

# OUT OF SIGHT, OUT OF MIND: FINDING A SOLUTION TO FOOD WASTE IN AMERICA

## I. INTRODUCTION

It is estimated that \$160 billion dollars of food from American retail food stores, restaurants, and homes will go uneaten every year.<sup>1</sup> Twenty-five percent of the food Americans bring home does not get eaten.<sup>2</sup> On a global level, “the average American consumer wastes ten times as much food as someone in Southeast Asia.”<sup>3</sup>

Now that population growth is at an all time high a solution to combat food waste is needed.<sup>4</sup> The amount of food that is wasted is staggering when just fifteen percent of the food waste in the United States could feed twenty-five million people every year.<sup>5</sup> In one year 1.5 million people die due to hunger, including 16,000 children.<sup>6</sup> That is the equivalent of one child dying from hunger every five seconds.<sup>7</sup>

The federal government recognizes that laws are needed in the United States to encourage farmers, consumers, and businesses to give edible food to those in need.<sup>8</sup> In 1996, the federal Bill Emerson Good Samaritan Food Donation Act (“Emerson Act”) was made law.<sup>9</sup> The Emerson Act’s purpose was to encourage food donation from individuals and businesses.<sup>10</sup> The Emerson Act tried to accomplish this a few different ways: it reduced the liability of donors who donate

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<sup>1</sup> See DANA GUNDERS, *Wasted: How America Is losing up to 40% of Its Food From Farm to Fork to Landfill*, NATURAL RESOURCES DEF. COUNCIL 1 (Aug. 3, 2012), <http://www.nrdc.org/food/files/wasted-food-ip.pdf>.

<sup>2</sup> See *id.* at 12.

<sup>3</sup> See *id.* at 4.

<sup>4</sup> See JEAN C. BUZBY & JEFFRY HYMAN, *Total and Per Capita Value of Food Loss in the United States*, 37 FOOD POL’Y 561, 562 (2012).

<sup>5</sup> GUNDERS, *supra* note 1, at 4.

<sup>6</sup> Bread of the World: Have Faith. End Hunger, *GLOBAL HUNGER*, <http://www.bread.org/hunger/global/> (last visited Nov. 18, 2013).

<sup>7</sup> *Id.*

<sup>8</sup> See GUNDERS, *supra* note 1, at 20.

<sup>9</sup> Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C.A. § 1791 (West 1996).

<sup>10</sup> See *id.*; see also GUNDERS, *supra* note 1, at 14.

food items to non-profit organizations, set a liability standard for those donating throughout the United States, and created a definition of gross negligence and intentional misconduct pertaining to food and grocery donation.<sup>11</sup> Unfortunately, the United States government's response to food waste has not made the impact intended.<sup>12</sup>

The government has been focused on reducing liability associated with food donation, instead the government can effectively aid in reducing food waste in the United States through reforming the date labeling system.<sup>13</sup> Improving the date labeling policies and practices would bring benefits to consumers by decreasing confusion and advancing food safety understanding.<sup>14</sup> This Comment suggests that the current food date labeling system creates misleading labels based on current federal law that prohibits such misleading methods to be used on food.<sup>15</sup> Therefore, the federal government should implement a more efficient and uniform food date labeling system, which should substantially cut food waste and extend the amount of food available to donate.<sup>16</sup> Part II of this Comment will define food waste as well as examine the life cycle of food waste. This section will also look at the overall impact that food waste is having on the environment.<sup>17</sup> Part III will address the federal government's strong interest in curbing food waste as seen by the passing of the Emerson Act. It will further address the shortcomings of the Emerson Act in achieving its primary purpose and will propose that the goal of reducing food waste should

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<sup>11</sup> *Food Don. Connection*, HARVEST PROGRAM, <http://www.foodtodonate.com/Fdmain/LegalLiabilities.aspx> (last visited Nov. 18, 2013).

<sup>12</sup> BUZBY & HYMAN, *supra* note 4, at 568.

<sup>13</sup> EMILY BROAD LEIB ET AL., *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA*, HARV. FOOD LAW & POL'Y CLINIC & THE NATURAL RES. DEF. COUNCIL 2 (2013) [hereinafter NRDC].

<sup>14</sup> COMPTROLLER GEN., MWD-75-19, *Food Labeling: Goals, Shortcomings, and Proposed Changes*, 48 (1975), available at <http://www.gao.gov/assets/120/115505.pdf>.

<sup>15</sup> Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 321(n) (West 2012).

<sup>16</sup> See THEODORE P. LABUZA & LYNN M. SZYBIST, *Current Practices and Regulations Regarding Open Dating of Food Products* 15 (The Retail Food Indus. Ctr., Working Paper No. 01, 1999) (increased overall awareness and understanding about date labels stretching the life of food and allow more time to safely eat food).

<sup>17</sup> See *Wastes: Reducing Food Waste for Businesses*, Env'tl. Prot. Agency, <http://www.epa.gov/wastes/consERVE/foodwaste/> (last updated Nov. 24, 2013).

focus on enforcing a standard expiration label on food products.<sup>18</sup> Part IV will address the state and federal government's authority to regulate food product labels and will argue that a uniform federal law regarding date labeling is necessary to meet the goal of reducing food waste.<sup>19</sup> Part V will provide justification for federal action by analyzing existing federal law regarding misleading food labels and arguing the same interest these laws seek to protect apply to a standardized expiration date label.<sup>20</sup> Part VI will recommend that the federal government standardize and clarify the food date labeling system across the United States and explain why uniform language that is clearly defined and understood by the consumer is the most efficient and effective option to reduce food waste.<sup>21</sup> This section will also address what individual consumers can do to stop food waste.

## II. THE FOOD WASTE CYCLE

### A. What Is Food Waste?

Most people are uneducated about food waste, which makes it a difficult problem to address.<sup>22</sup> Food waste is food that has been discarded or is unable to be used but could have been eaten by oneself or by others.<sup>23</sup> It involves buying more than one needs or rejecting food because it is slightly wrinkly, bumpy, or has a spot.<sup>24</sup> When one buys a whole tomato to prepare a recipe that only calls for a half, and throws away the unused half, the discarded tomato is food waste.<sup>25</sup>

### B. Environmental Impact

Food waste is now the single largest type of waste entering landfills in America today.<sup>26</sup> Addressing the issue of food waste will not only

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<sup>18</sup> See James Haley & Nicole Civita, *The Legal Guide to the Bill Emerson Food Donation Act*, ARK. LAW NOTES 3 (2013) <http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>; see also NRDC *supra* note 13, at 2.

<sup>19</sup> LABUZA & SZYBIST, *supra* note 16, at 3.

<sup>20</sup> *Id.*

<sup>21</sup> See NRDC, *supra* note 13, at 2.

<sup>22</sup> *Id.* at 28; see also *Wastes: Reducing Food Waste for Businesses*, *supra* note 17.

<sup>23</sup> BUZBY & HYMAN, *supra* note 4, at 561.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *Wastes: Reducing Food Waste for Businesses*, *supra* note 17, at 1.

help fight hunger and save money, but will also help the planet and fight climate change.<sup>27</sup> Food in landfills decomposes over long periods of time, creating potent greenhouse gases.<sup>28</sup> One of the gases that food rot creates is methane.<sup>29</sup> Methane is a gas with “twenty-one times the global warming potential of carbon dioxide.”<sup>30</sup> Furthermore, wet food waste is the main threat to ground water or stream pollution.<sup>31</sup> Wasting food squanders the time, energy, and resources used to produce that food.<sup>32</sup> Great amounts of fossil fuel are used to fertilize, apply pesticides, harvest, and process food; still more fuel is spent transporting the food from the farmer to the store, the store to the home, and the home to the landfill.<sup>33</sup> Waste is not just an issue for corporations, fast-food chains, and households; a large part of food waste also comes from farms.<sup>34</sup>

### C. Food Waste In Our Farms

From the retail sector to the farm field, perfectly edible food is thrown in the trash for numerous reasons; unfortunately, the majority of these reasons are not related to food safety or sanitation.<sup>35</sup> Much food waste has to do with cosmetic imperfections.<sup>36</sup> Consumers can perceive any product with even the smallest fault as unworthy of purchase, and perfectly good food becomes food waste.<sup>37</sup> Farmers will often over plant their fields, justifying the increased cost to ensure against the portion of their crop rendered unsellable by the consumer’s

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<sup>27</sup> RICHARD DOBBS ET AL., *Resource Revolution: Meeting The World’s Energy, Materials, Food, And Water Needs*, MCKINSEY GLOBAL INST. 11 (2011).

<sup>28</sup> BUZBY & HYMAN, *supra* note 4, at 562.

<sup>29</sup> *Id.*

<sup>30</sup> *See Wastes: Reducing Food Waste for Businesses, supra* note 17.

<sup>31</sup> *See id.* at 3.; *see also* NRDC, *supra* note 13, at 21.

<sup>32</sup> *See* Kevin D. Hall Et Al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, PLOS ONE (Nov. 25, 2009)

<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0007940>.

<sup>33</sup> *See id.* at 2.

<sup>34</sup> *See* Tamara Scully, *The Big Waste: Television Special Discusses Food Waste on Farms*, AM. FARM <http://americanfarm.com/publications/the-new-jersey-farmer/events/1105-television-special-discusses-food-waste-on-farms> (last visited Nov. 20, 2013).

<sup>35</sup> Dana Gunders, *Crop Shrink: Drivers of Fruit and Vegetable Loss at Production*, NATURAL RES. DEF. COUNCIL, (Jan. 11, 2014, 1:53PM),

<http://www.nrdc.org/food/crop-shrink.asp> [hereinafter *Crop Shrink*].

<sup>36</sup> *See* Scully, *supra* note 34.

<sup>37</sup> *Id.*

superficial expectations.<sup>38</sup> At the end of the crop-year, a grower may decide that the revenue from a sale does not justify harvesting their entire crop.<sup>39</sup> These situations can lead the farmer to leave entire fields of harvest-ready produce to rot.<sup>40</sup>

Though many farms donate much of their produce to food banks, often times the amount of time, labor, and resources it takes to move the produce will fall on the farmer.<sup>41</sup> That coupled with the lack of federal incentives, such as tax write-offs, causes much produce to never leave the field.<sup>42</sup> Feeding America, a non-profit organization, has reported “more than six billion pounds of fresh edible produce go unharvested or unsold each year.”<sup>43</sup> In order to survive, farmers must keep up with what produce buyers want, and buyers need to listen to what consumers want.<sup>44</sup> Though waste at the producer level is rampant, even more food is wasted at the consumption stage in developed countries.<sup>45</sup>

#### *D. Food Waste in Our Homes*

Fresh produce makes up most of the wasted food in households.<sup>46</sup> The United States Department of Agriculture (“USDA”) estimates thirty-four percent of fresh fish, twenty-three percent of eggs, and twenty percent of milk are lost at the retail and consumer level every year.<sup>47</sup> Much household waste is due to over-purchasing, food spoilage, and uneaten food from individuals’ plates.<sup>48</sup> A family household produces \$390 per capita<sup>49</sup> in food loss yearly.<sup>50</sup> However, including food lost to the garbage disposal, households can produce an average food loss of \$2,275 per year.<sup>51</sup>

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<sup>38</sup> *Crop Shrink*, *supra* note 35.

<sup>39</sup> *See Scully*, *supra* note 34.

<sup>40</sup> *Crop Shrink*, *supra* note 35.

<sup>41</sup> *Scully*, *supra* note 34.

<sup>42</sup> GUNDERS, *supra* note 1, at 14.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *See Scully*, *supra* note 34.

<sup>45</sup> *See BUZBY & HYMAN*, *supra* note 4, at 561.

<sup>46</sup> *See GUNDERS*, *supra* note 1, at 12.

<sup>47</sup> BUZBY & HYMAN, *supra* note 4, at 566.

<sup>48</sup> *See id.* at 23.

<sup>49</sup> *See DOBBS ET AL.*, *supra* note 27, at 154 (meaning for each person).

<sup>50</sup> NRDC, *supra* note 13, at 21.

<sup>51</sup> *Id.*

## III. THE FEDERAL GOVERNMENT'S INTENT TO DECREASE FOOD WASTE

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

With 925 million people suffering from hunger, donating edible leftover food is a simple yet powerful way to help end food waste.<sup>52</sup> The challenge to meet the global demand for food will only increase.<sup>53</sup> Donating one's time, resources, and food might be one of the more powerful things that can be done to help.<sup>54</sup> In order to further the effectiveness of eliminating food waste and increase donations to those in need, the federal government must implement laws that will arm consumers with the knowledge they need to attain these goals.<sup>55</sup> Implementing a uniform date labeling system that eliminates the confusion that currently results from the numerous expiration dates can do this.<sup>56</sup>

The Emerson Act's intent is to protect donors from food safety liability when donating food to non-profit organizations, thus reducing the amount of food that is wasted.<sup>57</sup> The main goal of the Emerson Act is to ensure that a person or gleaner<sup>58</sup> will not be subject to liability when donating edible food in good faith.<sup>59</sup> A good faith donation is made when a seemingly edible grocery product of a grower or gleaner is delivered to a non-profit establishment, and provides an exemption from liability for the donor even if the donated food accidentally causes the receiver to get sick.<sup>60</sup> On the other hand, if the donated food causes injury or death to the recipient because of an act or omission that is either intentional or grossly negligent, the immunity does not apply to the donor.<sup>61</sup>

The Emerson Act was seen as an essential solution to provide a consistent standard for donor liability across the states that was needed

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<sup>52</sup> See GUNDERS, *supra* note 43, at 19.

<sup>53</sup> *Id.*

<sup>54</sup> See HARVEST PROGRAM, *supra* note 11.

<sup>55</sup> See NRDC, *supra* note 13, at 4.

<sup>56</sup> See *id.* at 2.

<sup>57</sup> See HARVEST PROGRAM, *supra* note 11.

<sup>58</sup> See generally Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C.A. § 1791 (West 1996).; see generally § 1791(b)(5) (gleaner is a person who harvests for free distribution to the needy).

<sup>59</sup> See HARVEST PROGRAM, *supra* note 11.

<sup>60</sup> *Id.*; see also Haley & Civita, *supra* note 18, at 7.

<sup>61</sup> See HARVEST PROGRAM, *supra* note 11.

to encourage the donation of food to help the needy and stop food from being wasted.<sup>62</sup> However, donors' fear of lawsuits, arising from sicknesses caused by donated food, seems to not be a reality.<sup>63</sup> According to the Centers for Disease Control and Prevention, approximately one in six Americans, or forty-eight million people, get sick from foodborne illness not related to donated food.<sup>64</sup> As of 2013, there has never been a single lawsuit in the United States regarding liability for donated food.<sup>65</sup> Unfortunately, the goal of raising the amount of food donations at the level the Emerson Act intended has not been met.<sup>66</sup>

The Emerson Act was a step in a positive direction, but it has not met its full intent of promoting more food donations and lowering food waste.<sup>67</sup> There is still more food waste because liability is not the main reason food gets wasted,<sup>68</sup> a leading cause of food waste is consumers throwing away edible food as a result of confusing date labels.<sup>69</sup> A uniform date labeling system will do a more efficient job of stretching the life of food, therefore increasing the amount of food there is to donate, and minimizing food waste.<sup>70</sup>

A large amount of food waste in households is caused by the current date labeling system.<sup>71</sup> The majority of consumers believe eating food past its "sell by" or "use by" date is a health risk, according to a USDA report.<sup>72</sup> The meaning of these phrases varies from product to product because there is no industry agreement on definitions and on which labels should be applied to which foods.<sup>73</sup> In most cases, a product's "sell by" date is an instrument used for stock purposes.<sup>74</sup> It is a

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<sup>62</sup> The Good Samaritan Food Donation Act, *THE CAMPUS KITCHEN PROJECT*, <http://www.campuskitchens.org/good-samaritan-act/> (last visited Nov. 13, 2013).

<sup>63</sup> See Haley & Civita, *supra* note 18, at 3.

<sup>64</sup> CDC 2011 Estimates: Findings, *CTRS. FOR DISEASE CONTROL AND PREVENTION*, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited Nov. 13, 2013); see also Haley & Civita, *supra* note 18, at 3.

<sup>65</sup> See Haley & Civita, *supra* note 18, at 3.

<sup>66</sup> See *id.* at 3; see GUNDERS, *supra* note 1, at 14.

<sup>67</sup> See GUNDERS, *supra* note 1, at 14.

<sup>68</sup> *Id.* at 3.

<sup>69</sup> See NRDC, *supra* note 13, at 2.

<sup>70</sup> See *id.* at 22.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> See *id.* at 19.

<sup>73</sup> See *id.* at 12.

<sup>74</sup> See E. RESEARCH GRP., INC., *Current State of Food Product Open Dates In The U.S.*, 1-2 (2003).

suggestion by the manufacturers to the seller that they should no longer sell a product after a certain date in order to ensure the product will still have shelf life after consumers have purchased it.<sup>75</sup> “Best by” and “use by” dates are meant for consumer use, but they are often just a manufacturer’s estimate of the date after which food will no longer be at peak quality.<sup>76</sup> “Enjoy by” dates are also used by some manufacturers but are not clearly defined in a way that is useful to consumers.<sup>77</sup> Phrases like “best by,” “use by,” and “sell by” are not standardized and lead to confusion and false confidence in food safety.<sup>78</sup> Creation of the labels was meant to empower consumers; instead, they puzzle and mislead, making consumers throw away edible food unnecessarily.<sup>79</sup> A more efficient solution, to help alleviate this confusion and boost food donation while minimizing food waste, is a uniform date system.<sup>80</sup>

#### IV. STATE AND FEDERAL AUTHORITY

“Experts in food recovery and food waste report that there is currently widespread confusion among anti-hunger organizations due to the unknown meaning of the various dates on food products.”<sup>81</sup> Organizations like these must spend considerable time and energy differentiating between what the dates mean.<sup>82</sup> All of these complications stem from current date labeling practices and make it more difficult to use food recovery methods to mitigate food waste and increase the availability of donatable food.<sup>83</sup> In the absence of clear federal regulation on expiration date food labels, individual states have adopted their own date label requirements which vary significantly.<sup>84</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2-2.

<sup>77</sup> *Id.* at 3-7.

<sup>78</sup> See BROOK LYNDHURST, WRAP, CONSUMER INSIGHT: DATE LABELS AND STORAGE GUIDANCE 2.3 (2011) [hereinafter WRAP].

<sup>79</sup> See NRDC, *supra* note 13, at 8.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.

*A. States' Authority to Regulate Food Labels*

Because federal regulation of date labels is so limited, states consequently have vast discretion to regulate date labels in almost any way they see fit.<sup>85</sup> With this power, some states have implemented a number of requirements for date labels that require strict adherence.<sup>86</sup> Other states “have not regulated date labels at all.”<sup>87</sup> These extreme variations among states illuminate how our current food labeling system creates confusion for consumers and does not necessarily affect the ultimate goal of improving food safety.<sup>88</sup> For instance, forty-one states and the District of Columbia require date labels on at least some food items; nine states do not require them on any foods.<sup>89</sup> “New York does not require date labels to be applied to any products, while all six of its neighboring states do.”<sup>90</sup> All together only twenty states plus the District of Columbia regulate the sale of food products after a certain time period.<sup>91</sup> States also differ in the types of food they require to have date labels, as well as the type of date labels that are required.<sup>92</sup> For example, Maryland requires only that Grade A milk have a “sell by” date and does not require a date label on any other products.<sup>93</sup>

The use of expiration dates for food stemmed from consumers' demand for more accessible indicators of food freshness in the 20th Century.<sup>94</sup> In 1975, a nationwide survey of consumers was taken, and it showed that ninety-five percent of respondents considered date labels to be the most useful indicator to the consumer of the food's freshness.<sup>95</sup> The widespread agreement about this led Congress to introduce ten congressional bills between 1973 and 1975 proposing requirements for food dating.<sup>96</sup> Notwithstanding legislative efforts, there was not enough momentum to pass these bills into law and create a uniform nationwide system; in its place is the vague date labeling

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<sup>85</sup> See LABUZA & SZYBIST, *supra* note 16, at 29.

<sup>86</sup> See NRDC, *supra* note 13, at 12.

<sup>87</sup> *Id.*

<sup>88</sup> See E. RESEARCH GRP., INC., *supra* note 75, at 1-5.

<sup>89</sup> LABUZA & SZYBIST, *supra* note 16, at 20.

<sup>90</sup> NRDC, *supra* note 13, at 12.

<sup>91</sup> See LABUZA & SZYBIST, *supra* note 16, at 33.

<sup>92</sup> See E. RESEARCH GRP., INC., *supra* note 75, at 1-5.

<sup>93</sup> See LABUZA & SZYBIST, *supra* note 16, at 33.

<sup>94</sup> See NRDC, *supra* note 13, at 6.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

system we have today.<sup>97</sup> This free reign of labeling standards and poor regulation causes inconsistent labeling that further undermines the intent of labeling.<sup>98</sup>

### *B. The Role of the Industry*

The inconsistent regulation of date labels at the federal, state, and local levels means manufacturers must decide the form and content of date labels.<sup>99</sup> “Where no regulations exist, as is the case in many states and for many categories of food, manufacturers are free to decide for themselves which foods will display dates and which will not.”<sup>100</sup> Even when regulations mandate the presence of date labels on specific foods, they almost never dictate the criteria that industries use to arrive at the date on the label, thus leaving the decision entirely up to industry discretion.<sup>101</sup>

The federal government needs a date label system that will decrease the amount of confusion with the numerous types of date labels among manufacturers and the varying date label requirements among the states.<sup>102</sup> “Sell by,” “use by,” and “best by” dates all mean different things, yet none of the dates indicate that the food is spoiled.<sup>103</sup> A uniform system will lower the cost of food as consumers will likely not purchase food items as frequently, if the vague and confusing dates are removed from the packaging.<sup>104</sup> To accomplish this, a federal uniform date labeling system is needed with a single expiration date that only addresses the safety of the food.<sup>105</sup>

### *C. Federal Authority to Create a Uniform Date Label System*

Food labels are inconsistent and confusing, and the Food, Drug, and Cosmetics Act (“FDCA”), one of the most robust set of laws that regulates misbranded foods and misleading labels, grants their power

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<sup>97</sup> See LABUZA & SZYBIST, *supra* note 16, at 10.

<sup>98</sup> See NRDC, *supra* note 13, at 8.

<sup>99</sup> See LABUZA & SZYBIST, *supra* note 16, at 30.

<sup>100</sup> NRDC, *supra* note 13, at 15.

<sup>101</sup> See *id.* at 14.

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.* at 23.

<sup>105</sup> See COMPROLLER GEN., *supra* note 14, at 50.

to the USDA and Food and Drug Administration (“FDA”).<sup>106</sup> Together the USDA and FDA have the ability to implement a uniform date system that can ameliorate the confusion surrounding the numerous types of date labels used by manufacturers and states.<sup>107</sup>

Food may be considered misbranded if the food’s label is false or misleading.<sup>108</sup> The federal laws regulating food labeling are broad, but no laws today address date labeling with any specificity or consistency.<sup>109</sup> Congress has delegated its power to regulate food mislabeling to the FDA and USDA, and together they have passed a small and selective number of federal regulations that govern labeling of different types of food.<sup>110</sup> Even though no agencies have been given explicit authority to standardize food labeling, the FDA and USDA have been given general authority to ensure food safety and protect consumers from deceptive or misleading food package information within their respective purviews.<sup>111</sup> If Congress continues to postpone passing a law to address misleading date labeling, then the FDA or USDA can make a case that it has the existing authority to regulate this issue without any further action from Congress.<sup>112</sup>

Even though the FDA or USDA could argue that it has an existing authority to regulate food labeling, neither the FDA or USDA have made such a case.<sup>113</sup> Placing “sell by,” “use by,” or “best by” dates on food products is completely at the discretion of the state, and the states leave most food labeling decisions to the manufacturer.<sup>114</sup> The federal government should create universal labeling requirements because they have a legitimate interest and authority to do so, despite the extraordinary burden of reforming the date labeling system.<sup>115</sup> If the federal government decides to undertake creating new regulations that will be strictly adhered to, it must ensure that that they are not confusing or misleading, a concern that has been dealt with in similar

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<sup>106</sup> *Id.*; See also LABUZA & SZYBIST, *supra* note 16, at 23.

<sup>107</sup> See *id.* at 49.

<sup>108</sup> 21 U.S.C.A. § 343 (West 2012).

<sup>109</sup> See LABUZA & SZYBIST, *supra* note 16, at 24.

<sup>110</sup> See generally U.S. CONST. art. I, § 8, cl. 3 (this power allows congress to regulate food mislabeling and allows congress to transfer such power to other organizations).

<sup>111</sup> See LABUZA & SZYBIST, *supra* note 16, at 13.

<sup>112</sup> *Id.*

<sup>113</sup> See NRDC, *supra* note 13, at 9.

<sup>114</sup> See COMPTROLLER GEN., *supra* note 14, at 49.

<sup>115</sup> See NRDC, *supra* note 13, at 9.

contexts through federal laws that prevent false or misleading food labels.<sup>116</sup>

#### V. REASONABLE CONSUMER TEST AND MISLEADING LABELING LAWS

From the consumer to the manufacturer, the waste of viable food is putting a significant strain on the American food system.<sup>117</sup> Continuing this pattern of food waste costs manufacturers and consumers money and consumes vital natural resources that sustain our food supply.<sup>118</sup> Furthermore, the current date labeling system symbolizes a neglected opportunity to feed masses of food-insecure Americans struggling to find healthy, affordable food.<sup>119</sup> The misinterpretation of the date labels on food is a key factor leading to this waste.<sup>120</sup>

The federal statute that prevents mislabeling states that a label may be deemed misleading under the FDCA not only if its language makes misleading representations but also if the label fails to reveal important information to the consumer.<sup>121</sup> The direct application of this law is not appropriate, as it is meant for an individual manufacturer, purposely deceiving the public in order to increase sales.<sup>122</sup> However, the intent behind the elements of the mislabeling law, preventing consumers from being misled by food labels, explains why a uniform label law is appropriate even though it is a somewhat extraordinary remedy.<sup>123</sup>

Generally, federal courts determine whether labels are misleading by applying the reasonable consumer test.<sup>124</sup> This test focuses on whether a reasonable consumer would be misled into purchasing a manufacturer's products because of false and misleading labeling statements.<sup>125</sup> The reasonable consumer test specifically includes an analytical overview of (1) whether the statement on the label is false;

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<sup>116</sup> See LABUZA & SZYBIST, *supra* note 16, at 73.

<sup>117</sup> See NRDC, *supra* note 13, at 5.

<sup>118</sup> See GUNDERS, *supra* note 1, at 4.

<sup>119</sup> See NRDC, *supra* note 13, at 5.

<sup>120</sup> *Id.*

<sup>121</sup> See generally 21 U.S.C.A. § 343 (West 2012); see generally 21 U.S.C.A. § 341 (West 2012); see generally Food, Drug and Cosmetic Act, 21 U.S.C.A. § 321(n) (West 2012) (requires not only that statements not be misleading but that all relevant information be included on the packaging as well).

<sup>122</sup> See § 343.

<sup>123</sup> § 343.

<sup>124</sup> Jones v. ConAgra Foods, Inc., 912 F.Supp.2d 889, 891 (N.D. Cal. 2012).

<sup>125</sup> Food, Drug and Cosmetic Act, 21 U.S.C.A. § 321(n) (West 2012).

(2) whether a reasonable consumer would rely on the statement; and (3) whether the consumer suffered adequate injury, and therefore has the proper standing to bring the claim.<sup>126</sup> When a Plaintiff has pleaded that there is a false statement, the courts determine whether the public will most likely be deceived by the food provider's current misleading practices.<sup>127</sup> In determining whether a food labeling statement is misleading, the FDA and the courts take into account the extent to which the labeling fails to reveal any material facts about the product.<sup>128</sup>

Generally, when courts apply the reasonable consumer test, they look at whether a food is significantly different when compared to a similar product's structure, nutritional value, or safety; these are differences that the court would consider material facts that a consumer could find misleading.<sup>129</sup> Next, the Plaintiff's claim must sufficiently allege reliance on the misleading statements.<sup>130</sup> The courts look at whether a reasonable consumer would make his or her purchase based on the misleading label and whether they would have mistakenly believed the misrepresentation.<sup>131</sup> Determining whether statements on labels may be misleading goes beyond what they say or imply; they may be misleading by virtue of what they do not say.<sup>132</sup> Lastly, Plaintiffs must allege sufficient injury by pleading that they have suffered economic harm.<sup>133</sup> This can be established if consumers purchased too much of a product or they paid more for a specific product than they would have if the product had been labeled truthfully.<sup>134</sup>

The reasonable consumer test is normally used when a consumer brings legal action against a manufacturer of food products alleging that the manufacturer's products contain deceptive and misleading labels that violate federal laws.<sup>135</sup> The application of the reasonable

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<sup>126</sup> See *Jones*, 912 F.Supp.2d at 899.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 891.

<sup>130</sup> See generally *Id.* at 900 (defendant moved to dismiss due to plaintiff failing to allege reliance).

<sup>131</sup> *Id.*

<sup>132</sup> See *Gitson v. Trader Joe's Co.*, No. 13-CV-01333-WHO, 2013 U.S. App. WL 5513711 at \*2 (N.D. Cal., Oct. 4, 2013).

<sup>133</sup> *Jones*, 912 F.Supp.2d at 901.

<sup>134</sup> *Id.* at 901.

<sup>135</sup> *Jones*, 912 F.Supp.2d at 899.

consumer test to the current date labeling system in general will aid in showing that the current food labeling system is misleading and should be remedied to avoid the same kind of harms for which the underlying misleading label laws were created to prevent.<sup>136</sup>

*A. The Statement on the Label is False*

In general, the courts look at whether a reasonable consumer would be likely to be deceived in order to determine whether a label is false.<sup>137</sup> In *Gitson v. Trader Joe's Co.*, 2013 WL 5513711 (2013), Plaintiffs claimed Defendants engaged in false and misleading advertising in violation of several California laws, as well as violated the FDCA by using the term “evaporated cane juice” rather than sugar on the labels of their yogurt products.<sup>138</sup> The courts applied the reasonable consumer test to determine whether a reasonable consumer would be misled into purchasing Defendant’s products with false and misleading labeling statements.<sup>139</sup> In this case, the analysis focused on whether the product expressly states its sugar content.<sup>140</sup> The federal court held that because evaporated cane juice is a form of sugar, Plaintiffs had not established that the use of the term evaporated cane juice would lead a reasonable consumer to believe that sugar was not included in the products at issue.<sup>141</sup> The court points out that even though sugar is not expressly located anywhere else on the packaging the product’s label expressly discloses the sugar contents on the product’s nutrition label.<sup>142</sup>

False labels, in the traditional sense, have the same effect as the current confusing date labels.<sup>143</sup> In both situations, consumers are left with an inaccurate understanding of the product.<sup>144</sup> There is even some evidence that a profit driven intent motivates manufacturers in selecting their dating methods.<sup>145</sup> Placing a date that does not reflect

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<sup>136</sup> *Id.*

<sup>137</sup> *Gitson*, 2013 WL5513711, at \*8.

<sup>138</sup> *Id.* at \*1-2.

<sup>139</sup> *Jones*, 912 F.Supp.2d at 899.

<sup>140</sup> *Gitson*, 2013 WL5513711, at \*8.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> E. RESEARCH GRP., INC., *supra* note 75, at viii.

<sup>144</sup> *Id.*

<sup>145</sup> *See generally id.*; *see generally* NRDC, *supra* note 13, at 15 (arguing that food manufacturers make a profit due to the misunderstanding of date labels).

the product's spoilage date, but rather the peak of freshness date, may result in consumers purchasing more of the product because they believe the product is expired.<sup>146</sup>

### *B. The Consumer is Misled*

Generally, courts agree that they have discretion based on the product and consumer to determine when sufficient reliance on a product's label has been established.<sup>147</sup> In *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (2008), appellants argued that they bought Gerber's Fruit Juice Snacks because they sought healthy snacks for their young children and because they trusted the Gerber name.<sup>148</sup> Appellants challenged the use of the words "Fruit Juice" alongside images of fruits arguing that the statement and image together were deceptive because the product contained no fruit juice from any of the fruits shown on the label and furthermore, the only juice contained in the product was white grape juice from concentrate.<sup>149</sup> Next, appellants argued the statement on the packaging that said "with real fruit juice and other all natural ingredients," was a false statement because the main ingredients of the snack were corn syrup and sugar.<sup>150</sup> Lastly, appellants challenged another statement that said "the snack was 'one of a variety of nutritious Gerber Graduates foods and juices.'"<sup>151</sup> The court of appeals found that a reasonable consumer would easily rely on the statements because not only is Gerber a trusted and well known name in children's food, but the statements seemed to be straightforward in suggesting that all the ingredients were natural and nutritious when they were not.<sup>152</sup>

The appellee argued that all the true ingredients were specifically listed on the back of the packaging and that upon review of the ingredient list the appellants would have had no reason to rely on the other statements because they would have known the exact ingredients.<sup>153</sup> The court of appeals rejected this argument and found that "a reasonable consumer should not be expected to look beyond

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<sup>146</sup> See NRDC, *supra* note 13, at 19.

<sup>147</sup> *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 934 (9th Cir. 2008).

<sup>148</sup> *Id.* at 936.

<sup>149</sup> *Id.* at 934.

<sup>150</sup> *Id.* at 936.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 939.

<sup>153</sup> See *id.*

misleading representations on the front of the box” before purchasing the product.<sup>154</sup> The court went on to say “the reasonable consumer actually expects the ingredient list to contain more detailed information about the product that confirms other representations on the packaging.”<sup>155</sup>

In contrast to the *Williams* case, where Plaintiff double-checked the misleading information on the packaging with the products nutrition label, the misleading effect of date labels cannot be corrected by looking at another part of the packaging.<sup>156</sup> With date labels, often times a consumer has even less information available to them.<sup>157</sup> Consumers rely on the completely arbitrary dates of food products, with no opportunity to find clarification elsewhere on the label.<sup>158</sup> Many consumers rely on food date labels rather than risk injury to their health because of the common misconception that food past its expiration date is no longer safe to eat.<sup>159</sup> There truly is no alternative way to obtain this information about expiration dates.<sup>160</sup>

### C. Economic Harm Suffered

Generally, the courts agree that losing money as a result of purchasing Defendant’s misrepresented products constitutes economic harm.<sup>161</sup> In *Arroyo v. Chattem, Inc.*, 926 F.Supp.2d 1070 (2012) Plaintiff alleged being misled into purchasing the product Dexatrim.<sup>162</sup> Dexatrim is a “dietary weight loss supplement manufactured, marketed, and distributed under the Dexatrim brand by Defendant.”<sup>163</sup> Plaintiff alleged that, “according to Defendant’s website, ‘Dexatrim products give consumers the power to lose weight and keep them in control of their diet.’”<sup>164</sup> The website further indicated, “that the product owes its effectiveness, in part, to the mineral chromium, a

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See NRDC, *supra* note 13, at 7.

<sup>157</sup> See COMPTROLLER GEN., *supra* note 14, at 43.

<sup>158</sup> See *id.*

<sup>159</sup> See NRDC, *supra* note 13, at 19.

<sup>160</sup> *Id.*; see also COMPTROLLER GEN., *supra* note 14, at 43.

<sup>161</sup> See *Arroyo v. Chattem, Inc.*, 926 F.Supp.2d 1070, 1076 (N.D. Cal. 2012).

<sup>162</sup> *Id.* at 1073.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

primary ingredient in all Dexatrim products.”<sup>165</sup> Plaintiff asserted that “throughout the Dexatrim advertising campaigns Defendant promoted its weight loss supplement as ‘safe, healthy, and appropriate for consumption.’ ”<sup>166</sup> Plaintiff contended, however, “that Defendant misrepresented the safety of its Dexatrim products by failing to disclose that Dexatrim contains a particularly dangerous type of chromium called hexavalent chromium.”<sup>167</sup> Hexavalent chromium is allegedly a “toxic form of chromium that is a product of industrial pollution.”<sup>168</sup>

Plaintiff brought suit against Defendant, emphasizing that Defendant had knowledge of the dangerous chemical in the product, knew that the chemical increased the risk of serious medical conditions, and knew that it was a material fact to which a reasonable person would attach importance in choosing whether or not to purchase Dexatrim.<sup>169</sup> Plaintiff further alleged that had she known the true contents of the product she would not have purchased it.<sup>170</sup> Defendant contended that Plaintiff had not pleaded an injury sufficient to bring such a claim, specifically in regards to sufficient economic loss from the product.<sup>171</sup> The court determined that cases involving allegations of misbranding of foods “typically rely on two types of injuries to confer standing: first, the increased risk of harm from exposure to a dangerous substance, and second, a financial loss from purchasing a product in reliance on false or misleading information.”<sup>172</sup> The court found that Plaintiff’s injury was the second type, “focusing exclusively on the money Plaintiff lost from her initial sales transaction.”<sup>173</sup> The court established that an allegation that a Plaintiff would not have purchased a product if it has been labeled accurately was sufficient to establish injury under consumer laws.<sup>174</sup> Thus, the court found that the allegations were sufficient to establish standing due to Plaintiff’s economic injury.<sup>175</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1074-1075.

<sup>170</sup> *Id.* at 1076.

<sup>171</sup> *Id.* at 1075.

<sup>172</sup> *Id.* at 1076.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Absent a labeling scheme by the manufacturers, similar economic harm occurs as people must buy products more often because they are under the belief that the food is not edible due to the misleading date label.<sup>176</sup> These are the same damages the legislature and the judiciary through interpretation and application, sought to protect against.<sup>177</sup> Having economic damages caused by a lack of labeling is further justification for a federal labeling system.<sup>178</sup>

Applying today's labeling system to the reasonable consumer test highlights the indisputable evidence that misleading federal law contains similar elements and interests when applied to the current labeling system, and thus the current labeling system could violate FDA and USDA regulations.<sup>179</sup> First, it is clear that current labeling practices leave consumers with the same inaccurate understanding as an individual manufacturer intentionally putting a false statement on food.<sup>180</sup> These date labels come in dizzying varieties of forms depending on the state and the manufacturers' standards, yet they are all badly misunderstood and misleading to the majority of consumers.<sup>181</sup> Consumers seem to overly rely on date labels, leading them to actually ignore more prominent methods of determining food safety because they have no other means to reference the meaning of the dates.<sup>182</sup> Finally, this misleading belief that past-date food is unsafe to consume causes the exact economic damage that misleading laws was designed to protect consumers against.<sup>183</sup>

Even though courts have the power to deem individual date labels misleading, the federal government should implement a standardized food expiration date labeling policy to help consumers minimize food waste.<sup>184</sup> The system should be one of common sense, labeling food

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<sup>176</sup> See generally NRDC, *supra* note 13, at 19; In the *Williams* case, the consumer prevailed, despite appellee's argument that the nutritional information in question was present somewhere else on the label; often times, date labels are presented to consumers with a smaller amount of information available to them *Williams*, 552 F.3d at 939.

<sup>177</sup> *Jones*, 912 F.Supp.2d at 901; see 21 U.S.C.A. § 343 (West 2012).

<sup>178</sup> See NRDC, *supra* note 13, at 19.

<sup>179</sup> See § 343.

<sup>180</sup> See WRAP, *supra* note 79, at 2.3.

<sup>181</sup> See E. RESEARCH GRP., INC., *supra* note 75, at 4-12.

<sup>182</sup> See NRDC, *supra* note 13, at 19.

<sup>183</sup> *Arroyo*, 926 F.Supp.2d at 1076; see 21 U.S.C.A. § 343 (West 2012).

<sup>184</sup> See § 343; NRDC, *supra* note 13, at 26.

the same way when dealing with similar products throughout the United States.<sup>185</sup>

## VI. RECOMMENDATIONS

A new date labeling system should be created, which requires uniform language that is clearly communicated and understood by consumers.<sup>186</sup> One change would be to make “sell by” dates hidden from consumers since their purpose is purely business-to-business labeling information which misleads consumers into thinking that these are safety dates.<sup>187</sup> Also, removing dates from food that is nonperishable would help prevent food waste and put more of an emphasis on the foods that do have dates.<sup>188</sup> The government needs to step in and create a more uniform, easily understandable date labeling system that communicates with consumers by using clear and reliable language.<sup>189</sup> Such language should unambiguously differentiate between safety and quality-based dates and should have a predictable location for dates on the packaging.<sup>190</sup> Such predictability would create a set method that manufacturers and retailers can use, and consumers can then research how dates are selected for products.<sup>191</sup> The federal government should also increase the use of safe-handling instructions that would provide clear, pertinent food safety information alongside date labels.<sup>192</sup> If the federal government does step in and change the date labeling system, it must ensure that they comply with already established federal laws that are similar to manufacturer mislabeling laws.<sup>193</sup> The federal government can avoid misleading consumers by utilizing the elements and interests in the reasonable consumer test when looking at different systems to apply and ensure that all material

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<sup>185</sup> See DOBBS ET AL., *supra* note 27, at 154.

<sup>186</sup> See JOINT INDUS. UNSALEABLES LEADERSHIP TEAM, FOOD MKTG. INST. & GROCERY MFR. ASS'N./FOOD PROD. ASS'N, *IMPROVING THE SUPPLY CHAIN PRACTICES FOR OPEN DATED PRODUCTS* 7 (2007) [hereinafter FOOD MKTG. INST.].

<sup>187</sup> See, e.g., WRAP, *supra* note 79, at 1.2.

<sup>188</sup> NRDC, *supra* note 13, at 3.

<sup>189</sup> See, e.g., WRAP, *supra* note 79, at 1.1.

<sup>190</sup> See FOOD MKTG. INST., *supra* note 189, at 17.

<sup>191</sup> See generally WRAP, *supra* note 79, at 2.3. (notably, USDA regulations currently allow manufacturers to optionally include this kind of “qualifying” language on their date labels).

<sup>192</sup> See WRAP, *supra* note 79, at 4.5; GUNDERS, *supra* note 1, at 12-13.

<sup>193</sup> See LABUZA & SZYBIST, *supra* note 16, at 5.

information about the product is given to the consumer before a purchase is made.<sup>194</sup>

### A. What Consumers Can Do

Americans can help reduce waste by learning about when food goes bad, buying imperfect produce, storing, and cooking food.<sup>195</sup> American families contribute to food waste by throwing away about 160 billion pounds of the food and drinks they buy.<sup>196</sup> An average family of four throws out \$1,365 to \$2,275 in food waste annually.<sup>197</sup> Wiser shopping, including meal planning and grocery lists that are followed, can combat consumers' financial loss and help lower food waste.<sup>198</sup> Consumers can restrict how much food they purchase from the store.<sup>199</sup> Increasingly popular bulk purchasing should be discouraged because of the waste that occurs as a consequence.<sup>200</sup> Even though many of the changes that consumers can make are simple and seen as common sense to most, they are still not being done, and food waste has become a massive global problem that is having negative humanitarian, environmental, and financial implications.<sup>201</sup> A lack of food is not the problem.<sup>202</sup> The problem is the way that America produces food waste.<sup>203</sup>

## VII. CONCLUSION

A uniform date system will ultimately further the intent of the Emerson Act by making more food available to be donated and by minimizing food waste.<sup>204</sup> Rather than spending time, energy, and resources on supporting initiatives that have never solved the problem, the government should have uniform language that clearly

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<sup>194</sup> See NRDC, *supra* note 13, at 24.

<sup>195</sup> See generally KITCHEN COMPANION: YOUR SAFE FOOD HANDBOOK, U.S. DEP'T AGRIC. 1 (2008) (outlining different ways to ensure food safety through informing consumers).

<sup>196</sup> See NRDC, *supra* note 13, at 3.

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., *Kitchen Companion*, *supra* note 198, at 8-10.

<sup>199</sup> *Id.* at 8.

<sup>200</sup> *Id.*

<sup>201</sup> See *Wastes: Reducing Food Waste for Businesses*, *supra* note 17, at 1.

<sup>202</sup> See BUZBY & HYMAN, *supra* note 4, at 569.

<sup>203</sup> *Id.*

<sup>204</sup> See *id.* at 568.

communicates to consumers the meaning of dates as well as other food safety and handling information.<sup>205</sup> If the federal government made food date laws uniform across the nation, the food industry would have a single legal standard instead of individual state laws.<sup>206</sup> This would also ensure that consumers are provided consistent and coherent messages from food dates state-to-state.<sup>207</sup> With better laws, more information, and smarter practices, we can begin to reduce food waste and make our food system safer and more sustainable.<sup>208</sup>

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<sup>205</sup> See NRDC, *supra* note 13, at 3.

<sup>206</sup> *Id.*

<sup>207</sup> See generally LABUZA & SZYBIST, *supra* note 16, at 63. (arguing the current date labeling system that is regulated by individual states has not improved the consumers' understanding of the dates).

<sup>208</sup> BUZBY & HYMAN, *supra* note 4, at 562.

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