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AI IN EMPLOYMENT AND HIRING: A FIRESIDE CHAT WITH EEOC CHAIR CHARLOTTE A. BURROWS

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UNCORRECTED TRANSCRIPT

FIRESIDE CHAT:

CHARLOTTE A. BURROWS

Chair

U.S. Equal Employment Opportunity Commission (EEOC)

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The Brookings Institution

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**TURNER LEE:** We'll let a couple of people get settled. We have some treats in the back as well, and then we will get started. Well, welcome everybody to the Brookings Institution. This is a great first-- second event for me coming back. I am Dr. Nicol Turner Lee. I'm a senior fellow in Governance Studies and the director of the Center for Technology Innovation here at Brookings. As you all know, in the Center for Technology Innovation, we deal with a range of legislative and regulatory issues. We try to best to provide the best policy and research around those issues. And I'm so happy to say that my barista at my local coffee shop says when she listens to either our podcast or reads our newsletter TechTank, both of them are named, that she can actually understand these issues because all of us in this room just know how difficult it is to discern this industry and ecosystem in which we're in when it comes to tech policy.

This is a really welcomed surprise for me, of which I am highly humbled to have Charlotte A. Burrows, who is the chairwoman of the EEOC, and let me tell you why. We ran into each other after I have been a huge girl fan of her work and what she has done when it comes to acting as an agent of our federal agencies to really think about the future of AI in very settled verticals where we have laws on the books and where we have conversations and deliberations that have happened around worker protections and employee rights. And so it was just an honor and privilege to have her join us today and to join us in person, where we normally at Brookings do webinars. But for those of you who are watching, we are streaming, and we'll say hello to you as well. And we have a hashtag AlinHiring if you would like to contribute to the online conversation. We have limited time. I want to jump because we have to talk about.

**BURROWS:** Absolutely, absolutely.

**TURNER LEE:** Chairwoman, again, I am just humbled and excited that you are here among our audience. They are as well. You already understand the nature of where we are as far as AI's — I don't want to say invasion, I was about to — but AI's integration into critical and essential functions that we have in our society. And I'd like to sort of start with, as a person who has been appointed to this esteemed role, to sort of get your reflections on where we are as we look at the state of settled employment law and this introduction of new technology, I call it traditional AI, and now new formats that actually exist with generative AI. So I will leave that as an open-ended question for you to start with, just sort of laying out the landscape of where we are.

**BURROWS:** Wow. Well, thank you. That's such a humbling introduction. I am a huge fan of your work and of the work that Brookings has been doing, and terrific to be here with all of you. I would say, first of all, if you want to talk about reflections, I want to just for a minute pull back big picture, because the EEOC, of course, is the little agency brought to you by the March on Washington for Jobs and Freedom,

which was created, you know, we just celebrate that 60th anniversary this year, and the jobs and freedom, we were the jobs part of that. And so while we came from that in the sixties and still carry that flame and understand our work as rooted in that very clear democratic request, we also understand we got to be nimble enough to do our work now. And so in addition to some of the kinds of things that you immediately think about when you think about the March on Washington and the basic, you know, sort of closed doors, frankly, that were around issues of race and gender throughout the workplace, that was the starting point at the point that our agency first opened its doors.

We now cover things like genetic information discrimination, right? So we also-- and of course, disabilities, etc., LGBTQI issues and really look across the board at inclusion for all. So we are going to be nimble as we look in this moment, to answer your question, so much of employment is now becoming automated and it's including in that automation, increasingly artificial intelligence. So we actually held a hearing in 2016. We were looking at big data writ large and how it's changing the workplace. Fast forward to now, we had another hearing earlier this year, kicked the year off with it, and so much has changed. So the big deal is more and more employers are using artificial intelligence and some other forms of automation in just hiring, just right out the [inaudible], in fact, before hiring and recruitment. And so we knew we had to be able to keep up with that in order to be able to do our jobs and find if there were employment discrimination, denials of opportunity on any basis, in any format, across the board. So we are doing that.

And I think that one of the things that is most important for government to do is to find those problems that affect everybody, but that're are too big for one person to solve on their own. And ultimately, that's what we're doing. We understand that our laws represent a democratic national bipartisan consensus. And I know, like, we're in D.C., people don't talk about bipartisan because it's a lot, but every one of our statutes passed with broad bipartisan majorities. Some of them had to get over, you know, veto threat or a filibuster, but brought huge bipartisan majorities right from the very first time with the Civil Rights Act of '64, up until last year with the Pregnant Woman's Fairness Act and recognizing that hugely democratic support, bipartisan national consensus, we know that AI by, you know, it's no nefarious reason, but just because you need a certain level of expertise to understand what's happening, it's kind of the opposite of the broad bipartisan national democratic consensus, because a lot of people it's really hard to know what's happening. So at root, aside from-- and this goes for employment, but for every other area, too, we have to make sure that those things that we as a democratic society think are important are not undermined inadvertently. I'm not accusing anyone of trying to do this, but undermined or changed in ways we don't even know because it's very closely held the knowledge, the computer science of what exactly is happening here. So the good

news is we've got pretty good laws to deal with a lot of the issues that we're talking about. And I don't want to go on too long because I know you got more questions.

**TURNER LEE:** That's fine. That's fine.

**BURROWS:** I'm very excited about those.

**TURNER TURNER LEE:** I've enjoyed so much. Like I said, I'm a fangirl because I've enjoyed speaking with you, because the passion in which you just laid out, how this agency was created, is really some of the reasons why many of us stand in this abyss of trying to figure out how we make AI more equitable and fair. And to me, the other question I'd like to ask you, though, based on that is, given the amount of time we got to get to an EEOC, what are your challenges in ensuring that people are complying with those laws, because the opacity of artificial intelligence systems when it's deployed in these areas becomes very difficult to sort of claim, you know, discrimination. And so, just curious, you've-- you've put out some really great stuff to talk about at a moment, right? But I would love to hear, like, what are your challenges with AI that have sort of skirted the issue of compliance and how do we actually ensure that these historical rules and standards and norms are still protected?

**BURROWS:** Sure. So, I will give you the challenges, but I also want to say, I think there's good news here too, and we are going to make our own destiny, not just [inaudible], but like all of us in this society as we look at these new technologies, I firmly believe that that is a doable thing. So, challenge is though, as you said, it's the opacity of it. And there's... it's almost like you need a translator. So, there's deep expertise — this is really a new civil rights frontier — there's deep expertise on civil rights and on civil rights laws at certainly at our agency, but across the board, there are, you know, civil rights organizations, employers have a lot of information about that as well.

On the other hand, there's deep expertise in the computer science lane and their thinking about how to use these new technologies and develop them. But they're two different worlds in a lot of places. And one of the things that we have seen, and we're looking at this in a more holistic way and thinking about it, too, is that the world of, you know, those folks who developed these new technologies is not a very diverse world in terms of just who, you know, representative of the broader population, it's not a very diverse world. So as we think about what's being designed, we have to, first and foremost, the challenge is just making sure that those who are developing this-- these technologies, who, in all good faith, are trying to make the world a better place, and I truly believe that, and in some cases they really are, understand what their civil rights obligations are. A lot of them are very sophisticated and some of them are not. And so making sure that the civil rights experts know enough about what's happening in the technology to advise and the folks who are

developing the technologies understand their civil rights obligations, that's the crossover, because you have a lot going on in both spaces and they have to meet up in order to protect and best serve people.

So what we've been trying to do at the EEOC, we launch an initiative a couple of years ago, is to help both educate ourselves but educate the public about how to make those two worlds talk to each other in ways that best serve the American people ultimately. But the challenge is truly the fact that there, the lanes of expertise, there's not a natural bridge. We're building that. I would say the other challenge is a lot of times if someone is denied a job because of their-- you know, through an AI and automatic system, they have no idea, right? I mean, it's already a problem with respect to hire. They have no idea. And so it's really incumbent on us to be working with employers, working with vendors, educating them, and making sure we know how to spot things. So we've been doing a lot around training our own folks, thinking about the kind of expertise we need to develop in-house, but also building our, you know, relationships with those experts that we use to advise us who are outside so.

**TURNER LEE:** And I want to, like, stay on this for just a moment on this prescreening piece, right, because one of the things that also interests me about AI is that people don't necessarily have to fill out a box and say, "I'm African-American" or "I am a woman," you know, "I come from the LGBTQ community," "I have a disability," when it comes to the internet, right? The internet gathers these particles of our digital profile, and essentially there are direct interactions that we have, maybe around an ad, but then there's inferential interactions, which doesn't worry about the prescreening side of it and the EEOC's authority when it comes to that AI format, because technically, a prescreen is not necessary the retention of job, right? So I'm just curious, have you been thinking about that as well?

**BURROWS:** Sure, so a couple of things, and I want to pull back because I realize I have not talked about the panoply of different things that are out there that can be affecting employment practices. So we are very focused on screening, recruitment, and hiring because at least as of last year, the Society for Human Resource Management did an interesting sort of survey that said those companies that are using this, 79% of the action is in this area of recruitment and hiring. So we know we got to look. That's most of the ways it's being used, but — and I want to put a pin and come back to this — across the board, it's not just that. So it's pretty much everything and the understanding is that going forward, it's only going to increase. So we-- our eyes are on all of that, but we're focusing, as you anticipated, on that area. So with respect to recruitment and retention, it's very clear that those areas, if it's a step that gets you in the door and not being able to get in that door means you don't get the employment opportunity, our laws can reach it so that we do have the ability.

So, for instance, some companies decide to send an ad proactively to certain individuals based on an algorithm about what they believe that individual's characteristics are. And if you're doing that in a way that has disparate impact based on race or national origin or gender or any of the things that we cover, you know, religion, LGBTQ status, any of those disability, etc., age, then you cannot, you know, you can't do it. And so we have had-- you know, finding that practice is trickier. And so one of the things that we're thinking about and training our investigators around is understanding what kinds of questions to ask people because people won't know. But you can ask them things like, well, did you, was your rejection-- if you got a rejection at 2 a.m. in the morning, right, suddenly, like five minutes after you applied, probably that was not a human being doing that. I'm just going to go out on a limb and say that, right? So, you know, but also other kinds of things, you know, depending on the circumstances that you can start to ask, automatic screenings, you know, gamified assessments that you're taking as part of your initial assessment, that those kinds of things are usually got some sort of algorithm helping with the process, right? And so those are things we're looking at.

We've also had some, you know, as we look at these things, I think there's really two buckets of issues if you want to think about big picture, what we're seeing. The first is, as you talked, about screening and hiring, that we have the question of, what is behind the algorithm that's deciding are you in or out. And as a lot of the folks who are probably-- if you're listening to this, you probably are already familiar with some of the issues that have come up, for instance, around, you know, selection devices that had insufficiently diverse training material, such that-- at the end of the day, because the resumes that went in did not have women's basketball, or Smith college, or, you know, women's lacrosse on it — all the women got kicked out of the, the women that were screened, right? So that's one set of issues is an algorithm that's based on training data that's insufficiently diverse and therefore amplifying that lack of diversity. The other issue-- and variations on that theme, right? The other set of issues is actually much easier to find, and it raises a different set of issues, which is surveillance, what people think of as a boss ware.

So there are certain industries where there may be a real interest in the efficiency with which someone does their job, and the, you know, perceived need, anyway, to surveil. That alone is not, you know, our laws are agnostic as to that. But some of the ways that these things work with the algorithm, for instance, how quickly you have to deliver a package, right? How long from the truck to the door and back again or how long you have to pack a box or whatever it is, maybe you're on an assembly line, put that-- you know, your piece will be assembly line and manufacturing. If that doesn't allow whatever the assumptions about how quickly that has to go does not allow for a break if you have a disability, or for you to do it slightly differently or, you know, Pregnant Woman's Fairness Act, you have to take an extra bathroom break — which

sometimes happens when you're pregnant — if that's not permissible, or maybe you need a prayer break. We've done a lot of cases in other contexts, not in the AI context yet, but in other contexts where there were prayer breaks and those were not permitted. So if the algorithm isn't allowing for those things, and maybe you can make it up in another way, but no, each [inaudible] is too rigid, you have a problem, particularly if there's not an interactive process where you can reach out and find a person.

So a lot of the issues, the easier issues for both for us to spot, and frankly, I think for an employer to stall for, just go around-- okay, if you have something automated, how do you reach in and say, "Oh, I need a-- I've got a disability, I have to do this slightly differently." Is there the ability to find someone who can help you solve that problem and engage in an interactive process that's expected under the ADA, now under the Pregnant Workers Fairness Act you've got to do that. If it's so on autopilot that there's no way to have that conversation and get that legitimate ask fixed, then you're gonna probably end up looking at some real litigation risk. And we're trying to help folks on the front end think those issues through. So there are some super complicated, difficult issues. I don't wanna pretend that-- I wanna get to some of those too, but some of this is easy. It's just that you've got a new process. A lot of times people will have an outside vendor conducting the assessments or helping with it, and just talk to that vendor about what those ADA and Pregnant Women Fairness Act obligations actually look like, will go a really long way, I think, for employers in the end.

**TURNER LEE:** So, you know, I think that's so interesting because I've been trying to figure this out, to tell you the truth, that I think a lot of people in here, in terms of how the EEOC has looked at these issues, and for those of us listening, right, I think we've heard two things today. One is sort of like this behavioral expectation of algorithmic models when it comes to areas where the EEOC cares about, like you said, pre-assessment screening, employment, ensuring that there is equitable access to that algorithm and the outcomes that should be equitable is basically what I heard you say, which is so interesting because as you said, with the opacity of the internet and as we see these systems get more sophisticated, it's just hard to tell, right? I like the idea, but I get a rejection letter back in five seconds, it's not-- something I probably want to investigate because we don't have agency as consumers.

**BURROWS:** I mean, it was wrong, but it means it wasn't a person, right?

**TURNER LEE:** Which is interesting--.

**BURROWS:** If you do have another issue come. you know, [inaudible] for us.

**TURNER LEE:** Because you've got to, you know, again, the burden is rest on the individual to sort of say and point out these, these indiscretions. But I also love the way you talk about it, which I haven't heard talked about, which is about the workplace environment and the extent to which that even though it's

automated, there are still rights. So we're going to pick up on that because that is something for those of us who study the effect of automation on workers' rights in workplaces, that's something that we've not really dived into in terms of what are the compliance metrics that we should still be having. But you did bring up this conversation about Americans with disabilities, and one of the things that my former colleague Alex Engler talked a lot about was the guidance that came out from the EEOC was groundbreaking in terms of really taking us along the journey that you're on, that you just said in terms of how the agency is pivoting. Talk to us a little bit more about that, like what that process was like, how you actually came up with guidance when it comes to AI for persons with disabilities, and, you know, how helpful that's been for the audience that that was intended for? And what more we have to look forward to from you in those spaces?

**BURROWS:** Absolutely. Well, I really love that you mention that, because Alex, actually, Alex Engler, joined us for our hearing, which was really fun to hear from so many experts, from so many different angles, to really sort of help us think through what issues are really landing in the workplace. So kudos to him.

**TURNER LEE:** Yeah, and when I say former, he's actually landed up in a higher place. He's now working for the White House. So, if you follow his work [inaudible].

**BURROWS:** We had fun. So we're grateful in the administration.

**TURNER LEE:** Yeah.

**BURROWS:** So-- but with respect to the Americans with Disabilities Act, we really felt strongly about starting there, and the reason is there was already starting to be a lot of discussion about — very important and necessary discussion, and we are on that too, let me be clear — but about race and gender to some extents, even age, although I think there's been less attention on that, and the ways in which people can be excluded along those lines. And one example with respect to race and gender was with New York City came out with a bill really early saying we wanted to require companies to be transparent about this, to do some auditing, etc., but it didn't say anything about disability. And we were sort of observing this conversation very early at the start of this administration and under-- starting to understand that it was looking like a conversation about a set of, you know, just of civil rights issues that were very important but did not include disability, and the law under disability is different. And so our concern was not to privilege one or the other, but we could see other folks were really —and the civil rights groups did a great job of talking about all of these issues — but that the attention was-- this was on being left out, and that being left out was going to be really significant because if people assumed, "Oh. Well, we'll just do what we're doing on gender, right?" They were gonna get it wrong. So we wanted to, first and foremost — although we, you know, investigate, and litigate, and all of that is very important — first and foremost, we want to be helpful. This is a new



problem. Everyone is figuring it out. So we could see that there was a gap that we actually knew something about. So what we, you know, when we spot that on any issue, we try to lean into it and give advice first. And what we found is that folks were really saying it would be great if you could help us be the translator between the expertise in what's developing technology and your laws. So, "We know about your laws. We're familiar, but this is a new factual situation. Can help us map it onto it." So that's what we essentially did, and we wanted to be able to do it in a way that was not too, too technical, right? And I don't know how we did on that. You know, it was a difficult thing to sort of figure out because there's so many different audiences, but I will tell you those issues are important. And I, just to-- really quickly, there are sort of three things that we're looking at, and I think that the public should be aware of about ways in which this can be a problem. The first is that screening out-- I'll start there because that's the conversation was around race and gender and how people get these barriers, they can't get in the door to apply or to get the promotion or whatever it is. With disability-- with other areas, what you typically do is you start by looking statistically, well, was this, you know, kicking out most women from the application process. With disability, it's different because disability is such a broad category. There are so many different kinds of disabilities. And, you know, you don't actually-- the law does not require you to find statistically that everybody with a disability is being screened out.

**TURNER LEE:** Right.

**BURROWS:** You can have one person.

**TURNER LEE:** That's right.

**BURROWS:** If you got a test where you have to read it, and you've got one blind applicant who cannot read, and it's not Braille, just regular printed word, you've already violate-- and you don't have a workaround and there's no real burden on you to get that workaround to let them use their screen reader — you know, we have all of these technologies, right — you violated the ADA almost certainly, right? So we wanted people to understand that this works differently. It's not a, first and foremost, a statistical test. You don't have to have, you know, 5,000 blind people come and be-- not be able to read your piece of paper. So what we wanted to do is be helpful, flag that, also flag — which is related — the other kind of problem is when you don't have an accommodation. And some of these accommodations are not particularly complicated, right? But if you don't think about it ahead of time, and if you don't speak to if it's an outside vendor or just have a plan for it and articulate how to raise your hand and say you need an accommodation, you're going to end up not in the place that you want to be in terms of getting the best applicant and also in terms of the ADA.

I think the last thing, which is a little bit more or less familiar to people maybe, that we wanted to make sure everyone knew about was there's a part of the ADA that actually applies to everyone, whether or

not you have a disability. And it's actually almost like a privacy part of a statute which says that you cannot ask about disability-related inquiries, right, or give someone a medical exam before you give them a conditional offer of employment. So there's-- you know, some of these gamified assessments, let's say, you know, things that are assessing whether-- how quickly you do things, they can also screen people out. But if it's-- if you're actually collecting medical information, right? That-- or essentially asking a question that could be a disability-related question, like, you know, some of the personality tests are sometimes used as a screening for employees. So if you say, "Do you usually feel optimistic?" Well, depending on if you, you know, you may have had depression, etc., is that-- unless you're able, you know, you're really not able to defend yourself on that one before you've given a conditional offer. Now, there may be-- you know, people do drug testing and that sort of thing after you've been given a conditional offer,

there-- there's something different later on, but that when you're first applying, you should not be asking essentially, "Do you have a disability?" or things that can backdoor you into, "Do you have a disability?" And that's not as obvious, I think, to people. So we wanted to spell that out and just give some help. I don't think it's-- it has to be particularly complicated, but it's the kind of thing that if you're not focused on it, you can miss. So those are the three kinds of things that are talked about in the document.

**TURNER LEE:** You know, I really appreciate that because even myself as a digital divide expert — I see my friend here — we missed that, right, on terms of the disability community and how we are sensitized to that. And what I loved about the guidance, you're basically giving employers an opportunity to get off the hook and be compliant, right, without having to go to the rigor of potential litigation or kind of stepping out of line in the technical space based on what you said earlier. I get so worried about technical-- technological systems that ask people to submit videos and, you know, to look at things like that because there's so many contextual cues that can be picked up in the employment space that employers may not think are non-compliant, right, that could lead to some of those actions that you're talking about. I mean, what has been, since that came out, the reaction by employers on the guidance that you're actually putting out there? Because it is very progressive in terms of the guidance that you've issued. You now see why I'm a fan girl. I think the EEOC is such an interesting example of looking at AI in real-time in areas that are historically settled. So just curious, what's been the reaction on the, the guidance for the ADA?

**BURROWS:** Mostly appreciation. And what's interesting too, is that when you think about a big organization, and I think what among other things has started to happen is that more of the H.R. function is going to their lawyers first and saying, "Hey," and the lawyers now have this tool to sort of talk to them about it, because I've at least had — I don't know if this is anecdotal or it's broader — but at least some, you know, in-house counsel and other counsel saying to me, "I'm glad because I didn't even know we were doing this"

right? And so, given-- it's interesting organizationally that I think--and one thing, help people understand, "Okay, here are the issues that we need to be thinking about," and how to do those things. And so I have-- you know, it's been mostly positive and curious. And I think the main issue, honestly, after we came out with the ADA guidance was, "Well, why didn't you say anything about, you know, all these other issues?"

**TURNER LEE:** [Inaudible] Where's the next guidance? I thought you were going to do [inaudible].

**BURROWS:** So we, we did do that, but that was the main thing, is like, can you tell us, "Okay, this is helpful." Can you tell us more? And, you know, so we've tried to really have-- sometimes when your law enforcement agency and you do have sued authority that people-- you know, it's hard to wear the hat of, "We are leaning into this to help you solve problems," in a way that-- to really message that. So we've done, obviously, our public hearing, we also talk to folks as much as we possibly can. Separately because it's-- most people actually want to comply, and it is so much more helpful to prevent — and for the workers — to prevent it on the front, then to try and, you know, afterward, get relief. Obviously, we are very enthusiastic about doing that when we need to, but the good news is a lot of times we don't. So we'll see how that develops, but I think we're all in a period now where this is a rapidly changing area, and we need to watch it. One thing I will say, you sort of opened up talking about AI and generative AI, at least for now, I think for the most part, it doesn't appear that generative AI, which is a different area —very much different the way it works, really, really talking about generating new content — is mostly what's being used in the employment aspect, but, you know, six months from now, that could be different. So we are thinking about those issues too, but I did want to flag that.

**TURNER LEE:** What I was thinking as you were talking — and let me just do a quick commercial. We will be going to audience Q&A, so if you have questions in about 15 minutes, we're going to open it up for you to share, ask questions of our esteemed guest here today. But I do want to ask, because when I think about what your agency is doing, and I think about, you know, prior administrations who sort of put us on track for that, in terms of different federal agencies sort of outlining their strategy for how they were going to procure AI and some of the best practices, we're seeing that now in education and other places. My question to you is, how closely do you work with the White House and Congress and the — I call it the plethora of post-it notes of people — who are trying to come up with ideas on what is going to be the fate of AI going forward? Like, where do you sit yourself? Because when I saw you last, you were at the announcement of the Bill of Rights, and that's where I was like, "Oh my God, I'm this close to her and I'm getting to hear what this agency is doing." But share with that's where the EEOC sits in this ecosystem because I think there's just a lot-- for those of us who follow, this is a lot going on, and love to hear how it's coordinated, you know, where you're making breakthroughs, and how that conversation is evolving.

**BURROWS:** Absolutely. So we do work as part of this whole of government's effort to make sure we are on point on this issue. Absolutely. So the reason why we, you know, we're happy to sort of join an AI Bill of Rights, but also we work with the National Institute for Science and Technology, we obviously work with White House as part of their convening organization, just sort of in that standpoint, and we work with a lot of the law enforcement agencies that have either shared obligations and shared enforcement obligations with us, like the Department of Justice and the Office of Federal Compliance-- Contract Compliance programs over at DOL that do anti-discrimination work and some of the civil rights enforcement that we do, as well as we've worked really closely with the FTC, the Federal Trade Commission, and with the CFPB. And in fact, we together with Justice and the CFP and the Federal Trade Commission, joined in a joint statement earlier this year just to say a couple of things to sort of make it clear in this conversation that we're having that's very important and cutting edge and emerging, frankly, that even as we're looking at new factual situations, we have currently laws on the books that we intend to enforce. Because I think as the conversation about new technologies and new-- the need for new laws has been evolving, there's started to creep in this thought that, like, we're sort of in a law-free zone here. That is not the case--.

**TURNER LEE:** You know, I write about it. I was one of those people. I'll say ouch. I'm sorry, no but [inaudible] application, right?

**BURROWS:** Right, so just because the Civil Rights Act or the Americans with Disabilities Act didn't talk about AI because it didn't exist yet, does not mean that when you step into employment and you have a hiring procedure, you know, you don't have to worry about your civil rights obligations. That is not the case. And we wanted to just be clear about it because it seemed to be getting confusing. Yes, I think, you know, speaking for myself personally, I think new authorities might be needed and certainly welcome, but that doesn't mean that we're not going to use what we already have. And we actually have an obligation that we are not going to abdicate or back away from-- to the American people to protect in this moment, as everyone, you know, is thinking about it.

So we have started to, you know, bring those lawsuits where we needed to, but mostly leaning in, as I said, into trying to educate and coordinate, and both educate ourselves and the public. So, you know, that is-- that has been really an interesting journey. And we-- those other agencies that we work with really-- that has been a really helpful partnership because in part there are ways in which our respective statutes, if we can't reach it, they can't. So there's a piece of it that actually puts together a unified sort of look. And also, I think, frankly, as employers are trying to figure this out, to be fair to the public and to employers and others, we should speak with one voice, right? You don't want EEOC thinking AI is one thing and someone else in

the government thinking it differently. So that's another reason to coordinate so that we don't confuse people. It's-- you know, and that going on right here.

**TURNER LEE:** That's good to hear though, because I think so some of us, we're not clear about this enforcement ecosystem, right, that's going on behind the scenes. We're seeing a lot of stuff--and I love the way you sort of share it, it's like we're all on the job, like we're talking to each other on this. The question is like where we can't do somebody can pick up. But there's also this implicit assumption that I think people have made to your point, that these laws still apply, right? Just because they-- we're in a new modern-day age does not mean that we toss out what happened beginning in the 1960s to ensure people's civil and human rights. So I love the way we're talking about that because that has become confusing for people. We just did a TechTank podcast, some of you might've heard, with heard with Congressman Ted Lieu. And, you know, he talked about it as, well, like we're really trying to honor what people fought for, and, like you said, come up with new ideas of raising awareness about that.

And I think part of that confusion has come from the fact that we can't determine what disparate impact is because we haven't had that big lawsuit or that case that tells us that there was disparate impact that happened because of the AI. Now, I'm going to tell you a little secret... I do get the listserv of all the EEOC cases. They do come over all email. I'm always-- I know. People like, "Okay, Nicol." Yes, that is me. If you know me really well, I am very wonked out, and I do look at all the cases that come through because I'm waiting for that one case to come in that's related to the work that I do. But disparate impact in the AI system is hard, and I think we also talk about disparate impact versus differential treatment. And we sort of allow the differential treatment standard to lean in because we don't have enough data and evidence, and honestly, people who understand that this is happening to them. I think it's a really good idea, let's like talk about that. Like, how is the EEOC define that historically? And where do you find with the guidance, with the education, it's still going to be something that we have to keep persisting on, you know?

**BURROWS:** Okay, so I'm going to do this really high-level so that everyone does not sort of zone out. And I promise not to geek out on the employment laws [inaudible]--.

**TURNER LEE:** But we need to talk about it. You are here [inaudible].

**BURROWS:** There are two aspects of-- you know, roughly speaking, people like to put anti-discrimination, employment discrimination into two boxes. There's the-- they all start with the easier one, the disparate impa-- I'm sorry, disparate treatments, in what people think of as intentional discrimination. And the example, the one example we've had with someone intentionally using AI or at least an automated system — it's not true AI in this instance — we had a case that, fortunately, is settled, settled earlier this year, where the employer had decided to take applications online, and when you applied, you were supposed to put in

your birthdate it was an age cage. And if you were, I thought this was sort of interesting, if you were a man over 60 or a woman over 55, they would not consider your application. So you were automatically — yeah, I know people love that — so you're automatically kicked out. So we, of course, had a problem with that approach, and, you know, it was resolved. I'm not quite sure why we had to go all the way to court to get it resolved, but we were able to settle it after we filed. That's an intentional discrimination case. So you're basically taking an automated system and magnifying what an individual might do one by one, you're kind of amplifying that. That's [inaudible].

What you're talking about is disparate treatment, which is what — it sort of came out of, you know, the early, I think the first case was a case where right after or relatively soon after the Civil Rights Act made it illegal to discriminate against people based on race, an employer that had always discriminated against people based on race decided that they needed for a fairly, you know, that they needed to impose a high school graduation requirement on a job that had never required that before in an area — this is out of my home state, North Carolina, if I remember correctly — in an area where the schools had been abysmal, and African Americans really were not-- were disproportionately not able to get that high school education. So it was a disparate impact. Now, there, I think it probably was also intent, but, but it was a disparate impact case where what the Supreme Court says, "All you have to prove is that this high school requirement is totally unnecessary, not job-related," you know, "They never needed it before, and it's not-- and it's having a disparate impact." So it's weeding out your African American candidates disproportionately and you don't need it to do the job. So that is actually illegal in another context under our disparate impact cases.

So when you look at that in AI context, let's go back to this question of the insufficiently diverse screening or training data that I mentioned before, and that is actually a real example, if you're not familiar with it, where it was-- if you played lacrosse and your name was Jared, you were going to get the job. And if you're a woman who had women's basketball, or women's lacrosse, or, you know, women's college on your resume, you were not going to get the job. And that's a real example. And so you see the problem. that was a disparate-- and nobody was trying to do that. I truly believe in good faith they were not trying to do that. They're just trying to get the best candidates. The candidates they had were pretty much all male and so their resumes looked a certain way. And a lot of what, you know, in a way oversimplified —my sister went to MIT, she's gonna kill me for this — but way oversimplified way of looking at it, it's pattern matching. So what you have is, okay, you've trained the computer to look for what you've told it is the ideal, right? Your current workforce or the people are performing well in the current workforce. And that's what it's going to do is look for those patterns. The algorithm —and this is where it's, you know, really important — what is it that it is designed to say is the relevant? What assumptions are baked into that algorithm, the relevant decision-

making? That's where the rubber is going to hit the road. So the way we look at this is, the first-- where we start is to look at, you know, is there disparate impact. Because, while from an employer perspective, it is deeply important to me whether or not I'm actually getting the best person, right? But frankly, from the civil rights laws, if you aren't-- but your "not getting the best person" has no effect on any of our bases of disability or age or, you know, race or gender, national origin, religion, genetic information, then we don't actually have a civil rights violation. You may have a problem as an organizational problem not getting the best person, but we don't have a civil rights violation.

One of the things that we thought was really important is to be able to advise in this area, and we put out a document that I — if anyone's interested in going a little deeper on this — that I commend to you, to talk about how to do that disparate impact analysis. And what one of the things we have is some older guidance on that in the context. And it's become, I think, a little bit of a-- people have used it a little bit too much as a flat bright line rule. Our guidance says, if you are looking for disparate impact in this first instance, just as a rule of thumb, and you've got the, you know, one group, whatever it is, maybe it's women, being selected at four-- less than 4/5 or 80% of what the highest selection rate is. If women are getting kicked out more than 80% compared to what men are, you need to check that, right? Because that's not what--.

I got a problem with [inaudible]--.

**BURROWS:** You might have a problem that is a violation with respect to adverse impacts in the sense of the statute. Doesn't ne-- but it's a rule of thumb, and that's the part I think it's been getting lost. What we do, obviously, if we're gonna — I hope this is obvious — so if we're going to bring a lawsuit or we're really saying to an employer, "We think you have violated the law," we're doing something much more sophisticated than just taking up that sort of general rule of thumb, 80%. There are als-- and it's obviously 80% of the folks who would be qualified, right? And so we are, I wanted to-- we are trying to message for those folks who are trying to do this work well — and I think there are a lot of responsible vendors who are trying to get out there and get ahead of it and do this in a rigorous way — that you gotta not take the 4/5ths rule as just a bright line, "Hey, one and done. I'm finished," that's certainly not. And the good news is they are sophisticated enough to do a statistical analysis that's more rigorous than that, and so that's more encouraging.

**TURNER LEE:** And your agency has actually talked about, and many of us in here talk about algorithmic auditing and all this, and your agency is pushing those tools right into the laps of employers to do that. I love the way you're talking about it. These are really complicated issues that honestly require more research, too. So I'm going to questions, I promise. I just have to ask this question as a person who does research, what additional research is needed, you know, as we see the people here in this room who care

about this issue, what are you looking for? Like, what should we be generating on this space so that we can also be of assistance to the agency? Because, as you said, you're going in there and you're saying, "Hey, we know what the settled case law is, but, at the same time, we're also trying to help our employees understand that." And there are those of us that do research as academics or policymakers. Where, where are the gaps in this? You know, my very first exposure to this was with Solon Barocas, who was at Cornell. He's got a really nice understanding of this. Do you think we need more of that to actually help the agency sort of understand what's happening in the landscape?

**BURROWS:** We definitely-- I have a long list of things that we would love to know.

Everybody, pull out your pens and paper.

**BURROWS:** One of the, one of the things that's most simple and I think that is obvious but needs some flushing out is how are-- this is a-- if we're going to use this technology well, it has to serve the people and not the other way around. And that means the people have to be able to work in the organization and have to be able to understand what the value is and work well with it. So, for instance, my example about accommodations. Well, you know, how do you make the space to-- when someone says, "Hey, this is not working." It may work for 90% of the people, it's great. The algorithm's great. I [inaudible]. But make sure you have that organizationally that the-- it's set up so that when that conversation comes, you can actually do the interactive process well. Because I think that it's, you know, it's not super hard, but you got to spend time on it.

I think the other thing that is for research that's really important and interesting — and I wish I had more time to sort of think with it, so I'm offering that to anyone who wants to pick it up — is there's a lot of-- there's already research around the fact that when you get-- let's say you get a list of people, and I'm gonna give you a list of 20 applicants. If I tell you, "Oh, they're all equally qualified," but they're numbered one through. You're going to look at the first five, right? Because you, you need maybe three people, you can look at the first five. There's something about having a number list that people react to. When we-- and so the same thing with cut scores. So the-- there's a lot of research that I think could be interesting around how people, when they get something from a machine in an order, even if they know, like how do people-- what do people then do with it, right? Because it shouldn't matter if you're number one and 20 if the machine, you know, but there's that. The other thing which is much more tricky and important is people want to believe the machine, right? There's just that sort of-- you know, like if you're going to give me a long division problem, and also take out your calculator, and you give me 5 minutes, right? Who are you going to believe? The calculator or me, right? So that the cal-- hopefully the calculator, I just wanna--. If anyone is wondering, definitely go with the calculator.



**TURNER LEE:** I'm telling my daughter for the SATs, "Go and get a calculator."

**BURROWS:** Go with the phone. But not everything is that way.

**TURNER LEE:** That's right.

**BURROWS:** So there are things that machines are much better at than people, and there are things that, you know, common sense kinds of things, that people are much better at the machines. And it-- but there's something about introducing an automated process, a machine process in it, a computer, that makes people want to pull back and not use their own expertise.

**TURNER LEE:** Yes, yes, yes.

**BURROWS:** I mean, I think the research around that and how you get people to, you know, if you put, you know, there's a lot of conversations about human in the loop. If you put someone in the loop, they need training. They need the right kind of position within your organization so that that training can be heard, they need to understand what their role is. And then to, you know, know that you're going to support them if you're like, "This was a mistake," right? Actually, it doesn't matter if you're number one or 20 on this list, but everybody's always picking number one. And, you know, do we need to think about that? Now, that may or may not have civil rights implications in a particular instance. It's always going to have organizational impediments. So I think that there's a lot of research around how do people interact well with these devices and to the-- particularly because they're nascent, right? This is a new frontier. I'll go back to the new civil rights frontier, a new frontier period. We got to figure out how to make this work for us. And in these-- or particularly now, if people are not comfortable raising their hand in an organization, saying, "I see a problem with this," if they don't feel empowered, we're going to end up in a place we don't really want to be.

**TURNER LEE:** That's right. Well, you know, and this is a good segway — before I-- if you have a question, raise your hand. I'm gonna acknowledge you. We have time for some questions — this is a good segway into a project that we're gonna start at the Center for Technology Innovation at Brookings, which is around AI equity. And so one of the things that you just said, which I think is really valuable in this conversation as well, is interrogating these systems. Interrogating them for the things that we know are explicit violations of civil rights and human rights, but also interrogating for the the things that we don't see. I mean, we always often talk about as proxies, but really it's getting people in the room to talk about what you talked about. Is there something with order, you know, and if there are civil rights implications of people who've tried to get in the door, and they're always on the 10th on the list, not the fifth, not the fourth, based on these other variables of the school they went to, etc.

So just for everybody to hear more about this AI equity lab because employment is one of the areas alongside health care, criminal justice, voting rights. What else, Xavier? Everything else that is problematic in

society, we're going to be dealing with in this AI equity lab. So I thank you for that because that is something I think for those of us that work in the intersection of technology, social justice, race, we stay focused on the civil rights itself that's being violated and not necessarily the surrounding variables. So that is such an important takeaway, at least for me. See, I told you. I'm in my own world. You all are here but I am processing this conversation for a lot of work that we're interested in here at Brookings. Okay, questions. Who has a hand up? If you could just say your name, keep it to a question, we'll answer, and we'll give to as many as possible in the remaining time. I'll get to you second. I got one guy here first, and then we'll come right over to you, promise.

**AUDIENCE MEMBER:** Hi, my name is Jay. I've recently read that the general counsel of the EEOC has been confirmed. Do you have any indication as to what their priorities are going to be for their-- the remainder of their tenure? And then second question is, many antagonists to these types of applications that you are implementing would say that they are perhaps hindering for, for the American economy, especially in a global marketplace where America is falling behind other developing countries. What is your response to that and to, to say how this is actually bolstering the American economy?

**TURNER LEE:** All right, thank you, Jay.

**BURROWS:** All right. So starting with Karla Gilbride, who, if you all don't know of her, she's our newly confirmed, as of last night, general counsel. Super, super excited to work with her. She is absolutely amazing. I will let her speak for her own priorities. I will say that the agency recently adopted a strategic enforcement plan that binds all of our work by commission vote, and that does include in it looking at artificial intelligence and the ways in which that is affecting employment now. So I don't want to get ahead of her own conversations, but she's brilliant. Nine-zero opinion from this Supreme Court. So just to give you context, there's not a lot of people who could say that, and we're really looking forward to working with her. She's also our first-- I think only the second woman to be confirmed as a general counsel for the EEOC, which is very surprising, but that is the truth, and she's the first who has-- the first blind attorney to be confirmed at the EEOC as general counsel. So, but she's absolutely phenomenal. So your second question is-- you know, I don't know that I agree with the premise, if that was the premise, that we falling behind, but regardless--.

**AUDIENCE MEMBER:** Antagonist.

**BURROWS:** Antagonist [inaudible]. Thank you for the correction. I'm sorry, I apologize for that. I do think that with respect to this issue of AI we are seen internationally as leading, and so that's encouraging. But I think with respect to the regulation and how we sort of-- the governance around it, I, you know, maybe not. So I want to make sure that I'm catching the essence of your question. And I'm not sure if that's where you were going.

**TURNER LEE:** Where you were talking about, like, are these creating additional burdens for us to actually engage the innovative economy? You can take it in, and I want to take a second too because I [inaudible]. That's basically what it's saying. Do you think that your work is burdening the American economy?

**BURROWS:** Are we burdening the American economy? I don't believe that looking at protecting civil rights burdens the American economy. I feel very strongly, and I think that, you know, you'll probably be more qualified to talk to this than I am, but there's a lot of innovation and money to be made in this area with these tools. The question is, how are you going to do it? And ultimately, you can do that, there's infinite riches, I'm sure, to be made and innovation to be had. But the purpose, I think, and I'm not sure there's a lot of folks who would disagree with this, is to make life-- everyone's lives better. So how can you possibly do that if you are, at the same time, not paying attention to these democratic principles of fairness and equal justice, right? I don't think those things are in anyway in conflict. I think that strengthens it. And, you know, traditionally, I will say that in many instances, business leaders have led on civil rights, including on some of the desegregation issues. You know, some of the conversations that we had as we were looking at the March on Washington, I had the great privilege to interview Andrew Young, who was a confidant of Dr. King's, and he talked about sitting down with business leaders in Birmingham at the time of, you know, the campaign to desegregate there, and that the business community got there more quickly than some of the other leaders. So, I don't-- and I don't think that would have happened if it hadn't been in the economic interest and the interest of innovation, etc. So I do think that those things can coincide and actually be, you know, reinforcing.

**TURNER LEE:** That's right, and I'll just tag along real quick and then we'll go to this last question. So I have a book coming out in February called "Digitally Invisible: How the Internet Has Created a New Underclass," and it actually goes to the premise of the reason that we're still fighting the digital divide in many respects is because over time, we've not recognized the economic interests of having people connected, meaning people aren't just consumers with access, they're actually producers, they're workers, and having guardrails in place that ensure we have an inclusive economy of workers is actually beneficial to the United States. We will never lead when there are people who are disconnected in this country, period. We will never leave when a kid cannot have access to a job because they are screened out before they get the ability to interview. And so to your point, wait for my book, because I can say that more than the chairwoman, but that is such an important question that people ask. If these aren't in competition, they're actually creating much more inclusively and economically designed systems in communities that allow for everybody to participate. We need those laws so that people are not left behind because of new

technologies that continue to erase them. So that was the plug. I was trying to figure out how not to get it in, because that's all I've been talking about, but February, Brookings Press, I'll be talking about that. And I talk about employment as one of those areas. Let's go to this last question here and make sure--.

**AUDIENCE MEMBER:** [Inaudible].

**TURNER LEE:** We're gonna give you a mic because people are streaming and they're not going to be able hear your question.

**AUDIENCE MEMBER:** My name is Gary Nelson, Seminars at Steamboat. This is one of our areas of interest. You made reference to generative AI, like chat, ChatGPT, etc. Do you see that as being used in employment issues, like taking a resume, an application, a job description, and generating an essay? Because I tend to think of the AI applications as more like reading and then creating categories, and all, but generative will actually produce a misleadingly glib text.

**BURROWS:** Yeah. So for the most part, I don't think now gen AI is what you're seeing in the employment context, but that doesn't mean that it might not be. I've seen a few companies begin to say that they've got, you know, sort of a management version of like a ChatGPT. And I think that, that-- so that's interesting and definitely something that we're watching, but for the most part when I talk about this, that's not what we're seeing that employers are using so far.

**TURNER LEE:** Yeah, but it's a change, right? We have to keep paying attention to, right? Any last question? Yep, one last question and we're going to wrap it up. Let's get you the mic so we can hear you.

**AUDIENCE MEMBER:** Thank you so much. This was really, you know, great talk. I enjoy it a lot. So the example that you gave that in one instance there was-- you found that it would be discrimination because the age was mentioned. So now that I'm applying for the jobs because I just finished my PhD, so I know what, I know what I see. So, often, our race is asked. Do you think if the top 20 applicants are there and their race is disclosed, it's up to the hiring agency to decide which 20 can be hired? Which like three or, you know, four can be shortlisted? Because if the race is disclosed, then it's not a secret and it's up to them if they want to hire or not. I mean, what do you think?

**BURROWS:** Yeah, so the question with respect to whether or not the employers collect race, there is, you know, that information is asked. It's supposed to be, first of all, voluntary, but also separately used. And a lot of that is to just understand demographically, it's sort of like if you, you get the same question if you are, you know, buying a house, and there's a point in the process I think if you get a mortgage, they ask you those things. And the reason, well there's-- you know, the reason that it can be interesting is that that information's not tied to an individual, but can be used for it so that they have a sense of what their applicant pool is. So the question, obviously, if it's used in the wrong way, then you have a problem, but I think that

the--I think underlying your question is sort of a wondering about should they be asking that at all. You know, so there's-- it's completely voluntary as to whether or not you answer.

If you get a situation where it's not voluntary, then I think that would, you know, you should note that, and that might be a little bit of an alarm bell. But there's nothing, I don't think, you know, particularly alarming about the fact that you get asked, and it is something that makes it easier. Going back to this disparate impact question, so if they have that and they collect it, right? Not the names of who, you know, Charlotte Burrows, African American, but just the number of people, that way we can tell if people were disproportionately, you know, screened out. In the traditional employment process, of course, everybody would, you know, not everybody, but you would probably know either if you showed up for an in-person interview, it's-- so it's not as though that information was ever, ever secret. So, but yeah, good luck as you are looking for a Job. I'm so excited.

**TURNER LEE:** That's right. And we're looking for research so--.

**BURROWS:** Yes, we are looking for research.

**TURNER LEE:** Yeah. I mean, as part of the equity lab, we're just relying upon these questions and this interrogation to happen. First of all, I want to get you back to work and say for all of us, please help me in thanking Charlotte A. Burrows, nominated in her second term as the EEOC Chairwoman to our Brookings stage. Let's give her a round of applause.

**BURROWS:** You all have been fantastic. I wish we had longer to--.

**TURNER LEE:** I know, I do too.

**BURROWS:** Thank you for your attention and for your interest.

**TURNER LEE:** And thank you for the education here. Again, once again, thank you, everybody, for coming. We appreciate you and your support of the Center for Technology Innovation and Brookings in general. Stay tuned for more conversations like this. As I've said, this is part of our series in our workshopping of many of these issues across the board. And we are completely delighted that you actually came and joined us. Thank you. Thank you. All right, thanks, everybody.