# Burden Shifting in Immigration Bond Decisions

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**Abstract**

Non-citizens subject to deportation are often detained in prisons by the United States government. Like the criminally accused, respondents in immigration proceedings may be released on bond if they are judged not to be a danger to the community or a flight risk. Unlike the criminally accused, however, the burden of proof lies with the respondent, not the government. In addition, the standard of proof is subjective. In this paper, we identify the effect of changing these features of immigration court decision-making. To do so, we leverage a decision of the United States District Court for the District of Massachusetts in 2019, which shifted the burden of proof to the government and set an objective standard of proof. Using data on bond hearings from the Executive Office for Immigration Review (EOIR) at the Department of Justice between 2018 and 2020, we conduct a synthetic control analysis of the decision on immigration judge decisions to grant bond as well as the decision to grant bond initially. We find no effect, suggesting that both immigration court decisions and decisions of the government to set an initial bond are unrelated to the orders of the U.S. federal courts.

# 1 Introduction

Between October 2018 and December 2019, Immigration and Customs Enforcement ("ICE") detained an average of 49,000 individuals per day who were subject to removal from the country for alleged violations of U.S. immigration law. In what amounts to pretrial detention in the criminal law setting, individuals are held in prison-like conditions, often literally in prisons. The formerly detained, lawyers, and members of non-governmental organizations have reported squalid conditions, grossly insufficient medical standards, and abuse at the hands of government officials, all of which raise questions about violations of international and U.S. standards of human rights.

Although the detained may be released on bond, the process of seeking release is riddled with daunting challenges. Immigration law is notoriously complicated, the detained do not enjoy the right to a court-appointed lawyer free of charge, and they are often tasked with pursuing their own case in a foreign language while appearing in official proceedings via a video feed, even prior to the COVID-19 pandemic (Ryo, 2016; Eagly, 2014; Kim and Semet, 2019). Unlike pre-trial detention in criminal law, the detained carry the burden of proving that they are not a risk to flee the jurisdiction of the immigration court that manages their case or a danger to the surrounding community. They must prove their case to the "satisfaction of an immigration court judge," a standard that allows for considerable discretion on the part of judges directly accountable to the Attorney General of the United States.

In November 2019, the United States District Court for the District of Massachusetts found that the framework for evaluating a detained individual's "flight risk" and "dangerousness" violated the 5th Amendment's Due Process clause. In *Brito v. Barr* , the court ordered that the burden of proof be assigned to the government, and established that the government must prove a respondent is a flight risk by the preponderance of evidence, and dangerous by clear and convincing evidence.We leverage the natural experiment created by *Brito* to consider the causal effect of reallocating the burden of proof and establishing more familiar standards of proof on immigration court outcomes.

Informed by qualitative evidence from elite interviews and document analysis, we develop a theoretical account of immigration court decision-making. We use this account to structure a synthetic control

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This paper uses Annotation for Transparent Inquiry (ATI), an approach to openness in qualitative scholarship. Access to the annotations, as an overlay to the digital article, can be found here: `[BlindedforReview]`. Access to a stand-alone copy of the annotations and underlying data is available here: `[BlindedforReview]`.

study to estimate the causal effect of Brito on bond grant rates and immigration court caseload, outcomes that reflect two salient ways through which Brito could have effected the bond process. Obtaining a valid estimate of the causal effect of this decision is important for several reasons. The District Court's interpretation of the Constitution and its corresponding remedy is important purely on normative and legal grounds, but if they materially affect bond outcomes, the stakes of getting the law right takes on a heightened significance. The failure to find effects either on immigration judge decision-making or the initial bond decisions made by Immigration and Customs Enforcement ("ICE"), would itself raise questions about the ability of the federal judiciary to influence Executive Branch implementation of immigration law.

Our study contributes to theoretical and empirical scholarship on the burden and standards of proof (Sherwyn and Heise, 2010; Finley and Karnes, 2008; Cheng, 2012; Wexler, 1999; Holper, 2016), decision-making in immigration court (Kim and Semet, 2019; Ryo, 2016; Eagly and Shafer, 2015), as well as general scholarship on the separation of powers system and judicial independence (e.g. Durham, 2005; Spriggs, 1996, 1997; Ferejohn and Shipan, 1990; Staton and Vanberg, 2008).

We divide the remainder of our paper as follows: First, we provide a summary of the law governing immigration detention in the United States. Second, we summarize conceptualization of the burden of proof and standards of proof. We conclude this section with a discussion of existing perspectives over whether changes like those required in *Brito* should have influenced outcomes in immigration court. Third, we develop our theoretical argument of bond decisions. In the first, we assume that immigration judges ("IJs") make decisions without considering the possibility that ICE could have been affected by *Brito* as well. In the second, we consider these decisions in a model that allows IJs to consider the possibility that *Brito* had an effect on ICE as well. Fourth, we introduce a synthetic control study of *Brito*. Fifth, we offer a few concluding remarks.

## 2 Background

In the United States, when noncitizens are charged with violating the country's immigration laws, they enter removal proceedings in immigration court. The Immigration and Nationality Act ("INA") authorizes the Department of Homeland Security ("DHS") to detain noncitizens arrested for immigration violations and awaiting determinations as to whether they will be ordered removed. After noncitizens

are arrested, an ICE officer determines whether they should remain in custody or be released at any time during their removal proceedings. ICE agents follow immigration enforcement priorities the executive set forth rather than having complete discretion to determine whether to detain a particular individual. Noncitizens may request a review of ICE's decision by an IJ at a bond hearing. During the bond hearing, an IJ determines whether to require noncitizens to remain in custody or release them on bond and set the bond amount. INA Section 236(a) requires the noncitizens to demonstrate that they are not a danger to the community and that they are likely to appear for future removal proceedings "to the officer's satisfaction." Based on this statute, the Board of Immigration Appeals ("BIA") has held that noncitizens bear the burden of proving they should be released from custody. The BIA has held further that an IJ should only continue to determine the extent of flight risk posed by noncitizens if they have demonstrated they do not pose a danger to the community.

Immigration courts are administrative courts operating under the Executive's Department of Justice ("DOJ") and, more specifically, the Executive Office of Immigration Review ("EOIR"). These proceedings involve at three actors. IJs are lawyers appointed and removed by the Attorney General ("AG"). As administrative judges, IJs are not part of the Judiciary or subject to the Code of Conduct for United States Judges. Instead, they are subject to the policies and regulations set out for them by the DOJ and EOIR. These regulations instruct IJs to serve as the AG's delegates in the immigration cases that come before them.

The IJ hears arguments from two parties. First is the noncitizen who carries the burden of proof. The noncitizen must convince the judge that they are not a flight risk or danger to the community. Legal representation is not provided but can be immensely helpful in producing evidence while detained. Second is the ICE attorney representing the government and arguing against the noncitizen. These lawyers possess a deep understanding of immigration law and collaborate with government agencies and law enforcement entities to disprove or sow doubt in the noncitizen's arguments.

*Brito v. Barr* was a class action lawsuit brought before the United States District Court of Massachusetts on behalf of two classes of noncitizen immigrants, each of whom is held under 8 U.S.C §1226(a) discretionary detention regime pending the final outcome of their removal cases. The two classes challenged immigration regulation 8 C.F.R. §236.1(c)(8) as a violation of the 5th Amendment Due Process Clause, the Administrative Procedure Act ("APA"), and the INA, which requires immigrant detainees seeking release from detention to "demonstrate to the satisfaction of the officer that

such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." On November 27, 2019, the District Court of Massachusetts granted summary judgment in favor of the two classes. It agreed with other federal court decisions, including from the Massachusetts District Court, that due process requires the government bear the burden of proof in bond hearings. It then asserted that the standard applied during bond hearings, "to the satisfaction of the immigration judge," is standardless and produces arbitrary and inconsistent decisions. Recognizing the liberty interest at stake, the District Court ordered immigration courts holding custody hearings for detainees held in Massachusetts to place the burden of proof on the government to prove by clear and convincing evidence that the detained immigrants are dangerous or by the preponderance of the evidence that the noncitizen immigrant is a flight risk and "that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community." The District Court's decision aligned immigration detention requirements in Massachusetts with the constitutional due process requirements for pretrial detention and other forms of civil detention. Its order applies to all immigration courts conducting bond hearings in Massachusetts effective December 13, 2019.

## 3 The Burden of Proof

The burden of proof has two components: the burden of production and the burden of persuasion. The burden of production is the responsibility to bring forward sufficient evidence to show that a factual claim is worthy of a decision by the trier of fact. The burden of persuasion is the responsibility to persuade the trier of fact that a factual claim (or set of claims) should be accepted. These concepts derive from the idea that decisions to accept or to reject a factual assertion in court carries risks for the parties. Erroneously accepting that a defendant has committed a crime unjustly impinges upon the liberty rights of the defendant. Erroneously rejecting the claim risks a failure to hold a person accountable for illegal behavior. The Supreme Court describes the allocation of the burden of proof as a decision over which litigant should carry the greater risk of a wrongful decision against her. The litigant with the most at stake will suffer the most if the process reaches a wrongful decision. For this reason, the litigant with less at stake receives the burden of proof. Carrying the burden of proof effectively puts a thumb on the scale of evidence, weighting it against the litigant that carries it (Wexler, 1999, p.

75). The litigant with the benefit of the doubt—who is innocent until proven guilty—is not required to prove anything to win the case.

Assuming that the party bearing the burden of proof satisfies the burden of production, the party will need to persuade the trier of fact. Standards of proof are criteria that guide decisions about the party's persuasiveness. In a sense, the standard of proof determines how much benefit of the doubt to give the litigant who is entitled to it. This assessment again requires a balancing of each litigant's interests. The weightier the interests of the litigant with the benefit of the doubt relative to the litigant with the burden of proof, the greater the benefit of the doubt offered. The Supreme Court recognizes three different standards of proof. *Preponderance of the evidence*, which requires the litigant with the burden of proof to prove her facts are more likely than not, tolerates the greatest amount of risk of a wrongful decision and provides the least benefit of the doubt. *Clear and convincing evidence* tolerates a lower risk of error and provides a greater benefit of the doubt, requiring the party with the burden of proof to present evidence that makes it "highly probable" that her factual contentions are true. The *beyond a reasonable doubt* standard tolerates almost no risk of a wrongful decision and therefore provides the greatest benefit of the doubt. It applies to cases where the defendant's interests are of such magnitude that historically and without any explicit constitutional requirement, they are protected by standards designed to exclude as nearly as possible the likelihood of erroneous judgment.

### 3.1 Skepticism about Brito

There are several reasons to question whether a change in the burden of proof would meaningfully affect immigration judge decision-making. The most prominent reason is that generations of scholarship on judges of multiple types and locations around the world has provided compelling evidence that judicial decision-making can be understood in ideological and partisan terms (Segal and Spaeth, 2002; Lauderdale and Clark, 2012; Ríos-Figueroa, 2007; Desposato, Ingram and Lannes Jr, 2015). Lax and Rader (2010) have also raised serious methodological questions about Richards and Kritzer's (2002) findings purporting to show strong effects of precedent in the form of legal regimes; they find no such evidence. From this perspective, legal standards and the burden of proof are flexible enough and difficult enough to audit to allow a judge wide discretion in their application. This is especially relevant in the context of custody decisions in immigration court, which are not subject to the most exacting standard

of proof, and where we might imagine that the constraint on individual discretion might not be the strongest.

Finley and Karnes's (2008) study of the burden of proof in the U.S. Tax Court is also instructive. They considered the possible effect of a reform in the Internal Revenue Service Restructuring and Reform Act of 1998. To make it easier for civilian plaintiffs to pursue claims against the IRS, the Act removed the burden of proof from the plaintiff and placed it on the government. Finley and Karnes find no evidence consistent with a change in the burden of proof resulting in more pro-filer outcomes. If anything, the change is associated with decreased success among filers.

Incentives and accountability mechanisms also raise doubts that *Brito* will affect bond hearings. IJs are supposed to exercise independence, but they are animals of the executive branch and operate under the authority and supervision of the AG. The BIA grants IJs enormous discretion in bond determinations and those judges are not required to provide written decisions in their custody hearings. These factors make auditing an IJ's decision-making difficult, and a sitting AG who does not wish IJs to have less discretion will not make it easier. Consistent with these incentives and accountability mechanisms, Kim and Semet (2019) find that detainees succeeded less in bond hearings during the Trump Administration, even among IJs appointed by other presidents.

Finally, our research team spoke with several immigration attorneys about their expectations regarding Brito.[1] Some attorneys with whom we spoke reported being skeptical about the ability of Brito to change outcomes. They identified flexible interpretations, discretion, and barriers to reviewing an IJ's decisions as tactics the government would use to make it appear that it complied with Brito (RI #10, #51, and 52). These attorneys also expected the government to fight the implementation on other fronts, including footdragging its enforcement, complying with only parts of the decision, and appealing the Brito decision to the First Circuit.[2]

[1]IRB protocol number blinded for review.

[2]In June 2022, the U.S. Government filed a petition to have *Brito's* burden ruling reconsidered by the full ("en banc") group of First Circuit judges.

### 3.1.1 Why Brito could have Mattered

IJs are not Article III judges; they are not even administrative law judges. Yet as lawyers, they are members of a career that is characterized by a socialization process that promotes a commitment to legal norms (Knight and Epstein, 1996; Baum, 2009). An aspect of this socialization is the belief that legal decision-making is different than decision-making in other contexts: it is rule-bound. In Shapiro's (1981) classic formulation, legal disputes take the form of a triad: two opposing interests seek a resolution from a neutral third party. The fundamental problem that triadic dispute resolution systems confront is that once the third party has made a decision, she has taken a side. The challenge is how to ensure that losers will continue to believe that the process is unbiased and legitimate. Judges have strong incentives to develop and use bodies of law to structure their work and to create beliefs that they are capable of independent decision-making.

Although modern social science rejects the notion that any judge could be a mechanical applier of law, bodies of scholarship suggest that legal decision-making is different. There are strong pressures in the common law for judges to operate with respect to rules developed in past opinions (Friedman, 2006; Gillman, 2001). Scholars have found empirical evidence linking judicial decision-making to legally relevant information (Bailey and Maltzman, 2008; George and Epstein, 1992). In a study of the application of legal rules governing the level of scrutiny that should be applied to claims challenging the constitutionality of speech restrictions, Bartels (2009) finds that as the level of scrutiny increases, ideological differences between U.S. Supreme Court justices were decreasingly influential on their decisions. In a study of discrimination cases resolved by state courts of last resort, Baldez, Epstein and Martin (2006) find that the presence of an equal rights amendment in the state constitution is associated with the court using a higher standard of review, which itself increased the chance of the court finding a violation of equal protection.

Although scholars have found extra-legal influences on immigration judge decisions, studies repeatedly find the legally-relevant factors affect outcomes. Most relevant for our purposes are Ryo's (2016) findings, which suggest that a respondent's prior criminal record is strongly negatively associated with the probability of being granted bond, just as it is strongly positively associated with the bond amount, conditional on bond being granted (see also Eagly, 2014; Eagly and Shafer, 2015). Scholarly evidence on IJ decision-making explains legal professionals' endorsement of the decision: the law matters and

the Brito decision set key precedents that all Massachusetts immigration courts would have to follow. Other immigration attorneys we interviewed reported strong optimism when they first learned of the Brito decision:

> *"[E]verybody was in shock from it all. And defense lawyers thought that it was going to be the silver bullet."* (RI #51)

> *"[W]e thought [Brito] was going to change our entire world."* (RI #7)

> *"I was obviously really excited about it. I remember hearing about it the day before Thanksgiving in 2019. Obviously a huge win. [I was] optimistic because it had the reach that I had wanted for a long time, which is through a class as opposed to these individual petitions."* (RI #69).

### 3.1.2 Summary

There are plausible reasons for skepticism about the *Brito* decision's ability to change outcomes in immigration bond hearings, and yet there are also plausible reasons to believe that the decision could have affected outcomes. To properly evaluate the decision, we need an account that does more than claim that it could have mattered in a general sense. We need to identify precisely how *Brito* could have affected outcomes, assuming that it did. We develop a model that identifies two ways in which the decision could have mattered: (1) by directly affecting IJs' decisions, and (2) by affecting ICE's initial bond decisions in anticipation of changes in IJs' behavior.

## 4 Judicial Decisions and the Burden of Proof

Evaluating the possible effects of *Brito* requires a precise conceptual framework for the burden of proof. We begin with standards of proof, essential to the burden of persuasion. We adopt a familiar statistical interpretation (e.g. Cheng, 2012; Hay and Spier, 1997). Consider that a judge is asked to evaluate a factual assertion in light of evidence. We will suppose that the judge approaches the record with a prior belief about the truth of a factual assertion, $\pi$, which can be interpreted as a probability. After observing evidence, the judge's belief about the truth of this assertion is represented by Bayesian posterior. Specifically, the judge's posterior belief is the probability that an assertion is true, given the evidence that she has observed: $Pr(\text{Factual assertion true}|\text{evidence}) \equiv \hat{\pi}$.

A standard of proof is then a threshold indicating the value of the posterior belief above which the judge should conclude that the assertion is true. Given the legal logic of standards of proof described above, these thresholds should be related to the consequences of two types of errors in decision-making. In our case, an IJ is tasked with answering two questions in a custody hearing. Is the respondent a danger to the community and is the respondent a risk to flee her jurisdiction? For ease of exposition we will collapse these two questions into one: is the respondent dangerous? Denying bond to a respondent who is dangerous or granting bond to a respondent who is not are correct decisions. In contrast, granting bond to a dangerous respondent and denying bond to a peaceful respondent reflect two errors in decision-making. These errors are costly. We will say that the cost of first type of error is $\beta$, and that the cost of the second type of error is $\alpha$. Correct decisions are costless. This implies that the expected cost of granting bond is $\hat{\pi}\beta$ and that the expected cost of denying bond is $(1-\hat{\pi})\alpha$. If the judge's objective is to make the decision with the smallest expected cost in light of the evidence, then a judge should grant bond if and only if $\hat{\pi} < \bar{\pi}$, where $\bar{\pi}$ is a standard of proof defined as

$$\bar{\pi} \equiv \frac{\alpha}{\alpha+\beta}. \tag{1}$$

This decision rule reflects the conceptual connection between error costs and standards of proof. Indeed, in this framework, error costs fully characterize any standard of proof. For example, setting $\alpha = \beta$ yields the "preponderance of the evidence" standard. Similarly, setting $\alpha = 3 \cdot \beta$ yields something resembling "clear and convincing evidence," and setting $\alpha = 19 \cdot \beta$ yields something like the "beyond a reasonable doubt" standard.

A natural interpretation of what it means for a court to order that a particular standard of proof be used is that it is a statement about how judges ought weigh the costs associated with decision errors. In our case, the district court's order communicated to IJ's that they should assign a higher cost to denying bond to a peaceful person (i.e., $\alpha$ increased). An alternative interpretation, which could produce the same shift in the standard, is to imagine that the order communicated that IJs should assign a lower cost to granting bond to a person who is truly dangerous (i.e., $\beta$ decreased). The order could have been meant to change both costs simultaneously. It is, of course, entirely reasonable to imagine that the

decision had so such effect on IJs. We only mean to say that we interpret commands to use a particular standard of proof as intentions to communicate legal positions about the consequences of decision errors.

This exercise suggests a simple prediction about how *Brito* should have affected bond outcomes. If the district court's decisions increased $\alpha$, or decreased $\beta$, or both, then, all else equal, the rate of granting bond ought to have increased since the decision threshold associated with accepting the claim that a respondent is dangerous would have increased. Although simple and clear, this prediction depends heavily on the belief that *Brito* only affected the standard of proof, i.e., that all else would have been equal after the decision. In this framework, what this means is that as $\bar{\pi}$ shifted higher, $\hat{\pi}$ would not have changed. This is an extremely strong assumption. A judge's posterior belief about a respondent's dangerousness will be affected by the evidence she observes, and that evidence will likely be affected by the kind of people ICE denies bond to initially.

Our exercise so far has said nothing about decisions of ICE; however, it is important to note that the *Brito* decision did not merely affect the burden of persuasion. It affected the burden of production, too, shifting it from non-citizen respondents to the government. Prior to the decision, non-citizens would have had to present evidence showing that the were not dangerous (or a flight risk). The shift implied by *Brito* required the government to make a case for a respondent's dangerousness. To understand the full effect of *Brito* we need an account that not only models the decision-making of an immigration judge, but also an account of the way that evidence is produced and the decisions of ICE to bring argue cases.

# 5 A Model of *Brito*

## 5.1 Timing

Consider a game theoretic model of custody decisions in the context of a removal process. A game diagram is found in the Appendix, though we fully describe the game's components here. An ICE prosecutor decides whether to grant bond to a detained non-citizen. In the event that bond is denied initially, the decision will be reviewed by an IJ.[3] The IJ is tasked with answering a single question in

[3]We suppress the respondent's decision to challenge ICE's bond denial. We do not believe that this omission materially influences the central lessons of the analysis, and we discuss why in the conclusion.

the custody hearing: Is the respondent a danger to the community? The true status of the respondent is reflected by one of two states $\omega \in \{0, 1\}$, were $\omega = 1$ denotes a truly dangerous respondent and $\omega = 0$ denotes a respondent who is not. The IJ is uncertain about the respondent's dangerousness. Prior to a hearing, the IJ believes that $Pr(\omega = 1) = \pi$. We assume that ICE is better informed and observes $\omega$. Thus the ICE prosecutor has two types, the prosecutor who observes $\omega = 1$ ($\text{ICE}_1$) and the prosecutor who observes $\omega = 0$ ($\text{ICE}_0$). After observing $\omega$ both types choose whether or not to release the detainee ($r = 1$) (either on bond paid or on the person's own recognizance) or to deny bond ($r = 0$).

The decision to deny bond initially implies that ICE will exert effort to prepare for a hearing. The cost of this effort presents an opportunity to conceptualize the burden of production. The cost of preparing for a hearing should be higher when a party bears the burden of production. We also assume that the costs depend on $\omega$. Either making a case that a respondent is dangerous or refuting a respondent's case that they are peaceful should be easier when the respondent is truly dangerous. Thus, we assume that $\text{ICE}_i$ pays $\epsilon_i$, where $\epsilon_0 > \epsilon_1$.

In the event that ICE denies bond, there is a custody hearing, at which the IJ is tasked with answering whether the respondent is dangerous. The IJ makes a decision $b \in \{0, 1\}$, in which she grants bonded release ($b = 1$) or prescribes continued detention ($b = 0$). IJs make this decision after they observe written filings, evidentiary exhibits, and oral testimony. We refer to all of this as the "evidence." We conceptualize the evidence as a noisy signal that the IJ receives about $\omega$, denoted $e$. IJs observe one of two signals $e \in \{e_s, e_w\}$, where $e_s$ indicates that the government's evidence is strong and $e_w$ indicates that it is weak. We assume further that the $Pr(e_s|\omega = 1) = 1$ but that $Pr(e_s|\omega = 0) = q$. If a respondent is truly dangerous, the IJ will observe strong evidence of dangerousness; however, if the respondent is peaceful, the IJ may yet observe strong evidence. Thus, $q$ measures the "coarseness" of the information carried by strong evidence. As $q$ approaches 1, $e_s$ sends less useful information to the IJ, since the judges will be very likely to observe strong evidence even if the respondent is peaceful. As $q$ approaches 0, $e_s$ is a finer signal in the sense that it is now very likely that IJs will observe strong evidence only when the respondent is dangerous.

### 5.2 Preferences

We will say that $\text{ICE}_i$ pays a cost $v_i$ if the detained individual is released; and, we assume that $v_1 > v_0$, reflecting the fact that ICE prefers to detain the dangerous. We will also assume that $v_0 > \epsilon_0$, so that

no prosecutor would fail to deny bond initially if she believed that that the IJ would also certainly deny bond.

We assume that IJs wish to make correct legal decisions, so that their goal is to issue a decision such that $b \neq \omega$. We set the value of a correct decision to 0. We will then say that the cost of issuing bond to a person who is truly dangerous is $\beta > 0$, and that the cost of not issuing bond to a person who is not truly dangerous is $\alpha > 0$.[4] Thus, the payoff function for the IJ is given by

$$u_{IJ}(b, r; \omega) = \begin{cases} 0 & \text{if } (\omega = 0 \neq r) \text{ or } (\omega = 0 = r \neq b) \text{ or } (\omega = 1 \neq r = b) \\ -\alpha & \text{if } (\omega = 0 = r = b) \\ -\beta & \text{if } (\omega = 1 = r) \text{ or } (\omega = 1 = b \neq r) \end{cases}$$

Given our description above, ICE$_i'$s payoff function is as follows.

$$u_{ICE_i}(b, r) = \begin{cases} -v_i & \text{if } r = 1 \\ -v_i - \epsilon_i & \text{if } r = 0 \neq b \\ -\epsilon_i & \text{if } r = 0 = b \end{cases}$$

### 5.3 Results and Discussion

Our solution concept is Perfect Bayesian equilibrium (PBE). Beliefs are determined consistently with the strategies. We will assume that beliefs are formed via passive conjectures at histories that are not reached in equilibrium. Three pure strategy equilibria exist and we describe them, though none of these equilibria capture salient facts about the immigration bond process as well as the semi-separating equilibrium we also identify. A complete description of the analysis is found in the Appendix. Here we will summarize the key results. Figure 1 offers a visual summary of the four PBE in this game. They are displayed for all values of the coarseness of the signal ($q$).

[4]We can restrict $\alpha > \beta$, which is how we typically think about these errors in the law; however, for now it is useful to leave the order unrestricted.

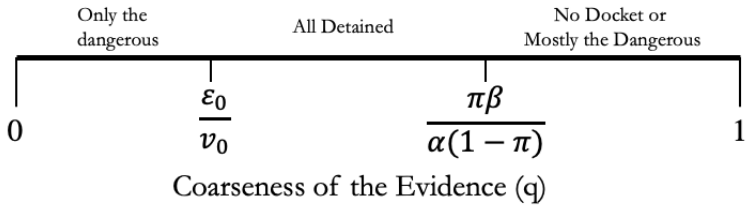



Figure 1: *Shows four equilibria as the value of strong evidence declines (i.e. as q increases).*

**Case 1: ICE Denies Bond Only to the truly Dangerous** When the signal strong evidence sends to the IJ is highly discriminating (low values of $q$), ICE prosecutors only deny initial bond to the truly dangerous; those whom they know to be peaceful are granted bond. In this kind of equilibrium, IJs make decisions that are consistent with the evidence they observe. Given ICE's behavior, the evidence IJs observe perfectly reveal the respondent's true level of dangerousness.

**Case 2: ICE Denies Bond to All Detained Non-Citizens** As the signal strong evidence sends to the IJ becomes increasingly coarse, both prosecutor types deny initial bond. If the IJ observes strong evidence, the IJ's posterior belief about the respondent's true dangerousness will be

$$Pr(\omega = 1|e_s) \quad = \quad \frac{\pi}{\pi + (1-\pi)q} \tag{2}$$

For both prosecutors to deny bond initially, it must be that the IJ will also deny bond when observing strong evidence. If the IJ were expected to grant bond even if the evidence were strong, $\text{ICE}_0$ would have no incentive to deny bond initially.

**Case 3: ICE Grants Bond to all Detained Non-Citizens** The third pure strategy equilibrium is one in which both prosecutors grant bond initially and all detained individuals are released. In this equilibrium, no cases come to immigration court. If a case did, passive conjectures would imply that the IJ's beliefs would be the same as they are in Case 2. To ensure that no prosecutor denies bond initially, it must be that the IJ will grant bond no matter the evidence. This requires that $q$ falls above the second threshold.

Although consistent with the basic structure of the model we have set up, Cases 1 and 3 very much fail to capture some basic facts about the immigration bond process. Clearly, Case 3 poorly represents the basic fact that immigration courts face very large caseloads; bond hearings number far greater than zero. Cases 1 envisions a system in which IJs deny bond to all individuals who come to immigration court. This is similarly not true. Case 2 envisions a world in which ICE grants bond initially to no person in its custody. In immigration court, IJs make decisions that match their view of the evidence, and so some individuals are released on bond. This may reflect some ICE jurisdictions in some times, though it is also not quite true that ICE grants bond initially to no person. We now turn to a case that captures the basic facts better.

**Case 4: IJ Dockets Contain Mostly the Dangerous** When $q > \max\{\frac{\pi\beta}{\alpha(1-\pi)}, \frac{\epsilon_0}{\upsilon_0}\}$ a case exists in which prosecutors fail to discriminate fully, but they do discriminate and they do so in a sensible way. Here, $\text{ICE}_1$ always brings a case and $\text{ICE}_0$ does so with positive probability, which we will denote by $\lambda$. The IJ in this case will always grant bond when observing $e_w$ and will grant bond with probability $p$ when observing $e_s$. As in Case 2, strong evidence is consistent with both types of respondents; however, unlike Case 2, the IJ's equilibrium beliefs about the prosecutors' will influence the IJ's belief upon observing strong evidence. The IJ's posterior belief upon observing $e_s$ is

$$Pr(\omega = 1|e_s) \quad = \quad \frac{\pi}{\pi + (1-\pi)\lambda q}. \tag{3}$$

How strongly the IJ updates in the direction of $\omega = 1$ now depends not only on the coarseness of evidence ($q$), but on the rate at which $\text{ICE}_0$ attempts to take advantage of the noisiness of the process of producing evidence at custody hearings. If this is very unlikely, this is if initial bond denials largely come from $\text{ICE}_0$, then the IJ will update very strongly in the direction of believing the respondent to be dangerous when the IJ sees strong evidence. If this kind of opportunistic prosecutorial behavior is very likely, the IJ's will be less likely to believe that strong evidence suggests a truly dangerous respondent. The equilibrium probabilities for $\text{ICE}_0$ and the IJ are as follows.

$$\lambda^* = \frac{\pi\beta}{q\alpha(1-\pi)}, \text{ and} \quad (4)$$

$$p^* = 1 - \frac{\epsilon_0}{qv_0} \quad (5)$$

These probabilities make the IJ indifferent between granting and denying bond when the IJ observes strong evidence and $ICE_0$ indifferent between denying and granting initial bond. Equation 4 shows that $ICE_0$ will be increasingly likely to deny initial bond as the IJ's prior and the IJ's cost of releasing a dangerous person increase. This is because those changes raise the incentive for the IJ to deny bond. $ICE_0$ can take advantage of this change by increasing the rate of initial bond denials. In contrast, $ICE_0$ is increasingly likely to grant initial bond as the coarseness of strong evidence increases and the IJ's cost of detaining a peaceful person increase. This is because these changes increase the IJ's incentive to deny bond, and $ICE_0$ must reduce his initial denial rate for equilibrium to be sustained.

Equation 5 gives the probability that the IJ will grant bond having observed strong evidence pointing to dangerousness ($e_s$). As ICE's cost of releasing a peaceful detainee increases, this probability increases, because as this cost increases, $ICE_0$ has a stronger incentive deny initial bond. The IJ responds by granting bond at a higher rate, again conditional on observing the strong evidence. Likewise, the IJ's rate of granting bond conditional on observing strong evidence will increase when the coarseness of evidence increases ($q$ increases). This is because an increase in $q$ means that $ICE_0$ has a stronger chance of surprisingly producing strong evidence at the hearing, which again increases his incentive to deny initial bond. This will be offset by a higher conditional bond grant rate. And finally, the IJ's conditional bond grant rate will decrease in the costs of litigation, because as these costs rise, the prosecutor will have a stronger incentive to grant initial bail. For equilibrium, the IJ's grant rate will need to fall.

### 5.4 The Observable Effects of Brito

How would the *Brito* decision have influenced this kind of interaction? We continue to maintain that *Brito* could have had two direct effects on parameters in the model: (1) the change in the burden of production would have increased $\epsilon_i$ and (2) the change in the burden of persuasion would have increased $\alpha$. We base our discussion on Case 4, though the effects on the equilibria in Cases 1 and 2 are consistent with our analysis. Case 4 envisions a scenario in which custody hearings are held, IJs both deny and

grant bond, and prosecutors discriminate when making initial bond decisions, so that some individuals are released without requesting bond from an immigration court. Thus is the equilibrium in the fourth case captures the empirical reality that we readily observe each year in immigration court.

The *Brito* decision should have had two types of effects on bond outcomes. The first is a direct effect, lowering the caseload of immigration courts. An increase in $\alpha$ decreases the rate at which $\text{ICE}_0$ denies bond initially. After *Brito*, fewer individuals who ICE believed were peaceful should have been denied bond. ICE would have shifted its legal resources toward cases which it could credibly defend in court. This would have lowered an immigration court's caseload.

Changing the burden of proof would have reduced the bond grant rate, as well. This happens in two ways. As $\epsilon_0$ increased, the rate of granting bond conditional on observing strong evidence would have decreased. As the cost of litigation increases, the IJ must grant bond less often for $\text{ICE}_0$ to continue denying bond to some. It is also true that an increase in $\alpha$ would have produced a decrease in the overall rate of granting bond. Importantly, this is not because an increase in $\alpha$ causes immigration judges to become less likely to grant bond when they observe strong evidence. That decision is independent of $\alpha$. This effect is a result of prosecutors being less likely to pursue weak cases as $\alpha$ increases. For this reason, the IJ is less likely to observe weak evidence ($e_w$). And precisely because the IJ's probablity of granting bail when observing strong evidence is independent of $\alpha$, the change in the prosecutor's behavior leads to a decrease in the probability of observing a decision granting bail through the combination of (1) lowering the probability of observing weak evidence and (2) lowering the probability of granting bond conditional on observing strong evidence.

The *Brito* decision would have reduced incorrect denials of bond, but in the context of immigration court, you would observe this effect as a decrease in the bond grant rate by IJs and a decrease in the caseload of immigration courts. This leads to two empirical implications of this analysis.

> ***Theoretical Prediction:*** *The Brito decision should have decreased the caseload of the Massachusetts Immigration Court relative to immigration courts not subject to Brito. It would have decreased the rate at which MA IJs granted bond.*

# 6 An Empirical Study of Brito v. Barr

*Brito* offers a natural experiment that provides an opportunity to evaluate the impact of changing the burden and standard of proof in immigration custody decisions. We use a synthetic control method (Abadie and Gardeazabal, 2003; Abadie, Diamond and Hainmueller, 2010, 2015, 2020) to estimate *Brito*'s effect on bond hearings in Boston.[5] The method constructs a counterfactual Boston (or "synthetic") that mirrors the values of the aggregate outcome variable in the actual Boston before *Brito*.

We estimate Brito's effect on bond hearings as the difference in the outcome variables in Boston compared to the synthetic. We predict that prosecutors are less likely to pursue weak cases as the cost of detaining a peaceful person increases. This mechanism should decrease the caseload of the Massachusetts Immigration Court relative to immigration courts not subject to Brito. We also expect the change in the prosecutorial behavior to decrease the probability of granting bond through both a lower probability of observing weak evidence and a lower probability of granting bond conditional on observing strong evidence. This combination should decrease the rate at which MA IJs granted bonded release. We infer that Brito did not affect judicial decision-making or prosecutorial discretion if there is no measurable distinction between the factual and counterfactual Bostons.

## 6.1 Data and Sample

We use weekly hearing base city (HBC) panel data from March 19th, 2019 through March 13th, 2020. This sample provides 38 and 13 weeks of pre-treatment and post-treatment observations, respectivley. Our sample period begins in March 2019 because the synthetic control method requires a perfectly balanced panel, and starting any earlier forces us to drop HBC units from the donor pool. We truncate the sample the week President Trump declared COVID-19 a National Emergency on Friday, March 13th. We do this because COVID did not impact all jurisdictions equally and simultaneously, and not all jurisdictions had identical responses to the pandemic. The 13 weekly periods following the *Brito* decision is sufficient to evaluate the decision's effect on bond hearing decisions; the ending ensures our outcome variables are unaffected by COVID or a new administration enacting policy changes. Our

[5]We use Boston and Massachusetts interchangeably because Boston is the only Hearing Base City in Massachusetts.

results are consistent when we repeat the analysis using data measured monthly and when using a synthetic difference-in-difference method to measure the decision's effect on each outcome.

We analyze publicly available data from the EOIR.[6] The data does not contain all necessary information for IJs. To collect this missing data, we scrape data from investiture announcements and code relevant information for over 550 IJ's, including their professional background and the president who appointed them. The result is a large rectangular dataset where each row represents a unique bond hearing decision. We collapse 215,762 bond hearing decisions into a HBC-week panel. This process transforms our variables from observed values into rates or averages.

Because the synthetic attempts to reproduce observed data for a counterfactual Boston absent Brito, we need to remove from the donor pool cases facing similar constraints. Our research team contacted immigration lawyers within each US immigration court to determine whether the burden or standard of proof had changed for immigrants held in detention pending removal proceedings. At the time of the study, no other jurisdiction experienced a change similar to Boston; all other jurisdictions require detainees to prove to the IJ's satisfaction that they are neither dangerous nor a flight risk. Confident that Massachusetts is the only jurisdiction that received the treatment, we remove from the donor pool jurisdictions that made fewer than four decisions per week (weekly analysis) or 25 per month (monthly analysis).

#### 6.1.1 Outcome variables

Our first outcome variable tests whether the decision decreased the caseload of the Massachusetts Immigration Court relative to immigration courts not subject to Brito. Caseload is the number of bond hearing decisions made in the jurisdiction in a particular period. Table 1 summarizes the number of decisions made by Democratic- and Republican-appointed IJs throughout the period. Numbers in parentheses show the rate at which IJs appointed by different presidents granted bonded release. Pre-*Brito*, IJs decided 1,940 Massachusetts bond hearings with Democratic appointees granting bonded release in 24% of their 246 decisions. Republican appointees granted bond at a higher rate on eight times as many decisions (1,694).

[6]Retrieved August 18, 2022 from `https://www.justice.gov/eoir/foia-library-0`.

| | Pre-*Brito*[a] | *Brito*[b] | Post-*Brito*[c] | Total |
|---|---|---|---|---|
| Treated Jurisdiction (Boston) | | | | |
| —Democratic IJs | 246 (24.4%) | - | - | 246 (24.2%) |
| —Republican IJs | 1,694 (30.8%) | 84 (29.8%) | 462 (30.1%) | 2,240 (30.6%) |
| | 1,940 (29.9%) | 84 (29.8%) | 462 (30.1%) | 2,486 (29.9%) |
| Donor Pool Jurisdictions (x23) | | | | |
| —Democratic IJs | 16,935 (40.0%) | 1,016 (41.9%) | 4,953 (37.5%) | 22,904 (39.6%) |
| —Republican IJs | 36,973 (40.0%) | 2,087 (39.7%) | 10,055 (37.1%) | 49,115 (39.4%) |
| | 53,908 (40.0%) | 3,103 (40.4%) | 15,008 (37.2%) | 72,019 (39.4%) |
| All Jurisdictions (x24) | | | | |
| —Democratic IJs | 17,181 (39.8%) | 1,016 (41.9%) | 4,953 (37.5%) | 23,150 (39.4%) |
| —Republican IJs | 38,667 (39.5%) | 2,171 (39.3%) | 10,517 (36.8%) | 51,355 (39.0%) |
| | 55,848 (39.6%) | 3,187 (40.1%) | 15,470 (37.0%) | 74,505 (39.1%) |

[a] 03/19/19 thru 11/26/19. *Brito* opinion published 11/27/19.

[b] 11/27/19 thru 12/13/19. *Brito* ordered effective by 12/13/19.

[c] 12/14/19 thru 03/13/20. COVID-19 declared a National Emergency 03/13/20.

Table 1: *Number of decisions from IJs appointed by different presidents. Values in parentheses indicate percentage of decisions granting bonded release. Reported for decisions in 24 Hearing Base Cities 03/19/19 through thru 03/13/20.*

Our second outcome variable tests our prediction that *Brito* decreased the rate at which MA IJs granted bond. *Rate granted bond* is the percentage of bond hearings in which IJs granted bond. We use EOIR data for individual bond hearings to calculate this measure. The data required extensive cleaning and we removed observations-totaling less than 5.6% of all observations-in which the decision code indicates the decision is outside our scope, undefined, or illogical. We used the clean data to create a binary variable identifying whether an IJ decides to grant bonded release for 203,799 observations.[7] We then trimmed the sample to eliminate decisions before 2019 and after President Trump declared COVID-19 a National Emergency on March 13th, 2020 (95,250 observations).

Note that by the time District Court of Massachusetts announced its *Brito* opinion on November 27th, 2019, IJs appointed by democratic presidents were active in local immigration courts but were tasked with responsibilities other than making bond hearing decisions. The lack of decisions by IJs appointed by democratic presidents post-*Brito* is undesirable and unavoidable, but it is the reality of docket at the time. However, according to Table 1, democratic- and republican-appointed IJs grant bonded release at roughly the same rate in both Boston before *Brito* and in other jurisdictions through-

[7]Appendix Table 3 shows our coding protocol for this outcome.

out the period. As we discuss in our results section, the synthetic control method strongly balances presidential appointment for rate granted bond in our weekly and monthly analyses (Table 2) and caseload in the monthly analysis (Table 2). Taken together, we do not believe the lack of decisions from IJs appointed by democratic presidents jeopardizes our analysis.

We use predictor variables in the pre-intervention period to identify the weight each unit in the donor pool contributes to the synthetic Boston. This process estimates the counterfactual rate granted bond that would have been observed for Boston absent the *Brito* treatment. Five variables are measured at the same level as our outcome variables. Two variables account for differences between respondents. *Respondent Criminal Charge* is the percentage of decisions in which DHS alleges the respondent violated a criminal charge. *Respondent Number of Appearances* is the average number of times, between 1 and 2, a respondent appears before an IJ for a decision. Three variables account for differences between judges. *IJ Trump Appointee* and *IJ Obama Appointee* measure the percentage of decisions in a jurisdiction made by IJs appointed under these administrations. *IJ Years of Experience* is a weighted average of IJs' years of experience as an IJ. The proportion of decisions made by a particular IJ corresponds to the weight the IJ's experience lends to the calculation. Three socioeconomic controls account for differences between jurisdictions: state GDP (logged),[8] state population (logged),[9] and government employees per capita.[10] To increase the synthetic's precision, all analyses utilize response variable values in prior periods as predictors.

## 6.2 Results

### 6.2.1 Synthetic control validation

The synthetic control method is a highly appropriate test for our theory. The method estimates the effect of an intervention of interest (i.e., *Brito*) by comparing the evolution of an aggregate outcome variables (i.e., caseload and rate granted bond) for an affected jurisdiction (i.e., Boston) to the evolution

[8]Total GDP in millions of dollars (annually). Transformed into equally-weighted monthly values. Source: Federal Reserve Bank of St. Louis

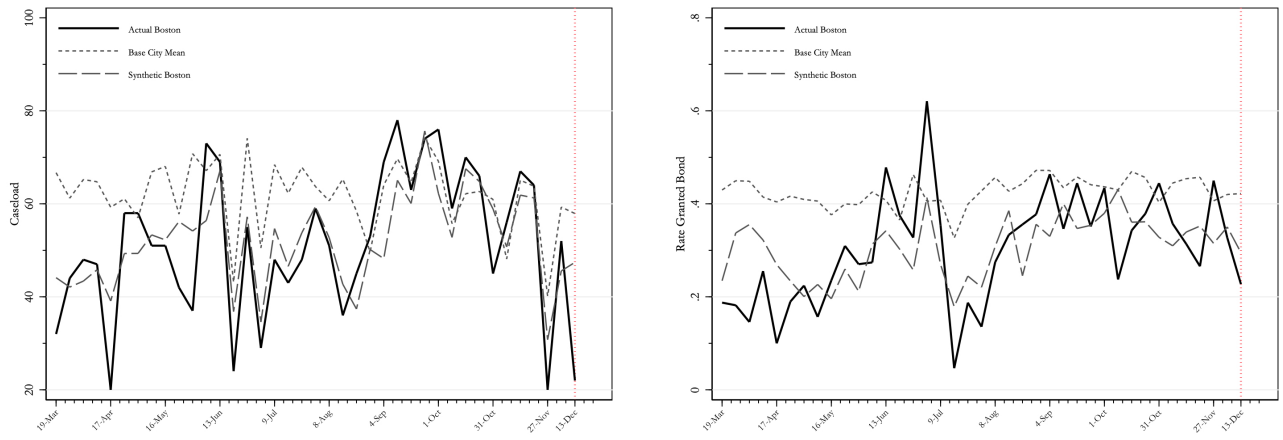
[9]Residents' measured in thousands of persons (annually). Source: Federal Reserve Bank of St. Louis

[10]Number of people in government occupations. Source: Federal Reserve Bank of St. Louis

of the same aggregate outcomes for the synthetic control group (i.e., 23 hearing base cities). The data necessary to execute the analysis is only available from the the DOJ's Executive Office for Immigration Review, Freedom of Information Act (FOIA) Library and the agency's investiture announcements. The synthetic control's credibility turns on its ability to recreate the response variables' data generating process in Boston before the decision. As we discuss next, the synthetic does not replicate these outcomes perfectly. Still, it is preferred as the counterfactual in this quasi-natural experiment and is preferred over available alternatives, including the donor pool average or any individual HBC. We next evaluate the synthetic's ability to recreate each response variable. As we do, we remind readers that both outcomes are germane to our theoretical prediction that Brito should have decreased the caseload and the rate IJs granted bond.

Figure 2a plots the weekly, 38-period progression of caseload in Boston compared to the broader donor pool and synthetic. Between March and August 2019, the synthetic outperforms the donor pool average in replicating Boston's caseload. For the remainder of the pre-treatment period, the donor pool average and the synthetic track Boston's volatile caseload equally well. Table 2 provides another suitability test. It compares the predictor balances in Boston, the synthetic counterfactual, and the broader donor pool to assess the synthetic's relative accuracy. We see that the average of HBCs in the donor pool does not provide a suitable control group for Boston. Instead, the synthetic Boston more accurately reproduces the values of 10 of the 12 predictor variables prior to *Brito*. A weighted combination of HBCs in Adelanto (CA), Jena (LA), and Tacoma (WA) reproduce Boston's caseload with the most accuracy (see weights in Appendix Table 4).

Figure 2b compares the rate at which IJs granted bonded release in Boston, the the broader donor pool, and the synthetic control. Except for only two periods, the granted bond rate in Boston generally ranged between 25% to 45%. In contrast, the average rate across other HBCs was regularly about 45%. The synthetic mirrors Boston's week-to-week movements closely. Moreover, Table 2 shows that the average of HBCs unaffected by *Brito* does not provide a suitable control group for Boston. The synthetic Boston more accurately reproduces the values of 10 of the 12 predictor variables prior to the decision. A weighted combination of HBCs in Elizabeth (NJ), Florence (AZ), Jena (LA), New York (NY), Omaha (NE), and Tucson (AZ) reproduce Boston's rate granted bond with the most accuracy (Appendix Table 4).




(a) Caseload

(b) Rate Granted Bond

Figure 2: *Weekly Progression of Caseload and Rate Granted Bond in Boston, the Donor Pool, and Synthetic Boston.*

### 6.2.2 Treatment effects

We next apply the synthetic control method to the number of bond hearing decisions IJs in a particular jurisdiction made in a given week and the percentage of those decisions that resulted in the IJ granting bonded release. Our theoretical expectations are that *Brito* decreases the caseload for IJs in the treated jurisdiction and decreases the rate IJs grant bonded release. We discuss each outcome in turn.

For our analysis to support our prediction, the difference between the treated Boston's weekly caseload and the synthetic Boston's caseload should be negative in the post-treatment periods. The solid line in Figure 3a represents this treatment effect measured as the observed caseload minus the synthetic caseload. *Brito* appears to an immediate effect with caseloads in the treated Boston noticeably lower than those in the treated Boston. This initial result supports our prediction that caseload decreased after the decision came into effect.

The decision's estimated treatment on the rate IJs grant bonded release is the difference between bonded release rate in the treated unit minus the synthetic unit. If we are correct that *Brito* decreases the rate IJs grant bonded release, then the solid line representing the treatment effect will be negative. Figure 3b shows *Brito* did not immediately decrease the rate IJs grant bonded release. Figure 3 suggests the decision had negative effects on caseload and rate granted bond, with the former's effect happening immediately and the latter's happening several weeks later. Yet we cannot be sure if this effect is random, the result of *Brito*, or the result of some unobserved factor.

| | Caseload | | | Rate Granted Bond | | |
|---|---|---|---|---|---|---|
| | Boston | | | Boston | | |
| Predictor | Actual | Synth[a] | Pool[b] | Actual | Synth[a] | Pool[b] |
| IJ Trump Appointee | 0.86 | 0.46 | 0.51 | 0.86 | 0.63 | 0.51 |
| IJ Obama Appointee | 0.13 | 0.15 | 0.26 | 0.13 | 0.18 | 0.26 |
| IJ Years of Experience | 1.97 | 9.17 | 6.59 | 1.97 | 4.94 | 6.59 |
| Respondent Criminal Charge | 0.05 | 0.05 | 0.05 | 0.05 | 0.05 | 0.05 |
| Respondent Number of Appearances | 1.42 | 1.34 | 1.29 | 1.42 | 1.33 | 1.29 |
| State GDP (logged) | 13.25 | 12.98 | 13.33 | 13.25 | 12.91 | 13.33 |
| State Population (logged) | 15.75 | 15.80 | 16.13 | 15.75 | 15.65 | 16.13 |
| State Government Employees/Capita | 0.07 | 0.07 | 0.07 | 0.07 | 0.07 | 0.07 |
| Caseload ($week = 8$) | 51.00 | 43.00 | 66.87 | | | |
| Caseload ($week = 22$) | 36.00 | 45.29 | 65.30 | | | |
| Caseload ($week = 24$) | 53.00 | 53.01 | 49.70 | | | |
| Caseload ($week = 37$) | 20.00 | 30.94 | 40.17 | | | |
| Rate Granted Bond ($week = 13$) | | | | 0.48 | 0.34 | 0.41 |
| Rate Granted Bond ($week = 17$) | | | | 0.35 | 0.27 | 0.41 |
| Rate Granted Bond ($week = 20$) | | | | 0.14 | 0.22 | 0.43 |
| Rate Granted Bond ($week = 38$) | | | | 0.33 | 0.35 | 0.42 |

[a] Weighted combination of donor units selected to approximate response variables in Boston in terms of the outcome predictors. All predictors averaged over pretreatment period.

[b] Average for jurisdictions in the donor pool excluding Boston, MA.

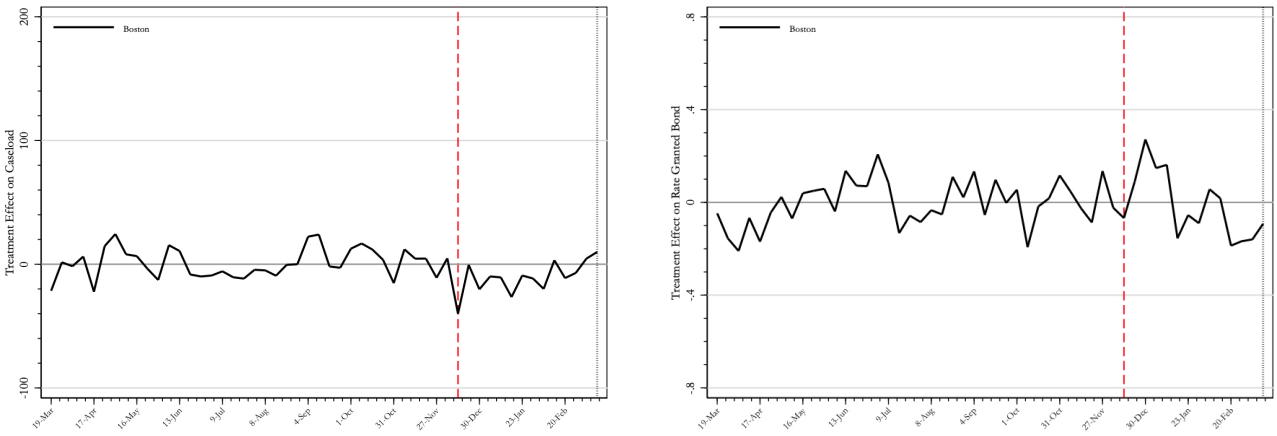
Note: Pretreatment (weeks 1-38), treatment (week 39), posttreatment (weeks 40-52).

Table 2: *Predictor Means (Source: DOJ EOIR FOIA Library).*

#### 6.2.3 Randomization inference

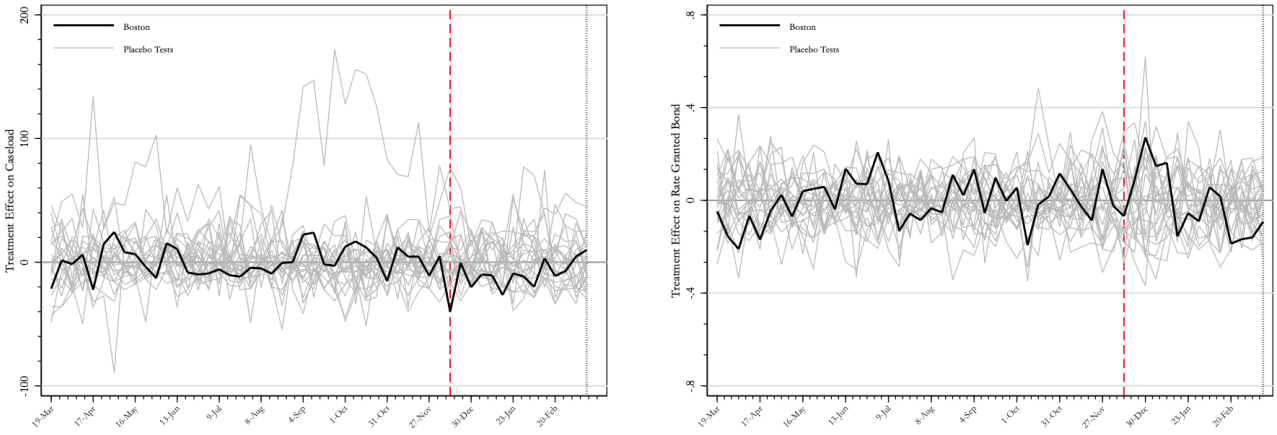
We follow Abadie, Diamond and Hainmueller's (2010) suggestion for inference in the context of a synthetic control study, adopting a randomization inference approach. Under the sharp null hypothesis, we can construct a reference distribution of test statistics by permuting the treatment assignment for each of our $J + 1$ units and then conducting the same synthetic control analysis. This is to say that we conduct a series of placebo tests. In the first placebo test, we assume that some other HBC in the donor pool received the *Brito* treatment and that Boston did not. We then run the synthetic control analysis with the placebo unit as the treated unit. In the next test, we assume that a different donor unit receives the treatment and return the unit from the first placebo test to the donor pool. We then repeat the synthetic control analysis. We do this for all permutations of a single treatment unit. The result is a distribution of treatment effects that would be observed if the sharp null hypothesis is true.

Figure 4 shows the results for the iterative placebo tests for all HBCs in the donor pool. Each plot overlays Boston's treatment effect (thick line) on the placebo tests (thin lines). Figure 4a shows the




(a) Caseload (b) Rate Granted Bond

Figure 3: *Treatment Effects: differences in outcomes between Treated and Synthetic Bostons.*




(a) Caseload (b) Rate Granted Bond

Figure 4: *Differences in outcomes between Treated Unit and Placebo Tests.*

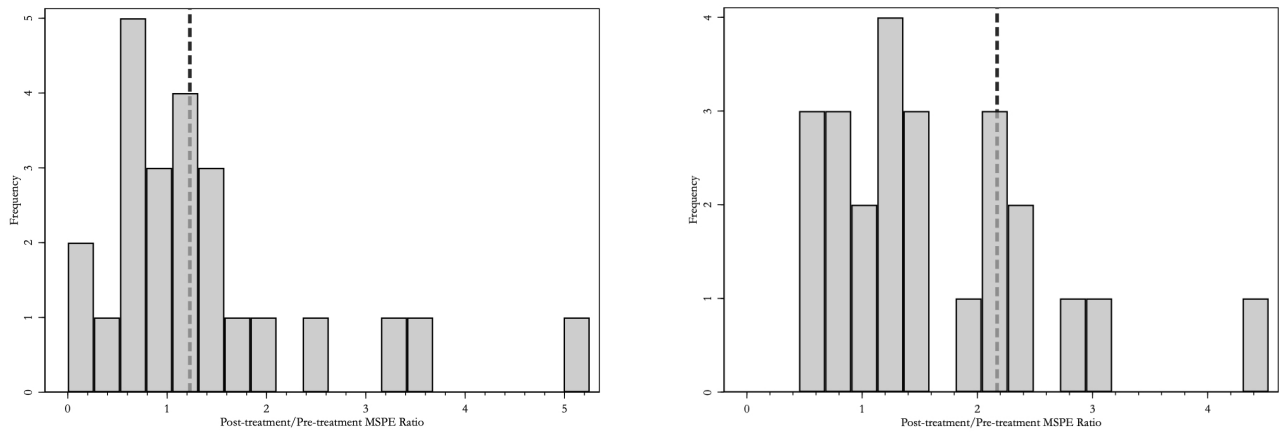
distribution of treatment effects on caseload. As should be the case, Boston's treatment effect during the pre-treatment period is near zero. In contrast, the pre-treatment period is quite noisy for the placebo tests. Figure 4b provides the same information for rate granted bond. Including the placebo tests puts *Brito*'s treatment effect into better perspective: a negative but not necessarily significant nor permanent effect on caseload and rate granted bond.

We use the distribution of treatment effects in two analyses to determine whether *Brito*'s treatment effect is statistically significant: post-treatment/pre-treatment mean squared prediction error (MSPE) ratios and Fisher-exact p-values.

Inspecting the post-treatment/pre-treatment MSPE ratios tells us whether *Brito* affects bond hearings in Boston. The ratio quantifies how precise a synthetic control is in the post-treatment period compared to the pre-treatment period; inflated ratios identify synthetics that are less accurate post-treatment than pre-treatment. If the synthetic control method produces unreasonable estimates in the pre-treatment period, we expect the post-treatment estimates to share those failings. With perfect data and identification, there is minimal prediction error between the treated unit and the synthetic control in the pre-treatment period, but the intervention causes the prediction error to increase in the post-treatment period. This inaccuracy is evidence of the treatment's effect in the treated unit whereas randomness and confounding factors generate inaccuracy in the placebos. Comparing the distribution of post-treatment/pre-treatment MSPE ratios allows us to evaluate an intervention's significance probabilistically. Where a HBC's ratio falls in the distribution of all ratios is the probability of obtaining a similar MSPE ratio if the treatment were randomly assigned. We can infer that the treatment effect is significant if its prediction error ratio is an outlier compared to the distribution.

Figure 5 shows the distribution of ratios for all HBCs for caseload and rate granted bond, respectively. If our empirical prediction is correct, Boston's ratio will be unusually large compared to the donor pool. For caseload, Boston's ratio is a 1.2, ranking it $10^{th}$ among 24 jurisdictions (Figure 5a). Boston's ratio's location in the distribution means that if one were to assign the intervention at random, the probability of obtaining a ratio as large as Boston's is 42% ($10/24 = 0.417$). Figure 5b communicates similar information. Boston's ratio is 2.2, ranking it $7^{th}$ in size among 24 jurisdictions. We can interpret this to mean that if intervention were assigned randomly, the probability of obtaining a ratio as large as Boston's is 29% ($7/24 = 0.292$). These placebo treatment effects are strong evidence against the assertion that *Brito* changed bond hearings in Boston.

MSPE ratios communicate information concerning a treatment effect's overall impact. It could be the case that the intervention's effect is short-lived or takes time to unfold. Our final assessment of *Brito*'s effect on bond hearing is to investigate the distribution of weekly treatment effects in the post-treatment period. We assess each weekly treatment effect relative to the distribution of treatment effects in the donor pool that same week. We use randomization inference to test the sharp null hypotheses that the treatment had no effect for any unit. We reject this null by estimating Fisher-exact P-values corresponding to the proportion of treatment effects that are as strong or stronger than the negative




(a) Caseload (b) Rate Granted Bond

Figure 5: *Randomization inference of negative treatment effect on outcomes using post-treatment/pre-treatment MSPE Ratios. Dashed line represents Boston's value within the 24-unit sample.*

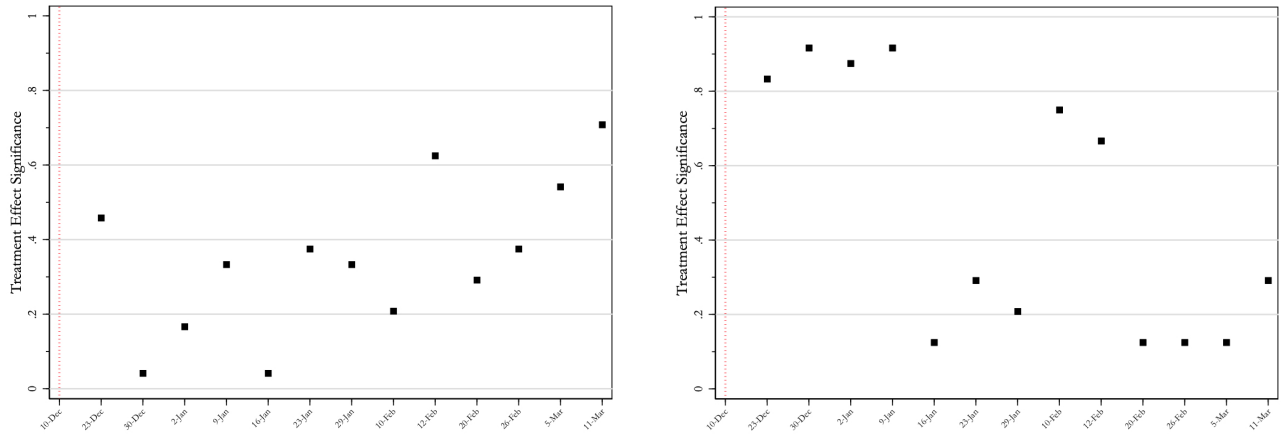
effects we predict.[11] The test is one-sided because we predict the decision negatively affected caseloads and the rate IJs granted bond.

*Brito*'s effect on caseload is significant in two ($p = 0.042$) and five ($p = 0.042$) weeks after the decision (Figure 6a). Combined with the middling MPSE ratio, we cannot reject the null hypothesis that *Brito* did not affect caseloads. Figure 6b plots the Fisher-exact P-value for rate granted bond. Boston's treatment effect is borderline significant five ($p = 0.125$), ten ($p = 0.125$), eleven ($p = 0.125$), and twelve ($p = 0.125$) weeks after the enforcement date (Figure 6b. These effects are not strong enough to support our argument that *Brito* affected the rate IJs granted bond. Taken together, we fail to conclude that *Brito* affected bond hearings–either prosecutorial discretion or judicial decision-making–in Massachusetts relative to the distribution of treatment effects generated by the placebo test.

### 6.3 Validating Findings and Identifying Mechanisms

Our synthetic control analyses failed to find evidence supporting our theoretical predictions that *Brito* affected Massachusetts bond hearings. Multiple immigration attorneys validate these results, with one sharing: "I've definitely come home from bond hearings before where I've said *Brito* was just a dream. It was so good when it happened, but it didn't mean anything. It didn't have impact" (RI 69). These null results lend support our alternative theoretical reasoning that changing either the burden or standard

[11]The minimum attainable Fisher-exact P-value that can be achieved is 1/(number of jurisdictions).




(a) Caseload

(b) Rate Granted Bond

Figure 6: *Randomization inference of negative treatment effect on outcomes using Fisher-exact p-values. Calculated weekly among 24 units in 13 post-treatment periods.*

would not meaningfully affect bond hearings or judicial decision-making. We turn to elite interviews and document analysis to identify possible mechanisms that stopped *Brito* from achieving its expected effects. Two mechanisms affect both outcomes, while several affect either the rate granted bond or caseload.

*Ignorance* and *fractional compliance* are two mechanisms that prevented *Brito* from affecting both the rate granted bond and caseload. The National Association of Immigration Judges (NAIJ) argues that the EOIR does not give IJs the time to keep current on legal development and does not provide IJs adequate training (NAIJ 09/2019). Immigration attorneys disagree and argue ignorance of the decision is no excuse. Interview participants report EOIR and ICE had full knowledge of *Brito* and could easily comply with the clearly defined standard and burdens it set forth (RI 69, 71). The second mechanism is fractional compliance, a term we use to refer to a suggestion that IJs and ICE personnel ignore *Brito* and maintain the status quo wherever possible (RI 7, 10, 51, 52). An attorney who once had high hopes for the decision now sees it as impotent: "Judges are very careful to at least make it look as if they're following Brito...'I'm going to recite these magic words. And I'm going to say that there is clear and convincing evidence of dangerousness, and that there is no reasonable alternative to detention that can protect the community or ensure the client's safety.'...Once you have a judge who said all the magic words, even if the evidence doesn't meet the clear and convincing standard, the district court will probably say no jurisdiction to review that" (RI 69).

*Representation*, *political control*, and *judicial discretion* explain why the rate granted bond remained unchanged. *Brito* does not change the reality that immigrants are often unrepresented, non-English speakers forced to square off against an ICE trial attorney who has litigated hundreds or thousands of cases (NAIJ 01/2020). Despite the due process *Brito* promises, detained immigrants who lack competent representation are unable to assert their rights during a fast-tempo bond hearing (RI 7, 23, 52). We expect representation positively affects individual outcomes (see also Ryo and Peacock 2021), but our results are unchanged when using representation as a predictor in our synthetic control. Political control is the second factor. The NAIJ has, on multiple occasions, made public statements warning lawmakers that IJs are highly susceptible to political influence. The professional association argues that the DOJ considers IJs not as independent judges but as mere attorneys employed "to enforce the political will of the then current administration" and creates profound conflicts of interest concerning decisional independence and due process (NAIJ 03/2021).

Interview respondents agreed that *Brito* changed bond hearings procedures and shifted the burden of production and persuasion to the government. Yet, attorneys generally observe that IJs have not adjusted their decisions accordingly and offer several explanations for why. An IJ's personality profoundly affects their decisions, and "having a precise legal standard [does not] take that out of the equation" (RI 23). What is more, IJs often overestimate the risks that noncitizen immigrants pose to communities (RI 10, 69, 71). Two experienced immigration attorneys explained it this way:

> *"The judge is always [asking,] 'What am I going to see in the newspaper the next day? What am I going to see on TV? Am I going to see that this person with a drunk driving arrest [from] 10 years ago going to be in five more [accidents and] kill somebody?"* (RI 10)

> *"[Brito] didn't change the underlying fact that whose burden it is isn't going to change the results. [If] you have a long enough criminal record[, which] doesn't technically bar you from bond, it makes the judge feel that you're not safe."* (RI 71).

The greatest challenge preventing IJs from complying with *Brito* is the inability to review their decisions as long as the IJ completes the analysis. Respondents clarified that 8 US Code 1226 Section E, denies federal courts the jurisdiction to review a discretionary detention decision, making litigating the standard's application to bond hearing a significant challenge (RI 69).

The administration's *priorities guidance* and *professional incentives* explain why caseloads remained unchanged. An administration's priorities guidance directs the civil immigration enforcement activities. IJs comment that these directives are "drastic pendulum swings" that inhibit consistent policy between administrations (NAIJ 01/2020). The Trump administration directed immigration enforcement that detained individuals with minor offenses (RI 7, 10, 64, 69). These directives inflated the case backlog from 500,000 to over one-million between 2017 to 2019 (NAIJ 01/2020). At the cost of $99 per day to detain a noncitizen immigrant (RI 10), the administration used the backlog to justify policies that demanded IJs make more decisions at faster rates. In October 2018, the DOJ implemented a performance management system that subjected IJs to arbitrary quotas and deadlines. Immigration attorneys argue the system is at odds with due process (RI 64), and IJs assert the metrics empower the EOIR "to dismiss judges who fail to follow their policy preferences under the pretext of inadequate performance" (NAIJ 01/2020). Unchanged caseloads can be an artifact of a large backlog coupled with IJs hustling to keep their judgeships. Meanwhile, high caseloads provide ICE attorneys opportunities for advancement. Building trial experience is how individuals advance within the DHS (RI 51, 69), which is why ICE trial attorneys "still try to put on their case even when their cases are weak" (RI 7).

# 7 Discussion and Conclusion

We have used theoretical and empirical approaches to determine whether *Brito v. Barr* affected either IJ decision-making or prosecutorial discretion. To quickly review, the case was a class-action lawsuit brought before the U.S. District Court of Massachusetts. The plaintiffs argued that immigration procedures requiring immigrants seeking release from detention to prove to the satisfaction of the IJ that they are not dangerous violate the 5th Amendment Due Process Clause, the Administrative Procedure Act, and the Immigration and Nationality Act. In November 2019, the District Court ordered all immigration courts holding custody hearings in Massachusetts to shift the burden of proof from the immigrant detainee to the government *and* prove by clear and convincing evidence that the individual is dangerous. The District Court's decision created a quasi-natural experiment that aligned requirements for immigration detention in Massachusetts with the constitutional due process requirements for pretrial detention and other forms of civil detention. Immigration detention requirements remained unchanged for the rest of the country.

The District Court's decision has two empirical implications: first, *Brito* should affect IJ decision-making by increasing the rate IJs grant bonded release, especially among conservative IJs. Second, *Brito* should affect prosecutorial discretion by decreasing the caseload of the Massachusetts IJs compared to other jurisdictions not subject to the District Court's decision. Using a synthetic control method to study the *Brito* decision's effect on rate granted bond and caseload, we find that the District Court's ruling did not affect either IJs' decision-making or prosecutorial discretion. These null findings are consequential. They suggest that a profound change in the rules IJs use to evaluate assertions about flight risk and dangerousness has no impact on decision-making or prosecutorial discretion. One possibility is that the Massachusetts IJs were already applying the rules laid out in *Brito*. We find this implausible for two reasons: the class-action lawsuit would have been unnecessary if this were the case, and the Office of the Chief Immigration Judge (2017, 2020*a*,*b*) would not produce Immigration Court Practice Manuals instructing IJs to apply rules that are different than those the District Court prescribed. An alternative explanation is that neither IJs nor ICE—at least under the Trump administration—willfully ignored District Court's directives. Given the career incentives of IJs and ICE prosecutors, perhaps this should not be surprising; however, it raises significant concern about the United States' continued use of immigration courts in the Executive Branch to monitor ICE. It also calls for reforms that place the federal courts to monitor the U.S. immigration system and compel government immigration officers to follow the rule of law, treat detained individuals with dignity, and protect asylum seekers.

We note the similarity between our findings and Finley and Karnes's (2008), who found no effect of the shift in the burden of proof in Tax Court. These legal rules may have no meaningful effect. Our theoretical analysis suggests that the effects of *Brito* could have been more variable than we have been able to observe. Future research should address how IJs interpret and apply the statutory standard. Experimental studies may be instructive, as could interview-based research, especially of retired IJs and ICE personnel.

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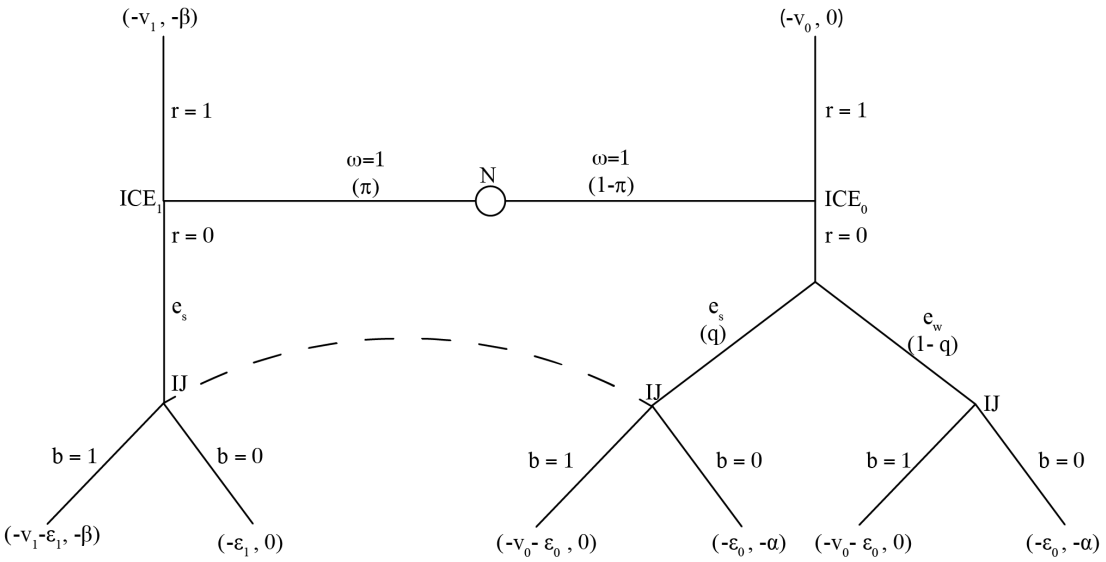
# 8 Appendix

## 8.1 Game Model Results

Figure 7 shows the structure of the bond game. There are three Perfect Bayesian equilibria in pure strategies. There is also a single semi-separating equilibrium. We consider each in turn, noting first that in any equilibrium, the IJ's posterior belief about the respondent's dangerousness when observing $e_w$ is always $Pr(\omega = 0|r, e_w) = 1$, since by construction it is only possible to observe weak evidence if the respondent is peaceful. And so in any equilibrium the IJ will grant bond (setting $b = 1$) if ever the IJ observes $e_w$.




Game Diagram of Model 2. *Illustrates terminal histories in the bond decision game. The game begins with a random draw from the state space, which selects the true level of dangerousness of the detainee (ω). ICE makes an intial bond decision (r). If ω=1, IJ will observe $e_s$ at the hearing; and, if ICE denies bond, IJ will observe $e_s$ with probability q. IJ is then tasked with making a bond decision (b).*

Figure 7

### 8.1.1 Case 1: Only the dangerous in court

In any equilibrium if ever the IJ observes $e_w$, the IJ selects $b = 1$. The first case has $\text{ICE}_1$ choose $r = 0$ and $\text{ICE}_0$ choose $r = 1$, so that the prosecutors deny (grant) bond to the appropriate detained non-citizens. Given this ICE strategy, when the IJ observes $e_s$, she believes that $Pr(\omega = 1|r = 0, e_s) = 1$ and $Pr(\omega = 0|r = 0, e_s) = 0$. The IJ will select $b = 0$ if she observes $e_s$, because $\beta > 0$. $\text{ICE}_1$ clearly has no incentive to set $r = 1$, given the IJ's strategy. Thus, we need to consider $\text{ICE}_0$'s decision. For $\text{ICE}_0$ to choose $r = 1$, it must be that

$$\begin{aligned} (1-q)(-v_0 - \epsilon_0) - q\epsilon_0 &< -v_0, \text{which holds when} \\ q &< \frac{e_0}{v_0}. \end{aligned}$$

### 8.1.2 Case 2: All detained non-citizens in court

The second case has both prosecutors choosing $r = 0$. The IJ makes a decision consistent with the signal she observes, setting $b = 0$ if $e_s$ and $b = 1$ if $e_w$. Given the ICE strategy, the IJ's beliefs when she observes $e_s$ (or $\hat{\pi}$) are

$$Pr(\omega = 1|e_s) = \frac{\pi}{\pi + (1-\pi)q}. \tag{6}$$

The expected utility of denying bond when the IJ observs $e_s$ is $(1 - \hat{\pi})(-\alpha)$ and the expected utility of granting bond is $(\hat{\pi})(-\beta)$. And thus, the IJ will deny bond if $q < \frac{\pi\beta}{\alpha(1-\pi)}$. In order for $ICE_0$ to set $r = 0$, it must be sufficiently likely that the IJ will observe $e_s$ if $\text{ICE}_0$ denies the initial bond. This requires $q \geq \frac{\epsilon_0}{v_0}$.

### 8.1.3 Case 3: All detained granted bond (No docket)

The third case has both prosecutor types choosing choose $r = 1$. In this case, the IJ sets $b = 1$ no matter what signal she observes. Beliefs in this equilibrium are not defined via Bayes's rule, because the probability of observing any signal of dangerousness is 0 given the ICE strategy. As always, if the IJ observes $e_w$ , the IJ knows that the respondent is peaceful. By passive conjectures, the IJ does not attempt to infer anything about which prosecutor type is in front of her. When observing $e_s$ in this

equilibrium, the IJ's beliefs are exactly as they are Case 2. For the IJ to grant bond it must be the that the evidence signal is sufficiently coarse or that $q \geq \frac{\pi\beta}{\alpha(1-\pi)}$. Given that the IJ will always grant bond, no ICE prosecutor has an incentive to deny bond initially since $\epsilon_i > 0$.

#### 8.1.4 No other pure strategy PBE

The remaining ICE pure strategy involves $\text{ICE}_0$ choosing $r = 0$ while $\text{ICE}_1$ chooses $r = 1$. Under this strategy, the IJ would believe that $Pr(\omega = 1|e_s, r = 0) = 0$ and $Pr(\omega = 0|e_s, r = 0) = 1$, and would accordingly set $b = 1$ since $\alpha > 0$. In so far as the IJ sets $b = 1$, $\text{ICE}_0$ would clearly prefer to set $r = 1$, since $\epsilon_0 > 0$. Thus, this kind of profile can not be part of a PBE.

#### 8.1.5 Semi-Separating equilibrium

Now consider a semi-separating equilibrium in which $\text{ICE}_1$ chooses $r = 0$ and $\text{ICE}_0$ chooses $r = 0$ with positive probability, which we denote $\lambda$. The IJ always chooses $b = 1$ if observing $e_w$. She chooses $b = 1$ with positive probability if she observes $e_s$, which we denote $p$. For this profile to be a PBE, it must be that the $\text{ICE}_1$ strictly prefers to deny initial bond (r=0) when the IJ sets $Pr(b = 1) = p$ while $\text{ICE}_0$ is indifferent between denying and granting initial bond. Simultaneously, the IJ must be indifferent between granting bond and denying bond when $\text{ICE}_0$ sets $Pr(r = 0) = \lambda$.

For the IJ expected utility of granting bond having observed $e_s$ is

$$\text{EU}_{IJ}(b = 1|e_s) = \frac{\pi}{\pi + (1-\pi)\lambda q}(-\beta),$$

and the expected utility of denying bond having observed $e_s$ is

$$\text{EU}_{IJ}(b = 0|e_s) = \frac{(1-\pi)\lambda q}{\pi + (1-\pi)\lambda q}(-\alpha).$$

In equilibrium, it must be that $\text{EU}_{IJ}(b = 1|e_s) = \text{EU}_{IJ}(b = 0|e_s)$. Solving this equation for $\lambda$ yields

$$\lambda^* = \frac{\pi\beta}{\alpha q(1-\pi)}.$$

Given allowable values of the parameters, $\lambda^* > 0$. For $\lambda^* < 1$, it must be that $q > \frac{\pi\beta}{\alpha(1-\pi)}$.

The cost of $r = 1$ is $v_0$ for $\text{ICE}_0$. If $\text{ICE}_0$ chooses $r = 0$, there are three possible outcomes: the IJ observes $e_w$, the IJ observes $e_s$ and sets $b = 1$, and the IJ observes $e_s$ and sets $b = 0$. Given the IJ's strategy, equilibrium requires that the expected utility of $r = 0$ for $\text{ICE}_0$ is equal to the cost of $r = 1$, which to say that

$$-v_0 = (1-q)(-v_0-\epsilon_0) + qp(-v_0-\epsilon_0) + q(1-p)(-\epsilon_0).$$

Solving this equation for $p$ yields

$$\begin{aligned} p^* &= \frac{qv_0-\epsilon_0}{qv_0}, \text{or equivalently} \\ p^* &= 1-\frac{\epsilon_0}{qv_0}. \end{aligned}$$

Given the allowable values of the parameters, $p^* < 1$ always, and $p^* > 0$ when $q > \frac{\epsilon_0}{v_0}$.

For equilibrium, $\text{ICE}_1$ must prefer to bring a case in light of the IJ's strategy. This requires

$$\begin{aligned} -v_1 &\leq p^*(-v_1-\epsilon_1) + (1-p^*)(-\epsilon_1) + q(1-p)(-\epsilon_0), \text{so that} \\ p^* &\leq \frac{v_1-\epsilon_1}{v_1}, \quad \text{and plugging in for the equilibrium } p \text{ and solving for q we have,} \\ q &\leq \frac{v_1\epsilon_0}{v_0\epsilon_1}. \end{aligned}$$

This last inequality always holds. To see how, note that $v_1 > v_0 > \epsilon_0 > \epsilon_1 > 0$, and so that the right hand side is always greater than one.

## 8.2 Synthetic Control Supplemental Information

The data required extensive cleaning and we removed observations using a field that records each bond decision. The coded values are C (New Amount) IJ set a different bond from the bond ICE set, or set a bond where ICE denied bond; R (Recognizance) IJ released the individual on recognizance; S (No Change) IJ did not change ICE's decision; A (No Action) IJ did not take action; N (No Bond) IJ denied bond; J (No Jurisdiction) IJ determined they lacked jurisdiction; D, G, O, F, and L are codes that exist in the database but are no longer used.

| Coded as 0 under any of the following: | Coded as 1 under any of the following: |
|---|---|
| • IJ denied bond;<br>• IJ did not change the prior bond decision *and* the bond set by ICE in its initial custody determination is zero or is missing; or<br>• IJ did not take any action *and* the bond set by ICE in its initial custody determination is zero or is missing. | • IJ updates the preexisting bond amount;<br>• IJ releases the individual on recognizance;<br>• IJ did not change the prior bond decision *and* the bond set by ICE in its initial custody determination is non-missing and greater than zero; or<br>• IJ did not take any action *and* the bond set by ICE in its initial custody determination is present and greater than zero. |

Table 3: *Coding Granted Bond Outcome Variable.*

| City, State (HBC Code) | Caseload | Rate Granted Bond[a] |
|---|---|---|
| Adelanto, CA (ADL) | 0.03 | 0 |
| Arlington, VA (WAS) | 0 | 0 |
| Atlanta, GA (ATD) | - | - |
| Atlanta, GA (ATL) | - | - |
| Aurora, CO (AUR) | 0 | 0 |
| Baltimore, MD (BAL) | 0 | 0 |
| Batavia, NY (BTV) | 0 | 0 |
| Boston, MA (BOS) | N/A | N/A |
| Chicago, IL (CHI) | 0 | 0 |
| Cleveland, OH (CLE) | 0 | 0 |
| Conroe, TX (CIC) | 0 | 0 |
| Dallas, TX (DAL) | 0 | 0 |
| Detroit, MI (DET) | - | - |
| El Paso, TX (EPD) | - | - |
| Elizabeth, NJ (ELZ) | 0 | 0.236 |
| Eloy, AZ (ELO) | 0 | 0 |
| Florence, AZ (FLO) | 0 | 0.267 |
| Fort Snelling, MN (BLM) | 0 | 0 |
| Guaynabo, PR (SAJ) | - | - |
| Harlingen, TX (HLG) | - | - |
| Hartford, CT (HAR) | - | - |
| Honolulu, HI (HON) | - | - |
| Imperial, CA (IMP) | - | - |
| Jena, LA (JNA) | 0.49 | 0.084 |
| Kansas City, MO (KAN) | - | - |
| Laredo, TX (LRO) | - | - |
| Las Vegas, NV (LVG) | 0 | 0 |
| Los Angeles, CA (NLA) | - | - |
| Los Fresnos, TX (PIS) | - | - |
| Lumpkin, GA (SDC) | 0 | 0 |
| Miami, FL (KRO) | 0 | 0 |
| New York, NY (NYV) | 0 | 0.145 |
| Oakdale, LA (OAK) | - | - |
| Omaha, NE (OMA) | 0 | 0.113 |
| Orlando, FL (ORL) | 0 | 0 |
| Otay Mesa, CA (OTM) | - | - |
| Otero, NM (OTO) | - | - |
| Pearsall, TX (PSD) | 0 | 0 |
| San Antonio, TX (SNA) | - | - |
| San Diego, CA (SND) | - | - |
| San Francisco, CA (SFR) | - | - |
| Tacoma, WA (TAC) | 0.48 | 0 |
| Tucson, AZ (TUC) | 0 | 0.155 |
| West Valley, UT (SLC) | - | - |

Note: "–" indicates unit omitted for lacking sufficient decisions in at least one period.

Table 4: *Base City Weights in the Synthetic Boston for all Outcome Variables.*

### 8.3 Summary of Research Interviews

Between January and March 2022, our research team identified 44 individuals, including 32 private immigration attorneys in Massachusetts and 10 government agencies and officials. Our team used a combination of emails, phone messages and voicemails, and text and phone conversations to make 88 research interviews requests. We conducted all interviews on Zoom and used audio recording to produce interview transcripts. We then used NVivo to code and analyze interview responses.

Eight immigration attorneys agreed to participate on the condition of anonymity. We screened research participants on (i) whether they represent immigrant respondents in custody hearings and (ii) their familiarity with the *Brito vs. Barr* decision. All immigration attorneys that agreed to an interview met both conditions. Given their limited availability, we used a semi-structured interview technique to explore eight relevant topics:

1. Whether the immigration attorney expected a change in process following the *Brito* decision.
2. Whether they expected a change in content—e.g., ICE changing its arguments—following *Brito*.
3. Whether they noticed a change in the order in which the respondent and ICE speak.
4. Whether they noticed a change in how ICE argues the cases.
5. Whether they noticed a change in how the court makes decisions.
6. Whether they noticed a change in the way immigration judges behave in custody hearings.
7. Whether they noticed a change in the outcomes of custody hearings.
8. Whether anything they've experienced or observed changed the advice they give to clients.

Meanwhile, zero of the 10 government offices contacted agreed to participate. The agencies and officers contacted either declined to participate or did not respond to our communicaitons.

- Customs and Border Protection, Assistant Commissioner, Office of Professional Responsibility
- Department of Homeland Security (DHS), Assistant Secretary for Partnership and Engagement
- DHS, Associate Director, Academic Research and Campus Safety in the Office of Partnership and Engagement

- DHS, Associate Director, Office of Intergovernmental Affairs
- DHS, Director of State and Local Affairs, in the Office of Intergovernmental Affairs
- DHS, Officer for Civil Rights and Civil Liberties
- Immigration and Customs Enforcement (ICE), Agency Spokesman for the New England
- ICE, Principal Legal Advisor
- ICE, Regional Community Relations Officer
- Federal Judicial Service, Judge, U.S. District Court, District of Massachusetts