



**THE FOOD LAW LAB**  
HARVARD LAW SCHOOL

# Preference and Perception in the Law of Food

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**Jacob Gersen**

Professor of Law at the Harvard Law School  
Director of the Food Law Lab at Petrie-Flom

**Harvard Food+ Research Symposium**  
Geological Museum Lecture Hall 100  
Friday, February 27, 2015



**HARVARD  
LAW SCHOOL**



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BRILLAT-SAVARIN

# PHYSIOLOGIE DU GOUT

PAR

**BRILLAT SAVARIN,**

ILLUSTRÉE

**PAR BERTALL**

PRÉCÉDÉE

D'UNE NOTICE BIOGRAPHIQUE

PAR ALPH. KARR.

**Dessins à part du texte, gravés sur acier par Ch. Geoffroy,**

**Gravures sur bois, intercalées dans le texte, par Hildebrand.**



GABRIEL DE GONET, ÉDITEUR, RUE DES BEAUX-ARTS, 6.



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Dis-moi ce que tu manges,  
je te dirai ce que tu es.

~ Brillat-Savarin



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Tell me what you eat,  
I will tell you what you are.

~ Brillat-Savarin





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# Angst

**Jean Paul  
Sartre  
1905 – 1980**







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**Common**

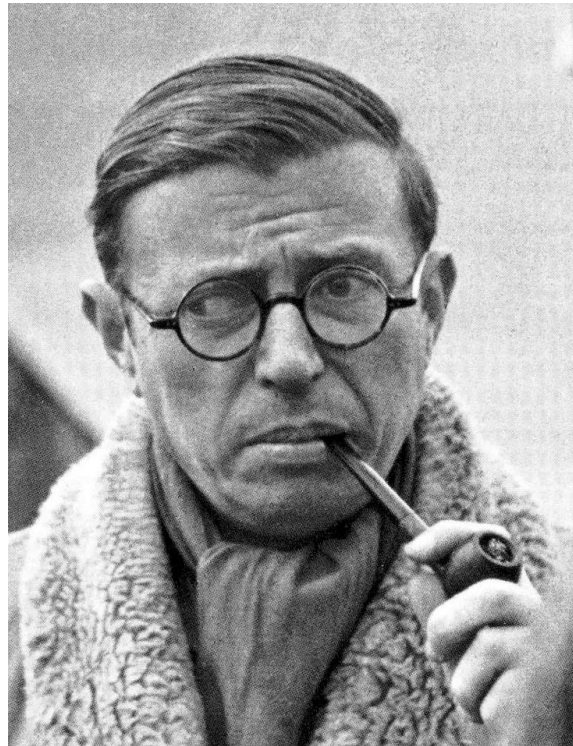
**Sir William  
Blackstone  
1723 – 1780**







**Brillat-Savarin**



**Sartre**



**Blackstone**



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# Security Problems

Are we buying what we think we are buying?

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# POM Wonderful LLC v. The Coca-Cola Company

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 12–761

POM WONDERFUL LLC, PETITIONER *v.* THE  
COCA-COLA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June 12, 2014]

JUSTICE KENNEDY delivered the opinion of the Court.

POM Wonderful LLC makes and sells pomegranate juice products, including a pomegranate-blueberry juice blend. App. 23a. One of POM’s competitors is the Coca-Cola Company. Coca-Cola’s Minute Maid Division makes a juice blend sold with a label that, in describing the contents, displays the words “pomegranate blueberry” with far more prominence than other words on the label that show the juice to be a blend of five juices. In truth, the Coca-Cola product contains but 0.3% pomegranate juice and 0.2% blueberry juice.

Alleging that the use of that label is deceptive and misleading, POM sued Coca-Cola under §43 of the Lanham Act. 60 Stat. 441, as amended, 15 U. S. C. §1125. That provision allows one competitor to sue another if it alleges unfair competition arising from false or misleading product descriptions. The Court of Appeals for the Ninth Circuit held that, in the realm of labeling for food and beverages, a Lanham Act claim like POM’s is precluded by a second federal statute. The second statute is the Federal Food, Drug, and Cosmetic Act (FDCA), which forbids the



# M Wonderful v. Coca-Cola

Are the labels confusing or deceptive?

---

## — POM Wonderful's Juice<sup>1</sup> —



*Brand name:*  
POM Wonderful  
Pomegranate  
Blueberry 100% Juice

*Ingredients:*  
" 85% Pomegranate  
juice from  
concentrate  
" 15% Blueberry  
juices from  
concentrate  
" Natural flavors

## — Coca-Cola's Juice<sup>2</sup> —



*Brand name:*  
Minute Maid® Enhanced  
Pomegranate Blueberry  
Flavored 100% Juice  
Blend

*Ingredients:*  
" 99% Apple juice from  
concentrate  
" 0.3% Pomegranate  
juice from concentrate  
" 0.2% Blueberry juice  
from concentrate  
" Added ingredients  
and other natural  
flavors

## ot: *POM Wonderful v. Coca-Cola*

### POM's complaint . . .

Coca-Cola's label is deceptive and misleading. This violates the Lanham Act.

### Legal question . . .

Does the FDCA preclude food-labeling related suits under the Lanham Act?

### Relevant federal and state statutes . . .

**Lanham Act**  
15 U.S.C. § 1125(a)

**Federal Food, Drug, & Cosmetic Act**  
21 U.S.C. §§ 301 *et seq.*

**CA's Unfair Competition Law**  
Cal. Bus. & Prof. Code §§ 17200 *et seq.*

**CA's False Advertising Law**  
Cal. Bus. & Prof. Code §§ 17500 *et seq.*

### Court's holding . . .

No, competitors are not precluded from suing for fraudulent or misleading food labels under the Lanham Act. POM's suit against Coca-Cola may go forward.



## Wonderful LLC Questions

We are faced with several questions following *POM Wonderful LLC*.

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When are labels misleading,  
confusing, or fraudulent?

Do labels affect  
consumer beliefs?

Do consumer beliefs  
affect consumer  
behavior?

What do consumers believe about the  
laws that govern labels?

**The Big Question:**  
How should law respond?



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# Recent Research Results: Juice Labels



# Congressional Election Study

The CCES offers a rich source of data that might yield some answers.

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## Sample Design



- “ Nationally representative sample taken in October . November during election year
- “ Conducted by YouGov over internet
- “ See Ansolabehere & Rivers (2013) for more information on quality measures

## Consortium of University Research Teams



- “ Each team buys a module (1000+ cases)
- “ Each team controls 50% of questions on each module
- “ Other 50% of questions are the same on all surveys (i.e., Common Content)

## Common Content



- “ 48 teams (i.e., 48 Team Content Surveys)
- “ 57,000 respondents in Common Content

## Harvard University



- “ In 2014, two modules each with 1500 cases
- “ One on Food Behavior; one on Agriculture Policy

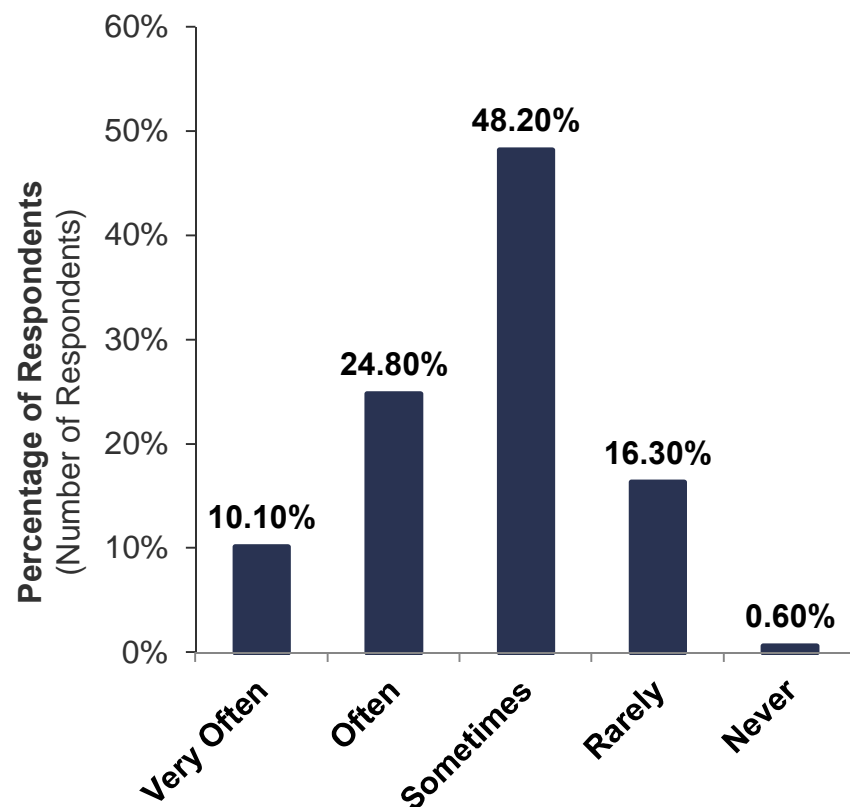
# Buying Habits

Labels have an impact on consumers' decision whether or not to buy.

**Question: "Ever NOT BUY something because of a label?"**

**Answer: 69.5% said YES**

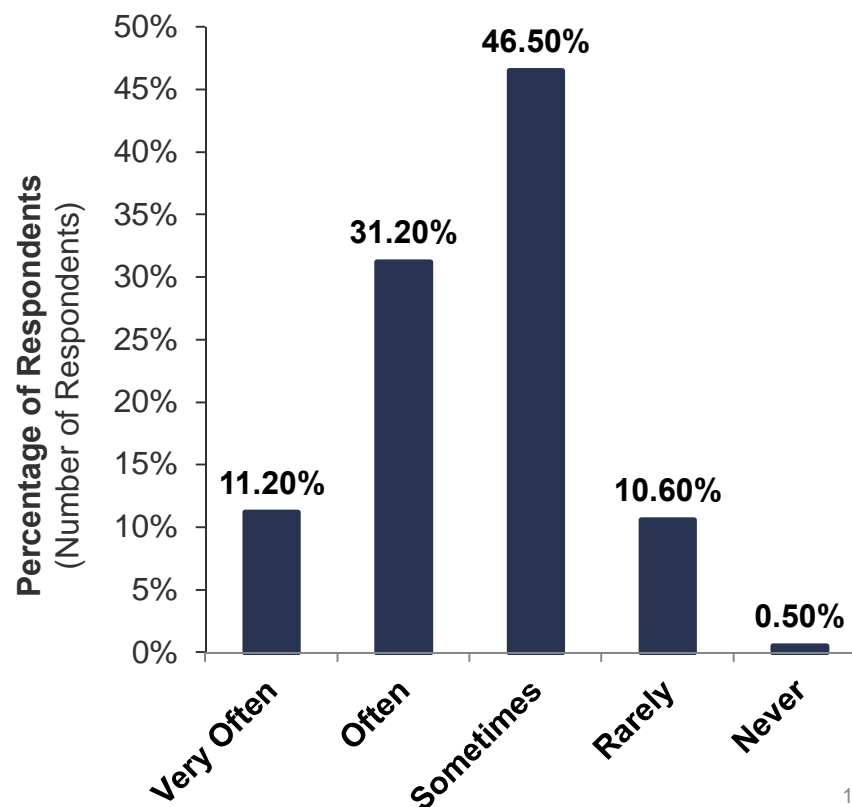
**How Often?**



**Question: "Ever BUY something because of a label?"**

**Answer: 64.2% said YES**

**How Often?**



# POM and Minute Maid Labels

Supermajority of respondents believe POM is the pomegranate drink.

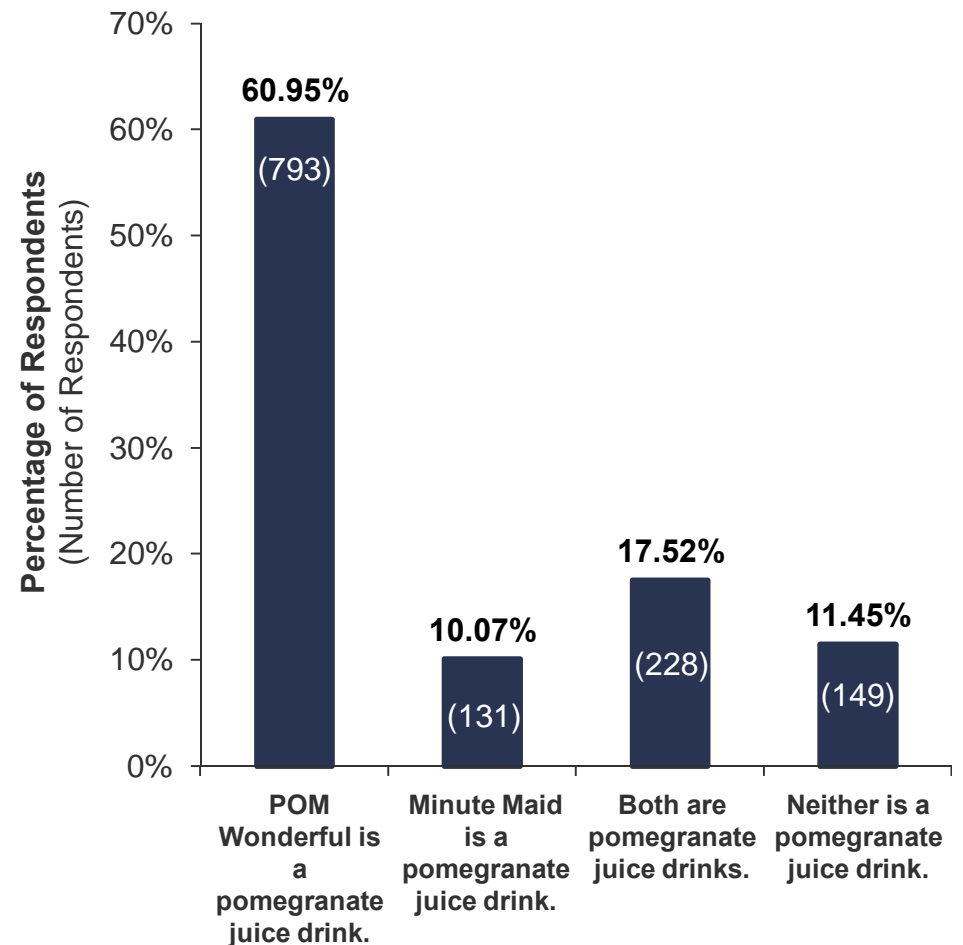
## Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which is a pomegranate juice drink.

## — Pomegranate Juice Drink? —





## POM and Minute Maid Labels

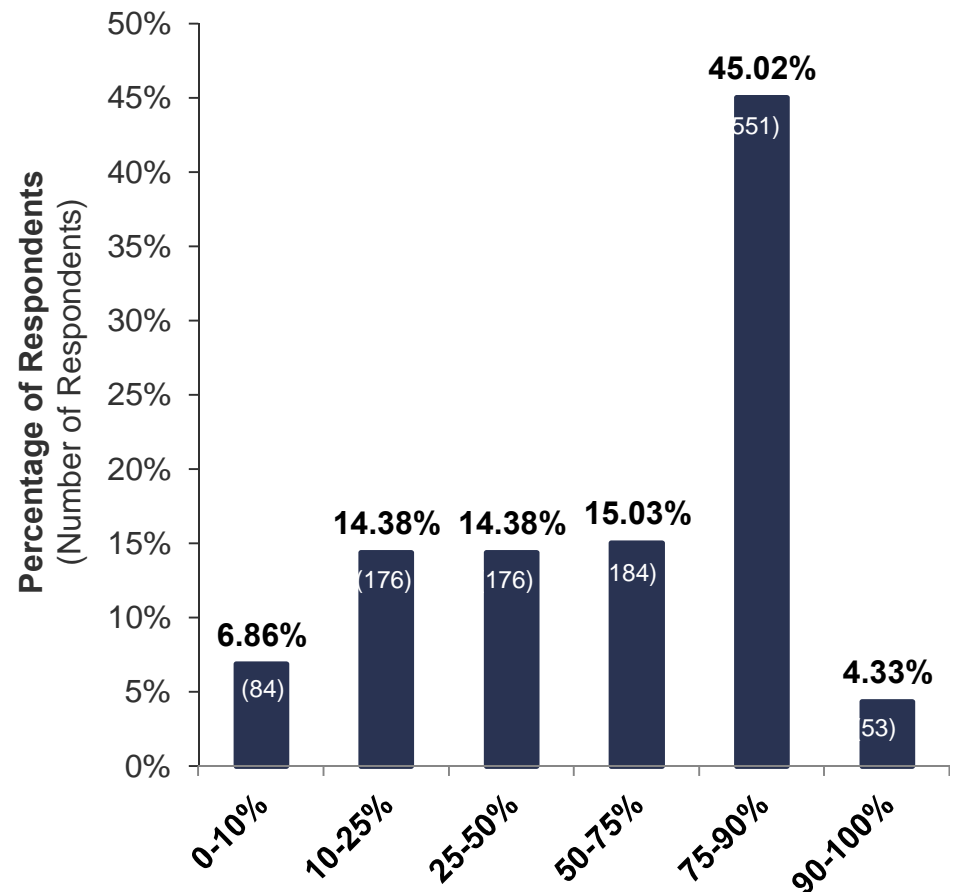
Forty-five percent believe that POM includes 75-90% pomegranate juice.

### Question

Respondents were shown the POM Wonderful Pomegranate Blueberry 100% Juice drink label.

They were asked to identify, based on the label, what percentage of the juice is pomegranate.

### — POM: Percent Pomegranate? —



## DM and Minute Maid Labels

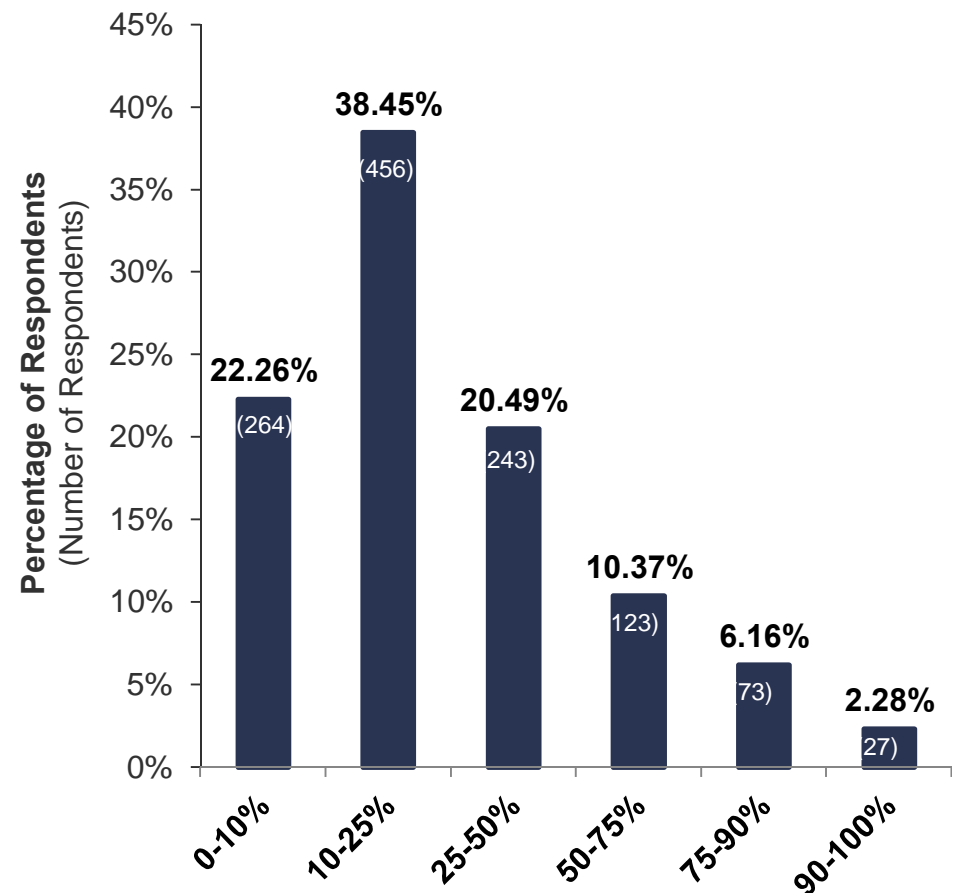
Nearly 80% believe Minute Maid has less than 50% pomegranate juice.

### Question

Respondents were shown the Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend drink label.

They were asked to identify, based on the label, what percentage of the juice is pomegranate.

### — MM: Percent Pomegranate? —



# POM and Minute Maid Labels

Majority believe neither juice is organic.

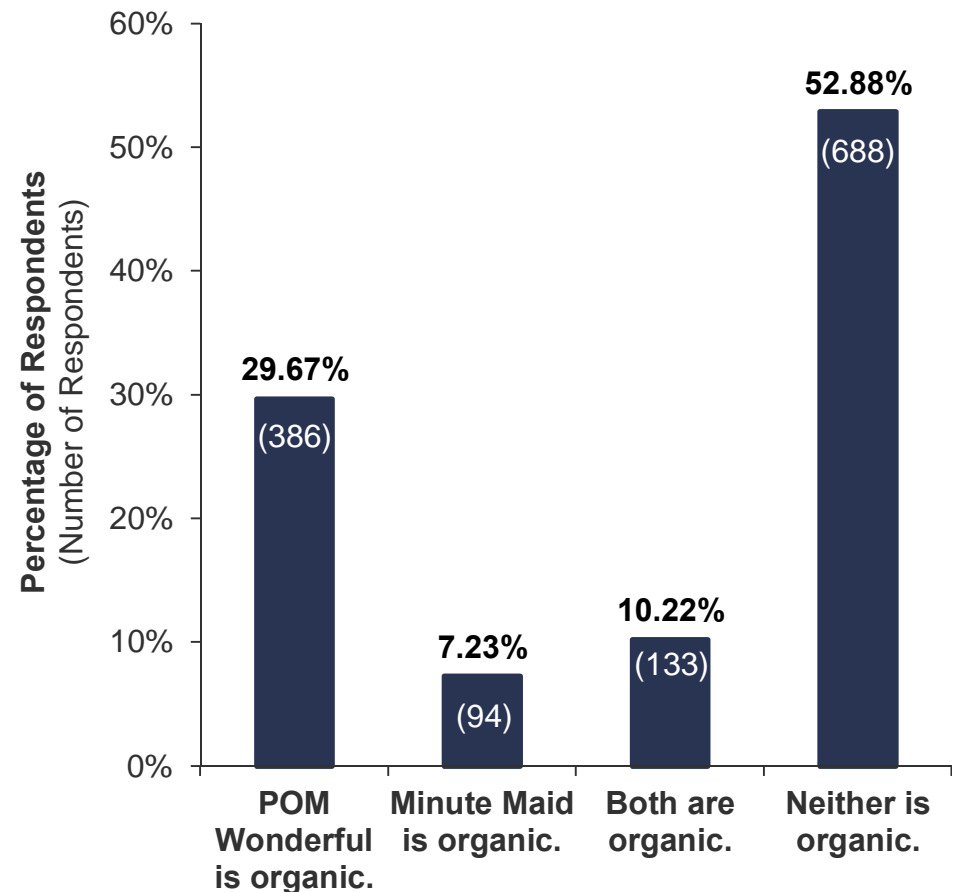
## Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they think is organic.

## Organic?





# POM and Minute Maid Labels

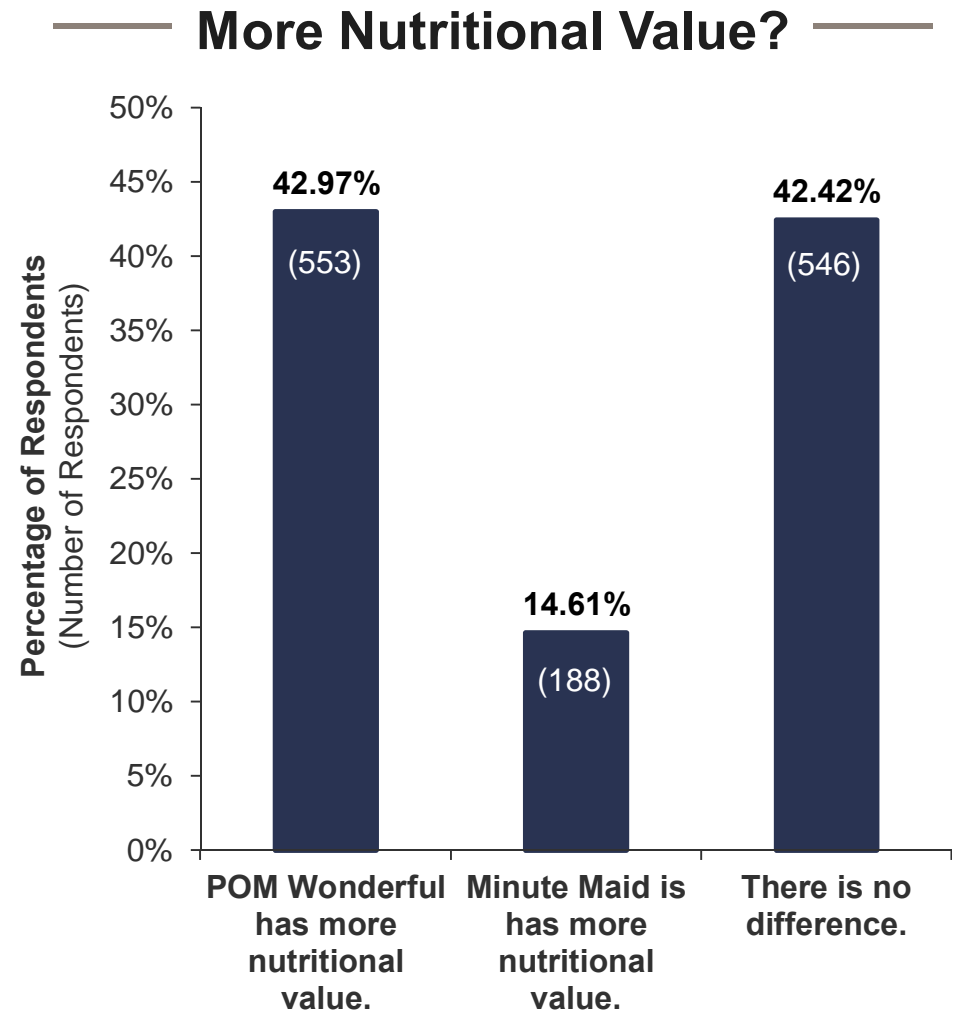
Less than 15% believe Minute Maid has more nutritional value.

## Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they think has more nutritional value.



## POM and Minute Maid Labels

Only 13.5% believe POM would taste sweeter.

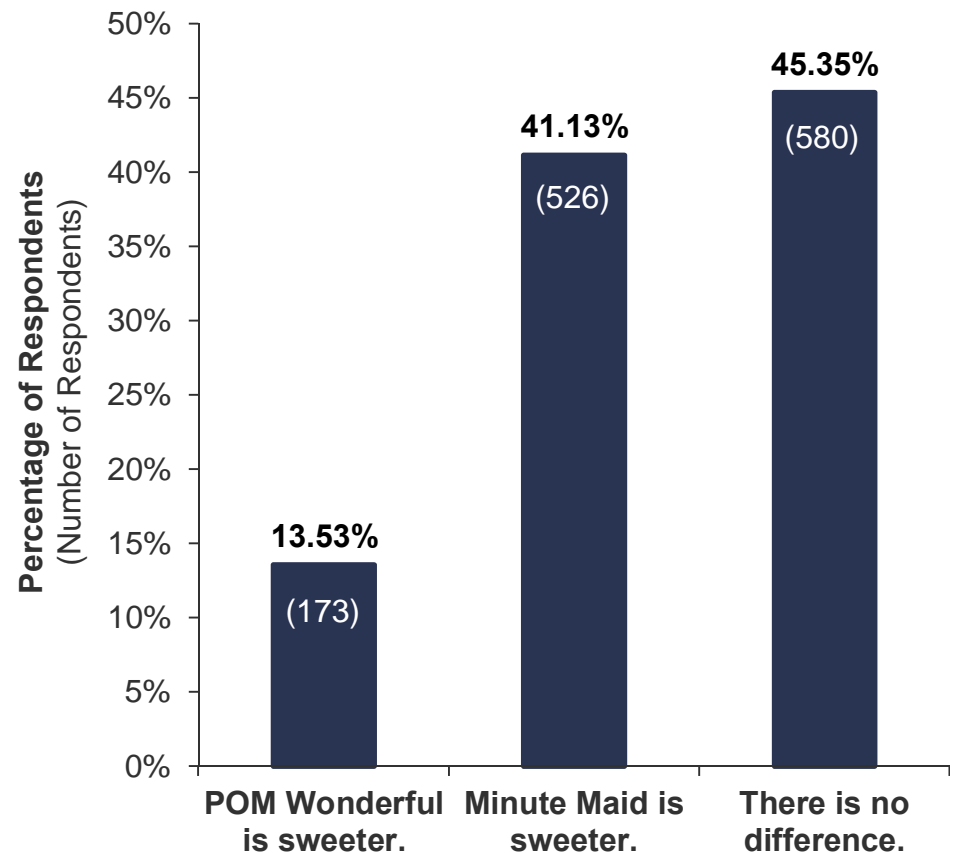
### Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they think would taste sweeter.

### Sweeter?



## POM and Minute Maid Labels

Almost half of respondents think there is no difference in taste.

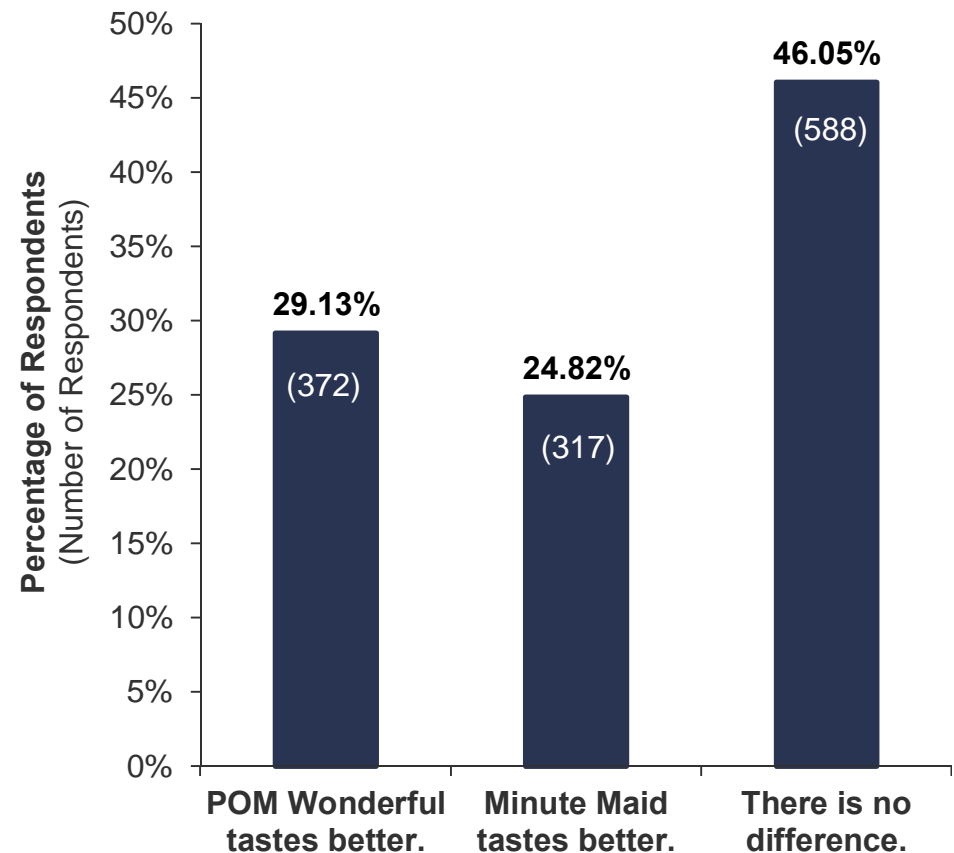
### Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they think would taste better.

### Taste Better?





# POM and Minute Maid Labels

Over 55% believe POM costs more than Minute Maid.

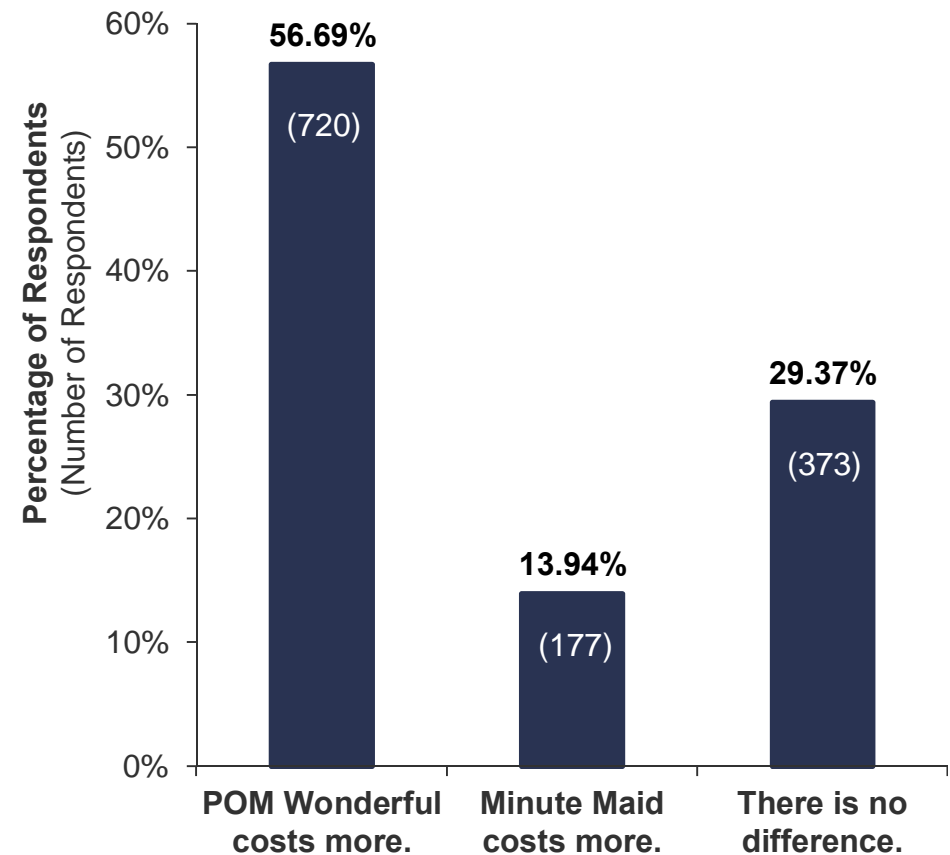
## Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they think costs more.

## Costs More?



## POM and Minute Maid Labels

Nearly 75% of respondents believe they would buy POM over Minute Maid.

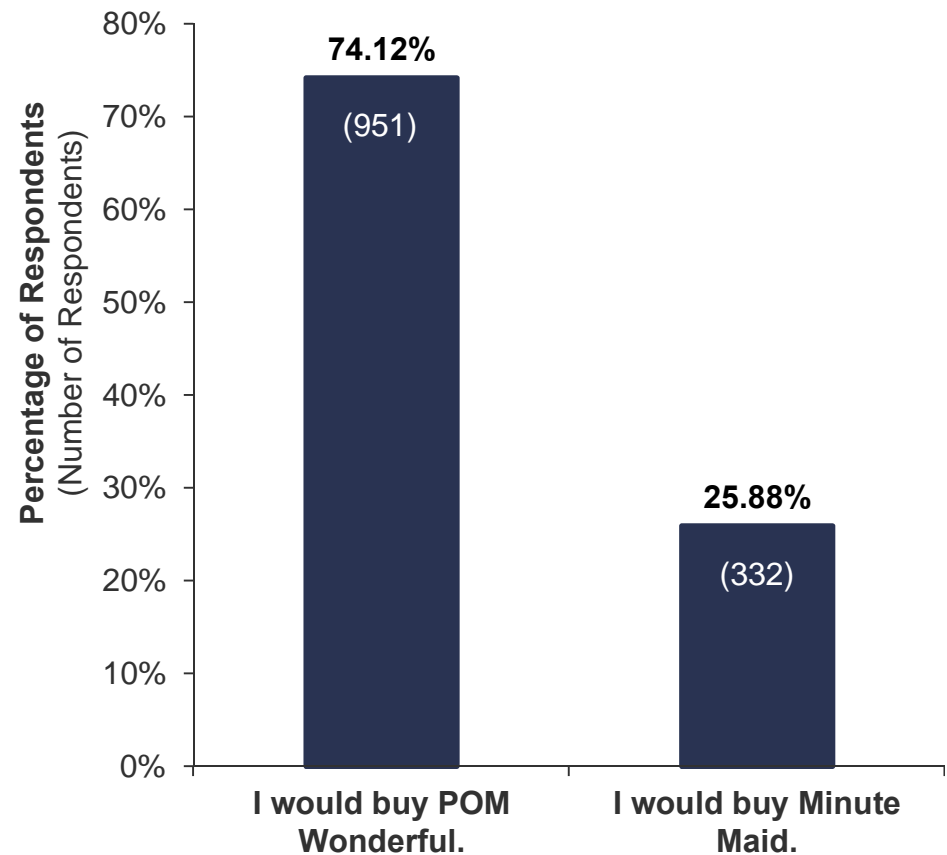
### Question

Respondents were shown two drink labels:

- POM Wonderful Pomegranate Blueberry 100% Juice
- Minute Maid® Enhanced Pomegranate Blueberry Flavored 100% Juice Blend

They were asked to identify, based on the labels, which drink they would be more likely to buy.

### More Likely to Buy?



# POM and Minute Maid Labels

It's all about cost.

**Question: “Which product are you more likely to buy?”**

**Y = 1, if POM**

	Coefficient	95% Confidence Interval	
POM is the real pomegranate juice	-0.015	-0.064	0.033
Minute Maid is the real pomegranate juice	0.031	-0.012	0.076
Which tastes sweeter? [1, 0, -1]	0.028	0.001	0.055
Which tastes better? [1, 0, -1]	-0.017	-0.044	0.009
Which costs more? [1, 0, -1]	<b>-0.329</b>	<b>-0.356</b>	<b>-0.301</b>
Which has more nutritional value? [1, 0, -1]	-0.019	-0.049	0.010
POM is the organic juice	-0.079	-0.120	-0.039
Minute Maid is the organic juice	0.096	0.044	0.148
Constant	1.419	1.370	1.469

Number of Observations = 1,238

R Squared = 0.417





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# Yogurt Labels: Evaporated Cane Juice vs. Sugar

## Yogurt Labels

Taste and nutritional value matter, but price does not.

**Question: “Which product are you more likely to buy?”**

**Y = 1, if Evaporated Cane Juice**

	Coefficient	95% Confidence Interval	
Which tastes sweeter? [1, 0, -1]	-0.057	-0.094	-0.022
Which tastes better? [1, 0, -1]	-0.204	-0.243	-0.164
Which costs less? [1, 0, -1]	0.053	0.017	0.089
Which has more nutritional value? [1, 0, -1]	-0.185	-0.235	-0.136
Brand A with evaporated cane juice is the organic yogurt	-0.036	-0.090	0.018
Brand B with granulated sugar is the organic yogurt	0.067	0.003	0.131
Constant	1.591	1.552	1.631

Number of Observations = 1,223

R Squared = 0.1876



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# Appendix



## Most Important Issues

People think about price, as well as the taste.

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**Question: “When it comes to food, which of the following do you think about the MOST or pay MOST attention to? Please choose up to 2.”**

	Value Most (%)
Nutritional Value	25.1%
Your Weight	15.1%
Price of Food	51.4%
Eating a Healthy Diet	31.1%
Allergies to Food	4.6%
Like or Taste Good	40.7%
Organically Grown	6.9%
Fair Trade/Pay of Growers	2.5%
Food Scarcity	2.3%
Religious/Moral Code	2.2%

# Yogurt Labels

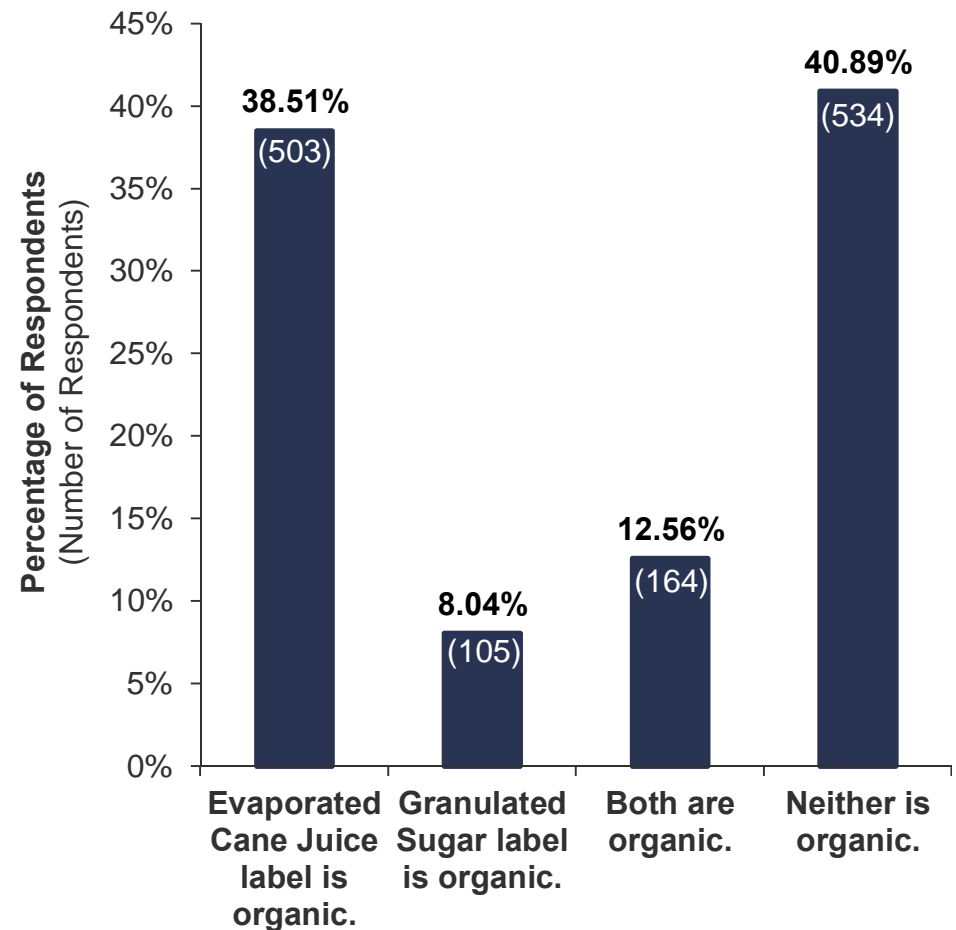
## Question

Respondents were shown two yogurt labels:

- One with %Evaporated Cane Juice+
- Another with %Granulated Sugar+

They were asked to identify, based on the labels, which yogurt is organic.

## Organic?



## n the Courts

How to know what we are eating

---

**[Insert food Fraud case]**

**Evaporated Cane Juice**  
Kane v. Chobani (N.D. Cal. 2013)

**Froot Loops**  
Videtto v. Kellogg (E.D. Cal. 2009)  
McKinnis v. Kellogg (C.D. Cal. 2007)

**All Natural**  
Pelayo v. Nestle (C.D. Cal. 2013)



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