup> Individual consumers reportedly waste more than the retail sector. Of the 133 billion pounds of food waste, 43 billion pounds of waste occurred in the retail sector, and 90 billion pounds occurred at the consumer level.<sup>3</sup> In 2014, the Environmental Protection Agency (EPA) calculated that the United States sent 29.38 million tons of uneaten food to the landfill.<sup>4</sup>

Smarter, individual purchasing choices and adjustments to personal habits would reduce the amount of food sent to a landfill. For instance, I will no longer buy two pounds of butternut squash without a purpose stronger than a cooking whim. However, food is also wasted along the supply chain during agricultural production, post-harvest handling and storage, processing, and distribution at the retail level.<sup>5</sup>

Some food never leaves the farm. One report estimates that 10.1 million tons of food is lost from the rest of the supply chain at farms and packing houses.<sup>6</sup> Salvation Farms, a Vermont gleaning organization, conducted the

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1. *Frequently Asked Questions: U.S. Food Waste Challenge*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/oc/foodwaste/faqs.htm> [<https://perma.cc/PN8J-YUAZ>] (last visited Dec. 4, 2017); *U.S. Food Challenge FAQ's Information Sources*, OFFICE OF THE CHIEF ECONOMIST, U.S. DEP'T OF AGRIC., <https://www.usda.gov/oc/foodwaste/sources.htm> [<https://perma.cc/8US5-F8F4>] (last visited Dec. 4, 2017).

2. JEAN C. BUZBY ET AL., U.S. DEP'T OF AGRIC., *THE ESTIMATED AMOUNT, VALUE, AND CALORIES OF POSTHARVEST FOOD LOSSES AT THE RETAIL AND CONSUMER LEVELS IN THE UNITED STATES 11* (2014), [https://www.ers.usda.gov/webdocs/publications/43833/43680\\_eib121.pdf](https://www.ers.usda.gov/webdocs/publications/43833/43680_eib121.pdf) [<https://perma.cc/F756-FS8V>].

3. *Id.*

4. ENVTL. PROT. AGENCY, *ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2014 FACT SHEET 6-7* (2016), [https://www.epa.gov/sites/production/files/2016-11/documents/2014\\_smmfactsheet\\_508.pdf](https://www.epa.gov/sites/production/files/2016-11/documents/2014_smmfactsheet_508.pdf) [<https://perma.cc/AV8U-UMPG>] (calculated by figuring out 21.6% of 136 million tons of waste that was landfilled).

5. JENNY GUSTAVSSON ET AL., *FOOD AND AGRIC. ORG. OF THE U.N., GLOBAL FOOD LOSSES AND FOOD WASTE 2*, 10-11 (2011), <http://www.fao.org/docrep/014/mb060e/mb060e.pdf> [<https://perma.cc/C75D-28V9>].

6. REFED, *A ROADMAP TO REDUCE U.S. FOOD WASTE BY 20 PERCENT 5* (2016), [https://www.refed.com/downloads/ReFED\\_Report\\_2016.pdf](https://www.refed.com/downloads/ReFED_Report_2016.pdf) [<https://perma.cc/YJ46-QVHK>].

first state-level study of food loss on Vermont farms.<sup>7</sup> The study estimates that 14.3 million pounds of vegetables and berries are lost on Vermont farms every year.<sup>8</sup> At the retail level, some food never gets sold and is thrown away for many marketing-related reasons including: dented cans or packages, unpurchased holiday foods, overstocking to meet a predicted consumer demand, storage malfunctions, and culling “ugly” food.<sup>9</sup>

Donating food for distribution through the charitable food sector is one way to reduce food waste and feed food-insecure families and individuals. Regrettably, food waste still far outweighs food donations. In 2011, the U.S. retail sector donated an estimated 335,000 tons of food.<sup>10</sup> In other words, the donations accounted for only 5% of estimated food waste in the United States in 2010.<sup>11</sup>

To increase food donations from retailers and farmers, Congress passed the Bill Emerson Good Samaritan Food Donation Act (Act) in 1996.<sup>12</sup> The Act limits food-safety liability for food donors and nonprofits that distribute food, such as food banks.<sup>13</sup> Congress chose to limit liability to increase corporate and individual food donations while addressing hunger and food waste in the United States.<sup>14</sup> In addition, the Act attempts to provide a national uniform framework for food-donation laws in response to the myriad of state laws that provided distinct and varied levels of protection to food donors.<sup>15</sup> The Act has not been as effective as Congress intended. In the 21 years since Congress passed the Act, food donations have not increased due to the Act, in part because potential food donors still remain wary of liability.<sup>16</sup> In 2016, the Food Waste Reduction Alliance found that

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7. THERESA SNOW & ELENA DEAN, SALVATION FARMS, FOOD LOSS IN VERMONT: ESTIMATING ANNUAL VEGETABLE AND BERRY LOSS 1 (2016), [http://salvationfarms.org/VT\\_Food\\_Loss\\_Study\\_2016.pdf](http://salvationfarms.org/VT_Food_Loss_Study_2016.pdf) [https://perma.cc/XV7X-UKLG].

8. *Id.*

9. BUZBY ET AL., *supra* note 2, at 5.

10. OFFICE OF RES. CONSERVATION & RECOVERY, U.S. ENVTL. PROT. AGENCY, FOOD WASTE MANAGEMENT SCOPING STUDY 2 (2014), [https://www.epa.gov/sites/production/files/2016-01/documents/msw\\_task11-2\\_foodwastemanagementscopingstudy\\_508\\_fnl\\_2.pdf](https://www.epa.gov/sites/production/files/2016-01/documents/msw_task11-2_foodwastemanagementscopingstudy_508_fnl_2.pdf) [https://perma.cc/4DAV-6HQB] [hereinafter EPA FOOD WASTE MANAGEMENT STUDY].

11. Divide 67 million pounds donated by 133 billion pounds wasted.

12. 142 CONG. REC. 17, 65 (1996).

13. Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (2012).

14. *E.g.*, Cameron Shaeffer Kalashian, *Out of Sight, Out of Mind: Finding a Solution to Food Waste in America*, 23 SAN JOAQUIN AGRIC. L. REV. 103, 103–04 (2013) (outlining Congress’s reasoning for passing the Act).

15. James Haley, *The Legal Guide to the Bill Emerson Good Samaritan Food Donation Act*, ARK. L. NOTES ¶ 3 (Aug. 8, 2013), <http://media.law.uark.edu/arklawnotes/2013/08/08/the-legal-guide-to-the-bill-emerson-good-samaritan-food-donation-act/> [https://perma.cc/8ESN-A3PG].

16. *See* Jessica A. Cohen, *Ten Years of Leftovers with Many Hungry Still Left Over: A Decade of Donations Under the Good Samaritan Food Donation Act*, 5 SEATTLE J. FOR SOC. JUST. 455, 477–78 (2006) (stating it is impossible to tell if the Act has increased food donations).

liability fear prevented many manufacturers, restaurants, and retailers from donating food.<sup>17</sup> Instead, excess or unsaleable food is fed to animals, applied to land, composted, or landfilled.<sup>18</sup>

This Note is a call to action to reform and amend the Act to increase food donations while also better protecting the recipients of donated food.<sup>19</sup> Food waste at the farming, distribution, and retail level is this Note's primary concern because food from these sources is typically donated to nonprofit food distribution centers, thereby minimizing food waste.<sup>20</sup> Specifically, this Note argues that the Act does not address potential food donors' liability fears because the extent of the Act's protection is ambiguous—providing clarity would increase donations and protect recipients from foodborne illnesses. Section I provides further background about why food waste is an environmental and social issue. It also tells the story of the political and social dynamics leading up to the passage of the Act. Section II discusses the ambiguities surrounding these specific, key terms in the Act: “good faith,” “quality,” and “recondition.” Section III discusses whether the Act preempts state law, which is currently unclear. Section IV addresses gaps in liability protection throughout the food-donation chain. Finally, Section V proposes models for amendments that could remedy the identified problems and ambiguities.

## I. WASTE NOT, WANT NOT: WHY FOOD DONATIONS MATTER

Food faces an uphill battle to get from the farm to the table. At every stage of production, some food will fall out of the system and get lost or wasted. Whether food is lost or wasted is debatable; there is not a consensus among groups about how to define the terms. Some organizations define “food loss” broadly as food that is lost during part of the supply chain leading up to human consumption.<sup>21</sup> “Food waste” could narrowly refer to retailer and consumer behaviors.<sup>22</sup> Other organizations refer to “food waste” broadly as “organic residues generated by the processing, handling,

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17. FOOD WASTE REDUCTION ALL., ANALYSIS OF U.S. FOOD WASTE AMONG FOOD MANUFACTURERS, RETAILERS, AND RESTAURANTS 17 (2016), [http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report\\_Final.pdf](http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report_Final.pdf) [<https://perma.cc/P4T4-FTMZ>].

18. *Id.* at 12, 39.

19. In this Note, “recipient” refers to the end-recipient who receives and eats the donated food; “consumer” refers to the person who buys food at a retail store or restaurant.

20. While ultimately food donation relies on surplus, there is some surplus and food waste that cannot be avoided. For instance, Salvation Farms's study also revealed that “only 33% of vegetables that are not sold are donated.” SNOW & DEAN, *supra* note 7, at 3.

21. GUSTAVSSON ET AL., *supra* note 5, at 2.

22. *Id.*

storage, sale, preparation, cooking, and serving of foods.”<sup>23</sup> In one report, the USDA says that “[f]ood waste’ is a component of food loss,”<sup>24</sup> but it later skirts the debate and says that “[t]he exact definition of food loss and waste could vary by country, business and consumer.”<sup>25</sup> For simplicity, this Note will use the phrase “food waste” to refer to food loss or waste that occurs before sale to an individual consumer (unless an organization specifically uses the phrase food loss).

Regardless of whether food is wasted or lost, growing, buying, and preparing food in excess raises environmental and social concerns. Environmentally, food waste is the second-largest category of materials sent to landfills next to paper.<sup>26</sup> Food waste accounts for 21.6% of the U.S. waste stream.<sup>27</sup> In addition, even when municipalities recycle, food is the most common item entering landfills.<sup>28</sup> The landfilled food “contributes to the 18% of total U.S. methane emissions that come from landfills.”<sup>29</sup>

The EPA also notes that food waste results in wasted “water, gasoline, energy, labor, pesticides, land, and fertilizers used to make the food.”<sup>30</sup> For instance, food lost on farms is generally composted or tilled back into the soil.<sup>31</sup> Gleaning<sup>32</sup> and farm-to-food-bank efforts only recover a fraction of unsold farm crops.<sup>33</sup> Compost and tilling add nutrients to the soil, but growing food requires significant agricultural inputs such as fertilizer, water, and fuel for machines.<sup>34</sup> ReFED, a collaborative organization dedicated to reducing food waste, estimates that avoiding agricultural inputs through prevention and recovery efforts, such as donations, results in up to

23. FOOD WASTE REDUCTION ALL., *supra* note 17, at 48.

24. BUZBY ET AL., *supra* note 2, at 1.

25. *Frequently Asked Questions: U.S. Food Waste Challenge*, *supra* note 1.

26. *The Benefits of Anaerobic Digestion of Food Waste at Wastewater Treatment Facilities*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/sites/production/files/documents/Why-Anaerobic-Digestion.pdf> [<https://perma.cc/V7L9-JRBU>] (last visited Dec. 4, 2017).

27. *Sustainable Management of Food*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/sustainable-management-food/sustainable-management-food-basics#what> [<https://perma.cc/8YT7-UF78>] (last updated July 6, 2017).

28. BUZBY ET AL., *supra* note 2, at 2.

29. *America’s Food Waste Problem*, ENVTL. PROTECTION AGENCY (Apr. 22, 2016), <https://www.epa.gov/sciencematters/americas-food-waste-problem> [<https://perma.cc/UGT6-F7TU>].

30. *Sustainable Management of Food*, *supra* note 27.

31. REFED, *supra* note 6, at 12.

32. See 42 U.S.C. § 1791(b)(5) (2012) (defining gleaner as “a person who harvests for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner”).

33. REFED, *supra* note 6, at 12.

34. *Id.* at 5 (explaining that preventing food waste on farms reduces use of unnecessary fertilizer and fuel).

ten times the amount of greenhouse gas reductions compared to simply composting food.<sup>35</sup>

Food waste does not only have environmental impacts; the quantity of food waste in the United States is deeply troublesome given the rate of food insecurity in the country. There are different levels of food insecurity, and the USDA describes food insecurity as either low or very low food security.<sup>36</sup> According to the USDA, “low food security” means “reports of reduced quality, variety, or desirability of diet. Little or no indication of reduced food intake.”<sup>37</sup> “Very low food security” means “reports of multiple indications of disrupted eating patterns and reduced food intake.”<sup>38</sup> Both terms mean a household has decreased quality food intake, but “very low food security” also refers to irregular eating habits and reduced food intake.<sup>39</sup> Food insecurity results from social and economic factors.<sup>40</sup> Hunger is more extreme than food insecurity—it is “the recurrent and involuntary lack of food.”<sup>41</sup> Prolonged food insecurity can lead to hunger.<sup>42</sup> Organizations often use these terms interchangeably, though they are distinct.<sup>43</sup>

In 2015, 12% of households were food insecure.<sup>44</sup> Nearly all of those food-insecure households were worried that their food would run out, could not afford to buy balanced meals, cut the size of their meals, or skipped meals.<sup>45</sup> Food insecurity can be traumatic for families because it often means that families are on the border of hunger but, by law, are not hungry

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35. *Id.* at 25.

36. *Definitions of Food Security*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx> [<https://perma.cc/D4NZ-UF34>] (last updated Oct. 4, 2017).

37. *Id.*

38. *Id.*

39. *Id.*

40. PANEL TO REVIEW U.S. DEP'T OF AGRIC.'S MEASUREMENT OF FOOD INSECURITY AND HUNGER, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *FOOD INSECURITY AND HUNGER IN THE UNITED STATES: AN ASSESSMENT OF THE MEASURE 44* (Gooloo S. Wunderlich & Janet L. Norwood eds., 2006).

41. *Id.* at 47.

42. *Id.*

43. *See, e.g., Child Hunger Facts*, FEEDING AM., <http://www.feedingamerica.org/hunger-in-america/impact-of-hunger/child-hunger/> [<https://perma.cc/P3VP-7CGJ?type=image>] (last visited Dec. 4, 2017) (describing child hunger using food-insecurity statistics).

44. *Interactive Chart: Food Security Trends*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/interactive-charts-and-highlights/#trends> [<https://perma.cc/2PJV-UA7Q>] (last updated Sept. 6, 2017).

45. MARK NORD & MARGARET ANDREWS, U.S. DEP'T OF AGRIC., FANRR-26-2, *REDUCING FOOD INSECURITY IN THE UNITED STATES: ASSESSING PROGRESS TOWARDS A NATIONAL OBJECTIVE 2* (2002).

enough to qualify for government benefits.<sup>46</sup> Feeding America, an umbrella organization for food rescue groups, banks, and pantries, reported that 20% of food-insecure families are not eligible for federal nutrition assistance programs and instead must depend on charitable donations.<sup>47</sup>

Before the Act, Congress enacted the Model Good Samaritan Food Donation Act of 1990 (Model Act) to increase food donations.<sup>48</sup> The Model Act did not have the force of law, but Congress intended it to provide a guide for states to pass their own laws to encourage private food donations.<sup>49</sup> Six years later, Congress used the Model Act as the framework for the Bill Emerson Act—the text of the two acts is almost identical.<sup>50</sup> The Bill Emerson Act merely strikes sections 401 and 403, retains section 402, and replaces the word “Model” with “Bill Emerson.”<sup>51</sup> Both incentivize food donations by limiting food-donor liability.<sup>52</sup>

Consistent with the purpose of the Bill Emerson Act, which protects food donors, “a person or gleaner” has a broad meaning.<sup>53</sup> According to the Act, a “gleaner” is a person who harvests donated crops for distribution to the needy or for donation to a nonprofit organization that ultimately distributes food to the needy.<sup>54</sup> “Person,” as defined by the Act, is broader than an individual.<sup>55</sup> It also encompasses a “corporation, partnership, organization, association, or governmental entity, including a retail grocer, wholesaler, hotel, motel, manufacturer, restaurant, caterer, farmer, and nonprofit food distributor or hospital.”<sup>56</sup>

The broad definition of person is consistent with the intent to increase donations from private industry on a national scale. For instance, the Executive Director of FoodChain, a charitable nonprofit distributor,

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46. See, e.g., ALISHA COLEMAN-JENSEN ET AL., U.S. DEP’T OF AGRIC., ERR-237, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES 30 n.32 (2016) (explaining that not all food insecure households were eligible for federal nutrition assistance programs).

47. *Child Hunger Facts*, *supra* note 43.

48. Good Samaritan Food Donation Act, Pub. L. No. 101-610, §§ 401–03, 104 Stat. 3183, 3183–85 (1990).

49. *Id.*

50. Compare Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (1996), with Good Samaritan Food Donation Act, Pub. L. No. 101-610, 104 Stat. 3183 (1990) (employing identical language).

51. See Cohen, *supra* note 16, at 471 (“The Good Samaritan Act repealed Section 401 and 403 of the NCSA and the word ‘Model’ was stricken.”).

52. Compare Good Samaritan Food Donation Act § 402 (emphasizing limiting liability for food donors as a model Good Samaritan Act), with Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791(c) (2012) (actually limiting a food donor’s liability).

53. 42 U.S.C. § 1791(c)(1) (2012); see 42 U.S.C. § 1791(b)(5), (10) (2012) (providing the definitions for “person” and “gleaner”).

54. *Id.* § 1791(b)(5).

55. *Id.* § 1791(b)(10).

56. *Id.*

testified at Congress about how the Act would increase national donations and strengthen the relationship between food banks and private industry.<sup>57</sup> Nonprofit distributors like FoodChain believed that limiting liability would increase their food-donor base while managing surplus.<sup>58</sup>

Twenty-one years since the Act's passage, potential food donors still fear liability because they remain misinformed about what exactly the law protects.<sup>59</sup> An EPA survey found that potential food donors fear product liability from issues such as lack of refrigeration, recalls, and insufficient food storage.<sup>60</sup> Congress is also aware that the Act needs clarity to further meet its purpose. In June 2016, the Senate introduced a bill to bolster initiatives to reduce food waste, one method being to amend the Act.<sup>61</sup> Notably, the proposed amendments included authorizing the USDA, through the Secretary of Agriculture, to carry out the Act and to refine the definitions of some terms.<sup>62</sup> One year later, in July 2017, the House introduced a comprehensive bill to reduce food waste through various means, including amending the Act.<sup>63</sup>

The 2016 proposed amendments never materialized into action, and the House amendments (at the time of this Note) were referred to committee.<sup>64</sup> This Note prompts Congress to reconsider amendments to the Act. Comprehensive amendments that clarify ambiguity, account for food safety concerns, and consider the full scope and roles of organizations in the food chain would increase food donations.

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57. H.R. 2428, *The Good Samaritan Food Donation Act: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 20 (1996) (statement of Christina Martin, Executive Director, FoodChain) [hereinafter *Martin Testimony*] (“I have a first-hand knowledge of the biggest obstacle [food donation] programs [face] . . . and that obstacle is the donors’ concerns about liability. . . . The most effective response would be the enactment of a National Good Samaritan Law, [which] . . . would make a dramatic difference in the number of donors to food-rescue programs. In particular, I believe that such a law would substantially increase the number of national donors to Foodchain programs.”); see H.R. REP. NO. 104-661 (1996) (referring to the Executive Director of FoodChain Christina Martin’s testimony regarding possible solutions to increase food donations during a committee hearing on May 31, 1996).

58. *Martin Testimony* 20.

59. EPA FOOD WASTE MANAGEMENT STUDY, *supra* note 10, at 2.

60. *Id.*

61. See generally S. 3108, 114th Cong. (2016) (proposing various methods to reduce food waste, including section 201, which amends the Good Samaritan Food Donation Act).

62. *Id.* § 201(6).

63. See generally H.R. 3444, 115th Cong. (2017) (proposing various methods to reduce food waste, including section 201, which amends the Good Samaritan Food Donation Act).

64. 163 CONG. REC. H6514 (daily ed. July 27, 2017) (stating the committees to which the bill was referred); 162 CONG. REC. S4723 (daily ed. June 29, 2016) (stating the proposed bill was referred to committee).

## II. THE ACT DOES NOT RELIEVE POTENTIAL FOOD DONORS OF LIABILITY FEAR BECAUSE THE ACT FAILS TO CLEARLY DEFINE KEY TERMS

The Act protects food donors and nonprofit distributors from civil and criminal liability when they donate or distribute apparently wholesome food in good faith.<sup>65</sup> This section first begins with an analysis of the term “good faith” and the problems associated with the Act’s failure to define the term. Next, this section continues by discussing the term “quality” as it pertains to apparently wholesome food in the Act, which refers to food that meets all “quality and labeling standards imposed by Federal, State, and local laws and regulations.”<sup>66</sup> The term “apparently wholesome food” includes “food that may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>67</sup> However, a donor does not have to donate apparently wholesome food if the receiving nonprofit can and does recondition the food.<sup>68</sup>

### *A. The Act Fails to Define Good Faith and Leaves Food Donors Confused and Recipients Unprotected*

Congress balanced its goal to increase food donations and recognize public safety concerns by qualifying the scope of liability immunity.<sup>69</sup> Except in cases of gross negligence or intentional misconduct, the Act protects food donors from civil and criminal liability for injuries the recipient might incur when they donate “apparently wholesome food . . . in good faith to a nonprofit organization for ultimate distribution to needy individuals.”<sup>70</sup> Similarly, the Act protects nonprofit distributors from civil and criminal liability (except in cases of gross negligence or intentional misconduct) when they distribute apparently wholesome food “received as a donation in good faith from a person or gleaner for ultimate distribution to needy individuals.”<sup>71</sup> Therefore, the Act qualifies the liability protection offered to food donors and distributors with three requirements: donate or

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65. Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791(c)(1)–(3) (2012).

66. *Id.* § 1791(b)(2).

67. *Id.*

68. *Id.* § 1791(e)(2).

69. H.R. 2428, *The Good Samaritan Food Donation Act: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 13 (statement of Christine Vladimiroff, President & CEO, Second Harvest National Food Bank Network) (indicating how the Act allows companies to donate “otherwise wholesome and safe” food).

70. 42 U.S.C. § 1791(c)(1).

71. *Id.* § 1791(c)(2).

distribute in good faith, act without gross negligence, and act without intentional misconduct.<sup>72</sup>

The Act does not define good faith, nor are there any court decisions that address good-faith food donation or interpret the Act.<sup>73</sup> Outside the food donation context, courts have defined “good faith” by determining when protection from liability does not extend.<sup>74</sup> The limits of liability immunity determine what is within the safe zone.

Gross negligence and intentional misconduct mark the limits of the Act’s liability protection to food donors and nonprofit distributors. The Act defines both terms.<sup>75</sup> “Gross negligence” means “voluntary and conscious conduct (including a failure to act) by a person who, at the time of the conduct, knew that the conduct was likely to be harmful to the health or well-being of another person.”<sup>76</sup> “Intentional misconduct” means “conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person.”<sup>77</sup> Implicitly then, the Act protects against civil and criminal negligence so long as the action (or inaction) does not rise to the level of gross negligence.<sup>78</sup>

Without a clear definition of good faith, it is unclear whether a good-faith food donation is measured subjectively or objectively.<sup>79</sup> The confusion compounds because courts measure civil negligence objectively.<sup>80</sup> Conversely, criminal negligence includes some level of subjective

72. *Id.* § 1791(c)(2)–(c)(3).

73. David L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 FOOD & DRUG L.J. 107, 131 (2002).

74. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (“[T]he Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available.”); *see also* Nelson v. Lindaman, 867 N.W.2d 1, 8 (Iowa 2015) (stating that when immunity “extends to negligent acts, reasonableness and the objective standard play no part in determining good faith.” Therefore, good faith “rests on a defendant’s subjective honest belief . . . .”) (quoting Garvis v. Scholten, 492 N.W.2d 402, 404 (1992)).

75. 42 U.S.C. § 1791(b)(7)–(8).

76. *Id.* § 1791(b)(7).

77. *Id.* § 1791(b)(8).

78. *See* Victoria Sutton, *Is There a Doctor (and a Lawyer) in the House? Why Our Good Samaritans Laws Are Doing More Harm than Good for a National Public Health Security Strategy: A Fifty-State Survey*, 6 J. HEALTH & BIOMEDICAL L. 261, 286–87 (2010) (explaining that negligence is a lower standard than gross negligence).

79. *See* Harlow v. Fitzgerald, 457 U.S. at 815 (stating that a good-faith defense has both subjective and objective components); *see also* Terrence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1, 3–6 (2000) (explaining how good faith either functions as an objective or subjective limitation on the Good Samaritan’s immunity from liability).

80. *See, e.g.*, LOUIS R. FRUMER & MELVIN I. FRIEDMAN, 21-101 PERSONAL INJURY--ACTIONS, DEFENSES, DAMAGES § 101.01(1) (Matthew Bender & Co. 2017) (explaining that the standard of care in a negligence action is defined by the actions of a reasonable person).

awareness<sup>81</sup> and requires a greater level of culpability than civil negligence.<sup>82</sup> As a result, the Act casts a wide net of protection for food donors. Even if there was a level of awareness that the food might be harmful, federal law would protect the food donor.

If an objective definition of good faith applies to the Act, the food donor must have donated food that a reasonable person would have thought was “apparently wholesome” to receive protection.<sup>83</sup> The reasonable-person standard is a hallmark of negligence in personal injury law; it refers to the standard of care a reasonable person would have provided in the same or similar circumstances.<sup>84</sup> On the other hand, if the Act allows the donor to make a personal decision about whether the food was “apparently wholesome,” then the law protects the food donor based on a subjective standard.<sup>85</sup>

For example, assume a person donates a case of unwashed lettuce harvested from a local farm to a local food pantry. Local food-handling laws require that all produce be washed before being sold,<sup>86</sup> but the donor is not familiar with the state’s food-safety laws. The lettuce looks perfectly edible, is aesthetically pleasing, and comes straight from a family farm. Unbeknownst to the food donor, there are traces of bacteria on the lettuce that make people sick. The food donor thinks the food pantry will wash the lettuce, but the food pantry thinks the food donor has washed the lettuce, so the lettuce is never washed before being consumed.

If the donor had a good-faith belief that the lettuce was safe—that is, she did not think she was harming anyone by not washing the lettuce and thought the food pantry would wash it—the Act would protect her if good faith is based on a subjective belief. Under an objective standard of good faith, the Act might not protect the donor because a reasonable person would have washed the lettuce first to comply with state law. Alternatively, some argue that those who purchase food assume some responsibility for food safety, so the consumer should have washed the lettuce in this

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81. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (noting that the reasonable-person standard for criminal conduct includes some awareness of wrongdoing).

82. See LYNN W. FAHEY, HOMICIDE—ARTICLE 125, in *NEW YORK PRACTICE SERIES - NEW YORK CRIMINAL LAW* § 6:9 (Richard A. Greenberg ed., 4th ed. 2016) (“[T]he degree of culpability required for criminally negligent homicide [is] ‘appreciably greater than that required for ordinary civil negligence.’”) (quoting *People v. Haney*, 284 N.E.2d 564, 567 (N.Y. 1972)).

83. FRUMER & FRIEDMAN, *supra* note 80, § 101.01(2)(b).

84. *Id.* § 101.01(1).

85. See *Nelson v. Lindaman*, 867 N.W.2d 1, 8 (Iowa 2015) (explaining that subjective good faith depends on an honest belief).

86. See, e.g., CAL. HEALTH & SAFETY CODE § 113992 (Deering 2017) (requiring produce to be washed before being offered for human consumption).

hypothetical.<sup>87</sup> The modern food-safety regulation system has made consumers and recipients dependent on producers and distributors for food safety.<sup>88</sup>

A subjective application of good faith gives food donors the benefit of the doubt. But, it does not adequately protect food recipients because good-faith protection extends to both civil and criminal negligence.<sup>89</sup> A subjective standard of good faith that protects against civil and criminal negligence severely limits a recipient's options for legal recourse.<sup>90</sup> If recipients get sick, they would not be able to seek legal damages if the food donor should have known or was aware that the food *might* harm another's health.<sup>91</sup> The recipient could only seek damages if the food donor acted with gross negligence or with intentional misconduct, which requires actual knowledge that the food *would* harm humans.<sup>92</sup>

Despite Congress's well-intentioned actions, it is no wonder that potential food donors and nonprofit distributors remain fearful of liability.<sup>93</sup> The Act requires food donors and nonprofit distributors to donate in good faith, but fails to define the term.<sup>94</sup> Even though the Act places gross negligence and intentional misconduct outside the scope of good faith, the Act protects against liability for both criminal and civil negligence.<sup>95</sup> The competing standards offer no guidance for the requisite actions of a good-faith food donation or distribution.

### B. The Term "Food Quality" Is Vague and Ambiguous

As discussed above, the Act defines "apparently wholesome food" to include food that meets all "quality and labeling standards imposed by Federal, State, and local laws and regulations."<sup>96</sup> The definition of apparently wholesome is ambiguous because it includes the word

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87. Gregory M. Schieber, *The Food Safety Modernization Act's Tester Amendment: Useful Safe Harbor for Small Farmers and Food Facilities or Weak Attempt at Scale-Appropriate Farm and Food Regulations?*, 18 DRAKE J. AGRIC. L. 239, 284 (2013).

88. *See id.* (arguing that "[t]he more responsibility the government takes for our food safety . . . the more protection consumers will expect").

89. *See* 42 U.S.C. § 1791(c)(1) (2012) (protecting good-faith donors from civil and criminal liability).

90. *Id.* § 1791(e).

91. *See id.* § 1791(c)(1)–(3) (outlining the liability scheme under the Act).

92. *Id.* § 1791(c)(3).

93. *See* FOOD WASTE REDUCTION ALL., *supra* note 17, at 17 (stating that 44% of surveyed food manufacturers indicated that liability concerns were a barrier to food donation).

94. 42 U.S.C. § 1791(b).

95. *Id.* § 1791(c).

96. *Id.* § 1791(b)(2).

“quality.”<sup>97</sup> Flavor, safety, appearance, and freshness could all be considered aspects of food quality depending on a consumer’s values.<sup>98</sup> Because the term quality is ambiguous, the standard for a good-faith food donation is unclear.<sup>99</sup> For instance, in the lettuce hypothetical above, it is unclear whether the food donor had to believe she was donating lettuce with flavor, safety, appearance, or freshness qualities to meet the current definition of apparently wholesome.

Statutory interpretation of quality within the Act starts with an analysis of the text, and the legislative history may resolve ambiguities.<sup>100</sup> The Act and its corresponding chapter and title in the United States Code do not define “food quality,” and the plain meaning of quality varies depending on context.<sup>101</sup> Quality can refer to a best-by-date or other food-quality labels.<sup>102</sup> Alternatively, quality can refer to safety.<sup>103</sup> Taste, flavor, or appearance may also define quality.<sup>104</sup>

In the Act, words that speak about appearance and marketability surround the term quality.<sup>105</sup> For instance, the Act allows people to donate food that might not be “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”<sup>106</sup> Appearance, age, freshness, grade, and size all speak to the way a product looks on a shelf. Though, “other conditions” can narrow or broaden the meaning depending on the interpretation methods used.<sup>107</sup> As such, legislative history and intent are useful tools to learn how Congress intended to define quality.

Quality could equate to safety because, during the passage of the Act, Congress was concerned with safety for the recipients.<sup>108</sup> One congressman worried that the definition of gross negligence would leave open an

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97. *Id.*

98. Marie Ferree, *What Is Food Quality?*, 4 J. FOOD DISTRIBUTION RES. 34, 34 (1973).

99. H.R. REP. NO. 104-661 § 402 (1996).

100. *See* Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546, 568 (2005) (stating that when interpreting statutes “the authoritative statement is the statutory text”); *see also* Nix v. Hedden, 149 U.S. 304, 306 (1893) (beginning statutory analysis by looking at the text).

101. 42 U.S.C. § 1791(b); *see* Ferree, *supra* note 98, at 34 (stating that what “food quality” means depends on who is being asked).

102. EMILY BROAD LEIB & DANA GUNDERS, HARVARD FOOD LAW & POLICY CLINIC & NAT. RES. DEF. COUNCIL, *THE DATING GAME: HOW CONFUSING FOOD LABELS LEAD TO FOOD WASTE IN AMERICA* 18–19 (2013).

103. *See* Scott Cook, *Farm Children As a “Major Identifiable Subgroup” for Setting Tolerances Under the Food Quality Protection Act of 1996*, 81 TEX. L. REV. 1121, 1127 (2003) (noting that the Food Quality Protection Act’s primary focus is food safety).

104. *See* Ferree, *supra* note 98, at 35 (indicating that consumers look to taste and appearance when judging quality).

105. 42 U.S.C. § 1791(b)(1)–(2).

106. *Id.* § 1791(b)(2).

107. *Id.*

108. 142 CONG. REC. 21,516 (1996).

opportunity to “harm . . . our poorest citizens.”<sup>109</sup> This statement supports the conclusion that Congress was concerned with safety. Another congressman said, “[I]t is vital for the health and safety of those who consume donated food that regulatory protections remain in place.”<sup>110</sup> This representative was directly concerned with safety for citizens.

The word “safety” does not appear once in the Act,<sup>111</sup> but Congress has used the term quality to describe safe food in other contexts.<sup>112</sup> The Food Quality Protection Act of 1996 sets tolerances for pesticide use in food and directs Congress to consider safety standards when setting tolerance levels.<sup>113</sup> This suggests that Congress uses “quality” to mean safety. Moreover, when President Clinton signed the Bill Emerson Act, he stated, “This [law] will encourage the charitable and well-intentioned donation of food to the needy, while preserving governmental authority to protect health and food safety.”<sup>114</sup> Arguably then, Congress and the President both assumed food safety to be an implicitly important consideration. The most recent proposed amendments to the Act support this assumption—the House bill considers striking the term quality and replacing it with safety.<sup>115</sup> Because the plain language and congressional intent surrounding the term quality are debatable, food donors and nonprofit distributors are still left wondering what qualifies as “apparently wholesome food” under the umbrella of the Act’s protection.

### C. The Act Fails to Define the Procedures to Recondition Food

The Act creates an exception to the general requirement to donate apparently wholesome food in good faith.<sup>116</sup> Food donors do not have to donate food that meets all federal, state, and local food-quality and labeling standards if: (1) the food donor informs the nonprofit distributor of the unwholesome or unfit condition; (2) the nonprofit distributor agrees to recondition the food to comply with all quality and labeling standards before ultimate distribution; and (3) the nonprofit distributor knows how to recondition the food to meet all quality and labeling standards.<sup>117</sup>

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109. 142 CONG. REC. 17,068 (1996).

110. 142 CONG. REC. 21,516.

111. See 42 U.S.C. § 1791(a)–(f) (omitting the word “safety”).

112. See, e.g., 42 U.S.C. § 1761(f)(4) (2012) (using the terms “quality” and “safety” to define nutritional standards).

113. Food Quality Protection Act of 1996, Pub. L. No. 104–170, § 405, 110 Stat. 1489, 1514.

114. Morenoff, *supra* note 73, at 125–26 n.149.

115. H.R. 3444, 115th Cong. § 201(a)(1)(A)(i) (2017).

116. 42 U.S.C. § 1791(e).

117. *Id.*

The Act does not define “recondition” nor does the relevant chapter or title of the United States Code.<sup>118</sup> As a result, potential food donors might hesitate to donate food that does not meet all quality and labeling standards because they would not know what reconditioned means. The Act places the burden of reconditioning food on the nonprofit distributor, yet fails to explain the standards for reconditioning food.<sup>119</sup> Thus, nonprofit distributors might be hesitant to receive food that does not meet all quality and labeling standards.

The Food and Drug Administration (FDA), the primary agency that Congress charges with regulating food safety,<sup>120</sup> does not define recondition either. Instead, it vaguely describes the process as one that removes the condition that adulterates the food.<sup>121</sup> Adulterated food refers to food that would cause injury if consumed due to added substances.<sup>122</sup> As a guide, the FDA recommends the Model Consumer Commodity Salvage Code (Code) for how to recondition food.<sup>123</sup> The Code defines recondition as a process that brings “distressed consumer commodities . . . into compliance” with all federal laws and makes it edible for humans or as animal feed.<sup>124</sup>

Unfortunately, the Code is not available for free distribution, although the authors intended the Code to “assist state and local health agencies that regulate the salvage and reconditioning of distressed consumer commodities.”<sup>125</sup> Because the FDA does not define recondition and the Code is not free, nonprofit distributors do not have fair access to learn about the steps to recondition food.

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118. See § 1791(b) (defining terms in the Act, but not defining “recondition”).

119. See § 1791(e) (requiring the donor to recondition donated food to comply with all “quality and labeling standards,” without defining what those standards are).

120. See *What We Do*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> [https://perma.cc/XBS5-9VNZ] (last updated Apr. 4, 2017) (stating that the FDA is “responsible for protecting the public health . . . by ensuring the safety of our nation’s food supply”).

121. *CPG Sec. 160.700 Reconditioning of Foods Adulterated Under 402(a)(4)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm073853.htm> [https://perma.cc/3HGP-MR82] (last updated Mar. 20, 2015).

122. 21 U.S.C. § 342 (2012).

123. Haley, *supra* note 15, at ¶ 69.

124. ASS’N OF FOOD & DRUG OFFICIALS, ET AL., MODEL CONSUMER COMMODITY SALVAGE CODE § 1-102(K), at 5 (2002).

125. *Id.* at 1.

III. THE ACT CONTINUES TO CONFUSE POTENTIAL FOOD DONORS  
BECAUSE IT IS NOT CLEAR WHETHER THE ACT PREEMPTS STATE LAW

Congress hoped the Act would address the myriad of state laws related to liability for food donations.<sup>126</sup> At the time the Act was passed, every state had its own food-donation law that limited liability in some form.<sup>127</sup> Today, all states have food-donation laws that offer a variety of protections to food donors.<sup>128</sup> Some states, like Arizona, provide liability protection to food donors with the same standard as the Act—the state law protects food donors from liability unless they acted with gross negligence or intentional misconduct.<sup>129</sup> However, other states—like Georgia—limit protection from liability by protecting food donors from liability unless they acted *recklessly or with intentional misconduct*.<sup>130</sup>

Despite Congress's intention to address the inconsistent standards of liability protection among state laws,<sup>131</sup> it remains unclear whether Congress intended the Act to preempt state laws. The Act includes a clause that “[n]othing in this section shall be construed to supercede State or local health regulations.”<sup>132</sup> Thus, the question remains whether food donors must follow state and local health laws when they donate food or whether donating apparently wholesome food in good faith is enough.

Usually federal law trumps state law.<sup>133</sup> Food safety has historically been left to the states' jurisdiction.<sup>134</sup> Absent an express contrary intent,<sup>135</sup> conflicts with federal law, or federal occupation of the legislative field, states retain regulatory authority.<sup>136</sup> The Act does not expressly preempt

126. Haley, *supra* note 15, at ¶ 3.

127. *Id.* at ¶¶ 28–29.

128. *Id.* at ¶ 28.

129. ARIZ. REV. STAT. ANN. § 36-916(A) (2017).

130. Ga. Code Ann. § 51-1-31 (2017).

131. 142 CONG. REC. 21,516 (1996).

132. 42 U.S.C. § 1791(f) (2012).

133. U.S. CONST. art. VI, cl. 2.

134. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (explaining that the Food and Drug Act of 1906 was the first congressional enactment in the field of public health, an area historically controlled under state police power).

135. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.”).

136. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (explaining that federal law may preempt state law if there is an actual conflict between state and federal law or “if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”) (citing Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

state laws that limit food-donor liability.<sup>137</sup> Lacking guidance from Congress, the USDA asked the Department of Justice (DOJ) to interpret the Act's preemptive scope.<sup>138</sup> In response, the DOJ said it did not think Congress intended federal law to completely occupy the food-donation field.<sup>139</sup> Congressional intent not to occupy the field is also evidenced by the fact that the Act says, "Nothing in this section shall be construed to supersede State or local health regulations."<sup>140</sup>

The DOJ describes the Act as partially preemptive.<sup>141</sup> Specifically, the DOJ stated, "Congress intended to establish a minimum level of immunity for those engaged in food donation and distribution."<sup>142</sup> That is, Congress intended the Act to implicitly preempt state laws that: (1) hold landowners, nonprofit distributors, or food donors liable for negligence; (2) provide no liability protection; or (3) only protect against civil liability.<sup>143</sup> Thus, it appears that state laws providing less protection than the Act conflict with Congress's intent.<sup>144</sup>

Still, the DOJ's opinion is just that—an opinion. It is persuasive guidance but not binding law.<sup>145</sup> If the Act is partially preemptive, as the DOJ says, the Act could potentially override eleven states' food-donation laws.<sup>146</sup> Nevertheless, the partial-preemption theory would be difficult to execute because states use distinct terms. For instance, Colorado protects a food donor from liability unless the donor acted "willfully" or "wantonly";<sup>147</sup> Iowa, unless the donor acted "recklessly";<sup>148</sup> and Indiana,

137. See 42 U.S.C. § 1791 (providing no express preemption on state law limiting food-donor liability).

138. Preemptive Effect of the Bill Emerson Good Samaritan Food Donation Act, 21 Op. O.L.C. 55, 55 (1997) [hereinafter Preemptive Effect Advisory Opinion].

139. *Id.* at 59.

140. 42 U.S.C. § 1791(f).

141. See Preemptive Effect Advisory Opinion, *supra* note 138, at 57 ("Although the Act contains no express preemption clause, its purpose is to supersede, at least to a certain extent, state good samaritan statutes.").

142. *Id.* at 55.

143. See Morenoff, *supra* note 73, at 128 (indicating that Congress likely intended to preempt state laws that afford less liability protection than the Act).

144. Preemptive Effect Advisory Opinion, *supra* note 138, at 57.

145. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) ("[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995))).

146. ALASKA STAT. § 17.20.346 (2004); COLO. REV. STAT. § 13-21-113 (2012); DEL. CODE ANN. tit. 16 § 6820 (1982); IDAHO CODE § 6-1302 (1980); IND. CODE § 34-30-5-1 (2013); IOWA CODE § 672.1 (2008); LA. STAT. ANN. § 9:2799.3 (2014); LA. STAT. ANN. § 9:2800.4 (1993); N.D. CENT. CODE § 19-05.1-03 (1983); OHIO REV. CODE ANN. § 2305.35 (LexisNexis 2001); 10 PA. CONS. STAT. § 354 (1981); TENN. CODE ANN. § 53-13-102 (2010).

147. COLO. REV. STAT. § 13-21-113(1) (2012).

148. IOWA CODE § 672.1(d)(2) (2008).

unless the donor acted “knowingly.”<sup>149</sup> To determine whether federal law preempts, food donors would need to compare each state’s language with the Act’s, which uses “gross negligence” and “intentional misconduct.”<sup>150</sup> This mind-numbing task would not meet Congress’s goal to relieve a business from the need to “hire a legal team to interpret numerous State laws.”<sup>151</sup>

Nor does the partial-preemption theory provide clarity when states provide more liability protection than the Act. The DOJ opines that states may choose to provide more protection to those involved in food recovery and donation.<sup>152</sup> If that is true, then some states could leave food recipients without any legal recourse if they become ill from donated food. For example, Kansas protects a gleaner or nonprofit distributor from liability unless the injury or death resulted from a willful or wanton act, intentional misconduct, or a malicious act.<sup>153</sup> Mississippi protects the nonprofit distributor from strict liability.<sup>154</sup> Public safety has traditionally been an area of state police power,<sup>155</sup> but it is unjust and unsafe to leave some citizens in some states without any viable legal recourse.

Thus, setting a national floor by partial preemption does not meet Congress’s goals when no one knows where the floor starts or if there is a ceiling. Still, because Congress intended to address the conflicting standards in state law, it seems unlikely that the Act does not preempt state law in some way. Yet, the current scope of that preemption is unclear.

#### IV. THE ACT DOES NOT ADDRESS POTENTIAL FOOD DONORS’ LIABILITY FEAR BECAUSE IT FAILS TO PROTECT ALL PARTIES INVOLVED IN FOOD DONATION AND THEIR ACTIVITIES

This section outlines how the Act fails to provide liability protection that reflects the full scope of duties of parties involved in food donations. Typically, food in the donation chain travels from those who have, collect, and distribute surplus food.<sup>156</sup> The Act attempts to fit these relationships into categories of a “person” or “gleaner,” “nonprofit organizations,” and

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149. IND. CODE § 34-30-5-1 (2013).

150. 42 U.S.C. § 1791(b)(7)–(8).

151. Preemptive Effect Advisory Opinion, *supra* note 138, at 58 (quoting 142 CONG. REC. 17,066 (1996)).

152. *Id.* at 59.

153. KAN. STAT. ANN. § 65-687 (1996).

154. MISS. CODE ANN. § 95-7-5 (1983).

155. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

156. *See* Cohen, *supra* note 16, at 456 (explaining that businesses and stores often donate food to nonprofit organizations that then distribute the food).

“persons who allow the collection or gleaning of donations.”<sup>157</sup> These broad, categorical distinctions leave some groups and activities unprotected.

Except in cases of gross negligence or intentional misconduct, the Act protects landowners and property managers who allow gleaning and recovery on their property from liability for injuries received while on their property.<sup>158</sup> In other words, the Act protects against premise liability.<sup>159</sup> However, the Act does not protect someone who allows food donors on their property to glean or recover food from food-safety liability.<sup>160</sup>

If someone got sick from the dairy products of a store that allowed food recovery, the Act would protect the food recoverer but not the store. Taken at its plain meaning, the Act protects food donors who donate to a “nonprofit organization for ultimate distribution to needy individuals.”<sup>161</sup> The text implies protection for direct donations to nonprofit distributors.<sup>162</sup> As such, courts could narrowly interpret the Act to only protect those who donate food directly to organizations responsible for ultimate distribution. A broader interpretation might protect anyone who donates food that ultimately gets distributed to the needy.

Consequently, under the Act, the clearest way for a landowner or property manager to receive food-safety liability protection is to donate directly to a nonprofit responsible for ultimate distribution. Some farms might prefer this model because the farms use a lot of machinery or chemicals; thus, those farms negate risks associated with allowing gleaners on their property. On the other hand, some farms might rely on food donors, like gleaners, to harvest the surplus. As Theresa Snow, Executive Director of Salvation Farms, said: “It’s not really the farmer’s fault when there is food loss on farms. Gleaners help move food into the community when the farms can’t afford to.”<sup>163</sup> To reflect this valuable service that gleaners can provide to farmers while reducing food waste, the Act should account for food-safety liability protection for those farms that rely on gleaners to move produce off the farm.

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157. 42 U.S.C. § 1791 (b), (d) (2012).

158. *Id.* § 1791(c).

159. *See* 79 AM. JUR. *Trials* § 2 (2001) (describing premises liability as the liability an owner incurs when someone is injured on the owner’s property); *see also* 42 U.S.C. § 1791(c).

160. 42 U.S.C. § 1791(d).

161. *Id.* § 1791(c)(1).

162. *Id.*

163. LAURIE J. BEYRANEVAND, ET AL., CTR. FOR AGRIC. & FOOD SYS., MODELS FOR SUCCESS: A SET OF CASE STUDIES EXAMINING GLEANING EFFORTS ACROSS THE UNITED STATES 30 (2017), [http://forms.vermontlaw.edu/farmgleaning/GleaningReport\\_2017.pdf](http://forms.vermontlaw.edu/farmgleaning/GleaningReport_2017.pdf) [hereinafter MODELS FOR SUCCESS].

The Act also fails to protect the food-donor organization from injuries its volunteers receive while gleaning or recovering food.<sup>164</sup> The Act only protects organizations that glean or recover food from liability for injuries to the recipient. Protecting food-donor organizations from liability for injuries their volunteers receive alleviates two problems. First, it is difficult for organizations to get liability insurance to cover them in case of volunteer injury.<sup>165</sup> Second, liability risk may deter gleaning and food-recovery organizations from increasing their operations and taking on more volunteers. Currently, many organizations try to resolve this issue by having volunteers sign waivers, but many of those waivers are not legally enforceable.<sup>166</sup>

By only protecting some activities and relationships, the Act leaves holes where liability fear may break the food-donation chain. The Act must ensure that the party at the beginning of the chain gets the same protection as the party at the end. Extending uniform liability protection for all groups and activities in the food-donation chain would diminish liability fear and bolster food-donation participation.

#### V. PROPOSED AMENDMENTS: TOOLS FOR THE MAKEOVER

Section V proposes key amendments that both narrow and broaden the Act's protections against liability. The proposed amendments aim to increase food donations and food safety. This section first considers amending the Act to remove criminal-negligence protections. Then, it recommends methods to clarify the scope of the Act's legal expectations and protections. Finally, this section suggests ways to more holistically protect the groups and activities within the food-donation chain.

##### A. *Strike the Protection Against Criminal Negligence*

To provide more safeguards to food recipients, the Act should only protect food donors and nonprofit distributors from civil-negligence claims. The Act unnecessarily provides extensive liability protection to food donors while severely limiting the legal recourse for a recipient that becomes ill

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164. See 42 U.S.C. § 1791(c) (showing that the Act does not extend protection to additional undefined groups).

165. See MODELS FOR SUCCESS, *supra* note 163, at 10, 24 (exemplifying one gleaning project's difficulty raising the funds to buy liability insurance).

166. See, e.g., 57A AM. JUR. 2D *Negligence* § 55 (2017) ("Statutory liability for negligence cannot be contracted away.").

from donated food.<sup>167</sup> Even though there is no identified case law about a recipient suing a food donor,<sup>168</sup> it is possible that someone who has eaten donated food has gotten sick. The Center for Disease Control estimates that every year one in six people in the United States gets sick from contaminated food or beverages.<sup>169</sup> The absence of a legal precedent in this field may be due to the social situation of food-insecure families or the state and federal laws that limit liability for food donors. Further, it is difficult to track donated food back to the original food donor.<sup>170</sup>

The broad civil- and criminal-negligence protections the Act grants to food donors are confusing, which counteracts the purpose of the Act. Potential food donors complained that fear of liability prevented them from donating,<sup>171</sup> but there is no empirical evidence that the private retail sector or farms increased food donations because of the Act. Money, not the law, might currently influence donation. Nonprofit food distributors have noted that companies donate when it benefits their bottom line.<sup>172</sup>

Nonprofit distributors also continue to purchase more food than what is donated to feed the food-insecure population.<sup>173</sup> In 2014, nonprofit distributors purchased 21% of the food they dispersed, and only 12% of food dispersed was donated to them.<sup>174</sup> If the Act was truly effective, nonprofit distributors would not need to purchase more food than they receive from donations. Worse, many potential food donors do not understand the scope of protection the Act affords.<sup>175</sup> Striking the protection for criminal negligence would clarify the scope of the Act's protection and reduce confusion. A limited but effective scope of protection should increase understanding of the Act and, therefore, food donations.

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167. See 42 U.S.C. § 1791(c) (explaining that liability is limited to gross negligence and intentional misconduct).

168. Morenoff, *supra* note 73, at 131.

169. See *Foodborne Germs and Illnesses*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/foodsafety/foodborne-germs.html> [<https://perma.cc/PC8U-9Y7T>] (last updated Dec. 20, 2017) (stating that approximately 48 million people get sick from foodborne illness).

170. See *MODELS FOR SUCCESS*, *supra* note 163, at 14, 31, 35, 38 (noting instances where produce was tracked as an innovative practice).

171. EPA FOOD WASTE MANAGEMENT STUDY, *supra* note 10, at 2.

172. See Cohen, *supra* note 16, at 475 (suggesting companies will sell to discount stores rather than donate to benefit their bottom line).

173. NANCY S. WEINFELD ET AL., *FEEDING AMERICA, HUNGER IN AMERICA 2014: NATIONAL REPORT 59* (2014), [http://help.feedingamerica.org/HungerInAmerica/hunger-in-america-2014-full-report.pdf?s\\_src=W16BDIRECT&s\\_subsrc=http%3A%2F%2Fwww.feedingamerica.org%2F&\\_ga=1.47555431.1188392175.1464235365](http://help.feedingamerica.org/HungerInAmerica/hunger-in-america-2014-full-report.pdf?s_src=W16BDIRECT&s_subsrc=http%3A%2F%2Fwww.feedingamerica.org%2F&_ga=1.47555431.1188392175.1464235365) [<https://perma.cc/H9AQ-GFT6>].

174. *Id.*

175. See Cohen, *supra* note 16, at 478 (explaining that companies still worry about being sued for donating food).

*B. Define the Scope of the Act's Legal Expectations and Protections*

Currently, the Act is so ambiguous that those involved in food donation are unaware what duties the Act imposes and what the Act protects against.<sup>176</sup> Clarifying the Act's key terms and jurisdictional scope will alleviate that problem. The Act should explicitly define "good faith" because it imposes a duty on food donors to act in good faith but fails to describe that duty.

If the Act omits the criminal-negligence protection, then a subjective good-faith definition would still meet the goals of the Act, continue to protect food donors from negligent acts, and provide more protection to recipients. In other contexts, such as contract law, good faith is given a subjective definition too. The Uniform Commercial Code defines "good faith" as an honest belief and a faithful observance of reasonable standards.<sup>177</sup> The Act could define good faith as an honest belief that the donated food is fit for human consumption.

Alternatively, the Act could define good faith by clearly identifying the types of behavior that are not immune from liability. For instance, the Protection of Lawful Arms in Commerce Act prohibits "qualified civil liability action[s]" against manufacturers, sellers, or trade associations of arms.<sup>178</sup> It then provides six specific descriptions of when immunity from civil liability will not attach to manufacturers, sellers, or trade associations.<sup>179</sup> Arguably, the Bill Emerson Act does this by excluding gross-negligence and intentional-misconduct actions from liability immunity.<sup>180</sup> However, the Act still leaves food donors confused as to what types of actions would rise to the level of gross negligence or intentional misconduct.

Congress should also amend the Act to replace "quality" with "safety" because quality can mean different things depending on a consumer's values. Apparently wholesome food would then mean "food that meets all [safety] and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions."<sup>181</sup>

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176. See *Food Donation Act of 2017*, REFED, <http://www.refed.com/tools/food-waste-policy-finder/federal-policy/food-donation-act-2017> [<http://www.refed.com/tools/food-waste-policy-finder/federal-policy/food-donation-act-2017>] (last updated Oct. 30, 2017) ("This legislation will help to clarify some of the ambiguous terms in the Emerson Act.")

177. U.C.C. §1-201(b)(20) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

178. 15 U.S.C. §§ 7902(a), 7903(5)(A) (2012).

179. *Id.*

180. 42 U.S.C. §1791(c)(3) (2012).

181. *Id.* § 1791(b)(2).

Replacing quality with safety resolves the ambiguity because “food safety” is a narrower term than “food quality.” In addition, adding safety would provide explicit support for the proposition that recipients should receive food that is safe for consumption regardless of its appearance. Thus, food donors and nonprofit distributors would be more aware of their responsibilities, which would ideally be to donate or distribute food that meets all federal, state, and local food-safety requirements.

As for the term “recondition,” Congress should include the Model Consumer Commodity Salvage Code’s definition in the Act.<sup>182</sup> Including the definition would provide clarity about what the term means, provide equal access to the law, and promote more food donations. Additionally, a definition would ensure that the person dropping off food at the nonprofit distributor would know what standards the nonprofit distributor should use to recondition food.

Defining both recondition and good faith while also replacing quality with safety will help the food donor and nonprofit distributor better understand their duty under the Act. When parties involved in food donations know the law’s expectations, they donate and receive with less hesitation.

Finally, the Act should expressly indicate what aspects, if any, of state law are preempted. An express preemption section would have the main benefit of informing parties involved in food donations about what standards govern their actions. Consistent with the DOJ’s opinion, Congress should explicitly set a national floor.<sup>183</sup> The floor would provide a consistent message to food donors that they can donate food with a reasonable expectation that they are shielded from liability.

Contrary to the DOJ’s opinion, Congress should also set a national ceiling for liability protection.<sup>184</sup> Although the Act currently does not extend liability protection to gross negligence or intentional misconduct, Congress should ensure that states cannot provide an absolute shield from liability.<sup>185</sup> A national ceiling on liability protection would balance the well-being of recipients with the valuable goal of decreasing food waste.

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182. See ASS’N OF FOOD & DRUG OFFICIALS, ET AL., *supra* note 124, at § 1-102(K) (defining recondition as a process that makes donated commodities edible for humans while bringing them into compliance with applicable laws).

183. See Preemptive Effect Advisory Opinion, *supra* note 138 (indicating that Congress may have intended to preempt state statutes that provide less liability protection).

184. *Id.*

185. 42 U.S.C §1791(c)(3) (2012).

*C. Acknowledge and Accommodate for the Multiple Roles and Parties Involved in the Food-Donation Chain*

The Act's current scope of liability protection reflects an incomplete understanding of the activities and roles of those involved in supplying and distributing food donations. Two amendments could fill some of the current gaps in the Act. First, the Act should explicitly protect those who allow food recovery and gleaning on their property from injuries a recipient receives because it would promote food donations. Food-safety-liability protection should also extend to those who have protection from premise liability.<sup>186</sup> The lack of protection deters landowners and property managers from allowing others to recover or glean on their property; thus, it is a missed opportunity for food donation. Yet, these are precisely the parties that need to increase food donations to fulfill the Act's purpose.<sup>187</sup>

Second, the Act should protect food donor organizations from injuries its volunteers receive while gleaning or recovering food. Doing so would relieve those organizations from the costly burden of buying liability insurance.<sup>188</sup> The resources organizations otherwise spend on liability insurance could then be spent to expand operations, increase efficiency, and build more relationships with entities that have surplus food. This would result in increased food donations.

On the other hand, limiting liability can diminish an aggrieved party's opportunity for fair compensation of losses.<sup>189</sup> If the Act continues to protect parties against criminal and civil negligence, then providing more protection could limit access to the courts. If the Act only protects against civil negligence, then aggrieved parties could still access the courts when injuries result from more culpable acts.

Each of the proposed amendments aims to increase food donations by identifying the duty the Act imposes on food donors and distributors while also providing increased legal recourse for injured parties. The proposed amendments also aspire to comprehensively protect each activity and party along the food-donation chain. The original intent of the Act, to increase

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186. See CIMA VOLUNTEER INS., INSURANCE BASICS FOR NONPROFIT ORGANIZATIONS 1 (2012) (explaining that premise liability involves general liability coverage for nonprofit operations).

187. See 142 CONG. REC. 21,516–17 (1996) (explaining that the purpose of the Act is to fight hunger by establishing a national liability standard for private donors).

188. See, e.g., CIMA VOLUNTEER INS., *supra* note 186, at 1 (quoting rates for general liability insurance starting at \$450 to \$750 a month).

189. See Centner, *supra* note 79, at 27 (2000) (indicating that some statutes may go too far in shielding egregious conduct from liability).

food donations, permeates through each of the proposed amendments.<sup>190</sup> Yet, liability protection can only increase food donations to the extent that those involved in food donations can decipher which actions are protected and which are not.

#### CONCLUSION

Congress should amend the Act to better address the vague terms and inconsistent protections because donations have not increased. Moreover, food waste and insecurity continue to prevail. Congress, not the courts, should clarify the Act's meaning because it is unlikely that a case involving the Act will reach the courts soon; no court has yet heard a case relating to the Act. The lack of judicial controversy does not signal an effective Act—increased food donations will measure the Act's success. Right now, the Act is not doing its job.

Overall, the Act's vague explanations and incomplete understanding of the food-donation chain hinders its purpose to reduce food waste and increase food donations. Considering the billions of pounds of wasted food at the consumer and retail level, amendments to the Act could significantly reduce food waste. Reducing food waste and increasing food donations is a key tactic to address issues surrounding food insecurity, greenhouse gas emissions, and resource management. Grassroots efforts, policies, and programs that work to reduce food waste inspire action. An effective Act will support groups dedicated to reducing food waste by unambiguously delineating the scope of its coverage.

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190. Bill Emerson Good Samaritan Food Donation Act of 1996, Pub. L. No. 104-210, 110 Stat. 3011 (“To encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals.”).