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Hunger Games in the Capital: An Examination of the Need for America's Elected Officials to Emerge from the Legislative Landfill and Combat our Country's Food Waste and Hunger Epidemics

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Cover Page Footnote

I would like to thank Professor Sheila Miller for the valuable advisory role she provided throughout this writing process; her honest and objective feedback and legal writing expertise elevated this Comment's potential from start to finish. I would also like to thank my family, especially my husband and children, for their endless support and infinite inspiration. Parenthood has expanded my capacity for empathy and amplified my awareness of important - too often overlooked - social issues like those this Comment addresses. I am grateful for this evolved perspective and am hopeful this work expands consciousness of the problems hunger and food waste pose domestically. On a lighter note, I am also indebted to John Oliver and his research team at *Last Week Tonight* for introducing me to this paradoxical subject matter and for using their celebrity platform to educate and entertain millions about numerous significant and concerning topics week-to-week. Finally, I would like to acknowledge that the title of this Comment includes an allusion to Suzanne Collins' popular book series, *The Hunger Games*.

HUNGER GAMES IN THE CAPITAL: AN EXAMINATION OF THE NEED FOR AMERICA’S ELECTED OFFICIALS TO EMERGE FROM THE LEGISLATIVE LANDFILL AND COMBAT OUR COUNTRY’S FOOD WASTE AND HUNGER EPIDEMICS

*Mary K. Bedard**

“You waste life when you waste good food.”¹

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* J.D., University of Dayton School of Law, 2017; B.A., University of North Carolina at Greensboro, 2009. I would like to thank Professor Sheila Miller for the valuable advisory role she provided throughout this writing process; her honest and objective feedback and legal writing expertise elevated this Comment’s potential from start to finish. I would also like to thank my family, especially my husband and children, for their endless support and infinite inspiration. Parenthood has expanded my capacity for empathy and amplified my awareness of important – too often overlooked – social issues like those this Comment addresses. I am grateful for this evolved perspective and am hopeful this work expands consciousness of the problems hunger and food waste pose domestically. On a lighter note, I am also indebted to John Oliver and his research team at *Last Week Tonight* for introducing me to this paradoxical subject matter and for using their celebrity platform to educate and entertain millions about numerous significant and concerning topics week-to-week. Finally, I would like to acknowledge that the title of this Comment includes an allusion to Suzanne Collins’ popular book series, *The Hunger Games*.

¹ KATHERINE ANNE PORTER, *FLOWERING JUDAS* 128 (1930).

I. INTRODUCTION

The face of hunger in America has changed dramatically since the 2008 recession.² High unemployment and low wages are largely to blame for the increase in persons receiving government nutrition assistance throughout the United States from 2007 (26.3 million recipients) to 2014 (46.6 million recipients).³ In Mississippi, Alison, a single mom, struggles to feed her two young daughters, ages five and two.⁴ Alison attended several job interviews in a few months' time, none of which resulted in employment.⁵ In hopes of securing a better future for herself and her daughters, Alison enrolled in night classes at the local nursing school.⁶ She frequently battles to pay her bills, living in constant fear that she will lose her electricity, her water supply, and/or her heat.⁷ Those utilities, however, must come second to feeding her children.⁸

Across the country, in Gloucester, Massachusetts, Dan and Tammy share Alison's plight as they battle to feed their three growing children, ages nineteen, fifteen, and seven.⁹ The married couple never had a problem providing for their family; their comfortable status seemed secure when Dan, a chef, was offered a job at one of the best restaurants in the city.¹⁰ Shortly thereafter, however, Tammy noticed an unfamiliar mole on Dan, which proved to be malignant melanoma.¹¹ Dan endured a total of nine operations, all of which required weeks—if not months—of rehabilitation and recovery.¹² Consequently, Dan had to stop working, and—after medical bills and living expenses rapidly consumed their savings—the five-person family was forced to rely solely on Tammy's income.¹³ Food, once a guaranteed staple, has become an inconsistent luxury.¹⁴

Finally, consider Derek out of Saint Louis, Missouri.¹⁵ Six years ago, Derek's wife dropped their three children, Francine, Derek, and Christine, off

² See U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: PARTICIPATION AND COSTS (Nov. 10, 2016), <http://www.fns.usda.gov/sites/default/files/pd/SNAPsummary.pdf> (last visited May 1, 2017) [hereinafter SNAP].

³ See *id.*; Jeff Cox, *Record 46 Million Americans are on Food Stamps*, CNBC (Sept. 4, 2012, 3:37 PM), <http://www.cnbc.com/id/48898378> (last visited May 1, 2017).

⁴ Feeding America, *Feeding America Real Hunger Stories: Alison*, YOUTUBE, at 00:04, 00:12, 00:38, 01:12 (Feb. 11, 2011), www.youtube.com/watch?v=MsbEwb8Bt6w (last visited May 1, 2017).

⁵ *Id.* at 00:25.

⁶ *Id.* at 00:29.

⁷ *Id.* at 00:55.

⁸ *Id.*

⁹ Feeding America, *Feeding America Real Story: Dan and Tammy*, YOUTUBE, at 00:27 (May 19, 2014), <https://www.youtube.com/watch?v=bmx5LEsKxdE> (last visited May 1, 2017).

¹⁰ *Id.* at 00:33.

¹¹ *Id.* at 00:49.

¹² *Id.* at 01:05.

¹³ *Id.*

¹⁴ *Id.* at 01:30.

¹⁵ Feeding America, *Feeding America Real Story: Derek*, YOUTUBE, at 00:05 (Aug. 19, 2014), <https://www.youtube.com/watch?v=d-qcwhV8M1g> (last visited May 1, 2017).

at the couple's home.¹⁶ His wife, the children's mother, then drove away and has not been seen since.¹⁷ Derek, who has sole custody of his children, works security for the Saint Louis transit system.¹⁸ He works 5:00 p.m. to 1:30 a.m. five days each week.¹⁹ He gets home at 2:00 a.m., goes to bed at 2:30 a.m., and is back up at 5:00 a.m. to help his kids prepare for school.²⁰ Whereas he works full time, he is often forced to put bills "on the back burner" so that he can feed his growing children.²¹ Unfortunately, despite his unparalleled efforts, there is no promise for reprieve in the future.²²

Today, hunger is the world's number one health risk—exceeding AIDS, malaria, and tuberculosis combined.²³ Whereas people living in developing countries in Africa, Asia, and the Pacific are most vulnerable to hunger, the epidemic is devastatingly present in the United States.²⁴ In 2013, 50 million Americans (14.3% of households) were food-insecure.²⁵ Food security is defined as "all people in a household having enough food for an active healthy life at all times . . ." ²⁶ In contrast, food insecurity exists when the food intake of one or more members of a household is reduced because the household lacks the resources to provide consistent, adequate nutrition.²⁷

Alison, Dan, Tammy, and Derek may be your neighbors; they may be your family; they may be you. Their stories are reflected in federal reports, which provide that single parent households and households with reported incomes near or below the federal poverty line have higher rates of food insecurity.²⁸ Such households may seek support from federal food assistance programs to help alleviate hunger and poor nutrition.²⁹ In fact, 62% of food-insecure households with incomes below the poverty line reported they had recently received aid from one or more of the three largest federal food and nutrition assistance programs: Supplemental Nutrition Assistance Program benefits ("SNAP") (formerly the Food Stamp Program); Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC");

¹⁶ *Id.* at 00:29.

¹⁷ *Id.* at 00:31.

¹⁸ *Id.* at 00:51.

¹⁹ *Id.* at 00:57.

²⁰ *Id.* at 01:00–01:06.

²¹ *Id.* at 01:08–01:20.

²² *See id.* at 01:27–02:31.

²³ *FAQs*, WORLD FOOD PROGRAMME, <https://www.wfp.org/hunger/faqs> (last visited May 1, 2017).

²⁴ *Hunger and Nutrition*, WORLD HUNGER EDUC. SERV., http://www.worldhunger.org/articles/Learn/hunger_and_nutrition.htm (last visited May 1, 2017).

²⁵ ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2013, at v (2014), https://www.ers.usda.gov/webdocs/publications/err173/48787_err173.pdf (last visited May 1, 2017).

²⁶ NANCY S. WEINFIELD ET AL., HUNGER IN AMERICA 2014, FEEDING AM. 1 (2014), <http://help.feedingamerica.org/HungerInAmerica/hunger-in-america-2014-full-report.pdf> (last visited May 1, 2017).

²⁷ COLEMAN-JENSEN ET AL., *supra* note 25, at v.

²⁸ WEINFIELD ET AL., *supra* note 26, at 2.

²⁹ *Id.*

and the National School Lunch Program.³⁰ That assistance is vital and it must be preserved, but that assistance is not enough. Congress must invest efforts elsewhere to combat hunger in this country.

Whereas the fight against hunger has traditionally been bipartisan, the fight to preserve some of the federal assistance programs has been more controversial.³¹ For example, many congressmen have repeatedly pushed to cut funding from SNAP, arguably the most important anti-hunger program in the United States.³² Oppositionists label the program “as wasteful as fraudulent and as something that is growing out of control.”³³ To the contrary, findings from the fiscal year 2014 report reveal that SNAP has a national payment error rate of 3.66%, representing a 96.34% accuracy rate of providing benefits to low-income recipients.³⁴ The government’s aggressive approach to reduce improper payments and improve SNAP administration reinforces how vital this program is; they would not strive for efficiency if it were not. However, as hunger continues to exist and as partisan debate continues to pollute the political conversation surrounding the federal assistance programs that currently aid food-insecure Americans, it is imperative that we seek a supplemental solution to augment the fight against hunger.

Paradoxically, while millions of Americans do not receive enough food, the American population collectively wastes 30–40% of all the food that is grown, harvested, and purchased each year.³⁵ Over 35 million tons of uneaten food were discarded in 2012 alone³⁶—enough to fill 730 American football stadiums.³⁷ A sanitation worker’s route does not, however, terminate at Lambeau or Soldier Field. Rather, food waste winds up in landfills where, as it decays, it emits methane gas, a greenhouse gas that traps heat twenty times more effectively than carbon dioxide—causing great harm to the environment.³⁸ Solutions to combat food waste, hunger, and other detrimental economic and environmental effects are within reach. Whereas federal and

³⁰ COLEMAN-JENSEN ET AL., *supra* note 25, at vi (“Data for the ERS food security reports come from an annual survey conducted by the U.S. Census Bureau . . . [which] covered 42,147 households comprising a representative sample of the U.S. civilian population of 123 million households.”).

³¹ Jim McGovern, U.S. Representative for 2d Cong. Dist. of Mass., House Floor Speech: Hunger is a Political Condition, JIM MCGOVERN (Apr. 17, 2012), <http://mcgovern.house.gov/media-center/press-releases/floor-speech-by-us-rep-jim-mcgovern-hunger-is-a-political-condition> (last visited May 1, 2017).

³² *Id.*

³³ *Id.*

³⁴ *Supplemental Nutrition Assistance Program*, U.S. DEP’T AGRIC., <http://www.fns.usda.gov/snap/quality-control> (last visited May 1, 2017).

³⁵ Niina Heikkinen, *Food Security: Businesses Learn There are Tax Incentives and Laws to Help Them Recycle Mountains of Food*, CLIMATEWIRE (July 22, 2015), <http://www.cenews.net/stories/1060022190> (last visited May 1, 2017).

³⁶ Eleanor Goldberg, *Tax Break Would Enable Farmers, Small Businesses to Donate Enough Food For 100 Million Meals*, HUFFPOST (Apr. 22, 2015, 1:12 PM), http://www.huffingtonpost.com/2015/04/22/farmers-donation-tax-deduction_n_7110320.html (last visited May 1, 2017).

³⁷ Last Week Tonight, *Last Week Tonight with John Oliver: Food Waste* (HBO), YOUTUBE, at 02:01–02:05 (July 19, 2015), <https://www.youtube.com/watch?v=i8xwLWb0LLY> (last visited May 1, 2017).

³⁸ *Id.* at 02:01–02:05.

state legislatures have made efforts to combat the staggering disconnect between our growing hungry population and our growing food waste, it is sometimes our own representatives keeping the food off our tables and piling up in our landfills.³⁹

This Comment will first consider the implications of food waste in America. Respectively, the examination will surface further troublesome hunger statistics; unveil expenses consumers are wasting on groceries and costs businesses are purging on unused goods and unnecessary disposal; and review the concerning effects food waste has on our natural resources.

Second, this Comment will consider the ways in which Congress has addressed the issue of food waste in recent history—to support the proposition that legislative change is necessary to combat this relevant, self-inflicted epidemic. Namely, successes like the Bill Emerson Good Samaritan Food Donation Act of 1996 (“Good Samaritan Act”) and the Federal Food Donation Act of 2008 (“Food Donation Act”) provided movement in the right direction; but such statutory achievements are not enough.

Third, this Comment will address the current legal and regulatory problems that contribute to the broken system. It will exploit how Congress recently mangled the once promising Fighting Hunger Incentive Act of 2015 (“Fighting Hunger Act”), which initially aimed to extend permanent tax deductions to small businesses for their charitable food donations—a failure sure to stunt Americans’ confidence in their Congressmen. This Comment will unveil the elements of the Fighting Hunger Act, at its inception, and illustrate how the absence of equal tax incentives for charitable food donation prevents massive quantities of quality nourishment from reaching food donation centers and, ultimately, food-insecure Americans. In addition, it will discuss the fractured methods by which the federal government regulates (or, rather, fails to regulate) food date labeling. It will reveal that the absence of uniform rules and standards leads to consumer confusion. Consequently, Americans misinterpret freshness- and quality-based dates for safety-based dates, and prematurely dispose of perfectly wholesome food.

Finally, this Comment will propose two solutions aimed at collectively combating domestic food waste, hunger, economic losses, and environmental destruction. First is the need for Congress to pass legislation resembling the Fighting Hunger Act, as introduced to the House of Representatives. Second is the need to implement a new system for food date labeling in order to prevent consumer confusion and reduce food waste.

Hunger and food waste are related tragedies, but solutions are within

1. ³⁹ See, e.g., Trade Facilitation and Trade Enforcement Act of 2015, 114 Bill Tracking H.R. 644 (2015) (chronicling H.R. 644 from its introduction as the Fighting Hunger Incentive Act of 2015 to its enactment, in an entirely different form, as the Trade Facilitation and Trade Enforcement Act of 2015).

reach. “We have more than enough food in America to feed everyone. We also have the delivery systems to ensure that food gets to those people who need it.”⁴⁰ The tools to combat hunger and food waste lie in the hands of our elected officials, who continue to evade their duties to enact valuable, timely legislation—including that which would discourage food disposal and incentivize food donation. Our government must employ the political will to enact legislation that permanently extends tax deductions to all businesses and corporations. It is equally necessary that either the legislature or executive agencies reform food-labeling standards so that more food may escape the landfill, and nourish a needy body instead.

II. IMPLICATIONS OF HUNGER AND FOOD WASTE

A. *Social Implications*

Hunger can adversely affect the way young people learn.⁴¹ Food fuels the body; therefore, children cannot make it through the school day—maintaining focus, absorbing information, or sustaining good behavior—without the requisite nutrients food provides.⁴² Moreover, a substantial amount of brain development occurs during childhood; therefore, absent valuable calories, food-insecure children are more likely to suffer negative long-term consequences to their learning abilities.⁴³ For example, a malnourished child is at least 50% more likely to miss school, close to two times as likely to be suspended, and nearly 50% more prone to have to repeat a grade level—patterns that will infect his formal education into adulthood.⁴⁴ As a result of his increased risk to absenteeism or drop out status, poor test results, grade repeat, etc., this individual is less likely to find a career and contribute to society.⁴⁵ Adolescent hunger is widespread and inexcusable; its pervasiveness directly threatens America’s future ability to compete with and against other world powers. Consequently, our government must find a bipartisan solution to eradicate food insecurity among school children. One such solution: turn food waste into food donation.

Food-insecure individuals and families are also more likely to experience adverse physical conditions including, but not limited to, iron deficiency, headaches, stomachaches, frequent colds, specific nutrient deficiencies, increased hospitalizations, and extended inpatient stays.⁴⁶

⁴⁰ McGovern, *supra* note 31.

⁴¹ Emily Walthouse, *Effects of Hunger on Education*, BORGENT PROJECT (July 2, 2014), <http://borgenproject.org/effects-of-hunger-on-education/> (last visited May 1, 2017).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*; see also DONALD S. SHEPARD ET AL., HUNGER IN AMERICA: SUFFERING WE ARE ALL PAYING FOR, CTR. FOR AM. PROGRESS 11 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/hunger_paper.pdf (last visited May 1, 2017).

⁴⁵ See SHEPARD ET AL., *supra* note 44, at 11.

⁴⁶ *Id.* at 10.

Malnourished persons are also more susceptible to certain mental health conditions.⁴⁷ In particular, food-insecure persons are seven times more likely to be adversely affected by psychosocial dysfunction—attributed in part to the stress, insecurity, embarrassment, etc. associated with inconsistent and inadequate food supply.⁴⁸ Anxiety and irritability, depression, withdrawn behavior, suicidal thoughts and behaviors, and the need for mental health in general also affect food-insecure persons at a greater rate.⁴⁹ Moreover, just as malnourished children are prone to miss school, malnourished adults are more likely to miss work and lose employment opportunities. Neither the individual, nor society has anything to gain from this scenario.

Hunger negatively affects everyone—not just those experiencing it firsthand. Our neighborhoods, schools, communities, and country can only benefit from eradicating domestic hunger; we must compel government action to provide resources to the food-insecure.

B. *Economic Implications*

“The nation pays far more by letting hunger exist than it would if our leaders took steps to eliminate it.”⁵⁰ A recent study revealed that hunger cost our country more than \$261 billion in 2010.⁵¹ Approximately \$167.5 billion was represented by three broad categories.⁵² First, \$19.2 billion was invested in public school education in efforts to combat lower education productivity.⁵³ Hunger exacts a particularly significant monetary burden on education because a malnourished, uneducated child contributes to lower economic productivity and earning potential.⁵⁴ Second, a staggering \$130.5 billion contributed to avoidable health care costs—stemming from hunger related physical and mental illness.⁵⁵ Finally, \$17.8 billion funded charity assistance to food-insecure Americans.⁵⁶ Whereas the costs associated with our country’s charitable response to hunger account for regional food banks (cash donations, donated food/supplies, staff time, facilities, and the value of volunteer time), the costs do not account for food distributed through the major federal government food assistance programs. In considering the latter

⁴⁷ *Id.* at 10–11.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ J. LARRY BROWN ET AL., THE ECONOMIC COST OF DOMESTIC HUNGER: ESTIMATED ANNUAL BURDEN TO THE UNITED STATES 22 (2007), http://us.stop-hunger.org/files/live/sites/stophunger-us/files/HungerPdf/Cost%20of%20Domestic%20Hunger%20Report%20_tcm150-155150.pdf (last visited May 1, 2017).

⁵¹ See SHEPARD ET AL., *supra* note 44, at 1 (describing that the 2010 report reveals an annual national “hunger bill” of \$167.5 billion and an annual cost of \$94 billion to fund key federal nutrition programs).

⁵² See *id.* at 13, for a break down in Table 6 of the elements of the 2010 hunger bill in comparison to that of 2007.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* at 9; see also *supra* text accompanying notes 23–25.

⁵⁶ SHEPARD ET AL., *supra* note 44, at 13.

figure, the actual amount the nation has expended on charitable assistance to the hungry is much greater than \$17.8 billion.

In fact, federal hunger assistance programs accounted for \$94 billion in 2010.⁵⁷ The largest federal nutrition assistance programs are (1) SNAP (formerly food stamps), which assisted 46.6 million people in 2014;⁵⁸ (2) WIC, which assisted approximately 103.2 million women, infants, and children in fiscal year 2013,⁵⁹ and (3) the National School Lunch Program, which provided lunch to more than 31.6 million children each school day in fiscal year 2012.⁶⁰ These programs provide a lifeline to millions of food-insecure men, women, and children.⁶¹ Critics argue that this is too much funding; however, this is only a fraction of the budget. The 2014 U.S. Government's budget provided \$526.6 billion in discretionary funding for Department of Defense,⁶² \$71.2 billion for the Department of Education,⁶³ \$80.1 billion for the Department of Health and Human Services,⁶⁴ and \$76 billion for the Department of Transportation.⁶⁵ Again, SNAP, WIC, and the National School Lunch Program are essential in our country's war on poverty and hunger. Perhaps the costs to support these programs would be sufficient, or could even one day be reduced, if our government began to attack hunger through a supplemental channel: turning food waste into food donation.

In addition to the great expenses hunger presents, food waste results in financial losses for individuals, businesses, and organizations.⁶⁶ "The total value of food loss at the retail and consumer levels was an estimated \$161.6 billion in 2010"⁶⁷ The 2010 values were estimated based on the retail purchase price of the wasted food.⁶⁸ When broken down per capita, excess food cost consumers \$371 in 2010; in other words, every American threw away roughly \$1 each day because of food waste.⁶⁹

Finally, throwing away good food implicates other industry costs as

⁵⁷ *Id.* at 17.

⁵⁸ See SNAP, *supra* note 2.

⁵⁹ WIC – *The Special Supplemental Nutrition Program for Women, Infants and Children*, U.S. DEP'T AGRIC., <http://www.fns.usda.gov/sites/default/files/WIC-Fact-Sheet.pdf> (last visited May 1, 2017).

⁶⁰ U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM 1, <http://www.fns.usda.gov/sites/default/files/NSLPFactSheet.pdf> (last visited May 1, 2017).

⁶¹ See *supra* notes 58–60 and accompanying text.

⁶² OFF. OF MGMT. AND BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 69 (2013), <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf> (last visited May 1, 2017).

⁶³ *Id.* at 79.

⁶⁴ *Id.* at 93.

⁶⁵ *Id.* at 137.

⁶⁶ *Sustainable Management of Food Basics*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/sustainable-management-food/sustainable-management-food-basics#social> (last visited May 1, 2017).

⁶⁷ JEAN C. BUZBY ET AL., THE ESTIMATED AMOUNT, VALUE, AND CALORIES OF POSTHARVEST FOOD LOSSES AT THE RETAIL AND CONSUMER LEVELS IN THE UNITED STATES 13 (Feb. 2014), https://www.ers.usda.gov/webdocs/publications/eib121/43680_eib121.pdf (last visited May 1, 2017).

⁶⁸ *Id.*

⁶⁹ *Id.* at 16.

well: energy, labor, and trash collection.⁷⁰ While it is unrealistic to imagine the United States will ever entirely eradicate food waste, it is hard to reason that any of the aforementioned economic costs and losses are justified.⁷¹ The value of preserving and distributing wholesome food to food-insecure persons undoubtedly outweighs the costs associated with preservation and distribution.

C. *Environmental Implications*

Food waste negatively affects our natural resources and impacts global climate change.⁷² Notably, “[w]asted food wastes the water, gasoline, energy, labor, pesticides, land, and fertilizers used to make the food.”⁷³ When food is disposed of in a landfill, the nutrients never return to the surface.⁷⁴ Rather, the food rots and becomes a substantial source of methane gas.⁷⁵ Methane, a potent greenhouse gas, has twenty-five times more global warming potential than carbon dioxide, the latter of which would have been the principal byproduct had humans consumed and metabolized the food.⁷⁶

Food waste also contributes to excessive consumption of freshwater and fossil fuels.⁷⁷ “Assuming that agriculture utilizes about 70% of the freshwater supply, [at least one study has inferred] . . . that more than one quarter of total freshwater use is accounted for by wasted food.”⁷⁸ Moreover, considering that the average farm uses 3 kilocalories (“kcal”) of fossil fuel energy to generate 1 kcal of food, “wasted food accounts for ~300 million barrels of oil per year representing ~4% of the total US oil consumption . . .”⁷⁹

Finally, common sense supports that throwing away excess food contributes to undesirable community sanitation and aesthetic environments. Food waste in residential garbage cans, rural trash receptacles, or commercial dumpsters—located behind businesses and/or tucked into urban alleyways—generate unwelcome odors and attract unwelcome rodents and insects. Everyone (except raccoons and roaches) can benefit from putting more food on the table and less food in the trash.

⁷⁰ See *Sustainable Management of Food Basics*, *supra* note 66.

⁷¹ See BUZBY ET AL., *supra* note 67, at 7.

⁷² See *Sustainable Management of Food Basics*, *supra* note 66; 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> (last visited May 1, 2017).

⁷³ See *Sustainable Management of Food Basics*, *supra* note 66.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *id.*; see also Hall et al., *supra* note 72.

⁷⁷ See Hall et al., *supra* note 72.

⁷⁸ *Id.*

⁷⁹ *Id.* (representing data from 2003).

III. HOW CONGRESS HAS RESPONDED THUS FAR: CURRENT LAW

A. *Merger of Federal Tax and Donation Legislation*

In 1976, Congress ignited the legislative fight against hunger and food waste when it enacted Section 170 of the Internal Revenue Code (“IRC”).⁸⁰ Section 170 provided that C corporations—but not small businesses—may earn an enhanced tax deduction for properly saving, donating, and documenting excess wholesome food.⁸¹ Under U.S. federal income tax law, a C corporation includes those taxed separately from its owners, generally accounting for most major corporations.⁸² Small businesses, which were not given the same tax benefits by the IRC, automatically become C corporations once they incorporate.⁸³ The enhanced deduction afforded to C corporations equates to the lesser of either one half of the business’ gross profit or the basis cost.⁸⁴ Gross profit is the difference between the company’s revenue from sales and the cost of the goods sold.⁸⁵ The basis cost is generally the amount, including taxes, paid for the good(s).⁸⁶ Section 170 provides a limitation, whereby the total tax deduction may not exceed twice the donated food’s basis cost.⁸⁷ The IRS looks to fair market value to assess the profit and basis amounts, and calculates the incremental tax deduction on a company-by-company evaluation.⁸⁸

On September 22, 2005, in response to the devastation brought by Hurricane Katrina, Congress passed the Katrina Emergency Tax Relief Act—extending the Section 170 enhanced tax deduction for charitable food donation to *all* business entities.⁸⁹ Whereas the Katrina Emergency Tax Relief Act provided for a *permanent* tax deduction for C corporations, the tax deduction for non-C corporations is *temporary*; the same law must be extended every two years for non-C corporations to benefit.⁹⁰ Consequently, many limited liability companies, sub-chapter S corporations, sole proprietors, and other ineligible (i.e., non-C corporation) advocates must

⁸⁰ *United States Tax Benefits*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/FdcMain/TaxBenefits.aspx> (last visited May 1, 2017).

⁸¹ *Id.*

⁸² *C Corporation: A Definition*, INC.COM, <http://www.inc.com/encyclopedia/c-corporation.html> (last visited May 1, 2017).

⁸³ *Id.*

⁸⁴ *Donate Surplus Wholesome Food with the Food Donation Connection Harvest Program: A Socially Responsible and Simple Alternative to Throwing Away Surplus Food*, FOOD DONATION CONNECTION, http://www.foodtodonate.com/pdfs/Harvest_Program_12.17.10.pdf (last visited May 1, 2017) (discussing enhanced tax deductions for food donations on slide 5).

⁸⁵ *Figuring Gross Profit*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p334/ch07.html> (last visited May 1, 2017).

⁸⁶ *Topic 703 – Basis of Assets*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxtopics/tc703.html> (last visited May 1, 2017).

⁸⁷ *United States Tax Benefits*, *supra* note 80.

⁸⁸ *Id.*

⁸⁹ See Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 305, 119 Stat. 2016, 2025 (codified at I.R.C. § 170(e)(3)(C) (2006)); *United States Tax Benefits*, *supra* note 80.

⁹⁰ *United States Tax Benefits*, *supra* note 80.

continue to battle for the temporary tax extender, which, again, expires every two years.⁹¹ Fortunately, since 2005, Congress has continued to reintroduce and reenact similar temporary legislation every two years; President Obama signed the most recent (as of the time this Comment was written) tax extender legislation on December 19, 2014.⁹² However, a problematic feature of these temporary laws is that they operate retroactively, meaning that the legislation President Obama signed in December of 2014 extended tax deductions to donations made to food banks and other charitable hunger-relief organizations since January 1, 2014.⁹³ There is no way to know for sure how many donations were lost by those corporations that failed to assume the financial burden of donating their excess product on the front end, in fear that they would never see compensation in the form of an enhanced tax deduction at the end of the fiscal year. Although there has been consistency in reenacting the tax deduction legislation for non-C corporations that provide charitable food donations, it is imperative that we make this economic benefit permanent—so as to minimize food waste and maximize assistance to food-insecure persons and families.

B. *Merger of Liability and Donation Legislation*

In addition to promulgating tax laws to incentivize charitable food donation, Congress has enacted the Good Samaritan Act⁹⁴ and the Food Donation Act.⁹⁵ These affirmative steps reinforce that hunger and food waste are significant problems that demand federal attention.

The Good Samaritan Act shields persons (individuals, corporations, farmers, retailers, etc.) or gleaners (those who pick up and donate leftover unharvested food from farms) from facing civil or criminal liability for donating “apparently wholesome food or an apparently fit grocery product . . . to a nonprofit organization for ultimate distribution to needy individuals[.]” so long as the donation is made in good faith.⁹⁶ The statute defines “apparently wholesome food” and “apparently fit grocery products” as those food items and grocery products “that meet[] all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the product may not be readily marketable due to appearance, age,

⁹¹ See *The Good Samaritan Tax Act: Hearing on H.R. 1325 Before the Oversight Subcomm. of the Comm. on Ways and Means*, 106th Cong. (Mar. 21, 2000) (testimony of Bill Reighard, President, Food Donation Connection); Goldberg, *supra* note 36.

⁹² See *United States Tax Benefits*, *supra* note 80 (discussing the federal tax extender legislation passed from 2005 to 2014); see also Tax Increase Prevention Act of 2014, Pub. L. No. 113–295, § 111, 128 Stat. 4009, 4014 (2014).

⁹³ *Enhanced Tax Laws Encourage Businesses to Donate Food and Produce*, ASSOC. ARIZ. FOOD BANKS (Feb. 6, 2015), http://www.azfoodbanks.org/index.php/blog/article/2_6_enhanced_tax_laws_encourage_businesses_to_donate_food_and_produce (last visited May 1, 2017).

⁹⁴ Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (2012).

⁹⁵ Federal Food Donation Act of 2008, Pub. L. No. 110–247, 122 Stat. 2314 (2008).

⁹⁶ 42 U.S.C. § 1791(c)(1); see Heikkinen, *supra* note 35.

freshness, grade, size, surplus, or other conditions.”⁹⁷ In addition to freeing the donative entity from liability, the Good Samaritan Act insulates the nonprofit recipients from liability for accepting and ultimately distributing food and/or products they believe, in good faith, to be wholesome.⁹⁸ Essentially, the only way charitable donors or nonprofits could face legal charges related to food donation and/or distribution is if a needy recipient of the donated goods is harmed or killed due to an act or omission of the charitable donor or nonprofit, constituting either gross negligence or intentional misconduct.⁹⁹

Congress furthered its efforts to combat hunger and food waste when it enacted the Food Donation Act, the purpose of which is to encourage executive agencies and their contractors, “to the maximum extent practicable and safe, to donate excess, apparently wholesome food to feed food-insecure people in the United States.”¹⁰⁰ “Food-insecure” is defined within the statute to mean “inconsistent access to sufficient, safe, and nutritious food.”¹⁰¹ The Food Donation Act revised the Federal Acquisition Regulation to require “all contracts above \$25,000 for the provision, service, or sale of food . . . to a private entity for events at which food is provided in the United States,” to contain a clause that encourages food donation.¹⁰² The clause must include a section pertaining to terms and conditions regarding costs, whereby the head of the executive agency that enters into a contract with a contractor, under which apparently wholesome food is donated to food-insecure people in the United States, shall not be responsible for costs associated with safely distributing excess, apparently wholesome food.¹⁰³ Additionally, the required clause must include a provision expressly extending protection against civil and criminal liability—to the extent provided for in the Good Samaritan Act—to the executive agency and any contractor making donations pursuant to the Food Donation Act.¹⁰⁴

The legislation discussed in this section serves as evidence that Americans and the United States government recognize and appreciate that domestic food waste and hunger are real problems in this country. Furthermore, whereas the laws listed above reflect some of Congress’s successes in combatting food waste and hunger, so much more must be accomplished if we are to better support our food-insecure neighbors, and better protect our environment.

⁹⁷ 42 U.S.C.S. § 1791(b)(1)–(2).

⁹⁸ *Id.* § 1791(c)(2); see Heikkinen, *supra* note 35.

⁹⁹ 42 U.S.C.S. § 1791(c)(3); see Heikkinen, *supra* note 35.

¹⁰⁰ Federal Food Donation Act of 2008, Pub. L. No. 110-247, § 2, 122 Stat. 2314 (2008).

¹⁰¹ *Id.* § 3(3).

¹⁰² *Id.* § 4(a).

¹⁰³ *Id.* § 4(b)(1).

¹⁰⁴ *Id.* § 4(b)(2).

C. *Food Date Labeling: The Current Regulatory Scheme*

The most common types of food dating labels are “open” and “closed.”¹⁰⁵ “Open Dating” refers to the use of a calendar date, usually stamped on a food product’s package, to guide retailers in determining how long to display a product for sale.¹⁰⁶ “Closed” or “coded” dates, on the other hand, are packing numbers that manufacturers use to track products in interstate commerce.¹⁰⁷ Packing codes generally appear on shelf-stable products like cans and boxes of food, and enable manufacturers to “rotate their stock as well as to locate their products in the event of a recall.”¹⁰⁸ The packing codes appear as a series of letters and/or numbers, often indicating the date or time of manufacturing; there is no resource that describes how to translate the codes into dates.¹⁰⁹

1. Federal Regulation: Congress and Executive Agencies

The U.S. Constitution’s Commerce Clause gives Congress the power to regulate date labels, as they are affixed to products sold in interstate commerce.¹¹⁰ Congress has yet to use this power to enact a uniform federal food date labeling law; aside from infant formula, federal regulations do not require any food product date labeling.¹¹¹ Congress has, however, delegated food-labeling authority to two executive agencies: the Food and Drug Administration (“FDA”) and the United States Department of Agriculture (“USDA”).¹¹² The FDA and the USDA are entrusted “to ensure food safety and protect consumers from deceptive or misleading food package information.”¹¹³ Specifically, with the exception of meat, poultry, and certain fish, the FDA has statutory authority to regulate the safety of all foods.¹¹⁴ The USDA, on the other hand, may regulate meat, poultry, and some egg products.¹¹⁵ Because both federal agencies are charged with protecting

¹⁰⁵ EMILY BROAD LEIB ET AL., *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA* 6 (Sept. 2013), <http://www.nrdc.org/food/files/dating-game-report.pdf> (last visited May 1, 2017).

¹⁰⁶ *Food Product Dating*, U.S. DEP’T AGRIC., <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited May 1, 2017).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See U.S. CONST. art I, § 8, cl. 3 (providing that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); see also Broad Leib, *supra* note 105, at 8.

¹¹¹ *Food Product Dating*, *supra* note 106.

¹¹² See BROAD LEIB, *supra* note 105, at 8–9 (explaining that whereas no agency has been given *explicit* authority to regulate food labeling, the FDA and USDA have the *clearest* delegation).

¹¹³ *Id.* at 9.

¹¹⁴ *Id.* (noting that the FDA’s regulatory authority stems from the Food, Drug, and Cosmetic Act of 1938, the Nutritional Labeling and Education Act of 1990, the Fair Packaging and Labeling Act of 1966, the Infant Formula Act of 1980, and the Food Safety Modernization Act of 2011).

¹¹⁵ *Id.* (noting that the USDA’s regulatory authority stems from the Poultry Products Inspection Act of 1957, the Federal Meat Inspection Act of 1906, the Egg Products Inspection Act of 1970, the Perishable Agricultural Commodities Act of 1930, and the Agricultural Marketing Act of 1946).

consumers from misleading labeling information, either (or both) could exercise its authority to regulate food labeling in order to rectify the mislabeling, or “misbranding,” without any additional Congressional action.¹¹⁶

In addition to the FDA and the USDA, the Federal Trade Commission (“FTC”) also has food labeling authority “to regulate food advertising in order to prevent misleading information from reaching the consumer.”¹¹⁷ Rather than working together to streamline date labeling practices across different foods, the federal agencies have mostly issued voluntary guidance on this subject, which only a minority of states have implemented.¹¹⁸ The FDA Food Code (“Food Code”) is one example of federal voluntary guidance.¹¹⁹ The Food Code offers model regulations for state and local governments on specific food and safety laws.¹²⁰ Numerous states have voluntarily adopted the Food Code—typically adding their own modifications—because the Food Code reflects the knowledge of dozens of food safety experts.¹²¹ While the Food Code does provide limited guidance, it is important to note that it does not cover all food and beverages¹²² and it is not law; only when states adopt the Food Code’s language by statute or regulation do the words become binding.¹²³

The FDA, USDA, and FTC are not the only federal entities that have authority to input voluntary guidance regarding food labeling, and the Food Code is certainly not the only example of federal voluntary guidance implemented by a federal agency. In fact, jurisdiction to promulgate voluntary regulations is not limited to the federal platform at all; state governments, local governments, and industries (manufacturers and retailers) also require and/or prohibit a variety of food-labeling information on a range of products.¹²⁴

¹¹⁶ *Id.*

¹¹⁷ BROAD LEIB, *supra* note 105, at 9–10 (explaining that The Federal Trade Commission Act of 1914 grants the FTC authority to regulate food labeling if action is required to prevent “unfair or deceptive acts or practices in or affecting commerce”); see Memorandum of Understanding, FDA Memorandum of Understanding Between the FTC and the FDA, U.S. Food Drug Admin. (May 14, 1971), <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm115791.htm> (last visited May 1, 2017).

¹¹⁸ BROAD LEIB, *supra* note 105, at 11.

¹¹⁹ See *id.* See generally, e.g., FOOD AND DRUG ADMIN., FOOD CODE: U.S. PUBLIC HEALTH SERVICE (2013), <http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf> (last visited May 1, 2017) [hereinafter FOOD CODE].

¹²⁰ See BROAD LEIB, *supra* note 105, at 11–12. See generally FOOD CODE, *supra* note 119.

¹²¹ See BROAD LEIB, *supra* note 105, at 12.

¹²² See *id.* (stating the code only “addresses date labeling requirements in three different areas: shellfish; refrigerated, ready-to-eat potentially hazardous food; and reduced oxygen packaging” (footnotes omitted)).

¹²³ *Id.*

¹²⁴ *Id.* at 12, 15–16.

2. State Regulation

In the absence of federal regulation of date labels, states often use their discretion to create a range of requirements for date labels.¹²⁵ States have widely departed from one another in their methods; states regulate different food products, have different definitions, and use different language: “sell by,” “quality assurance,” “born on,” “best if used by,” “best before,” etc.¹²⁶ Forty-one states, plus the District of Columbia, mandate food date labels on at least some products.¹²⁷ On the other hand, nine states, including New York, have no date label requirements at all.¹²⁸ New York State has yet to report “any ‘adverse public health effects, poor milk quality or a decrease in milk demand’ arising from not requiring a ‘sell by’ date at the state level.”¹²⁹

3. Local Government and Industry

Cities may also regulate food labels and product sales based on those labels.¹³⁰ For example, Baltimore “prohibits the sale of any perishable food past its expiration date, whereas the state of Maryland does not.”¹³¹ In addition, because regulation is so inconsistent at the federal, state, and local levels, industry actors are often compelled to choose the method and content of date labels—and they are free to do so.¹³² For example, in 2004, Wal-Mart implemented its own regulations to govern products sold in its stores.¹³³ Wal-Mart required that its suppliers place a “best if used by” date on all food products because they wanted to ensure the products’ freshness to the customers.¹³⁴

As this section illustrates, there is current law that supports food donation and waste reduction. Furthermore, there are numerous federal, state, and local regulations guiding manufacturers, retailers and consumers regarding food product dates, quality, and freshness. Is this enough?

¹²⁵ *Id.* at 12.

¹²⁶ *Id.*

¹²⁷ *See id.* at 14 (providing a table in Figure 4 describing which states require labeling for different categories of food products).

¹²⁸ *Id.* at 12–13.

¹²⁹ *Id.* at 15 (quoting the DEP’T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF A RESOLUTION REPEALING ARTICLES 111 AND 117 OF THE NEW YORK CITY HEALTH CODE 3 (2010), <http://www.nyc.gov/html/doh/downloads/pdf/notice/2010/notice-article-111-117-noa.pdf> (last visited May 1, 2017)).

¹³⁰ *Id.*

¹³¹ *See id.* at 15; *see also* BALT., MD., REV. CODE tit. 6, § 6-505.1 (2009).

¹³² *See* BROAD LEIB, *supra* note 105, at 15.

¹³³ *Id.* at 16.

¹³⁴ *Id.*

IV. EXPLOITING THE INEFFICIENCY OF THE STATUS QUO

A. *What Happened to H.R. 644?*

On February 2, 2015, Representative Thomas Reed of New York introduced H.R. 644, short-titled the “Fighting Hunger Incentive Act of 2015,” in the House of Representatives.¹³⁵ This piece of legislation, which was partially modeled after former failed legislation,¹³⁶ aimed to amend the IRC of 1986¹³⁷ to (1) *permanently* extend and expand the charitable deduction for food donations by *any* trade or business, (2) increase the amount of deductible food donations a taxpayer may make in any taxable year from 10% to 15% of the taxpayer’s aggregate net income, and (3) promulgate rules for determining the basis amount of donated food for non-C corporation taxpayers and rules for determining the fair market value of such contributed food.¹³⁸

H.R. 644 was sent to the House Ways and Means Committee, whereby committee Chairman Representative Paul Ryan (R-WI) submitted a report, which included that:

H.R. 644 provides an important incentive for food-service companies like restaurants to donate, rather than discard, surplus wholesome food inventory to charitable organizations that help children and families in need. Recognizing that donated food inventory must be properly saved, packaged, labeled and kept refrigerated or frozen until it is delivered to the charitable organization, H.R. 644 encourages food-service companies to incur and offset these costs through the enhanced deduction. According to testimony received by the Committee, the enhanced deduction for food inventory has been a vital incentive to support community food pantries and other tax-exempt organizations that work to fight hunger in local communities across the nation.¹³⁹

Incredibly, the House of Representatives, comprised of 435 members

¹³⁵ Fighting Hunger Incentive Act of 2015, H.R. 644, 114th Cong. (2015).

¹³⁶ Supporting America’s Charities Act, H.R. 5806, 113th Cong. (2014). Similar to the Fighting Hunger Incentive Act of 2015, the Supporting America’s Charities Act aimed to equalize tax incentives for C and non-C corporations; the bill, however, failed in the House on December 11, 2014. *Id.*

¹³⁷ *See generally* 26 I.R.C. (2015).

¹³⁸ *See Summary: H.R. 644 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/644/summary/00?q=%7B%22search%22%3A%5B%22All+infor+HR644%22%5D%7D&resultIndex=1> (last visited May 1, 2017) (summarizing H.R. 644 as introduced to the House in Feb. 2015).

¹³⁹ H.R. REP. NO. 114-18, at 3 (2015).

of Congress, passed H.R. 644 in a mere ten days.¹⁴⁰ Between the time of introduction and that of House approval, the bill was re-named the “America Gives More Act of 2015,” (“America Gives More Act”) but remained substantially similar to its original form.¹⁴¹ The Senate received the engrossed bill on February 23, 2015, but did not consider it on the Senate Floor until May 14, 2015.¹⁴² Upon consideration, Senator Orrin Hatch (R-UT) proposed an amendment, the purpose of which was to act as a complete substitute to the America Gives More Act.¹⁴³ A substitute it was. The amendment completely replaced all prior content and renamed H.R. 644 the “Trade and Facilitation and Trade Enforcement Act of 2015”; the Senate passed the “amended” bill the same day.¹⁴⁴

The official title of H.R. 644, as amended by the Senate, is “[a]n act to reauthorize trade facilitation and trade enforcement functions and activities, and for other purposes.”¹⁴⁵ Legislative testimony suggests that the motivation behind the bill’s new content was “to guarantee that Americans can find a more level playing field as we compete in the world economy[;] to show that Americans should not be patsies for other countries”¹⁴⁶ Ironically, during his monologue, Senator Sherrod Brown (D-OH) compelled Congress to support American companies that face unfair competition—particularly the small businesses, “which are always hurt to a much greater degree than large businesses.”¹⁴⁷ Senator Brown’s argument—that we need to stand up for domestic businesses dealing with unfair trade competition in order to save local companies and jobs—has merit. However, addressing domestic hunger issues and the implications food waste has on our communities, economy, and environment is equally, if not more, important. The Senate robbed Americans of the redress the original H.R. 644 was intended to bring.

On May 14, 2015, the same day the Senate passed H.R. 644, the Senate also high-jacked legislation that—similarly to H.R. 644 at conception—

¹⁴⁰ See *Final Vote Results for Roll Call 80*, OFF. CLERK (Feb. 12, 2015, 5:07 PM), <http://clerk.house.gov/evs/2015/roll080.xml> (last visited May 1, 2017); see also *Summary: H.R. 644*, *supra* note 138.

¹⁴¹ See *Titles: H.R. 644 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/644/titles?q=%7B%22search%22%3A%5B%22All+infor+HR644%22%5D%7D&resultIndex=1> (last visited May 1, 2017).

¹⁴² *All Actions: H.R. 644 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/644/all-actions?q=%7B%22search%22%3A%5B%22All+infor+HR644%22%5D%7D&resultIndex=1> (last visited May 1, 2017).

¹⁴³ *Purpose: S.Amdt. 1224 – 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/amendment/114th-congress/senate-amendment/1224/> (last visited May 1, 2017); see 161 CONG. REC. S2852 (daily ed. May 13, 2015), <https://www.congress.gov/crec/2015/05/13/CREC-2015-05-13-pt1-PgS2852.pdf> (last visited May 1, 2017).

¹⁴⁴ See *All Actions: H.R. 644*, *supra* note 142.

¹⁴⁵ See *Titles: H.R. 644*, *supra* note 141.

¹⁴⁶ S. REP. NO. 114-74, at S2900 (2015), <https://www.congress.gov/congressional-record/2015/05/14/senate-section/article/S2899-5> (last visited May 1, 2017).

¹⁴⁷ *Id.*

—proposed amending the IRC of 1986.¹⁴⁸ H.R. 1295 was introduced to, and passed through, the House of Representatives as the “IRS Bureaucracy Reduction and Judicial Review Act,” intended “to improve the process for making determinations with respect to whether organizations are exempt from taxation under section 501(c)(4) of such Code.”¹⁴⁹ However, anticipating consideration of H.R. 644 and H.R. 1295, the Senate reviewed the two bills *en bloc* and completely redirected the substance upon which each was based.¹⁵⁰ The conversation went from donation and tax deduction to trade, customs, and imports; H.R. 1295 became the “Trade Preferences Extension Act of 2015,” “[a]n act to extend the African Growth and Opportunity Act, the Generalized System of Preferences, the preferential duty treatment program for Haiti, and for other purposes.”¹⁵¹

The America Gives More Act proposed offsetting the issue of food waste by creating a permanent deduction that would allow all companies, including small businesses, retailers, restaurants, and farmers to take an enhanced tax deduction when donating excess nutritious food.¹⁵² Unfortunately, the Senate gave nothing to a bill that promised to give so much. The evolution of H.R. 644, and related bills, proves that no matter how much effort American citizens, local politicians, organizations, advocates, etc. put behind an issue, their energy may be thwarted in the eleventh hour by Congressmen operating on their own agenda. Such unpredictable practices should neither be allowed, nor tolerated.

B. *Inconsistent Food Label Guidance Leads to Consumer Confusion and Waste*

Another major contributor to food waste is confusion over food date labeling due to the absence of standardized regulations.¹⁵³ What do all those labels and dates on food products—“sell by,” “use by,” “best before”—really mean? As the definitions vary from one location to another, not many Americans know.¹⁵⁴ The absence of comprehensive action at the federal level “increases the complexity of the food labeling regime by causing a regulatory void that states and localities have attempted to fill in various ways, resulting in a tremendously varied set of state and local laws regarding the use of date labels.”¹⁵⁵ Consequently, misguided industry employees and consumers

¹⁴⁸ See *Titles: H.R. 1295, 114th Congress (2015–2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/1295/titles> (last visited May 1, 2017).

¹⁴⁹ *Id.*

¹⁵⁰ S. REP. NO. 114-74, at S2899 (2015), <https://www.congress.gov/congressional-record/2015/05/14/senate-section/article/S2899-5> (last visited May 1, 2017).

¹⁵¹ *Titles: H.R. 1295, supra* note 148.

¹⁵² Goldberg, *supra* note 36.

¹⁵³ BROAD LEIB, *supra* note 105, at 5.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.*

misinterpret labels and prematurely discard perfectly good food.¹⁵⁶

Furthermore, whereas customers generally prefer open dating, finding it clearer and more useful,¹⁵⁷ a 2007 USDA-funded survey revealed that most of the participants were unable to identify the general meanings of different open dates, with fewer than half (44 %) correctly describing the meaning of the “sell by” date and only 18 % correctly indicating understanding of the “use by” date.¹⁵⁸ To clarify, the “sell by” date is an inventory-control date that merely recommends the time a product should be displayed on a shelf; it is not the final day a product can be consumed.¹⁵⁹ As a result, consumers often mistaken food *freshness* and *quality* labeling for food *safety* labeling and prematurely discard perfectly wholesome food.¹⁶⁰

Problems arise when a state or local regulation requires a label on specific foods, yet the regulation lacks specificity as to how the industry should word or date the label; the decision becomes pure industry discretion.¹⁶¹ Such was the case when Walmart issued company-wide standards for their food products, discussed previously in Section III(C)(3). Walmart’s good intentions to standardize its labels likely result in waste because their shelf-stable inventory, which would have sold without a date label, risks being discarded when the “best if used by” dates expire.¹⁶² Additional difficulties surface when organization A engages in business with organization B, yet A has different food dating label regulations than B; such inconsistency is inefficient and invites conflict.

This Comment has only touched upon a few variations among federal, state, local, and industry regulations—to illustrate how the current food labeling system generates consumer confusion without concretely improving food safety. Such confusion results in misinterpretation of food date labels: when faced with the uncertainty of a label’s date or language, store employees and consumers too often prematurely discard the food items—contributing to food waste and preventing wholesome food from finding a needy recipient. If the federal government took ownership of this area and standardized regulations, including language and definitions, our country could better combat both the domestic food waste and hunger epidemics.

¹⁵⁶ *Id.* at 2.

¹⁵⁷ See DEP’T OF HEALTH, EDUC., AND WELFARE ET AL., FOOD LABELING: GOALS, SHORTCOMINGS, AND PROPOSED CHANGES 44 (Jan. 19, 1975), <http://www.gao.gov/assets/120/115505.pdf> (last May 1, 2017).

¹⁵⁸ Katherine M. Kosa et al., *Consumer Knowledge and Use of Open Dates: Results of a Web-Based Survey*, 70 J. FOOD PROTECTION 1213, 1218 (2007).

¹⁵⁹ BROAD LEIB, *supra* note 105, at 19.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 12.

¹⁶² *Id.* at 16.

V. NEED FOR ACTION: PROPOSED SOLUTIONS

A. *Extend Permanent Tax Deductions to Non-C Corporations for Charitable Food Donation*

Simply put, Congress needs to enact legislation similar to the original version of H.R. 644. It is not enough that temporary versions of the enhanced tax deductions are passed every two years because, in the meantime, too many non-C corporations refrain from donating their excess wholesome food inventory in fear that they may never see compensation in the form of tax benefits. Furthermore, while some smaller retailers and farmers continue to donate what they can, “they [cannot] afford to scale up the process, because of the costs associated with buying proper packaging, training staff how to store the food and paying the additional wages, among other expenses.”¹⁶³ Throwing away excess food is cheaper.

By extending permanent tax deductions to non-C corporations for donating charitable food inventory, Congress would both combat domestic food waste and assist food-insecure individuals and families. There is no reason this tax benefit should be extended to the larger C corporations—who generally have greater resources to pay for the costs associated with donation—but not to non-C corporations. The current system results in more wasted food, more food-insecure Americans, and more work for Congress—as advocates must do the legwork to get the temporary legislation reenacted every two years.

The main argument that challengers raised regarding the original version of H.R. 644 was that extending permanent tax deductions to non-C corporations for their charitable food donations would increase the federal deficit, and the tax provisions should not be made permanent without any revenue offset.¹⁶⁴ The Committee on Ways and Means Report provided that “[t]he staff of the Joint Committee on Taxation (JCT) estimates that enacting H.R. 644 would reduce revenues, thus increasing federal budget deficits, by about \$2.2 billion over the 2015-2025 period.”¹⁶⁵ The JCT estimated that with each year, more and more non-C corporations would participate if guaranteed the permanent tax benefits; thus, the non-C corporation donators were predicted to save approximately \$59 million in 2015, \$160 million in 2016, \$216 million in 2020, and \$256 million in 2025.¹⁶⁶ While the initial jump from \$59 million in 2015, to \$160 million in 2016, is substantial, it is important to note that the margin begins to narrow from year to year and will likely plateau a decade after implementation.¹⁶⁷ Moreover, when reviewing

¹⁶³ Goldberg, *supra* note 36.

¹⁶⁴ H.R. REP. NO. 114-18, at 8, 44 (2015).

¹⁶⁵ *Id.* at 8.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

these amounts, it is imperative to keep in mind that there will inevitably be social, environmental, and economic cost offsets from all of the reduced waste, thus comprehensively shrinking the \$2.2 billion figure even further.

If politicians are concerned about reducing the deficit for the sake of reducing the deficit (i.e., saving face with their constituents), this is not the area to do so. Yes, the federal deficit is of great consequence; however, \$2.2 billion of deducted taxes—over ten years' time—is a miniscule fraction of American debt. For example, the Congressional Budget Office (“CBO”) expects the 2015 deficit will be \$426 billion, which is \$59 billion less than the 2014 deficit (\$485 billion).¹⁶⁸ In considering how to reduce the federal deficit, CBO experts have detailed 79 options that would either decrease federal spending or increase federal revenue from 2015–2024; denying permanent tax deductions to non-C corporations for charitable food donations is not on that list.¹⁶⁹ Furthermore, *all* 79 individual options estimate saving the government more than \$2.2 billion in the next decade.¹⁷⁰

Why are Congressmen using the budget argument to fight legislation like the America Gives More Act when the CBO proposes options like increasing the excise tax on cigarettes by \$.50 per pack, which would generate an additional \$35 billion in federal revenue over the next decade?¹⁷¹ Moreover, the government could save nearly \$103 billion from 2015–2024 if our elected representatives redirected their own agendas and passed legislation requiring manufacturers to contribute a minimum rebate on medications covered under Medicare for low-income beneficiaries.¹⁷² Increasing taxes on cigarettes and imposing costs on drug manufacturers are only two rational options on a non-exhaustive list of ways to reduce the federal deficit. Again, denying permanent tax deductions to non-C corporations for their charitable food donations is *not* one of those rational options. The benefits of decreasing food waste and increasing food-insecure Americans' access to wholesome food greatly outweighs the burden of the estimated lost taxes. The budget argument has no merit; Congress should pass this beneficial bipartisan legislation.

B. *Implement a Federal System for Food Date Labeling*

Another bipartisan, common sense solution to combatting food waste is to create a new system for food date labeling that may be promulgated from the federal level down.¹⁷³ The standards and regulations should use clear,

¹⁶⁸ *An Update to the Budget and Economic Outlook: 2015–2025: Summary*, CONG. BUDGET OFF. (Aug. 25, 2015), <https://www.cbo.gov/publication/50724> (last visited May 1, 2017).

¹⁶⁹ *Summary Table of Options*, CONG. BUDGET OFF. (Nov. 20, 2014), <https://www.cbo.gov/budget-options/2014/summary-table> (last visited May 1, 2017).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See BROAD LEIB, *supra* note 105, at 23.

uniform terms and definitions so consumers can understand the significance of both the dates and the handling information. To the extent possible, the system should govern all foods within a general category of products, across all currently identified classes of food products: perishable foods, potentially hazardous foods, milk/dairy, meat/poultry, shellfish, and eggs.¹⁷⁴

First, regulations should mandate the use of “closed” or “coded” dating to represent “sell by” dates—thus making such dates invisible to the consumer.¹⁷⁵ Again, “sell by” dates provide a means of communication between the manufacturer and retailer, guiding retailers as to when they should stock and rotate products on display; “sell by” dates do not give the consumer any beneficial guidance regarding the product’s safety or handling.¹⁷⁶ Grocers or retailers may oppose this proposal, insisting that open dating for “sell by” dates is critical because dates, rather than random codes, make it easier for the employees to stock the shelves. In response, this Comment challenges that nearly all stores are equipped with technology, usually handheld scanners, which the employees can use to translate the codes. Understandably, that may add a few seconds for each product in the process; however, the benefit of reducing consumer confusion outweighs the time burden. Should that recommendation fail, this Comment proposes the government change the language to “stock by” or “display through,” and place the information in an inconspicuous location: the back, side, or bottom of a product.

In addition to changing “sell by” dates from open dating to closed dating, the new system of regulations should clearly delineate between labels that provide quality-based dates and those that indicate safety-based dates.¹⁷⁷ If manufacturers insist on including quality-based information for some food products, the government should require standardized, unambiguous terms that act as industry disclaimers: “This date indicates quality and freshness,” or “This date is not linked to product safety.”¹⁷⁸ This Comment proposes the new system should eliminate the presence of quality-based dates on non-perishable, shelf-stable food products altogether.¹⁷⁹ If anything, such dates should be replaced with information guiding shelf life after opening.¹⁸⁰ For example, “Best within XX days of opening[,]” or “highest quality XX weeks after opening.”¹⁸¹ Removal or replacement of quality-based dates on non-perishables should face little opposition because such food products generate little concern for safety.¹⁸² This remedy would help to eliminate consumer

¹⁷⁴ *Id.* at 14, 23.

¹⁷⁵ *Id.* at 23.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 24.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

confusion because it would reduce the volume of information through which consumers must sift every time they purchase groceries—putting greater weight on the more important safety date labels.¹⁸³ Furthermore, this remedy would reduce food waste because industry actors would have no need to employ conservative quality-based dates, which consumers confuse for safety dates, and consumers will be less likely to prematurely discard their non-perishable food products.¹⁸⁴

On the other hand, for foods where the date may play a role in indicating safety, “safe if used by” language better communicates the safety message than “use by” language.¹⁸⁵ Additionally, handling information is often linked to safety-based labels. Consequently, the new system should include “freeze by” dates on all perishable products that are suitable for home freezing.¹⁸⁶ According to the USDA Food Safety and Inspection Service, “once a perishable product is frozen, it doesn’t matter if the date expires because foods kept frozen continuously are safe indefinitely.”¹⁸⁷

In addition, safety and handling information should be placed in conspicuous, predictable locations.¹⁸⁸ For example, just below the item name on the front of the product or perhaps just below the table of nutritional facts.¹⁸⁹ A more costly alternative, but one that would save space, is the use of smart labels.¹⁹⁰ Consumers could use their smart device to scan the smart label and obtain any and all quality or safety-based information. I propose that the government contribute some funding to the implementation of smart labels if the new, standardized system were to mandate them. Otherwise, manufactures should be encouraged to voluntarily adopt this tech-friendly method to inform customers.

A new, uniform system of food date labeling that: (1) differentiates between quality-based and safety-based information; (2) makes “sell by” dates invisible to consumers; (3) reduces the presence or visibility of quality-based information; and (4) increases and clarifies the visibility of safety-based information, would directly respond to current sources of consumer confusion. Better-informed consumers would make more informed decisions when handling and preserving food. A financially savvy mom will be less inclined to throw away the loaf of bread that reads “peak quality ensured through Dec. 31,” as compared to “good through Dec. 31”; she will get a few extra days of packed lunches for her kids, save money, and contribute to waste reduction.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; see *Food Product Dating*, *supra* note 106.

¹⁸⁸ See BROAD LEIB, *supra* note 105, at 24.

¹⁸⁹ *Id.* at 25.

¹⁹⁰ *Id.*

VI. C ONCLUSION

Whereas U.S. lawmakers have addressed this country's food waste epidemic, they have fallen short of fulfilling their duties to serve their constituents. Every American that goes to bed undernourished is a failure; every landfill that houses unnecessary waste is a failure; every dollar squandered due to an inefficient food labeling system is a failure; and every missed opportunity to mitigate such harm to our society, our environment, and our economy is a failure.

Again, one such missed opportunity was H.R. 644, whereby Congressmen butchered a bill that would have extended permanent tax deductions to small businesses that donate excess wholesome food to the hungry—potentially reducing the millions of tons of food that is wasted annually and fueling some of the millions of food-insecure Americans. As it is much more cost effective for those small businesses to throw away unused food-products, they need an economic incentive to donate. Thus, it is imperative that our lawmakers pass legislation that will aid all businesses in their donative efforts.

Our federal government's responsibility to combat the growing food waste epidemic does not end with tax breaks. Research supports that current, inconsistent food-labeling regulations regarding dates, wording, language placement, etc. confuse retailers and consumers. Consequently, the legislature and executive agencies must work together to draft and implement a standard set of regulations to govern food-safety labeling. Such regulations will better educate retailers and consumers – thus, reducing unnecessary food waste. The trivial burden this solution poses to the federal government promises a wealth of benefits: social, environmental, and economic. We should not hesitate to demand such action because, upon being sworn into office, our elected representatives publically pledge they “will well and faithfully discharge the duties of the office on which [he or she is] about to enter.”¹⁹¹ The status quo is neither evidence of well discharged duties nor evidence of faithfully discharged duties. If we hope to combat food waste and eradicate domestic hunger, Americans deserve more.

¹⁹¹ Kathy Gill, *Oaths of Office for Federal Officials*, ABOUT.COM, http://uspolitics.about.com/od/usgovernment/a/oaths_of_office_4.htm (last visited May 1, 2017).