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## Food Date Labels and Hunger in America

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# STUDENT COMMENT

## FOOD DATE LABELS AND HUNGER IN AMERICA

*Gwen B. Thomson\**

*Millions of Americans go hungry, while 40% of the food in the United States is wasted. Research has shown that 43% of the waste occurs in homes and that consumers are making decisions about purchasing and throwing away food without understanding the meaning of the food date labels. One of the most cost-effective ways to begin to effect a change is to eliminate the myriad of confusing food date labels so that individuals do not throw away good food. In May 2016, the Food Date Labeling Act of 2016 was proposed in both houses of Congress. This bicameral bill was drafted with the assistance of food industry experts and would provide federal oversight of food date labeling, reducing the number of labels allowed and removing state regulations prohibiting food banks' use of food with expired quality dates. This Comment evaluates the effectiveness of the proposed legislation in light of reducing food waste. While the Act includes many positive attributes, arguably its effectiveness would be enhanced if it allowed only for safety-based food labels and eliminated quality-based labels.*

### INTRODUCTION

Food waste is a complex and far reaching issue. More than 40% of food is wasted each year in the United States,<sup>1</sup> at a cost of \$218 billion.<sup>2</sup> This

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<sup>1</sup> *Food Waste from Field to Table: Hearing on H.R. 5298 Before the H. Comm. on Agric.*, 114th Cong. 10 (2016) (statement of Dana Gunders, Senior Scientist, Food and Agriculture Program, Natural Resources Defense Council) (“[I]magine walking out of the grocery store with five bags of groceries, dropping two in the parking lot, and not bothering to pick them up. It seems crazy, but that is essentially what we are doing today across the country where we are wasting 40 percent of all of our food. We are leaving entire fields unharvested and eliminating produce solely for its looks. We are serving massive portions, throwing out food just because it has passed its sell by date, and eating out instead of eating what is in our fridge.”).

<sup>2</sup> REFED, A ROADMAP TO REDUCE U.S. FOOD WASTE BY 20 PERCENT 5 (2016), [https://www.refed.com/downloads/ReFED\\_Report\\_2016.pdf](https://www.refed.com/downloads/ReFED_Report_2016.pdf).

equals about 400 pounds of food per year for each American.<sup>3</sup> Yet one in seven Americans is food insecure,<sup>4</sup> including 13.1 million children.<sup>5</sup> Wasted food rotting in landfills is a significant contributor to greenhouse gas emissions,<sup>6</sup> and the country uses one quarter of its fresh water and 300 million barrels of oil to grow this unused food.<sup>7</sup>

Multiple solutions are needed to address the magnitude and complexity of the food waste problem. Arguably, one of the most cost-effective solutions is to replace the hodgepodge of current food date label schemes with a simple, unified program overseen by the federal government. A successful centralized food date labeling program will direct activities and influence the behavior of businesses, consumers, and government officials to reduce food waste and hunger in America.

In May 2016, with the support of the food industry and food researchers, the Food Date Labeling Act was introduced in both houses of Congress.<sup>8</sup> This legislation provides federal oversight of food date labeling, reduces the number of allowed food date labels, and removes any state regulations prohibiting food banks' use of foods past the quality date.<sup>9</sup> This Comment will evaluate the proposed Food Date Labeling Act in light of reducing food waste. Although the Act includes many positive attributes, its effectiveness would be enhanced if it allowed only food safety date labels and eliminated all discretionary date labels for food quality.

Part II examines the scope of the food waste problem in the United States and discusses the link between food waste and food date labeling. This

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> ALISHA COLEMAN-JENSEN ET AL., USDA, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2015 6–7 (2016), <https://www.ers.usda.gov/webdocs/publications/err215/err-215.pdf?v=42636>. Food insecure households had difficulty in providing enough food for everyone in the home due to strained financial resources. *Id.*

<sup>6</sup> Megan Cronin, *Wasted: A Failure of Food Waste Reduction and Pollution Prevention*, GEO. ENVTL. L. REV. ONLINE (Jan. 8, 2016), <https://gehr.org/2016/01/08/wasted-a-failure-of-food-waste-reduction-and-pollution-prevention/>.

<sup>7</sup> Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, PLOS ONE (Nov. 25, 2009), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0007940>. In total, agriculture uses about 70% of the freshwater supply in the United States. *Id.*

<sup>8</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. (2016); Food Date Labeling Act of 2016, S. 2947, 114th Cong. (2016). For the sake of simplicity, this Comment will only refer to the House version of the bill. With the exception of the cover pages, the bills are identical.

<sup>9</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 4 (2016).

section will also include an overview of the current regulatory environment. Part III examines the pending Food Date Labeling Act of 2016, developing a framework of key factors to be used to examine food date labeling; the strengths and weaknesses of the proposed Food Date Labeling Act will then be considered under this framework. Part IV proposes a modification to the language of the bill and suggests removing the optional food quality dates. Next, Part V explores possible arguments against the proposed modification to the Act. Finally, Part VI concludes by showing that a modified version of the Food Date Labeling Act, which omits food quality dates, is more effective than the proposed Act currently under consideration by Congress.

### I. BACKGROUND INFORMATION

Food waste increases hunger and creates environmental problems. This Part will explore the scope of the food waste problem, the link between food waste and food date labeling, and the existing regulatory environment for food date labels.

#### A. *Scope of the Food Waste Problem*

Worldwide approximately 793 million people go hungry<sup>10</sup> and food waste per year is estimated at 1.3 gigatonnes<sup>11</sup> as compared to six gigatonnes

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<sup>10</sup> The Food and Agriculture Organization (FAO) reported “about 793 million people were undernourished in 2015, down 167 million over the last decade.” U.N. FOOD & AGRIC. ORG., THE STATE OF FOOD INSECURITY IN THE WORLD 2015: KEY MESSAGES (2015), <http://www.fao.org/hunger/key-messages/en/>. However, the reliability of the statistics was severely questioned by Jason Hickel, *The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals*, 37 THIRD WORLD Q. 749, 750 (2016), <http://www.tandfonline.com/doi/full/10.1080/01436597.2015.1109439>. Hickel argues that the FAO changed its baselines and methodology in counting hunger in response to pressure to meet the Millennium Development Goals established in 1996. *Id.* In addition, the FAO definition of hunger only includes hunger that lasts for over a year. *Id.* at 760. Thus, someone who is hungry for eleven months will not be included in the FAO statistics. *Id.* The FAO figures also assume “extreme caloric deprivation” and that many poor must engage in “arduous manual labor,” requiring higher than normal caloric intake to sustain. *Id.* at 759. Hickel states that if hunger is measured by the calories required for normal activity, the number of hungry is 1.5 million; by calories needed for intense activity, 2.5 million. *Id.* The debate over the reliability of the statistics is beyond the scope of this paper.

<sup>11</sup> A gigatonne is equal to 1 billion metric tons and there are 2.2 tons in 1 metric ton. METRIC CONVERSIONS, <https://www.metric-conversions.org> (last visited Mar. 4, 2017). Unless otherwise noted, all measurements assume U.S. units of measure.

of total food production.<sup>12</sup>

In the United States, 62.5 million tons of food are wasted each year, of which 52.4 million tons are sent to landfills and 10.1 million tons are on-farm loss.<sup>13</sup> Forty-three percent of waste occurs in homes.<sup>14</sup> Yet 42.2 million people lived in food insecure households in 2015, including 13.1 million children.<sup>15</sup> The value of this wasted food is estimated at \$218 billion per year, costing consumers \$144 billion.<sup>16</sup> This waste costs an average American family between \$1,365 and \$2,275 per year.<sup>17</sup> Approximately 80% of the waste comes from perishable foods, which include meats, dairy products, fruits and vegetables, and bakery goods.<sup>18</sup> Non-perishable goods, such as canned goods, pastas, and other shelf-stable products, make up the remainder.<sup>19</sup> Reducing total food waste by just 15% would provide enough food for 25 million Americans.<sup>20</sup>

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<sup>12</sup> U.N. FOOD & AGRIC. ORG., FOOD WASTAGE FOOTPRINT: IMPACTS ON NATURAL RESOURCES SUMMARY REPORT 11 (2013), <http://www.fao.org/docrep/018/i3347e/i3347e.pdf>.

<sup>13</sup> REFED, *supra* note 2, at 10. Farm loss occurs when it is uneconomical for farmers to harvest due to low market prices and/or high labor costs, or the produce is imperfect in appearance and not marketable due to cosmetic standards. *Id.* at 14. Most of this unharvested food is left in the fields and tilled under. *Id.*

<sup>14</sup> *Id.* at 13. By weight, twenty-seven million tons of waste occurs in homes. *Id.* Another twenty-five million tons (40%) of waste occurs in consumer-facing businesses. *Id.* Consumer-facing businesses include distributors, retail grocers, restaurants, food service providers, and institutions. *Id.*

<sup>15</sup> COLEMAN-JENSEN ET AL., *supra* note 5, at 6–7. In the U.S., 12.7% of households were food insecure in 2015, and five percent of households had very low food security. *Id.* Children were food insecure in three million (7.8%) households. *Id.* In severely food insecure households, some members had to reduce their food intake due to limited resources. *Id.* The USDA notes that the 2015 results were an improvement in the figures from the high of 14.9% of food insecure households in 2011 and 14% in 2014. *Id.*

<sup>16</sup> REFED, *supra* note 2, at 13. In addition to high volumes of waste in the home, the cost to consumers includes the higher retail costs passed on from consumer-facing businesses. *Id.*

<sup>17</sup> EMILY BROAD LEIB ET AL., THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA 5 n.11 (2013), <http://www.nrdc.org/sites/default/files/dating-game-report.pdf> (citing JONATHAN BLOOM, AMERICAN WASTELAND 187 (2011)).

<sup>18</sup> REFED, *supra* note 2, at 14.

<sup>19</sup> *Id.* According to the USDA, canned goods are safe indefinitely as long as they are not exposed to freezing temperatures or temperatures above 90° F (32.2° C). USDA, FOOD PRODUCT DATING (2016), [http://www.fsis.usda.gov/wps/wcm/connect/19013cb7-8a4d-474c-8bd7-bda76b9defb3/Food\\_Product\\_Dating.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/19013cb7-8a4d-474c-8bd7-bda76b9defb3/Food_Product_Dating.pdf?MOD=AJPERES). If the cans look okay, they are safe to use. *Id.* “Discard cans that are dented, rusted, or swollen.” *Id.*

<sup>20</sup> DANA GUNDERS, WASTED: HOW AMERICA IS LOSING UP TO 40 PERCENT OF ITS FOOD FROM FARM TO FORK TO LANDFILL 4 (2012), <https://www.nrdc.org/sites/default/files/wasted-food-IP.pdf>.

In addition to diverting food from the hungry, food waste has significant environmental consequences. Worldwide, the carbon footprint of wasted food rotting in landfills is about the equivalent of 3.3 gigatonnes of carbon dioxide.<sup>21</sup> Twenty-five percent of America's fresh water<sup>22</sup> and 300 million barrels of oil are used to produce food that is later wasted.<sup>23</sup> Food waste contributes not only to widespread hunger but also raises ominous environmental concerns.

#### B. *Food Waste and Food Date Labeling*

Current food date labeling practices are a significant factor in food waste. Food waste is linked to food labeling because consumers use labels to make decisions about what food to buy and whether to throw food away. A recent study found that 37% of Americans say they always or usually throw food away because it is close to or past the date on the package, and 84% of consumers throw food away based on the date labels at least occasionally.<sup>24</sup>

Consumers are confused about what the date labels mean: 70% believe that "best if used by" was a label indicating food quality, 42% of consumers thought "use by" was an indication of food safety, and 40% thought that it was a food quality label.<sup>25</sup> The decision to throw away food past the "use by" date depends on the food. Consumers were most cautious about three foods: raw chicken—69% always or most of the time throwing it away past the date; pasteurized milk—59% always or most of the time; and deli meat—61% always or most of the time.<sup>26</sup> However, of these concerning foods, only deli meat has been shown to increase risk of serious illness if

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<sup>21</sup> U.N. FOOD & AGRIC. ORG. *supra* note 12, at 6. If food waste was a country, it would rank as the third largest emitter of carbon dioxide in the world, behind the U.S. and China. *Id.* In addition, produced but uneaten food uses almost 30% of the world's agricultural land area and contributes to biodiversity loss as agriculture expands in an effort to produce sufficient food. *Id.*

<sup>22</sup> LEIB ET AL., *supra* note 17, at 5 n.9 (citing Hall et al., *supra* note 7).

<sup>23</sup> Hall et al., *supra* note 7.

<sup>24</sup> EMILY BROAD LEIB ET AL., CONSUMER PERCEPTIONS OF DATE LABELS: NATIONAL SURVEY 2 (2016), [http://www.comunicarseweb.com.ar/sites/default/files/consumer-perceptions-on-date-labels\\_may-2016.pdf](http://www.comunicarseweb.com.ar/sites/default/files/consumer-perceptions-on-date-labels_may-2016.pdf).

<sup>25</sup> *Id.* Usually, "best if used by," "best by," and "freshest by" are labels that indicate food quality. *Id.* at 1. "Expires on" and "use by" are labels that indicate food safety. *Id.* "Sell by" is a label for information to stores. *Id.* However, some states have different definitions for the labels, adding to confusion. *Id.* See *infra* notes 48–51 and p. 151–2.

<sup>26</sup> *Id.* at 3.

consumed after the label date.<sup>27</sup> In general, microbiological safety hazards are linked to processing and storage issues, not age.<sup>28</sup>

Almost 70% of consumers erroneously believe that throwing food away after the package date expires reduces the risk of foodborne illness.<sup>29</sup> Almost 60% believe that some food waste is necessary to ensure fresh-tasting meals.<sup>30</sup> However, more than 75% agreed or strongly agreed that they felt guilty throwing food away.<sup>31</sup> Researchers have concluded that removal of “sell by” dates would help reduce confusion over the perceived tradeoff between food waste and the risk of foodborne illness.<sup>32</sup>

The research shows that consumers are making decisions about purchasing and throwing away food without understanding the meaning of the food date labels. As a result of this confusion, an estimated \$29 billion of food is lost each year in the United States.<sup>33</sup> Standardizing date labels could reduce this waste by five to ten percent.<sup>34</sup>

### C. *Existing Regulatory Environment*

The USDA provides some general guidelines for product dating, but notes: “There are no uniform or universally accepted descriptions used on food labels for open dating in the United States.”<sup>35</sup> While federal administrative departments do have the authority to regulate food date labeling, they have chosen not to do so.<sup>36</sup> Without a central federal regulatory

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<sup>27</sup> LEIB ET AL., *supra* note 17, at 21. Deli meats and un-reheated frankfurters have a high risk of contamination by *Listeria monocytogenes*, which can cause serious illness in those with reduced immune systems. *Id.*

<sup>28</sup> *Id.* at 20.

<sup>29</sup> Danyl Qi & Brian E. Roe, *Household Food Waste: Multivariate Regression and Principal Components Analyses of Awareness and Attitudes Among U.S. Consumers*, PLOS ONE (July 21, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0159250>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> REFED, *supra* note 2, at 33.

<sup>34</sup> *Id.*

<sup>35</sup> USDA, *supra* note 19. There is one exception: federal regulations do require a “use by” date on infant formula labels. *Id.*

<sup>36</sup> LEIB ET AL., *supra* note 17, at 11. A number of federal initiatives to reduce food waste have arisen in recent years. *USDA and EPA Join with Private Sector, Charitable Organizations to Set Nation’s First Food Waste Reduction Goals*, USDA (Sept. 16, 2015), <https://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/09/0257.xml>; *USDA and EPA Launch U.S. Food Waste Challenge*, USDA (June 4, 2013), <https://www.usda.gov/2013>

scheme, many states have taken it upon themselves to create their own food date labeling regimes. These regimes vary widely from state to state and include an often-bewildering array of labels and requirements.<sup>37</sup> This section will discuss the existing federal and state regulatory environment.

Three federal agencies are involved in regulating food in the United States.<sup>38</sup> The Food and Drug Administration (FDA) has authority to regulate the safety of all food except meat, poultry, and some fish;<sup>39</sup> the United States Department of Agriculture (USDA) has authority to regulate meat, poultry, and certain egg products;<sup>40</sup> and the Federal Trade Commission (FTC) has authority to prevent unfair acts affecting commerce.<sup>41</sup> The authority of each of these agencies extends to the mislabeling of foods.<sup>42</sup> The penalty for mislabeling foods is typically imprisonment of not more than one year and a fine of not more than \$1,000 for the first offense and imprisonment of not more than three years and a fine of not more than \$10,000 for intentional

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/06/0112.xml. One of the first initiatives was the 1996 Bill Emerson Good Samaritan Act, which limits liability of businesses donating food. 42 U.S.C. § 1791 (2010). There are also federal tax deductions for food donations in the Internal Revenue Code. 26 U.S.C.A. § 170(e)(3)(C) (West 2016). The Federal Food Donation Act of 2008 encourages federal agencies and contractors to donate excess food. 42 U.S.C.A. § 1792 (West 2016).

<sup>37</sup> LEIB ET AL., *supra* note 17, at 12–13.

<sup>38</sup> *Id.* at 8–9. Congress relies on the Commerce Clause of the U.S. Constitution for its power to regulate food sold in interstate commerce. *Id.* at 8. Although Congress has delegated authority to the agencies to ensure food safety, it has never mandated a national regulatory scheme for food date labeling. *Id.* at 9.

<sup>39</sup> Fish, fishing, and aquaculture are subject to a multitude of regulations by the FDA. *E.g.*, 21 C.F.R. § 123 (2016); 9 C.F.R. § 531 (2016). The U.S. Department of Commerce’s National Marine Fisheries Service, an agency within the National Oceanic and Atmospheric Administration, is also involved in regulating fish for food. NAT’L MARINE FISHERIES SERV., <https://www.usa.gov/federal-agencies/national-marine-fisheries-service> (last visited Mar. 4, 2017). FDA statutory authority: Food, Drug, and Cosmetic Act of 1938, Nutritional Labeling and Education Act of 1990, Fair Packaging and Labeling Act of 1966, Infant Formula Act of 1980, and Food Safety Modernization Act of 2011. LEIB ET AL., *supra* note 17, at 9–10. FDA has broad authority to regulate misleading labels under the Food, Drug, and Cosmetic Act, which prohibits “adulteration or misbranding of any food.” *Id.* at 9.

<sup>40</sup> *Id.* at 9–10. USDA statutory authority: Poultry Products Inspection Act of 1957, Federal Meat Inspection Act of 1906, Egg Products Inspection Act of 1970, Perishable Agricultural Commodities Act of 1930, Agricultural Marketing Act of 1946. *Id.* USDA also has power to regulate misleading labels for all products within its authority through its Food Safety and Inspection Service (FSIS). *Id.*

<sup>41</sup> *Id.* at 9–10. FTC statutory authority: Federal Trade Commission Act of 1914 to prevent “unfair methods of competition” or “unfair or deceptive acts or practices in or affecting commerce.” *Id.* at 10. The FTC and FDA have joint authority under Fair Packaging and Labeling Act. *Id.*

<sup>42</sup> *Id.* at 9–10.



fraud.<sup>43</sup> With a few minor exceptions, such as the USDA requirement for “pack dates” on eggs, these agencies have not chosen to use their authority to regulate date labels.<sup>44</sup>

States are not explicitly preempted from creating food date label regulations.<sup>45</sup> A lack of preemptive federal laws has led to a confusing hodgepodge of state regulation of food date labels. Forty-one states plus the District of Columbia have laws requiring date labels on some foods, and 20 states regulate the sale of foods past some label dates.<sup>46</sup> The laws not only vary from state to state, but from food to food within a state.<sup>47</sup> For example, in Georgia, “pull date,” “best-by date,” “best before date,” “use by date,” and “sell by date” are all considered synonymous with “expiration date,” defined as the last date certain foods can be sold at the retail or wholesale level.<sup>48</sup> In contrast, Massachusetts distinguishes between “best if used by date,” representing the expiration of the food’s shelf life, and “sell by date,” representing a recommended last date of sale, assuming a reasonable subsequent shelf life.<sup>49</sup>

Alabama provides for “date limits,” defined as terms “reasonably construed to mean food is not intended to be used or sold after the date limit

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<sup>43</sup> Mislabeling food under the Federal Food, Drug, and Cosmetic Act is prohibited. 21 U.S.C. § 331(a)–(c) (2015); 21 U.S.C. § 333(a) (2015). For the second offense or “a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000 or both.” 21 U.S.C. § 333(a) (2015). A similar punishment exists under the Poultry Inspection Act, but, in addition to intent, the increased penalty applies to attempting to or distributing an adulterated product, not a second offense. 21 U.S.C. § 461 (2011). A violator of the Egg Products Inspection Act would be subject to imprisonment of not more than one year and/or a \$5,000 fine, increased to not more than three years’ imprisonment and/or \$10,000 fine for intent to defraud or adulterated product. 21 U.S.C. § 1041(a) (2011). Under the Federal Meat Inspection Act, the Secretary of Agriculture may have the product withheld from the market, subject to a request for hearing by the violator under and subject to the same penalty as for poultry. 21 U.S.C. § 607(e) (1997); 21 U.S.C. § 676 (2010). Interestingly, the penalties for bribing a meat inspector are the same as for mislabeling food. 21 U.S.C. § 622 (2010); 21 U.S.C. § 333(a) (2015).

<sup>44</sup> LEIB ET AL., *supra* note 17, at 12.

<sup>45</sup> Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, § 2 (“This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>46</sup> LEIB ET AL., *supra* note 17, at 12–13. Only Idaho, Nevada, South Dakota, Nebraska, Missouri, Tennessee, and New York have no food date labeling laws. *Id.*

<sup>47</sup> *Id.* at 12.

<sup>48</sup> GA. COMP. R. & REGS. 40-7-1.02 (2013).

<sup>49</sup> 105 MASS. CODE REGS. 520.119 (2013).

or that food quality is best before the date limit.”<sup>50</sup> Alabama’s regulations provide seven examples of terms but do not limit the possibilities.<sup>51</sup> The regulations also provide for six standard and 14 additional “open date statements,” but the State’s distinction between “date limits” and “open date statements,” if any, is unclear.<sup>52</sup> Ironically, Alabama does not require date labels, even on potentially hazardous foods (with the exception of federally regulated baby formula) but has made it illegal to sell foods beyond their undefined and nearly unlimited open date statements.<sup>53</sup>

Consumers are confused by the meaning and significance of the existing patchwork quilt of state-regulated date labels: this results in wasted food, global warming, and the depletion of other precious resources such as water and oil. A national standardized food date label program could be one of the most cost-effective ways to correct this confusion and reduce food waste.<sup>54</sup>

## II. STANDARDIZING FOOD DATE LABELS

To address the problem of food waste caused by current labeling schemes, the Food Date Labeling Act of 2016 has been proposed in both houses of Congress.<sup>55</sup> This Part examines the substance of this Act and uses the current body of research as a framework for evaluating the Act’s effectiveness as a standardized food date labeling scheme.

### A. *Analysis of Pending Federal Legislation*

U.S. Senator Richard Blumenthal (D-CT) and Congresswoman Chellie Pingree (D-ME) introduced bicameral legislation to standardize food

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<sup>50</sup> ALA. ADMIN. CODE r. 420-3-22.01 (2013); ALA CODE § 20-1-20 (2013) (concerning definitions); ALA ADMIN. CODE r. 80-1-22.33 (2013) (regarding set of terms that are considered open date statements).

<sup>51</sup> ALA. ADMIN. CODE r. 420-3-22.01 (2013).

<sup>52</sup> Open date labeling refers to readable dates on food labels for store employees and consumers. Rosetta Newsome et al., *Applications and Perceptions of Date Labeling of Food*, 13 COMPREHENSIVE REVIEWS IN FOOD SCI. & FOOD SAFETY INST. OF FOOD TECHNOLOGISTS 745, 746 (2014), <http://onlinelibrary.wiley.com/doi/10.1111/1541-4337.12086/full>. Manufacturers also place closed date labels on food, typically products with long shelf life, to manage stock and for product tracing or recall. *Id.*

<sup>53</sup> USDA, *supra* note 19; *see also* ALA. ADMIN. CODE r. 420-3-22.01 (2013).

<sup>54</sup> Standardizing food date labels is one of the top three solutions to food waste reported by REFED. REFED, *supra* note 2, at 5.

<sup>55</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. (2016).

date labeling, known as the Food Date Labeling Act of 2016, in May 2016.<sup>56</sup> Food-policy advocates and food-industry leaders supported the legislation.<sup>57</sup> The proposal reduces the number of possible food labels to two: “best if used by” and “expires on.”<sup>58</sup> The “best if used by” date is considered a quality date and can be used at the discretion of the food labeler.<sup>59</sup> However, the “expires on” date is defined as a safety date and is required for any ready-to-eat product that has a high risk of foodborne illness if consumed after a certain date.<sup>60</sup> The Act also states: “No one shall prohibit the sale, donation, or use

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<sup>56</sup> *Id.* This bicameral legislation was introduced in the House of Representatives on May 18, 2016, and in the Senate on May 19, 2016. *H.R. 5298 – Food Date Labeling Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5298?q=%7B%22search%22%3A%5B%22hr+5298%22%5D%7D&r=1> (last visited Mar. 4, 2017). The legislation was then referred to committee: in the Senate, the Committee on Health, Education, Labor, and Pensions; in the House, the Committee on Energy and Commerce and the Committee on Agriculture. *Id.*

<sup>57</sup> Anne Marie Mohan, *Legislation Proposed to Standardize Food Date Labeling*, PACKAGING WORLD (May 23, 2016), <http://www.packworld.com/print/63853>. Steve Armstrong, Chief Food Counsel at Campbell Soup Company, and Paul Bakus, President of Corporate Affairs at Nestle, attended the press conference announcing the legislation, along with Dana Gunders of the Natural Resources Defense Council and Emily Broad Lieb of the Harvard Food Law and Policy Clinic. *Id.*

<sup>58</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 3 (2016).

<sup>59</sup> *Id.* § 4. The bill distinguished between safety and quality dates. *Id.* “The term ‘safety date’ means a date printed on food packaging of a ready-to-eat product, which signifies the end of the estimated period of shelf life under any stated storage conditions, after which the product may pose a health safety risk.” *Id.* § 3. When required under the statute, safety dates are designated by the phrase “expires on.” *Id.* “The term ‘quality date’ means a date voluntarily printed on food packaging that is intended to communicate to consumers the date after which the quality of the product may begin to deteriorate, but may still be acceptable for consumption.” *Id.* Optional quality dates on food packaging are allowed using the phrase “best if used by.” *Id.* § 4.

<sup>60</sup> *Id.* The Act calls for the following:

The administering Secretaries [the Secretary of Agriculture and the Secretary of Health and Human Services], acting jointly shall describe criteria that determine what ready-to-eat products may have a high level of risk associated with consumption after a certain date, including those that may be high or very high risk for *Listeria monocytogenes* or other contaminants or pathogens causing foodborne illness.

*Id.* The USDA advises that ready-to-eat foods such as hot dogs, luncheon meats, cold cuts, and other deli-style meats are associated with *Listeria monocytogenes*. USDA, *supra* note 19. The pathogen can cause serious illness or even death in at-risk individuals (pregnant women, newborns, older adults, and people with weak immune systems). USDA, *FOODBORNE ILLNESS: WHAT CONSUMERS NEED TO KNOW* (2011), [http://www.fsis.usda.gov/wps/wcm/connect/602fab29-2afd-4037-a75d-593b4d7b57d2/Foodborne\\_Illness\\_What\\_Consumers\\_Need\\_To\\_Know.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/602fab29-2afd-4037-a75d-593b4d7b57d2/Foodborne_Illness_What_Consumers_Need_To_Know.pdf?MOD=AJPERES).

of any product after the [best if used by] date for the product has passed.”<sup>61</sup> Although states are still allowed to establish their own rules prohibiting the sale or donation of food after the “expires on” date, the Act preempts all other state food labeling schemes.<sup>62</sup>

Compliance with the proposed statute would be enforced by a coordinated effort between the USDA, the FDA, and the FTC.<sup>63</sup> Existing regulations will be amended to add violations under the Act to the current food labeling provisions.<sup>64</sup> In the case of the “best if used by” date, the statute is violated by using the incorrect phrase on the label, placing the label in an inconspicuous place, or using an incorrect format.<sup>65</sup> However, the Act does not preclude “any State or Federal common law rights, or any State or Federal statute creating a remedy for civil relief, including those for civil damage, or a penalty for criminal conduct.”<sup>66</sup> This could provide an opportunity to challenge misleading date labels in the courts.

#### B. *Framework*

To reduce food waste, the primary goal of the proposed legislation should be to create a simple, cohesive, and unified food labeling system. An effective system will meet four requirements. First, the number of possible food date label descriptors will be dramatically limited. Second, the remaining labels should be clearly differentiated from each other. Third, organizations and consumers should be able to rely on a label’s meaning to make decisions about the food. Finally, a single federal law must preempt state statutes.

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<sup>61</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 4 (2016).

<sup>62</sup> *Id.* (“No State or political subdivision of a State may establish or continue in effect any requirement that—(A) relates to the inclusion in food labeling of a quality date or a safety date that is different from or in addition to, or that is otherwise not identical with, the requirements under this section; or (B) prohibits the sale or donation of food based on passage of the quality date.”).

<sup>63</sup> *Id.* This is not the first time these departments have coordinated their efforts; for example, the FDA and the FTC work together to administer the Egg Products Inspection Act. LEIB ET AL., *supra* note 17, at 9.

<sup>64</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 5 (2016). The portions of the code to be amended include: section 403 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343; section 4(h) of the Poultry Products Inspection Act, 21 U.S.C. § 453(h); section 1(n) of the Federal Meat Inspection Act, 21 U.S.C. § 601(n); and section 7(b) of the Egg Products Inspection Act, 21 U.S.C. § 1036(b). *Id.*

<sup>65</sup> *Id.* § 4.

<sup>66</sup> *Id.*

This framework is a synthesis of the research compiled by ReFED in *A Roadmap to Reduce U.S. Food Waste by 20 Percent*.<sup>67</sup> ReFED, a collaboration of 30 leaders of businesses, nonprofits, government agencies, and foundations, plus 80 experts in the food-industry field, issued a report on food waste in the United States in March of 2016.<sup>68</sup> ReFED gathered data on food waste, came up with 27 possible solutions, and evaluated each on a cost/benefit basis.<sup>69</sup> The Roadmap showed a way to reduce food waste by 20% within a decade.<sup>70</sup> Overall, the group found an annual net economic gain of over \$10 billion from implementing the 27 solutions, plus 15,000 new jobs, 1.8 billion meals per year to nonprofits, and a reduction of 18 million tons of greenhouse gases per year.<sup>71</sup> The top three solutions by economic value were standardized date labeling, consumer education, and packaging adjustments.<sup>72</sup>

According to ReFED, the confusion caused by current labeling practices results in approximately 20% of consumer waste of safe, edible food, resulting in \$29 billion in wasted consumer spending per year.<sup>73</sup> The group recommends standardizing food label dates and eliminating visible “sell by” dates, thereby reducing consumer confusion.<sup>74</sup> The group promoted the Food Recovery Act, the predecessor to the Food Date Labeling Act, which provided for three standardized labels: “best if used by,” “manufacturer’s suggestion only,” and “expires on.”<sup>75</sup> The current legislation was based on recommendations from ongoing research, which was based on the foundation provided by ReFED and similar projects.<sup>76</sup>

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<sup>67</sup> REFED, *supra* note 2, at 2.

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

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.*

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 33.

<sup>74</sup> *Id.* The proposed standardization involves both perishable and non-perishable foods.  
*Id.*

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

<sup>76</sup> Blumenthal, *Pingree Introduce Commonsense Bill to Standardize Food Date Labeling*, RICHARD BLUMENTHAL (May 18, 2016), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-pingree-introduce-commonsense-bill-to-standardize-food-date-labeling>. This press release from Senator Richard Blumenthal and Representative Chellie Pingree indicates that the bill was based on the recommendations in the reports by the Natural Resources Defense Council, the Harvard Food Law and Policy Clinic, and the Food Date Labeling Working Group, along with the recent study by the Harvard Food Law and Policy Clinic, the National Consumers League, and the Johns Hopkins Center for a

C. *Using the Framework to Evaluate the Legislation*

For the most part, the proposed Food Date Labeling Act compares favorably to the framework described above. First, the bill reduces the number of permitted labels to two: “best if used by” and “expires on.”<sup>77</sup> Second, the labels clearly communicate their different meanings; “best if used by” is a discretionary quality date and “expires on” is a required safety date.<sup>78</sup> Third, at least for the “expires on” date, organizations and consumers can rely on the date label to make decisions regarding the safety of the food.<sup>79</sup> Finally, the bill preempts the wide array of state food date labeling regulations.<sup>80</sup>

The proposed Food Date Labeling Act of 2016 meets most of the criteria outlined in the above framework. However, the inclusion of discretionary quality date labels weakens the effectiveness of the legislation because it still has the potential of creating food waste, particularly for non-perishable foods.<sup>81</sup> The “best if used by” quality date does not meet the criterion—the ability to rely on a label’s helpfulness in making accurate decisions about food.<sup>82</sup> The “best if used by” date is established by the labeler and reflects only the labeler’s opinion.<sup>83</sup> These quality labels will continue to

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Livable Future. *Id.* The press release did not name the study but is presumed to refer to *Consumer Perceptions of Date Labels: National Survey*, which cited the ReFED project and confirmed previous findings that consumers are confused by date labels and, as a result, unnecessarily throw away food. *Id.*

<sup>77</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 3 (2016).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 4.

<sup>81</sup> Even with a clear understanding of the difference between a safety date and a quality date label, consumers concerned with food quality are induced to throw away non-perishable food based on a perceived degradation of taste or nutrition that is not based in fact. *See*, Qi & Roe, *supra* note 29; LEIB ET AL., *supra* note 24.

<sup>82</sup> However, the bill removes any state regulations prohibiting the sale or donation of foods that have exceeded quality dates, allowing food banks to use quality dated food past the “best if used by” date. Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 4 (2016).

<sup>83</sup> Although it would be possible to regulate quality labels by requiring a particular level of shelf-life research to justify a date, it would be at an added expense to the food industry and government regulators. However, unless the research requirements were minutely and rigorously defined, the added regulation would still not eliminate the opinion-based nature of a quality label or the impact of the opinion on consumer behavior.

contribute to food waste because of confusion and negative consumer perceptions.<sup>84</sup>

There is another potential problem in allowing the discretionary “best if used by” dates. The legal remedies do not address potentially misleading quality labels because the statutory violation involves only the use of an incorrect phrase or an incorrect format of the quality label<sup>85</sup> and does not address potentially unsupported and misleading information. Consequently, an unscrupulous or overly cautious food labeler could legally place a “best if used by” date on a non-perishable product to encourage a user to discard the product long before necessary. In order to punish the offender and stop this date labeling practice, a claimant would need to prove that this label was misleading under the applicable federal statute.<sup>86</sup> However, because this practice relates to a quality date label on a shelf-stable, non-perishable product, it would be difficult to prove “mislabeling” according to the statutory provisions.

For example, in *U.S. v. Farinella*,<sup>87</sup> the defendant was charged with “introducing into interstate commerce a misbranded food with the intent to defraud.”<sup>88</sup> The food in question was 1.6 million bottles of Henri’s Salad Dressing, which the defendant purchased from a grocery outlet store chain after the “best when purchased by” date had expired.<sup>89</sup> The defendant then pasted a new date label over the expired label and sold the salad dressing to dollar stores.<sup>90</sup> The court noted that although “misbranded food” is defined in 21 U.S.C. § 343, the definition does not include anything about dates on labels, so the conduct was illegal only if it was “false or misleading in any

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<sup>84</sup> LEIB ET AL., *supra* note 17, at 16 n.141 (citing Christine Blank, *Good News on Unsaleables?*, SUPERMARKET NEWS (July 19, 2004), <http://www.supermarketnews.com/archive/good-news-unsaleables>).

<sup>85</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 5 (2016).

<sup>86</sup> As previously noted, in general, mislabeling food is prohibited under 21 U.S.C. § 331 (2015): “The following acts and the causing therefor are prohibited: (a) The introduction or delivery for introduction into interstate commerce any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.” An article can be mislabeled because of “representations made or suggested by statement, word, design, device, or any combination thereof,” along with failures to make material representations as “relates under the conditions of use prescribed in the labeling.” 21 U.S.C.A. § 321(n) (West 2016). In theory, the definition could be used to claim that a label is misleading because the actual quality of food has not diminished beyond the date on the quality date label.

<sup>87</sup> *U.S. v. Farinella*, 558 F.3d 695 (7th Cir. 2009).

<sup>88</sup> *Id.* at 696–97.

<sup>89</sup> *Id.* at 697.

<sup>90</sup> *Id.*

particular.”<sup>91</sup> The court determined there were no health issues from selling the salad dressing after the label date.<sup>92</sup> The court commented: “[S]o far as it appears, Henri’s Salad Dressing is edible a decade or more after it is manufactured.”<sup>93</sup> It also noted there was nothing in the record concerning consumers’ understanding of the date label or that the “best when purchased by” date had a uniform meaning in the industry.<sup>94</sup> The court also noted that there was no FDA regulation defining “best when purchased by” or forbidding a wholesaler or retailer from changing the date.<sup>95</sup> The Farinella court held that altering a “best when purchased by” date label on a non-perishable food product is not criminal misbranding.<sup>96</sup>

Current FDA regulations assume false labeling is an objective, fact-based issue.<sup>97</sup> Quality, however, is a subjective measure and defined as discretionary in the proposed legislation.<sup>98</sup> The Food Date Labeling Act provides for enforcement of incorrect terminology and format, but there is no enforcement included in the bill for deceptive quality labels.<sup>99</sup> The proposed legislation defines “best if used by” as “the date after which the quality of the product may begin to deteriorate.”<sup>100</sup> The bill defines a food labeler as “the producer, manufacturer, distributor, or retailer that places a date label on food packaging of a product.”<sup>101</sup> There is no provision within the bill addressing a change in label.<sup>102</sup>

Thus, the Farinella court would likely reach the same conclusion after the proposed legislation has been enacted. As a result, a consumer must look

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<sup>91</sup> *Id.* at 698.

<sup>92</sup> *Id.*

<sup>93</sup> The court described salad dressing like Henri’s as shelf stable, meaning that, unopened, it had no expiration date. *Id.* at 697. The court also noted that there was no evidence that any buyer of the 1.6 million bottles sold by the defendant ever complained about the taste. *Id.* at 698.

<sup>94</sup> *Id.*

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

<sup>96</sup> *Id.* at 700.

<sup>97</sup> There are 23 different categories in which food and drugs can be considered misbranded. 21 U.S.C. § 343 (2010). The proposed Food Date Labeling Act would add a twenty-fourth. Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 5 (2016). The requirements in this section range from accurately displaying the quantity of a package’s contents to nutrition information. 21 U.S.C. § 343 (2010).

<sup>98</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. § 4 (2016).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 3 (emphasis added).

<sup>101</sup> *Id.*

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



to other enforcement methods. Unfortunately, few exist. Litigation is cost-prohibitive. The individual's damage is minimal. Individual injury is only the cost of food that was still good but was discarded because of a misperception based on quality date. A consumer could seek to certify a class to spread the cost of litigation, but certification is difficult to achieve. In conclusion, it appears nigh impossible for consumers to effectively challenge a misleading discretionary quality food date label.

### III. RECOMMENDATION

Although the proposed legislation would solve many of the current problems with food date labeling, the provision for discretionary "best if used by" labels will still result in continued food waste. To address this weakness in the proposed bill, discretionary quality labels should be banned for all non-perishable, shelf-stable food.<sup>103</sup> This recommendation would eliminate residual public perception of food safety associated with quality food label dates and decrease food waste. It would also eliminate dependence of consumers on a labeler's discretionary quality dating and encourage consumers to make independent decisions.

Food labelers should still be allowed to provide consumer access to information to allay consumer concerns about the quality of the food.<sup>104</sup> Under this proposal, food labelers would have the discretion to provide a 1-800 number or QR code<sup>105</sup> on the product to direct consumers to a source of additional information on the product, such as information on when the product was packaged or storage recommendations for the food after it is opened. The optional information could be in a form similar to that recently

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<sup>103</sup> LEIB ET AL., *supra* note 17, at 24. Leib recommends removing quality labels on non-perishable, shelf-stable food. *Id.* Alternatively, Leib would provide consumers with a "pack date." *Id.* However, a "pack date" would likely also lead to consumer confusion, since it suggests an age but not an explanation of the ramifications of the age. *Id.* To avoid the potential of unwarranted confusion, a visible "pack date" is not recommended under this proposal. *Id.*

<sup>104</sup> LEIB ET AL., *supra* note 17, at 24.

<sup>105</sup> A QR Code, or Quick Response code, is a machine-readable code consisting of an array of black and white squares, typically used for storing URLs or other information that can be read by the camera on a smartphone. Andrew Amelinckx, *What You Need to Know About the New GMO Labeling Law*, MODERN FARMER (Aug. 8, 2016), <http://www.modernfarmer.com/2016/08/gmo-labeling-law/>.

enacted for Genetically Modified Organism (GMO) labeling options.<sup>106</sup> Since a similar provision has already been approved in the recently enacted GMO labeling act,<sup>107</sup> it would be easy to incorporate into the proposed legislation.

#### IV. OPPOSITION TO THE PROPOSED MODIFICATION

Opposition to the proposed modification will likely come from the food industry and, surprisingly, even consumers.<sup>108</sup> The food industry has a

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<sup>106</sup> The national bioengineered food disclosure standard was enacted July 29, 2016 and requires the labeling of food and ingredients developed from genetically modified organisms. 7 U.S.C.A. § 1639 (West 2016). “Seventy-five to eighty percent of food contains genetically modified ingredients.” Mary Clare Jalonick, *Obama Signs Bill Requiring Labeling of GMO Foods*, U.S. NEWS & WORLD REP. (July 29, 2016), <http://www.usnews.com/news/business/articles/2016-07-29/obama-signs-bill-requiring-labeling-of-gmo-foods>. Although the FDA says the foods are safe to eat, advocates for labeling say that not enough is known and people want to know what is in their food. *Id.* Labels may include text, symbols, or electronic links, or alternatively, for small food manufacturers, a toll-free telephone number and website. 7 U.S.C.A. § 1639(b)(2)(D)–(E) (West 2016).

<sup>107</sup> *Id.*

<sup>108</sup> There may also be opposition to the concept of federal regulation in general. The USDA, FDA and FTC are already involved in regulating food safety and food labels and could possibly create the new labeling program without Congressional intervention. LEIB ET AL., *supra* note 17, at 9. However, in spite of their numerous mandates and programs, the agencies have been hesitant to attempt such a unilateral solution and there is no assurance that an agency-directed program could provide the simplicity and clarity of the proposed Food Date Labeling Act. *Id.* Opponents of the bill may object to the idea of additional centralized federal regulation in the area of food date labeling. It could be argued that the proposed legislation, and the recommended modification, would be costly to implement. However, the food industry is already complying with a dizzying array of existing labeling requirements in the state regulations. *See, e.g.*, GA. COMP. R & REGS. 40-7-1.02 (2013); 105 MASS. CODE REGS. 520.119 (2013); ALA. ADMIN. CODE r. 420-3-22.01 (2013); ALA CODE § 20-1-20 (2013); ALA. ADMIN CODE r. 80-1-22.33 (2013). The proposed change may actually reduce costs, particularly for companies that operate in multiple states and must manage the requirements of the varied regulatory schemes. Others may argue that the states should retain the right to regulate food safety as they see fit. Food safety is not a state-specific issue. Concerns about food safety cross state borders and are national issues. Indeed, the federal government is already regulating other aspects of food fitness and labeling under the Commerce Clause. U.S. CONST., art. I, § 8, cl. 3. The current state regulations are confusing and lead to wasteful behavior. The simple approach proposed here will dovetail with existing federal regulations and, by adding the recommended step of omitting the quality label, should eliminate consumer confusion. In addition, it could be argued that food date labeling should be left to private industry. However, this plan would perpetuate inconsistencies and confusion in the market. For instance, concerned with food waste, Walmart has led private industry in implementing solutions. Walmart requires suppliers of its private label line to use “best if used by” as the standardized label for its non-perishable foods. Twilight Greenaway, *Can Walmart’s Food Labels Make a Dent in America’s \$29bn Food Waste Problem?*,

vested interest in providing quality date labels to prevent damage to brand identities and a loss of consumer confidence. Consumers, concerned over food safety and quality, may object to the loss of the information. This Part will explore both groups' objections to the proposed ban on quality date labels.

A. *The Food Industry*

Food-industry representatives from Campbell's Soup Company and Nestlé supported the introduction of the Food Date Labeling Act of 2016, and noted the importance of reducing consumer confusion.<sup>109</sup> However, the proposed legislation includes the "best if used by" label, which still provides the food industry with discretionary power to shape consumer perception of the relationship between the age and quality of their products. Thus, the food industry may argue that the proposed modification, omitting the quality date labels, infringes upon its right to protect brand perception and commercial free speech.<sup>110</sup>

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GUARDIAN (June 26, 2016), <https://www.theguardian.com/sustainable-business/2016/jun/26/food-waste-walmart-date-labels>. However, as explained above, the quality label is still subject to potential consumer misunderstanding and labeler misrepresentation.

<sup>109</sup> Steve Armstrong, Chief Food Counsel at Campbell Soup Company, and Paul Bakus, President of Corporate Affairs at Nestlé, attended the press conference announcing the legislation. Mohan, *supra* note 57. Armstrong was quoted as saying:

We applaud Senator Blumenthal and Representative Pingree for their leadership in crafting a bill that addresses a source of consumer confusion—trying to understand 'use by' and 'sell by' code dating on food packages. Importantly, it would make it easier for companies to donate products to organizations such as food banks, which could help cut down on food waste while helping those in need.

*Id.* Similarly, Paul Grimwood, Chairman and CEO of Nestlé, said, "We fully support establishing federal standards to help food companies like Nestlé more clearly communicate with consumers and avoid confusion that leads to unnecessary food waste . . . Standardizing date labeling is a practical and commonsense approach to giving consumers the information they need." *Id.*

<sup>110</sup> The food industry's opposition to the proposed modification to the Food Date Labeling Act is conjecture. To date, no one in the food industry has come out against the proposed legislation, but there has also been no suggestion of modifying the bill to remove the "best if used by" dates. However, it is reasonable to assume that a quality date on a non-perishable food product is designed to influence consumer perception and behavior. The research has shown that the behavior being influenced is tossing out food because of quality concerns. *See, e.g.,* Qi & Roe, *supra* note 29; LEIB ET AL., *supra* note 24. Presumably, these consumers replace the outdated food with new purchases. Logically, the food industry has an economic incentive to continue quality food date labels over and above brand protection.

The public perception of the quality of a food item is an important part of the brand identity. A quality date label is a method by which a food producer attempts to maintain the perception of quality by signaling to the consumer that a product may be past its prime. The industry uses different methods to determine the shelf life of a product, ranging from microbial challenge studies, to mathematical models, to copying what their competitors are using. However, there is no accepted standard, and the dates chosen have an inherent margin of error to assure that the product is used before any safety or quality concerns may arise.<sup>111</sup>

Rather than attempting to regulate the standards or testing requirements for a quality date, it seems preferable and more economically reasonable to eliminate the visible quality date. The modification still allows food producers the discretion to provide a 1-800 number or QR code on the product to direct consumers to a source of additional information on the product, such as “pack date” or a general estimate of a product’s shelf life.<sup>112</sup> If used thoughtfully, food producers could impress consumers by providing access to additional information about food quality.<sup>113</sup> Although this modification may limit business interests, the rights of the businesses ought

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<sup>111</sup> Londa Nwadike, *How Do Food Manufacturers Pick Those Dates on Their Product Packaging – and What Do They Mean?*, CONVERSATION (June 26, 2016), <https://theconversation.com/how-do-food-manufacturers-pick-those-dates-on-their-product-packaging-and-what-do-they-mean-60591>. In microbial challenge studies, the researchers add a pathogenic microorganism to the food product and store the food in conditions like those the food will likely experience in transportation, in storage, at the store, and in the home. *Id.* This type of testing is often used for perishable goods, such as deli meats. *Id.* Non-perishable foods are more likely to be statically tested, meaning the food is stored for an extended period of time, and sampled occasionally to check for safety and quality. *Id.* The storage conditions may replicate typical conditions or may be stressed to speed up deterioration. *Id.* Based on the tests, the companies can then calculate a shelf life of a product or use mathematical modeling to apply the test results to other products. *Id.* Smaller companies, without the resources to conduct testing, may base their product dates on their competitors’ dates or use reference materials to estimate dates. *Id.* Date labels reflect a date that is earlier than the calculated shelf life to err on the side of safety or best quality. *Id.* There is no standard for testing, calculations, or margins of error. *Id.*

<sup>112</sup> Manufacturers of canned goods are currently required to have a packing code so that the product can be traced through interstate commerce. USDA, *supra* note 19. This code is also used for inventory control and to manage stock. *Id.* These “closed dates” would still be allowed under the proposal.

<sup>113</sup> If the food labeler chose to provide additional information to the consumer, it would require a capital expenditure to maintain the website or telephone lines and fund other implementation issues. However, some of the cost should be offset by the savings realized from no longer having to comply with the numerous state regulations.

to be weighed against the influence of the discretionary quality dates on consumer food waste behavior.

The food industry represents a substantial portion of the United States economy<sup>114</sup> and may exert political pressure to see that the discretionary quality labels remain part of the proposed regulatory scheme.<sup>115</sup> If the legislation were enacted with the discretionary quality labels omitted as recommended, the food industry could challenge the legislation as unconstitutional under the theory that it violated commercial free speech.

Commercial speech has been defined as “expression related solely to the economic interests of the speaker and its audience.”<sup>116</sup> Like any other form of speech, there are permissible regulations of commercial speech: restrictions on time, place, and manner; prohibitions on untruthful, false, and misleading speech; or bans on illegal transactions.<sup>117</sup> In one of its first cases to hold that commercial speech is protected by the First Amendment, *Virginia State Board of Pharmacy*, the Supreme Court explained that “the protection afforded is to the communication, to its source and to its recipients both.”<sup>118</sup> The consumer group claimed that the Virginia State Board of Pharmacy regulation, which stated that pharmacists could not advertise the price of drugs, violated the First Amendment.<sup>119</sup> The Court acknowledged consumer and societal interests in the “free flow of commercial information” and declared the regulation to be unconstitutional.<sup>120</sup>

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<sup>114</sup> *Ag and Food Sectors and the Economy*, USDA ECON. RES. SERV., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/>.aspx (last updated Feb. 15, 2017). The USDA estimates that agriculture and agriculture-related industries represent 5.7% of the gross domestic product in 2014. *Id.* Food accounted for 12.6% of American households’ spending. *Id.* Agriculture and its related industries were about ten percent of U.S. employment and food manufacturing provided 14% of all U.S. manufacturing jobs. *Id.*

<sup>115</sup> Nancy Watzman & Bob Lannon, *Five Charts on Food Industry Influence*, SUNLIGHT FOUND. (Jun. 16, 2014), <http://www.sunlightfoundation.com/2014/06/16/five-charts-on-agribusiness-influence/>. The food industry has spent more than \$1.5 billion on federal lobbying since 1997. *Id.*

<sup>116</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 579 (1980).

<sup>117</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–71 (1976).

<sup>118</sup> *Id.* at 756.

<sup>119</sup> *Id.* at 749–50.

<sup>120</sup> *Id.* at 764–65 (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

Four years after Virginia State Board of Pharmacy, the Court outlined a four-part test, commonly known as the Central Hudson test, for determining whether commercial speech is protected by the First Amendment:

- (1) Does it concern a lawful activity and is not misleading;
- (2) Is the governmental interest substantial;
- (3) Does the regulation directly advance the governmental interest;

and

(4) Is the regulation no more extensive than necessary to serve that interest?<sup>121</sup>

Here, the commercial speech would be a quality food date and, unless included within the narrow definition of allowed date labels, its use would be considered illegal. Food-industry advocates would argue that quality date labels should not be considered unlawful and are not misleading but instead provide consumers with desirable information about the food. Substantial research, however, shows these labels are indeed confusing and drive wasteful conduct. The governmental interest in reducing food waste is substantial. Because there is a direct link between wasted food and quality food date labels, the regulation requiring only safety labels advances the governmental interest in reducing food waste. It is difficult to conceive how the regulation is more extensive than necessary. It reduces regulation of the food industry by preempting state regulatory schemes. It reduces the required food date labels to only one. The elimination of the quality date labels seems much less restrictive than the creation of regulations to standardize the quality date labeling process. Thus, it is unlikely that the commercial free speech argument using the Central Hudson test would invalidate the Food Date Labeling Act of 2016.<sup>122</sup>

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<sup>121</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

<sup>122</sup> However, the entire Supreme Court does not appear to be committed to using the *Central Hudson* test, and some members have indicated that they might favor an approach closer to strict scrutiny for commercial speech. For example, in *Lorillard Tobacco Co. v. Reilly*, the Court struck down several provisions of a Massachusetts law that governed tobacco advertising for violating the First Amendment. 533 U.S. 525, 529 (2001). Justice O'Connor, writing for the Court, acknowledged the concerns that some justices had with the application of the *Central Hudson* test. *Id.* at 555. But since the statute did not meet even the intermediate standard of scrutiny in the *Central Hudson* test, there was "no need to break new ground." *Id.* at 554. The majority reasoned that the regulations failed the fourth prong of the *Central Hudson* test because they were not sufficiently narrowly tailored. *Id.* at 584. "A speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 565. Using this reasoning, it could be argued that the ban on discretionary

B. *The Consumer*

Another group that may object to the elimination of quality labels is the consumer. Date labeling systems were originally implemented in the 1970s in response to consumer requests.<sup>123</sup> By 1975, 95% of shoppers considered date labels the “most useful” customer service to determine product freshness.<sup>124</sup> In spite of the subsequent widespread misunderstanding of what the labels mean, it may be difficult to convince consumers to let go of familiar labeling. Consumers have come to depend on food date labels, perhaps to their detriment.<sup>125</sup> Consumer overreliance on food date labels causes them to throw away good food, while ignoring the more important factors affecting food safety, such as temperature control.<sup>126</sup>

However, the standardization of the food safety dates should allay many consumer concerns. Shelf-life information available from FDA and other educational sources<sup>127</sup> and data on specific products will likely be provided by most major food brands. It will require consumers, however, to make an effort to obtain the information. While more inconvenient, removing quality date labels will prevent the reflexive response to the date labels and result in less wasted food.

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quality food date labels is an unlawful attempt to protect citizens from making foolish decisions like the ban on tobacco advertising in *Lorillard*. However, unlike the situation in *Lorillard*, consumers can still obtain information about their food through other sources.

<sup>123</sup> Newsome et al., *supra* note 52, at 746.

<sup>124</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, FOOD LABELING: GOALS, SHORTCOMINGS, AND PROPOSED CHANGES 44 (1975). This report recommended a uniform open dating system after finding that 20% of shoppers surveyed reported purchasing stale, perishable foods. *Id.*

<sup>125</sup> LEIB ET AL., *supra* note 17, at 20.

<sup>126</sup> *Id.*

<sup>127</sup> The U.S. Department of Health & Human Services created a website as a gateway to federal food safety information for the public. FOODSAFETY.GOV, <https://www.foodsafety.gov> (last visited Mar. 4, 2017). The website operates in partnership between the USDA, FDA, CDC, and National Institute of Health. *Id.* The USDA also publishes a multitude of nutrition and food safety guidelines. USDA, FOOD AND NUTRITION, <http://usda.gov/wps/portal/usda/usdahome?navid=food-nutrition> (last visited Mar. 4, 2017). In the private sector, organizations, such as Fight Bac! and Food Safety News provide information to consumers on recalled products and best practices to prevent food poisoning. FIGHT BAC!, <https://www.fightbac.org> (last visited Mar. 4, 2017); FOOD SAFETY NEWS, <https://www.foodsafetynews.com> (last visited Mar. 4, 2017).

## V. CONCLUSION

The research has shown that the relationship between consumer confusion about food date labels and increased food waste is significant. The Food Date Labeling Act of 2016<sup>128</sup> provides a simple, national standard to reduce consumer confusion and reduce waste. According to ReFED, 25% of the waste of safe, edible foods by consumers is caused by current labeling practices, at a cost of \$29 billion per year.<sup>129</sup> Standardization of food date labels is expected to: (1) reduce wasted food by five to ten percent, for a net economic value of \$1.8 billion;<sup>130</sup> (2) divert 398,000 tons of food from landfills;<sup>131</sup> (3) reduce greenhouse gases by 1,593,000 tons per year;<sup>132</sup> and (4) conserve 192 billion gallons of water per year.<sup>133</sup> If the food saved by standardization can be recovered and distributed, it could provide a complete diet to 1.38 million people.<sup>134</sup>

The proposed legislation can be even more effective if quality food date labels are eliminated. Because perishable foods will have “expires on” safety dates, removal of quality “best if used by” labels will affect only non-perishable goods, which represent about 20% of the food wasted per year.<sup>135</sup> If removing quality date labels would only save half of the wasted non-perishable food, the result could be an additional \$180 million saved, 39,800 tons of food kept out of landfills, 159,300 tons less greenhouse gas emissions, and 19.2 billion gallons of water saved.<sup>136</sup> This incremental change could help feed another 138,000 hungry people.<sup>137</sup>

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<sup>128</sup> Food Date Labeling Act of 2016, H.R. 5298, 114th Cong. (2016).

<sup>129</sup> REFED, *supra* note 2, at 33.

<sup>130</sup> *Id.* at 5.

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

<sup>132</sup> *Id.* at 88.

<sup>133</sup> *Id.*

<sup>134</sup> One might ask, how does one arrive at the figure of 1.38 million? Gunders estimates that a 15% reduction in food waste would feed 25 million people. GUNDERS, *supra* note 20, at 1. The total value of wasted food is \$218 billion. REFED, *supra* note 2, at 5. Therefore, a 15% reduction would be \$32.7 billion and a \$1.8 billion drop food waste equates to approximately 1.38 million people. ReFED also provided seven food recovery strategies to improve ways to get food to those in need, which are outside the scope of this paper. *Id.* at 39–48. If implemented, these strategies could “rescue” 1.8 billion meals per year. *Id.*

<sup>135</sup> REFED, *supra* note 2, at 14.

<sup>136</sup> GUNDERS, *supra* note 20, at 1 (estimating a 15% reduction in food waste would feed 25 million people).

<sup>137</sup> According to REFED, the total value of wasted food is \$218 billion. REFED, *supra* note 2, at 33. A 15% reduction in \$218 billion is \$32.7 billion. It follows that, proportionately,



Food waste is a problem and standardized labeling can help. The proposed Food Date Labeling Act of 2016 is good legislation. It provides a simple food date labeling scheme, alleviates much of the confusion, and preempts the maze of state regulations. But this good legislation can be made even better. A discretionary quality food date label will continue to lead to food waste. As shown, its elimination will enhance the efficiency of the legislation while not unduly burdening either the food industry or the consumer.

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if a \$32.7 billion reduction in food waste would feed 25 million people, then the \$1.8 billion drop in food waste from standardized labels equates to approximately 1.38 million people. The elimination of the quality food dates as proposed in this paper would impact non-perishable food, which represents 20% of food waste. This is an incremental increase because ReFED assumed two quality food date labels would continue to be allowed, which could lead to confusion and continued food waste. *Id.* Twenty percent of 1.38 million people equates to 260,000 people. Even if the non-perishable food waste was only reduced by half by the elimination of the quality dates, one half of 260,000 people equates to food available for 130,000 people.