

HEAT UP THOSE LEFTOVERS, NOT THE PLANET: HOW COMBATTING FOOD WASTE CAN AFFECT CLIMATE CHANGE

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INTRODUCTION

Every year Americans punt enough food to fill 730 football stadiums.¹ Imagine 730 football stadiums brimming with rotting food. The stench is unbearable, the air laden with methane gas. Eventually, all the organic matter breaks down into compost, and the methane gas clears. The methane moves into the atmosphere, where it has 21 times the climate-affecting

1. Ryan Reed, *Watch John Oliver's Sobering Look at U.S. Food Waste*, ROLLING STONE (July 20, 2015), <http://www.rollingstone.com/tv/news/watch-john-olivers-sobering-look-at-american-food-waste-20150720> [https://perma.cc/XF6M-WA4Q].

capabilities as carbon dioxide.² Food waste accounts for over 20% of methane emissions.³ Methane accounts for 10% of anthropogenic, or human-caused, greenhouse-gas emissions in the United States.⁴ Unfortunately, much of the food that is discarded in the United States is still suitable for human consumption.⁵ Each year, while Americans waste 730 football stadiums full of food, 17.4 million homes nationwide are food insecure.⁶

Food waste is a jumbo-sized problem that has grown around 50% since 1974.⁷ My family, like many others in the United States, encouraged me as a child to join the “clean plate club” and always finish my meals so I would not waste good food. Growing up, my Great Depression-era grandmother never failed to save even a spoonful of leftover food to reheat and eat later. How has this food-saving mentality eroded so drastically on the consumer level? Why do producers and retailers throw away perfectly edible food when it could be donated? Society knows that waste negatively impacts the environment, but how can we break these bad, wasteful habits that contribute to the United States’s waste problem?

This note will examine how expanding our federal framework for food donation and date labeling will help reduce food waste, which accounts for 7% of climate-affecting greenhouse-gas emissions.⁸ This note proposes a two-pronged approach for reducing food waste. Specifically, it advocates: (1) amending the Bill Emerson Act to designate it as the official minimum national liability scheme for food donation and (2) creating a uniform, federal date-labeling policy to reduce consumer confusion over expiration dates. This approach will not only positively affect the environment but also food-insecure families in the United States that could benefit from charity food donations.

2. James Haley, Note, *The Legal Guide to the Bill Emerson Good Samaritan Food Donation Act*, 5 ARK. L. NOTES 1448, ¶ 13 (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].

3. *Id.*

4. *Id.*

5. See generally *id.* ¶ 5 n.4 (discussing the amount of food wasted in the United States, and how that food could be used for those in need).

6. ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2015, at 6 (2016).

7. Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, 4 PLoS ONE, Nov. 2009, at 3.

8. ANDREW PARRY ET AL., WASTE & RES. ACTION PROGRAMME, STRATEGIES TO ACHIEVE ECONOMIC AND ENVIRONMENTAL GAINS BY REDUCING FOOD WASTE 6 (2015), http://static.newclimateeconomy.report/wp-content/uploads/2015/02/WRAP-NCE_Economic-environmental-gains-food-waste.pdf [https://perma.cc/U6DP-4EME].

The note will begin by providing background information that generally describes the problem of food waste, defines food waste, and introduces current problems associated with it. The background will also explain why food waste in the United States is an important topic in both national and international contexts. Finally, the analysis section will explain the reasoning behind, and feasibility of, each prong of the proposed two-pronged approach for reducing food waste on the federal level. The federal government should take the lead in providing solutions to the problem of food waste. Simply sitting back and watching discarded food pile up in landfills while global temperature rise increasingly threatens the planet is no longer an option.

I. BACKGROUND

A. Food Waste Generally

1. Broad Environmental Impacts of Food Waste

Approximately one quarter of food produced in the United States for human consumption is lost or wasted each year.⁹ Once discarded, excess food is almost never recovered.¹⁰ Ninety-eight percent of discarded food ends up in landfills.¹¹ There, the food decomposes and releases methane gas into the atmosphere.¹² In fact, food waste accounts for 7% of greenhouse-gas emissions around the world, with each ton of wasted food producing 3.8 tons of greenhouse-gas emissions.¹³

In addition to food waste causing large quantities of methane gas to enter the atmosphere, food waste also negatively impacts the environment; water, land, energy, and labor capital resources are expended to grow, produce, and transport food that feeds no one.¹⁴ Harvesting, processing, shipping, refrigerating, storing food, and applying fertilizers and pesticides

9. Press Release, U.S. Dep't of Agric., EPA and USDA Join Private Sector, Charitable Organizations to Set Nation's First Goals to Reduce Wasted Food (Sept. 16, 2015), <https://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2015/09/0257.xml&printable=true> [<https://perma.cc/CTH2-HC9T>] [hereinafter USDA Press Release].

10. See *id.* (discussing that food waste is the largest component of municipal solid waste).

11. See U.S. ENVTL. PROT. AGENCY, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2012, at 6 (2014) (calculating the figures from the chart) [hereinafter 2012 FACTS AND FIGURES].

12. Carmen Shaeffer Kalashian, *Out of Sight, Out of Mind: Finding A Solution to Food Waste in America*, 23 SAN JOAQUIN AGRIC. L. REV. 103, 106 (2014).

13. PARRY ET AL., *supra* note 8.

14. *Save Food: Global Initiative on Food Loss and Waste Reduction*, UNITED NATIONS FOOD & AGRIC. ORG., <http://www.fao.org/save-food/resources/infographic/en/> [<https://perma.cc/B4EV-Q43Q>] (last visited Feb. 28, 2017).

require large amounts of fossil fuels.¹⁵ When consumers, farmers, or businesses have excess food, they often discard it in the trash, which eventually goes to landfills.¹⁶

2. What is food waste?

The United States Department of Agriculture (USDA) defines food waste as a “component of food loss [that] occurs when an edible item goes unconsumed, such as food discarded by retailers due to undesirable color or blemishes and plate waste discarded by consumers.”¹⁷ Food loss consists of all “edible food, postharvest, that is available for human consumption but is not consumed for any reason.”¹⁸ Food loss more broadly refers to the wasting of food products, and it occurs for a variety of reasons, such as “cooking loss and natural shrinkage (e.g., moisture loss); loss from mold, pests, or inadequate climate control; and plate waste.”¹⁹ This note focuses on how the USDA defines food waste, and thus, primarily focuses on the waste of perfectly edible food.

The Environmental Protection Agency (EPA) categorizes food waste as a type of municipal solid waste.²⁰ Municipal solid waste accounts for various common, household items that are thrown away as trash.²¹ Municipal solid waste “does not include industrial, hazardous, or construction waste.”²² Municipal solid waste, which includes food waste, comes from residential, commercial, and institutional sources.²³ In 2012, the United States’s total municipal-solid-waste generation was 251 million tons.²⁴ Organic materials comprised the largest percentage of that waste; food waste accounted for the largest percentage of organic materials at 28%.²⁵ Although recycling and composting recovered 87 million tons of the

15. Kalashian, *supra* note 12, at 106.

16. *See id.* at 105–07 (describing the reasons why retail, consumers, and farmers allow food to go to waste).

17. JEAN 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, at v (2014), <https://www.ers.usda.gov/publications/pub-details/?pubid=43836> [<https://perma.cc/YQA7-WG2J>].

18. *Id.*

19. *Id.*

20. 2012 FACTS AND FIGURES, *supra* note 11, at 4.

21. *Id.* at 2–3.

22. *Id.* at 2.

23. *Id.*

24. *Id.* at 4.

25. *Id.*

total municipal solid waste, only 2% of the recovered waste was food waste.²⁶

3. Where Food Waste Occurs

“Food waste occurs at three levels: the primary production level, the retail level, and the consumer level.”²⁷ On each level, food waste exists for various reasons.²⁸ On the production level, farmers often overplant their fields knowing that certain crops will have “cosmetic imperfections” that will render them unsellable to consumers.²⁹ Sometimes, they overplant in the event of a difficult growing season with low yields.³⁰ At the end of the growing season, farmers may decide that harvesting the crops is too expensive.³¹ In such cases, farmers may leave entire fields of ripe produce in the field to rot.³² Even if farmers would like to donate their produce to food banks, sometimes the time, labor, and resources required to harvest and transport the food make it economically infeasible to do so.³³

On the retail level, farmers, manufacturers, schools, plants, and restaurants might be reluctant to donate excess food to local shelters or food banks because of the costs involved, because they fear liability, or both.³⁴ On the consumer level, waste includes “losses for food consumed at home and away from home (e.g., restaurants and fast food outlets) by consumers and foodservice establishments.”³⁵ Causes of consumer-level waste include: “improper handling or storage, failing to use before the item ‘goes bad,’ consumers confusing ‘best by’ / ‘use by’ / ‘sell by’ with an expiration date, excessive [food] portions, plate waste, consumer tastes, and food appearance.”³⁶ “Much of this food waste occurs at the retail level, but consumers are responsible for a significant portion of the loss as well.”³⁷

Creating federal solutions that address the food-waste problem on all production levels could be a means of ultimately reducing greenhouse-gas emissions in the United States. Such efforts would help curb the amount of

26. *Id.*

27. Haley, *supra* note 2, ¶ 6.

28. Kalashian, *supra* note 12, at 106.

29. *Id.*

30. *Id.* at 106–07.

31. *Id.* at 107.

32. *Id.*

33. *Id.*

34. Stacey H. Van Zuiden, *The Good Food Fight for Good Samaritans: The History of Alleviating Liability and Equalizing Tax Incentives for Food Donors*, 17 *DRAKE J. AGRIC. L.* 237, 240 (2012).

35. Haley, *supra* note 2, ¶ 6 (internal quotations omitted).

36. *Id.*

37. *Id.*

food in landfills that ultimately emits harmful climate-affecting greenhouse gases into the atmosphere. In doing so, the United States government could take steps to address climate change.

B. Food Waste: A Topic of National and International Concern

The United States has an international obligation to reduce climate-affecting greenhouse-gas emissions. As a signatory of the United Nations Framework Convention on Climate Change (UNFCCC) and of the newly adopted Paris Agreement, the United States has committed to help “strengthen the global response to the threat of climate change.”³⁸ As a party to the Paris Agreement, the United States “shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” to help work toward “[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels.”³⁹

The United States is the second largest emitter of climate-affecting greenhouse gases, so its reduction of greenhouse-gas emissions will be imperative to meeting the Paris Agreement’s 2°C target.⁴⁰ The United States committed to reducing greenhouse-gas emissions 26–28% by 2025 by submitting its Intended Nationally Determined Contributions (INDC) to the United Nations prior to the climate-change negotiations at the 21st meeting of the Conference of the Parties (COP21).⁴¹ To meet its greenhouse-gas emissions-reduction target by 2025, the United States will need to make various changes.⁴²

One way to meet its target is to drastically reduce the amount of food waste that ends up in landfills. The United States did not include food-waste reduction as part of its INDC mitigation pledge; however, reducing

38. Paris Agreement on Climate Change, art. 2(1), Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement]; see generally United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC No. 102-38, 1771 U.N.T.S. 107 (demonstrating the basis for the Paris Agreement).

39. Paris Agreement, *supra* note 38, at art. 2.1(a), 4.2.

40. Mengpin Ge et al., *6 Graphs Explain the World's Top Emitters*, WORLD RESOURCES INST. (Nov. 25, 2014), <http://www.wri.org/blog/2014/11/6-graphs-explain-world's-top-10-emitters> [<https://perma.cc/DVZ7-JUJ5>].

41. U.S. DEP'T OF STATE, U.S. INTENDED NATIONALLY DETERMINED CONTRIBUTIONS 1 (2015), <http://www4.unfccc.int/Submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> [<https://perma.cc/5C4A-5HES>] [hereinafter U.S. INDC].

42. See *id.* (reporting the various actions the United States plans to undertake to reach its carbon emissions goal).

food waste would be a viable means of helping reach its emissions-reduction target.⁴³

In addition to international obligations, the EPA and USDA recently announced a national goal of reducing United States food waste 50% by 2030.⁴⁴ The United States can simultaneously work toward meeting these goals by reducing food waste in landfills, which will consequently reduce greenhouse-gas emissions. The United States should do this by encouraging food donations and establishing a federal date-labeling policy.

C. Food Donation as a Solution to Reducing Food Waste

1. Virtues of Food Donation

The EPA created a “food-recovery hierarchy” to communicate preferable means of decreasing excess food and food waste.⁴⁵ In the food-recovery hierarchy, the EPA recognizes the importance of food donation.⁴⁶ Rather than sending excess food to landfills, the EPA advocates “recovering food to feed hungry people, providing food to livestock farmers or zoos, recycling food for industrial purposes, and composting food to improve soil fertility.”⁴⁷ The United States has a large network of food-donation centers that accept edible food that would likely otherwise go to landfills.⁴⁸ For this reason, food-donation centers have the potential to play a role in reducing climate-affecting greenhouse-gas emissions. Food-donation centers also provide the humanitarian benefit of helping feed food-insecure populations.

Food pantries, food banks, and food-rescue programs across the nation accept excess foods that are nonperishable or unspoiled and perishable.⁴⁹ After accepting the food, these organizations sort and redistribute it to people in need.⁵⁰ Food banks distribute the food in a variety of ways. They often distribute the food through emergency food-assistance agencies, which then send the food to soup kitchens, youth or senior centers, shelters,

43. *See id.* (illustrating that the pledge includes no mention of food waste).

44. USDA Press Release, *supra* note 9.

45. ENVTL. PROT. AGENCY, U.S. DEP’T OF AGRIC., WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 1 (1999) [hereinafter WASTE NOTE, WANT NOT].

46. *Id.*

47. *Id.*

48. *Donated Food*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/recycle/food-donation> [<https://perma.cc/L3JS-N5L5>] (last visited Mar. 31, 2017).

49. *Id.*

50. *Id.*

and pantries.⁵¹ Food-rescue programs take food to agencies and charities and also accept food directly from donors.⁵² Even when foods are not fit for human consumption, some food-donation centers can still find meaningful uses for the food.⁵³ Typically, this type of food can either be composted or donated for animal feed and then donated to small producers.⁵⁴ Donated food that is unwholesome or inedible can be made into compost, which improves soil conditions by adding organic material and nutrients back into the soil.⁵⁵ Donated compost can go to local farmers and reduce their fertilizer use.⁵⁶

2. Why Food Donation Is Not More Common

Despite the virtues of food donation, much of the food that is suitable for donation is wasted every year at every stage of production. Unfortunately, donating food is often prohibitively difficult and expensive for many businesses, nonprofits, and consumers. Many small farms and businesses would like to donate food but lack the funds to gather, store, and transport food to donation centers.⁵⁷ Such potential donors also lack the “time and energy, which results in forgone opportunity costs.”⁵⁸

Many businesses also fear liability risks for foodborne illnesses connected with donated food. The Centers for Disease Control and Prevention estimates that 48 million cases of foodborne illness occur annually in the United States.⁵⁹ Foodborne illnesses annually cause 128,000 hospitalizations and 3,000 deaths.⁶⁰ Moreover, food distributors and sellers face severe consequences for providing the source of an illness.⁶¹

For example, an outbreak of *E. Coli* in 1992 cost Taco Bell over \$98 million in settlement costs from resulting claims.⁶² A recent outbreak of *E.*

51. *Id.*

52. *Id.*

53. See WASTE NOT, WANT NOT, *supra* note 45, at 1–2 (providing examples for what can be done with perished food, such as composting and animal feed).

54. *Id.*

55. *Id.*

56. *Id.*

57. H.R. REP. NO. 104-661, at 3 (1996) (discussing testimony from the President and CEO of Second Harvest National Food Bank Network regarding companies’ liability fears of food donations).

58. Van Zuiden, *supra* note 34, at 251.

59. *Burden of Foodborne Illness: Findings*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> [<https://perma.cc/Q3N6-3UDY>] (last updated July 15, 2016).

60. *Id.*

61. Haley, *supra* note 2, ¶ 24 (discussing that most states hold distributors of defective food strictly liable).

62. *Id.*

Coli, linked to at least 40 Chipotle restaurants in Washington and Oregon, has left more than three-dozen people sick.⁶³ At least three people have already commenced lawsuits; one woman is seeking \$75,000 of damages.⁶⁴ This outbreak has the potential to cost Chipotle millions of dollars in settlement costs.⁶⁵ Nevertheless, “as of 2013, there have been no lawsuits concerning liability of donated food.”⁶⁶

Donating excess food to recovery organizations ensures that the food goes to food-insecure individuals or families, animals (once converted to feed), or small producers (in the form of compost) and is a means of cutting down on the amount of food in landfills. Food donation has the potential to reduce harmful greenhouse-gas emissions while at the same time helping hungry United States citizens. Taking action at the federal level to remove liability fears and financial constraints will encourage food donation and help reduce greenhouse-gas emissions with climate-affecting capabilities.

II. TWO-PRONGED FOOD WASTE REDUCTION PLAN

This note proposes to tackle the food-waste problem in the United States by: (1) amending the Bill Emerson Act to explicitly deem it the minimum national liability scheme for food donation and (2) creating a uniform federal date-labeling policy to reduce consumer confusion. Adopting these measures has the potential to reduce climate-affecting greenhouse-gas emissions and, at the same time, provide wholesome food to food-insecure United States citizens.

A. *The Bill Emerson Good Samaritan Food Donation Act*

Congress passed the Bill Emerson Good Samaritan Food Donation Act (Bill Emerson Act) in 1996.⁶⁷ Representative Bill Emerson was a Republican member of the United States House of Representatives from Missouri.⁶⁸ Throughout his career, Representative Emerson worked “to

63. Lisa Baertlein & Suzannah Gonzales, *Chipotle Now Linked to 35 Confirmed E.Coli Cases*, REUTERS (Nov. 3, 2015, 7:15 PM), <http://www.reuters.com/article/us-chipotle-ecoli-idUSKCN0SS20K20151104> [<https://perma.cc/TV2Q-6GTV>].

64. *Id.*

65. See, e.g., Emma Court, *Why Chipotle Should Care About a Deadly '90s Burger Epidemic*, MARKETWATCH (Mar. 17, 2016, 11:46 AM), <http://www.marketwatch.com/story/why-a-deadly-90s-burger-epidemic-matters-to-chipotle-today-2016-03-08> [<https://perma.cc/2LD5-6D9V>] (explaining how a similar outbreak led to million dollar settlements in the past).

66. Kalashian, *supra* note 12, at 109.

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

68. *Bill Emerson*, CONG. HUNGER CTR., <http://www.hungercenter.org/about/emerson/> [<https://perma.cc/ZMT2-NCDF>] (last visited Mar. 3, 2017).

advance anti-hunger initiatives” and “reduce administrative rules that make food assistance to hungry Americans inaccessible.”⁶⁹ Representative Emerson “worked very hard to have [the Bill Emerson Act] actively considered during the 104th Congress.”⁷⁰

The purpose of the Bill Emerson Act was to encourage food recovery and gleaning efforts by providing a federal law to reduce potential donor liability.⁷¹ Section (b)(5) of the Bill Emerson Act defines a 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.”⁷²

The Bill Emerson Act removes civil and criminal liability for “persons” or “gleaners” who in “good faith” donate “apparently wholesome food” or “apparently fit grocery product[s] . . . to a nonprofit organization for ultimate distribution to needy individuals.”⁷³ A product is “apparently wholesome” if the “food meets all quality 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.”⁷⁴ The civil and criminal liability waiver does not apply when the donated food causes injury or death due to the donor’s act of “gross negligence or intentional misconduct.”⁷⁵ Symbolically, the Bill Emerson Act also demonstrates congressional willingness to address the problem of food waste.

Unfortunately, since Congress enacted the Bill Emerson Act, food waste has actually increased in the United States.⁷⁶ Many businesses in the retail food industry are unfamiliar with the Bill Emerson Act and its protections from liability.⁷⁷ Confusion as to whether the Bill Emerson Act actually preempts state laws also hinders intrastate businesses from donating food.⁷⁸ This confusion arises because the Bill Emerson Act contains no explicit preemption language, and all 50 states have Good

69. *Id.*

70. H.R. REP. NO. 104-661, at 4.

71. 42 U.S.C. § 1791.

72. *Id.*

73. *Id.* § 1791(c)(1).

74. *Id.* § 1791(b)(2).

75. *Id.* § 1791(c)(3).

76. BUZBY ET AL., *supra* note 17, at 22 n.14.

77. Haley, *supra* note 2, ¶ 4.

78. See David L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 FOOD & DRUG L.J. 107, 107–08, 128 (2002) (explaining that although the Good Samaritan food-donation laws seek to alleviate potential food donors’ fears, food donors still do not know whether to follow state or federal law).

Samaritan food-donation laws.⁷⁹ Thus, many businesses do not know whether to apply federal or state law.⁸⁰

Even if state law applies, it is not always clear which state law in the “patchwork” of state Good Samaritan food-donation laws applies.⁸¹ State laws vary widely, making it even more difficult for producers, distributors, and retailers with contacts in multiple states to know which standard applies.⁸² The laws vary in liability vocabulary and as to whether the risk elimination applies to only civil or criminal liability or both.⁸³ Naturally, many businesses are wary of committing a benevolent act when they are not sure whether they might be held liable and, if so, to what extent.

Amending the Bill Emerson Act to include a preemption clause deeming the Act to be the minimum national standard for food-donation liability would help reduce the confusion surrounding food donations. Although the Bill Emerson Act is silent on preemption, the legislative history implies that Congress intended for the federal law to preempt state law.⁸⁴

Prior to the Bill Emerson Act, Congress adopted a Model Good Samaritan Food Donation Act (Model Act) in 1990.⁸⁵ The Model Act was largely ineffective because it was not legally binding and only one state chose to adopt it.⁸⁶ Because the Model Act did not have a large impact on food donation, Missouri Representative Pat Danner introduced H.R. 2248, the future Bill Emerson Act, which gave the Model Act a legally binding effect.⁸⁷ Representatives during House debate expressed Congress’s intent for H.R. 2248 to “relieve concerns over liability . . . that deter companies and individuals from donating as freely as they would like.”⁸⁸ A Senator in a Senate debate also found “[l]iability concerns [to be] the overriding reason why unsalable, but otherwise wholesome, food is destroyed rather than donated to charity.”⁸⁹

Recognizing the difficulty of adhering to 51 different liability schemes, President Clinton signed the Bill Emerson Act into effect on October 1,

79. *Id.*

80. *Id.* at 128.

81. *See id.* at 120 (discussing potential food donors’ hesitation to donate food because of the 50 different state laws).

82. *Id.* at 116, 120.

83. *Id.* at 116–17.

84. Haley, *supra* note 2, ¶ 36.

85. *Id.* ¶ 29.

86. *Id.*

87. *Id.*

88. *Id.* ¶ 33 (quoting 143 CONG. REC. H7479 (daily ed. July 12, 1996) (statement of Rep. McKeon)).

89. *Id.* (quoting 143 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Santorum)).

1996.⁹⁰ He acknowledged that “[a]lthough many States have enacted their own ‘Good Samaritan’ laws to support food recovery and donation efforts, many businesses have advised that these varying State statutes hinder food donations.”⁹¹ The Bill Emerson Act’s legislative history indicates that Congress intended the Act to preempt state laws concerning food-donation liability.⁹² Nevertheless, creating an express preemption clause within the Bill Emerson Act would remove all doubts to wary businesses that fear liability.

The Bill Emerson Act, the current federal statute pertaining to food donation liability, would be more effective and better tailored to meet its purpose of encouraging excess food donation if amended to include a preemption clause, making it the minimum national standard for food donation liability. Amending the Bill Emerson Act would allow Congress to help combat the negative, climate-changing effects of food waste.

B. Uniform Date Labeling

The Waste and Resources Action Programme⁹³ conducted a study in the United Kingdom and discovered “that one-fifth of food thrown out by households was incorrectly perceived as being out of date due to confusing labels.”⁹⁴ In the United States, misinterpreting date labels on food products is also a major cause of waste.⁹⁵ The confusion surrounding the date labels arises because date labels that say “use-by,” “sell-by,” or “best-before” are not specific or targeted toward consumers.⁹⁶ They give consumers the impression that the date listed is an expiration date, when often it is not.⁹⁷ As a result, people and food-donation centers throw away perfectly edible food because they incorrectly believe it is bad or unsafe to eat.⁹⁸

The problem of inconsistent and confusing date labeling is due to the federal government’s lack of a comprehensive framework that would

90. *Id.* ¶ 31.

91. *Id.* (quoting Presidential Statement on Signing H.R. 2428, 32 WEEKLY COMP. PRES. DOC. 1943 (Oct. 7, 1996)).

92. *Id.* ¶ 36.

93. WRAP, <http://www.wrap.org.uk/> [<https://perma.cc/C8YR-HYXK>] (last visited Mar. 20, 2017).

94. Brian Lipinski, *10 Ways to Cut Global Food Loss and Waste*, WORLD RESOURCES INST. (June 6, 2013), <http://www.wri.org/blog/2013/06/10-ways-cut-global-food-loss-and-waste> [<https://perma.cc/6W3S-AH86>].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

establish standard laws or regulations for the date labels of food products.⁹⁹ This lack of federal oversight gives the states the ability to regulate date labels on food.¹⁰⁰ But, states do so in a patchwork of ways that is confusing for businesses and consumers.¹⁰¹ Some states do not regulate date labels at all.¹⁰²

Retailers and consumers often throw away food that could be eaten or sold because they incorrectly believe the food is unsafe.¹⁰³ Discarding food that is safe for human consumption “results in economic losses and inefficiencies for food producers, manufacturers, distributors, and retailers, as well as substantial challenges for anti-hunger organizations and others who seek to utilize food that otherwise may be wasted.”¹⁰⁴

Date labeling became a common practice in the United States during the 20th century due to consumers’ interest in information on food freshness.¹⁰⁵ Between 1973 and 1975, congressional bills mandating date labeling never became laws that would create a federal date-labeling framework.¹⁰⁶ Now, over 40 years later, there is still no federal framework to regulate date labels on food products.¹⁰⁷ Thus, states are not preempted from passing their own date-labeling laws. The states instead decide how they will label their food.¹⁰⁸ Forty-one states have adopted varying date-labeling protocols.¹⁰⁹

Often date labels are meant to convey information to the retailer, not the consumer.¹¹⁰ The labels typically help retailers with logistics for shelving and storage.¹¹¹ Yet, consumers do not realize this and throw out food while it is still safe to eat.¹¹² Establishing a date-labeling system on the federal level for food products would help reduce food waste in the United

99. EMILY LEIB ET AL., *THE DATING GAME: HOW CONFUSING FOOD LABELS LEAD TO FOOD WASTE IN AMERICA* 3 (Dana Gunders ed., 2013).

100. *Id.* at 12.

101. *Id.* at 3, 12.

102. Kalashian, *supra* note 12, at 111.

103. LEIB ET AL., *supra* note 99.

104. *The Dating Game: Harvard FLPC and NRDC Publish Comprehensive Report on Food Expiration Dates*, HARV. FOOD L. & POL’Y CLINIC (Sept. 18, 2013), <https://blogs.harvard.edu/foodpolicyinitiative/2013/09/18/the-dating-gameharvard-flpc-and-nrdc-publish-comprehensive-report-on-food-waste/> [https://perma.cc/RQM4-LXZX].

105. Kalashian, *supra* note 12, at 111.

106. *Id.*

107. *See id.* at 111–12 (providing context that the labels today are as vague as they were in 1975).

108. *Id.* at 111.

109. LEIB ET AL., *supra* note 99, at 12.

110. Kalashian, *supra* note 12, at 109–10.

111. *Id.*

112. Emily M. Broad Leib, *Keynote Remarks: Re-Tooling Law and Legal Education for Food System Reform: Food Law and Policy in Practice*, 38 SEATTLE U. L. REV. 1175, 1187 (2015).

States by promoting greater food safety knowledge.¹¹³ Creating an efficient, uniform federal system would generally reduce discarded food while helping spur edible food donations.¹¹⁴

Congress has the authority to regulate date labels under the Commerce Clause, which allows Congress to control products sold in interstate commerce.¹¹⁵ Congress has delegated authority to the Food and Drug Administration (FDA) and the USDA regarding the “adulteration or misbranding of any food.”¹¹⁶ The Food, Drug, and Cosmetic Act (FDCA) gives the FDA the authority to regulate “false or misleading” food product labels in order to prevent consumer confusion.¹¹⁷ Viewing date labels as misleading affords the USDA and FDA the power to regulate food labels.¹¹⁸

Under the FDCA, a label can be found to be misleading if it makes deceptive statements or omits material information to the consumer.¹¹⁹ Courts apply the reasonable-consumer test to determine whether labels are misleading under the Act.¹²⁰ Although this law is meant to apply to individual manufacturers, “the intent behind the elements of the mislabeling law, preventing consumers from being misled by food labels, explains why” establishing a uniform labeling regime is important to consumers’ understanding of the food products they buy.¹²¹

Although courts typically apply the reasonable-consumer test “when a consumer brings legal action against a manufacturer of food products,” applying the policy behind the test to the United States’s inconsistent date-labeling system for food products reveals that the current date-labeling system is misleading.¹²² This misleading system contributes to the problem of food waste. Date-labeling reform is important to addressing food waste. The FDCA allows such reform “to avoid the same kind of harms for which the underlying misleading label laws were created to prevent.”¹²³

The reasonable-consumer test questions whether a reasonable consumer would be misled into buying a product due to false and misleading statements.¹²⁴ Specifically, the test asks three questions: (1) whether the label contains a false statement; (2) “whether a reasonable consumer [is]

113. Kalashian, *supra* note 12, at 121.

114. *Id.* at 133.

115. *Id.* at 9.

116. LEIB ET AL., *supra* note 99, at 9.

117. *Id.*

118. *Id.*

119. Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(n) (2012).

120. *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 898–99 (N.D. Cal. 2012).

121. Kalashian, *supra* note 12, at 114.

122. *Id.* at 115–16.

123. *Id.* at 116.

124. 21 U.S.C. § 321(n).

likely to be deceived by the offending statements”; and (3) whether the consumer has suffered sufficient injury to have standing to bring the claim.¹²⁵

The first element of the reasonable-consumer test is met because “[f]alse labels, in the traditional sense, have the same effect as the current confusing date labels.”¹²⁶ They both give the consumer an imprecise view of the product.¹²⁷ The plaintiffs in *Gitson v. Trader Joe’s Co.* alleged that the defendant grocery chain violated the FDCA by “illegally list[ing] evaporated cane juice as an ingredient,” instead of sugar on a yogurt container.¹²⁸ To determine whether the label would likely deceive reasonable customers with false statements, the United States District Court of the Northern District of California applied the reasonable-consumer test.¹²⁹ One of the issues the court addressed was whether the label stated the sugar content of the product.¹³⁰

The court found that defendant Trader Joe’s did not mislead reasonable customers because evaporated cane juice is a form of sugar.¹³¹ Furthermore, the Nutrition Facts section of the yogurt product clearly indicated the amount of “sugars” per serving.¹³² Hence, there was no false statement to mislead a reasonable consumer into buying the product. The court explained that a label expressly explaining the sugar content of evaporated cane juice in a visible, specially designated area on the packaging is not deceptive to a reasonable customer.¹³³ Furthermore, Trader Joe’s did not advertise the product to be sugar-free or no-sugar-added.¹³⁴ Unlike the evaporated cane juice in *Gitson*, date labeling is misleading to reasonable consumers.¹³⁵ The mere indication of a date with no express explanation of its meaning creates an imprecise and confusing message for consumers looking for safe products. The mixed messages from these labels deceive many consumers into believing that perfectly edible food is in fact dangerous to consume. Because consumers so incorrectly interpret the labels, the content can effectively be considered as a false statement.

125. *Jones*, 912 F. Supp. 2d at 899–901.

126. Kalashian, *supra* note 12, at 116.

127. *Id.*

128. *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-WHO, 2013 WL 5513711, at *5 (N.D. Cal. Oct. 4, 2013).

129. *Id.* at *6.

130. *Id.* at *8.

131. *Id.* at *9.

132. *Id.* at *8.

133. *Id.*

134. *Id.*

135. Kalashian, *supra* note 12, at 104.

The second element of the reasonable-consumer test is met because confusing date labels on packaging are likely to deceive and mislead reasonable consumers; they must rely on “arbitrary dates of food products, with no opportunity to find clarification elsewhere on the label.”¹³⁶ In *Williams v. Gerber Products Co.*, the Ninth Circuit explained that the aggrieved party “must show that members of the public are likely to be deceived,”¹³⁷ and that the law prohibits “not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”¹³⁸

The product in question in *Williams* was called “Fruit Juice Snacks,” and pictures of different fruits appeared on the package.¹³⁹ A statement claiming that the product was made with “fruit juice and other all natural ingredients” also appeared on the package.¹⁴⁰ The package labeling misled the appellant into thinking she was actually buying snacks with real fruit and fruit juice, but in reality, the snacks contained no fruit at all.¹⁴¹ The Ninth Circuit found that reasonable consumers should not “be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.”¹⁴² The court explained that “reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.”¹⁴³

Applying the court’s reasoning in *Williams* to date labeling, consumers should not have to take additional efforts to better understand confusing or misleading terminology.¹⁴⁴ Unlike in *Williams*, however, consumers reading date labels “have even less information available to them.”¹⁴⁵ With no other sources of information, consumers are, therefore, more likely to find date labels deceptive or misleading.

The third element of the reasonable-consumer test is met because confusing date labeling causes economic harm—sufficient to allow standing—to consumers who unnecessarily throw away food and buy more

136. *Id.* at 118.

137. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (internal quotations omitted).

138. *Id.* (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002)).

139. *Id.* at 939.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 936.

144. *See id.* (determining that a product should not confuse a consumer with its packaging).

145. Kalashian, *supra* note 12, at 118.

of the same product.¹⁴⁶ Economic injury is one way of meeting the injury-in-fact requirement of standing.¹⁴⁷ *Arroyo v. Chattem, Inc.* involved Dexatrim weight loss supplements advertised as a safe way to lose weight, but which actually contained a harmful mineral.¹⁴⁸ The plaintiff claimed she would not have purchased the weight loss supplements had she known that it contained a dangerous ingredient.¹⁴⁹ The court determined that the plaintiff satisfied the standing requirements due to the plaintiff's economic injury.¹⁵⁰ Similarly, consumers who read a misleading date-label on a food product are likely to face economic injuries for losses incurred due to throwing away perfectly good food.

The federal government should create a new and uniform date-labeling system for food products that consumers and food-donation centers can easily understand. Various changes will be needed to incentivize consumers and food-donation centers to modify their food-discarding habits. Such changes could include: removing the sell-by date from customers' vision so that they are not confused with safety dates; removing dates from nonperishable items; establishing a clear, uniform-labeling vocabulary system; and adding freeze-by dates on products to encourage preserving food for longer periods.¹⁵¹

CONCLUSION

Food waste is a dire problem in the United States that negatively affects the environment. Unfortunately, this problem is only getting worse. Increasing food donation is important because it helps reduce methane emissions by saving discarded food from landfills.¹⁵² Food donation also provides food-insecure families and individuals greater access to wholesome food.¹⁵³ Increasing food donation on a nation-wide level will be important to the United States in reducing climate-affecting greenhouse-gas emissions caused by food waste.

The United States should address the problem of food waste and encourage food donation in two ways: (1) amending the Bill Emerson Act

146. *Id.* at 120.

147. *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 453 (E.D.N.Y. 2013); *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011).

148. *Arroyo v. Chattem, Inc.*, 926 F. Supp. 2d 1070, 1070 (N.D. Cal. 2012).

149. *Id.* at 1076.

150. *Id.*

151. Kalashian, *supra* note 12, at 121.

152. Carol Borwner & Dan Glickman, *Foreword* to ENVTL. PROT. AGENCY, U.S. DEP'T OF AGRIC., WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 1, 1 (1999).

153. WASTE NOT, WANT NOT, *supra* note 45, at 5.

to explicitly make it the minimum national liability scheme for food donation and (2) creating a uniform federal date-labeling policy to reduce consumer confusion. This two-pronged plan will help the United States reduce climate-affecting greenhouse-gas emissions by encouraging food donation and streamlining food-recovery policies.