The Feasibility Era Is Over:

Thirty Years of Retail Age Assurance and the Reallocation of Duty in Platform Child Safety

Travis Gilly* ❧ August 2026 (v0.5)

Abstract

For two decades, platforms facing demands to identify and protect minor users have answered with one defense in several costumes: it cannot be done. Age assurance online is said to be infeasible, an undue burden, or a fundamental alteration of the service. This Article closes that defense with two records the debate has never joined. The first is historical: American retail has run the age-assurance experiment at national scale since the early 1990s. The voluntary arm, the Entertainment Software Rating Board, drove underage purchase rates for Mature-rated games from 85 percent in 2000 to 13 percent by 2011 with no legal compulsion; the mandatory arm, the Synar program for tobacco, spent federal money and sixteen years reaching the same number. The arms converged, and the residual failure mode in both was never the gate; it was the credentialed adult who walked through it. The second record is the industry's own: the executed August 2026 Meta settlement, which sets audited false-positive ceilings of 3 percent for users thirteen to fifteen and 10 percent for sixteen to seventeen and obligates an under-13 detection model against auditor-supervised enforcement targets, and the production deployment of machine-learning age estimation that infers minority regardless of the birthday supplied. A defendant cannot contract to perform what it litigates as impossible. The Article then cashes the feasibility fact where it decides elements. In the pending products litigation, the court has held that age verification is a product actionable past Section 230 while leaving the feasibility of alternative designs unlitigated; the admissions are that missing proof, a reasonable alternative design not hypothesized but contracted, priced, and shipped. In accommodation law, undue burden and fundamental alteration are defenses the entity must demonstrate, and an entity that has warranted the capability elsewhere cannot demonstrate its impossibility. And in First Amendment tailoring after *Free Speech Coalition, Inc. v. Paxton*, feasibility evidence hinges the scrutiny analysis, and the retail record is the evidentiary base beneath the Court's description of age verification as traditional and legitimate. With feasibility closed, what remains is duty allocation, a design-defaults question the platform owns.

Keywords: age assurance; capability admission; credentialed-adult failure mode; duty allocation; design defaults; ESRB; Synar Amendment; platform accountability; child online safety; infeasibility defense; age verification; industry self-regulation.

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I. Introduction

In November 2026, the most anticipated entertainment product in history will be sold across the United States from behind an age gate that no law requires, that the Constitution forbids any legislature to mandate, and that works.[1] A seventeen-year-old who attempts to buy Grand Theft Auto VI at a national retailer will, in roughly nine cases out of ten, be refused.[2] Two days before this writing, the largest social platform in the world settled with 52 state and territorial attorneys general over harms to the minor users it has spent two decades insisting it could not reliably identify, and among the terms it accepted is an obligation to identify them.[3]

This Article is about the collision between those sentences. Its claim is narrow and, once the evidence is assembled, difficult to resist: the feasibility era of the age-assurance debate is over. It was ended by two records. The first is a thirty-year natural experiment that American retail ran at national scale, in which a voluntary rating regime and a federally mandated one converged on the same performance figure from opposite directions, demonstrating that age gating at scale is routine and that its residual failure mode is stable, known, and instructive. The second is a set of admissions from the platform industry itself: a settlement in which the industry's largest firm committed to build and audit under-13 identification against specified error goals, and the production deployment of machine-learning age estimation that infers a user's age

1. Rockstar Games, *Grand Theft Auto VI: An Extended Look*, Rockstar Newswire (Aug. 2026), https://www.rockstargames.com/newswire/article/9k2kaa1o3297k9/ (last visited Aug. 28, 2026) (announcing the staged premiere of promotional material through a subscription platform followed by age-managed channels); *see also* Netflix, *Grand Theft Auto VI: Extended First Look*, Tudum (Aug. 27, 2026), https://www.netflix.com/tudum/articles/grand-theft-auto-6-extended-first-look (last visited Aug. 28, 2026).

2. Press Release, Fed. Trade Comm'n, FTC Undercover Shopper Survey on Entertainment Ratings Enforcement Finds Compliance Highest Among Video Game Sellers and Movie Theaters (Mar. 25, 2013), https://www.ftc.gov/news-events/news/press-releases/2013/03/ (last visited Aug. 28, 2026) [hereinafter FTC 2013 Survey] (reporting that 13 percent of underage mystery shoppers were able to purchase M-rated games, the highest compliance level among all surveyed media, and that four of the six major game retailers refused sale to 90 percent or more of underage shoppers).

3. Bobby Allyn, *Meta, States Agree to $17 Billion Settlement in Child Safety Trial*, NPR (Aug. 26, 2026), https://www.npr.org/2026/08/26/nx-s1-5944781/ (last visited Aug. 28, 2026); Jonathan Vanian, *Meta Settles Social Media Addiction Case with California, Other States*, CNBC (Aug. 26, 2026), https://www.cnbc.com/2026/08/26/meta-social-media-trial-settlement.html (last visited Aug. 28, 2026) [hereinafter CNBC Settlement Report]; Lois M. Collins, *What Meta's Settlement Means for Teens*, Deseret News (Aug. 26, 2026), https://www.deseret.com/family/2026/08/26/ (last visited Aug. 28, 2026) (quoting Meta's announcement of "a historic agreement between Meta and 52 Attorneys General").

from behavior regardless of the birthday supplied at registration. A party cannot simultaneously perform a capability and plead its impossibility. What remains, once feasibility is closed, is the question the infeasibility defense was built to postpone: who bears the duty, and at which point in the design. Part V walks the feasibility fact into the three doctrines where it decides elements: the reasonable-alternative-design requirement in the pending products litigation, the undue burden and fundamental alteration defenses of accommodation law, and post-*Paxton* tailoring. Part VI argues that the allocation question those doctrines pose is a question about defaults, and that defaults are owned by the party that builds the enrollment flow.

Three boundaries at the outset. First, this Article makes no claim that exposure to violent entertainment causes violence; the empirical literature points the other way, and nothing here depends on the content of what is gated.[4] The retail record matters here as evidence about gates, never as evidence about games. Second, this Article proposes no content-based restriction on speech and needs none; the duty-allocation claim runs to conduct and design, and Part IV situates it against *Brown v. Entertainment Merchants Association* and *Free Speech Coalition, Inc. v. Paxton*.[5] Third, the Article does not argue that platform age assurance will be perfect. It argues something stronger and stranger: that the error-bounded performance the industry has now accepted by contract is a tighter discipline than anything the celebrated retail regimes ever faced, which means perfection was never the standard and the industry knows it.

II. The Retail Record: A Thirty-Year Controlled Experiment

Between 1992 and 1994, the United States launched two age-assurance regimes within twenty-four months of each other. One was mandatory, federally funded, and enforced through

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4. *See* Andrew K. Przybylski & Netta Weinstein, *Violent Video Game Engagement Is Not Associated with Adolescents' Aggressive Behaviour: Evidence from a Registered Report*, 6 Royal Soc'y Open Sci. 171474 (2019), https://doi.org/10.1098/rsos.171474; Patrick M. Markey, Charlotte N. Markey & Juliana E. French, *Violent Video Games and Real-World Violence: Rhetoric Versus Data*, 4 Psych. Popular Media Culture 277 (2015), https://doi.org/10.1037/ppm0000030 (finding decreases or no change in violent crime following violent game releases).

5. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011); Free Speech Coal., Inc. v. Paxton, 606 U.S. 461 (2025).

conditions on the substance-use block grant.[6] The other was voluntary, industry-built, and backed by nothing at all after 2011, when the Supreme Court held that it could never be backed by anything.[7] They are the mandatory and voluntary arms of a single experiment, and they converged.

A. The Voluntary Arm: The ESRB, 1994 to Present

The Entertainment Software Rating Board was created in September 1994 under congressional threat, after the 1993 hearings convened by Senators Lieberman and Kohl over Mortal Kombat and Night Trap made federal content regulation appear imminent. The industry organized what is now the Entertainment Software Association and stood up a voluntary rating system to preempt legislation, adopting a self-regulatory code that prohibits the target marketing of M-rated games to teens and enforces the code with fines and sanctions.[8] The system's early enforcement was poor, and the Commission documented it. When the Federal Trade Commission began sending unaccompanied thirteen-to-sixteen-year-old mystery shoppers into stores in 2000, 85 percent of them walked out with a Mature-rated game.[9]

The trajectory from that baseline is the single most important dataset in the age-assurance debate, and it has never been placed at the debate's center. Underage purchase rates fell survey over survey: 85 percent in 2000, 78 percent in 2001, 69 percent in 2003, 42 percent in 2005, 20

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6. 42 U.S.C. § 300x-26; *see* Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 1926, 106 Stat. 323 (1992); Substance Abuse & Mental Health Servs. Admin., *Synar Amendment to Reduce Youth Tobacco Access*, https://www.samhsa.gov/substance-use/learn/tobacco-vaping/synar (last visited Aug. 28, 2026) [hereinafter SAMHSA Synar Overview] (describing the 1992 enactment and the 1996 implementing regulation).

7. *Brown*, 564 U.S. at 789, 805 (holding a state restriction on the sale of violent video games to minors invalid under the First Amendment).

8. Fed. Trade Comm'n, *Marketing Violent Entertainment to Children: A Sixth Follow-Up Review of Industry Practices* (2009), https://www.ftc.gov/sites/default/files/documents/reports/ (last visited Aug. 28, 2026) [hereinafter FTC Sixth Follow-Up] (describing the industry's self-regulatory code, its prohibition on target marketing of M-rated games to teens and T-rated games to children under thirteen, and its enforcement through fines and other sanctions).

9. Press Release, Fed. Trade Comm'n, Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children (Mar. 2006), https://ftc.gov/news-events/news/press-releases/2006/03/ (last visited Aug. 28, 2026) [hereinafter FTC 2006 Survey] (tabulating purchase rates of 85 percent in 2000, 78 percent in 2001, 69 percent in 2003, and 42 percent in 2005). The 2000 baseline followed the Commission's report finding that publishers had marketed M-rated games to audiences under seventeen, the scandal that created the mystery-shopper program. *See* FTC Sixth Follow-Up, *supra* note 8.

percent in 2009, and 13 percent in 2011.[10] The 2013 survey found the figure unchanged at 13 percent and the game industry the best performer among every surveyed medium: 24 percent of underage shoppers bought R-rated movie tickets, 30 percent bought R-rated DVDs, and 47 percent bought explicit-labeled music.[11] One national retailer, Target, refused all thirty-seven attempted underage game purchases, the first perfect enforcement record the Commission had measured for any retailer in any category shopped more than ten times.[12] In eleven years, a voluntary system with no legal force reduced underage sales by 72 percentage points, an 85 percent relative reduction, and finished first against every competing medium, including those, like theatrical exhibition, with decades more institutional practice.[13]

Two features of this record deserve emphasis. The first is what did the falling. No statute tightened; no penalty attached; the ratings did not change. What changed was retail practice: point-of-sale prompts, identification checks, and chain-level policy. The Commission's own instrumentation captured the mechanism: the share of stores where clerks asked the shopper's age rose from 15 percent in 2000 to 50 percent in 2005, and national chains outperformed regional and local sellers by 28 percentage points.[14] The gate was operational, and it was built at the register.

The second is what the falling survived. In 2011, *Brown v. Entertainment Merchants Association* held that video games are protected speech and that a state law restricting their sale to minors fails strict scrutiny, removing forever the legislative threat under which the ESRB

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10. FTC 2006 Survey, *supra* note 9; Fed. Trade Comm'n, *Nationwide Undercover Shop of Movie Theaters and Retailers* (2009), https://www.ftc.gov/node/43507 (last visited Aug. 28, 2026) (reporting the 20 percent figure, with GameStop refusing 94 percent of underage shoppers); Press Release, Fed. Trade Comm'n, FTC Undercover Shopper Survey on Enforcement of Entertainment Ratings Finds Compliance Worst for Retailers of Music CDs and the Highest Among Video Game Sellers (Apr. 20, 2011), https://www.ftc.gov/news-events/news/press-releases/2011/04/ (last visited Aug. 28, 2026) [hereinafter FTC 2011 Survey] (reporting the fall from 20 percent in 2009 to 13 percent, a statistically significant improvement).

11. FTC 2013 Survey, *supra* note 2.

12. *Id.*

13. *Compare* FTC 2006 Survey, *supra* note 9 (85 percent in 2000), *with* FTC 2013 Survey, *supra* note 2 (13 percent in 2012).

14. FTC 2006 Survey, *supra* note 9 (reporting age-inquiry rates of 15, 21, 24, and 50 percent across the 2000, 2001, 2003, and 2005 surveys, and purchase rates of 35 percent at national sellers against 63 percent at regional and local sellers).

was born.[15] The Court emphatically rejected the proposition that a legislature may create new categories of unprotected speech by balancing a category's value against its social costs,[16] and it observed that the State's asserted interest was already served by the existing voluntary rating system.[17] On the standard account of self-regulation, in which industry compliance is a hostage payment against the threat of statute, enforcement should have decayed after 2011. It did not. The 2013 survey, fielded after *Brown*, found compliance at its historical maximum.[18] The system is sustained by structure rather than by threat: console manufacturers will not license unrated titles, national chains will not stock adult-only ratings, and the rating became load-bearing in the distribution chain itself.[19] That fact will matter in Part V, because it identifies the class of incentive that actually maintains a gate once built.

B. The Mandatory Arm: The Synar Program, 1992 to Present

Two years before the ESRB, Congress enacted the Synar Amendment, conditioning each state's substance-use block grant on an agreement to "annually conduct random, unannounced inspections to ensure that retailers do not sell tobacco products" to underage buyers, and to report annually to the Secretary on its activities, its success, and its strategies.[20] States must hold their

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15. *Brown*, 564 U.S. at 790 ("[V]ideo games communicate ideas—and even social messages—through many familiar literary devices . . . . That suffices to confer First Amendment protection.").

16. *Id.* at 792 (discussing United States v. Stevens, 559 U.S. 460, 470 (2010), and rejecting the "startling and dangerous" balancing approach); *see also* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818 (2000) ("[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree . . . ."), *quoted in Brown*, 564 U.S. at 790; Winters v. New York, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another's doctrine."), *quoted in Brown*, 564 U.S. at 790.

17. *Brown*, 564 U.S. at 803–04 (describing the ESRB system in the course of holding the statute not narrowly tailored). The lower courts had struck comparable restrictions on the same medium. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001), *cited in Brown*, 564 U.S. at 798; Interactive Digital Software Ass'n v. St. Louis Cnty., 329 F.3d 954 (8th Cir. 2003), *cited in Brown*, 564 U.S. at 798.

18. FTC 2013 Survey, *supra* note 2 (surveying retailers in 2012, the first full year after *Brown*, and finding game-industry compliance the highest among all media).

19. *See* FTC Sixth Follow-Up, *supra* note 8 (describing the code's enforcement through fines and sanctions within the industry's own distribution architecture); FTC 2006 Survey, *supra* note 9 (documenting the national-chain compliance advantage that follows from chain-level policy).

20. 42 U.S.C. § 300x-26(a)(1)–(2). As enacted in 1992, the provision applied to sales to individuals under eighteen; Congress raised the covered age to twenty-one in 2019. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. N, § 603 (2019); *see* SAMHSA Synar Overview, *supra* note 6.

retailer violation rate at or below 20 percent, a compliance floor of 80 percent.[21] The penalty structure has had two eras. Under the original regime, a noncompliant state faced the loss of up to 40 percent of its block grant.[22] The 2019 restructuring softened the hammer while keeping the condition: the Secretary now reduces a noncompliant state's allotment by up to 10 percent, and a state may avoid withholding entirely by certifying that it will commit additional state funds equal to 1 percent of its allocation for each percentage point by which it misses the compliance goal, or by agreeing to a negotiated corrective action plan.[23] The design lesson survives the softening: the gate is maintained as a funding condition on the party that administers it.

The Synar baseline was catastrophic and the improvement was slow. At the program's inception, the highest reported state non-compliance rate was 75 percent; the national weighted average retailer violation rate stood at 40.1 percent in 1997.[24] It took until 2008, sixteen years of federal mandate, dedicated enforcement funding, annual inspection of probability samples of retailers in every state, and re-inspection of violators, to grind the national violation rate below 10 percent, where it has since hovered: 8.5 percent in 2011, the program's historical low, 9.1 percent in 2012, 9.6 percent in 2013, and 9.8 percent in 2014, the first year since 2005 in which a state was found out of compliance.[25]

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21. Nat'l Ass'n of State Alcohol & Drug Abuse Dirs., *An Overview of the Synar Provision* (Jan. 2023), https://nasadad.org (last visited Aug. 28, 2026) [hereinafter NASADAD Overview]; Substance Abuse & Mental Health Servs. Admin., *Synar Guidance on Tobacco Regulation for the Substance Abuse Block Grant* (2020), https://www.samhsa.gov/sites/default/files/synar-guidance-tobacco-21.pdf (last visited Aug. 28, 2026) [hereinafter SAMHSA T21 Guidance] (confirming that the 2019 amendments did not change the 20 percent compliance-rate goal while expanding the definition of a violation to all tobacco-selling outlets, including electronic-cigarette retailers).

22. NASADAD Overview, *supra* note 21 (describing penalties of up to 40 percent of the block grant under the pre-2019 framework).

23. 42 U.S.C. § 300x-26(b)(1) (reduction of "up to 10 percent"); *id.* § 300x-26(b)(2)(A)–(B) (certification and corrective-action alternatives, with the 1-percent-per-point formula and a maintenance-of-effort requirement); *id.* § 300x-26(c)(1) (directing the Secretary not to withhold for three years after December 20, 2019, and to exercise discretion for two years thereafter).

24. Substance Abuse & Mental Health Servs. Admin., *FFY 2008 Annual Synar Reports: State Compliance* (2009) (reporting the decline from 40.1 percent in 1997 to 9.9 percent in 2008, then the lowest rate in the program's twelve-year history, and noting the 75 percent figure at inception).

25. Substance Abuse & Mental Health Servs. Admin., *Synar Program Annual Reports: Youth Tobacco Sales*, https://www.samhsa.gov/synar/annual-reports (last visited Aug. 28, 2026) (compiling the FFY 2011 through 2014 national weighted average retailer violation rates).

Set the two arms side by side. The mandatory regime, with every instrument of federal leverage, moved from roughly 40 percent violation to roughly 10 percent over sixteen years.[26] The voluntary regime, with no instrument at all, moved from 85 percent to 13 percent over eleven.[27] The endpoints sit within the two regimes' methodological noise of one another; the surveyed populations, protocols, and product contexts differ, and nothing here depends on declaring a winner.[28] The honest claim is parity, and parity is devastating to the infeasibility defense, because it demonstrates that the compliance ceiling is a property of retail gatekeeping as such, reachable with or without legal compulsion, and that what compulsion buys is at most speed, never altitude.

C. The Control Cases: Alcohol and the Manufactured Leak

The experiment even ran its own controls. Alcohol, the age-gated product with the most direct documented relationship to violent offending, has never had a national Synar equivalent; enforcement is a state and local patchwork. When researchers first measured it systematically in the early 1990s, underage buyers in three New York counties and the District of Columbia succeeded in a substantial share of attempts,[29] and the community-trial literature found that sustained, community-level enforcement was required to move retailer behavior, with gains concentrated where inspection pressure persisted.[30] The lesson of the alcohol control is that gates decay without a maintenance structure, which is the Synar lesson and the console-licensing lesson stated a third way.

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26. *See supra* notes 24–25.

27. *See supra* notes 10–13.

28. The Synar survey inspects a probability sample of tobacco outlets using state protocols, 42 U.S.C. § 300x-26(a)(1); the Commission's program used recruited thirteen-to-sixteen-year-old shoppers at major retail chains, FTC 2011 Survey, *supra* note 10. The honest cross-regime claim is parity within noise, never superiority.

29. David F. Preusser & Allan F. Williams, *Sales of Alcohol to Underage Purchasers in Three New York Counties and Washington, D.C.*, 13 J. Pub. Health Pol'y 306 (1992), https://doi.org/10.2307/3342730.

30. Alexander C. Wagenaar et al., *Communities Mobilizing for Change on Alcohol: Outcomes from a Randomized Community Trial*, 61 J. Stud. Alcohol 85 (2000), https://doi.org/10.15288/jsa.2000.61.85; *cf.* Jean L. Forster et al., *The Effects of Community Policies to Reduce Youth Access to Tobacco*, 88 Am. J. Pub. Health 1193 (1998), https://doi.org/10.2105/ajph.88.8.1193 (parallel findings in the tobacco context).

The second control is the inverse case: what happens when the manufacturer, rather than the retailer, is the leak. A two-year, bipartisan, 34-jurisdiction investigation found that JUUL Labs marketed its nicotine products to youth through launch parties, advertisements with young models, social media campaigns, and free samples, while relying on "age verification techniques that it knew were ineffective."[31] JUUL paid $438.5 million to the 34 settling jurisdictions in 2022,[32] a further $462 million to New York, California, Colorado, Illinois, Massachusetts, New Mexico, and the District of Columbia in 2023,[33] more than $1 billion across state settlements in total, alongside a $1.7 billion resolution of consolidated private claims.[34] The injunctive terms are the tell: they include mandatory age verification on all sales and restrictions on retail access and display,[35] which is to say the remedy for upstream youth targeting was the imposition of exactly the gate this Article's subjects call infeasible.

When demand is manufactured upstream of the gate, downstream compliance is graded on containment of a breach it did not create. The JUUL record therefore marks the boundary of what any point-of-access regime can be asked to do, and it supplies the correct description of the platform question: the entities now pleading infeasibility control both the marketing surface and the gate, which is to say they occupy the JUUL position and the retailer position simultaneously.

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31. Press Release, Conn. Att'y Gen., AG Tong Leads Multistate Agreement with JUUL Labs (Sept. 6, 2022), https://portal.ct.gov/AG/Press-Releases/2022-Press-Releases/AG-Tong-Leads-Multistate-Agreement-With-JUUL-Labs (last visited Aug. 28, 2026) [hereinafter Conn. AG JUUL Release]; Press Release, Tex. Att'y Gen., Paxton Announces $439 Million Multistate Settlement with JUUL (Sept. 6, 2022), https://www.texasattorneygeneral.gov/news/releases/ (last visited Aug. 28, 2026); *see also* Complaint, Commonwealth v. JUUL Labs, Inc. (Mass. Super. Ct. filed Feb. 2020) (alleging, among other practices, advertising placements on websites directed at children).

32. Conn. AG JUUL Release, *supra* note 31; Jen Christensen, *Juul to Pay $438.5 Million in Settlement with Dozens of States*, CNN (Sept. 6, 2022), https://www.cnn.com/2022/09/06/health/juul-settlement-marketing/ (last visited Aug. 28, 2026).

33. Jordan Valinsky, *Juul to Pay $462 Million to Six States in Its Largest Settlement Ever*, CNN (Apr. 12, 2023), https://www.cnn.com/2023/04/12/business/juul-settlement/ (last visited Aug. 28, 2026); *Juul to Pay $462 Million Over Claims It Marketed Vapes to Minors*, NBC News (Apr. 12, 2023), https://www.nbcnews.com/health/health-news/rcna79375 (last visited Aug. 28, 2026).

34. NBC News, *supra* note 33 (reporting settlements with 45 states exceeding $1 billion and the earlier $1.7 billion private resolution).

35. Press Release, Utah Dep't of Com., Utah, 34 States Reach $438.5 Million Agreement with JUUL Labs (Sept. 6, 2022), https://commerce.utah.gov/2022/09/06/ (last visited Aug. 28, 2026) (listing injunctive terms including "age verification on all sales" and retail access limits).

III. The Capability Admissions

If Part II establishes that age assurance works where it has been tried, Part III establishes that the platforms have stopped denying it, in the two forums where denial has consequences: contract and code.

A. The Contractual Admission

On August 26, 2026, Meta Platforms settled the coordinated claims of 52 state and territorial attorneys general, brought under state consumer-protection law and the Children's Online Privacy Protection Act, in the middle of a bellwether trial in Oakland.[36] The headline figures drew nearly all public attention: approximately $12.7 billion, 70 percent of the total, guaranteed to the participating states over ten years, with the remaining $5.3 billion, 30 percent, payable only if YouTube and TikTok implement comparable youth-safety measures, including age assurance, and agree to pay a matching share, half tied to each rival.[37] The dollar figure joins a rapidly assembling ledger: a $567 million New Mexico abatement order and $375 million jury verdict earlier in August, a $400 million TikTok settlement with the Department of Justice over children's-privacy violations five days before Meta's, and a $27 million school-district bellwether settlement in May.[38]

The provisions that matter doctrinally drew almost none, and they are citable to the executed instrument itself. The agreement's Age Assurance Standards set U18 False Positive

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36. Allyn, *supra* note 3 (describing the claims, including allegations that Meta violated COPPA by collecting data about children under thirteen who "skirt the rule by registering with false birth dates"); CNBC Settlement Report, *supra* note 3; Collins, *supra* note 3.

37. CNBC Settlement Report, *supra* note 3 (describing the 70/30 structure, the conditions on YouTube and TikTok, and Meta's expectation of "a legal expense of approximately $10 billion in the third quarter of 2026"); Olivier Knox, *What Meta's $18 Billion Settlement Means for Teens*, U.S. News (Aug. 27, 2026), https://www.usnews.com/news/national-news/articles/2026-08-27/ (last visited Aug. 28, 2026).

38. CNBC Settlement Report, *supra* note 3 (New Mexico abatement and verdict); Ashton Jackson, *New Meta Safeguards for Teens*, CNBC Make It (Aug. 28, 2026), https://www.cnbc.com/2026/08/28/new-meta-safeguards-teens.html (last visited Aug. 28, 2026) [hereinafter CNBC Safeguards Report] (TikTok's $400 million settlement); *Meta's $17.1B State Settlement*, OpenClassActions (Aug. 27, 2026), https://openclassactions.com/news/ (last visited Aug. 28, 2026) (Kentucky district settlement; 3,137 personal-injury cases pending in MDL 3047 per the Judicial Panel's August 3, 2026 report, with a parallel California coordination).

Rate Thresholds, defined as the percentage of actual thirteen-to-seventeen-year-old users incorrectly identified as eighteen or older: within one year of the effective date, commercially available methods must perform at or below 3 percent for users aged thirteen to fifteen and 10 percent for users aged sixteen to seventeen, with Meta's proprietary methods stepped at 7 and 14 percent in year one and tightened to 5 and 10 percent in year two, certified by an accredited third-party testing provider and reviewed by an Independent Auditor.[39] On the under-13 side, the agreement obligates Meta to develop, train, and conduct initial testing of a "U13 Age Model" prototype within one year, report its effectiveness to the Independent Auditor, and set auditor-supervised annual enforcement-volume targets for identifying and removing under-13 accounts, alongside a release of COPPA claims relating to the data used to train the models.[40] Detected under-13 accounts are removed, and the ages of their network connections are checked in turn.[41] The money is a licensing cost; ten-year amortization against revenue at Meta's scale

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39. Settlement Agreement & Consent Judgment at Exhibit 1, People v. Meta Platforms, Inc., No. 4:23-cv-05448 (N.D. Cal. Aug. 26, 2026), ECF No. 572-1, https://oag.ca.gov/system/files/attachments/press-docs/23-05448-ecf-572-1-exhibit-1-mdl-c (last visited Aug. 28, 2026) [hereinafter Settlement Agreement] (§ II.A.6(a)(i) (Commercially Available Age Assurance Methods "shall meet or fall below the following U18 False Positive Rates excluding method circumvention within one year of the Effective Date: 10% for minors aged 16-17 and 3% for minors aged 13-15"); § II.A.6(a)(ii) (Proprietary Age Assurance Method step-downs); § II.A.2 (annual testing by an accredited Third-Party Testing Provider)). The consent judgment was executed and filed on August 26, 2026; its obligations run from an Effective Date that follows court entry, and references here are to the executed instrument as filed.; *accord Meta's Accuracy Minimums Confirm That Yes, Some Third-Party Age Checks Do Work*, Biometric Update (Aug. 2026), https://www.biometricupdate.com/202608/ (last visited Aug. 28, 2026) (quoting the Age Verification Providers Association's summary of the thresholds and annual independent review); *Beyond Guardrails*, Stan. L. Sch. CodeX (Aug. 27, 2026), https://law.stanford.edu/2026/08/27/ (last visited Aug. 28, 2026) (detailing the proprietary-method step-downs and the exclusion of circumvention from the rate definition).

40. Settlement Agreement, *supra* note 39, § II.A.6(b) (U13 Age Assurance Framework, including the six-month detection measures and the Model Development and Enforcement Commitments establishing the U13 Age Model prototype, auditor reporting, and the Year 3 Enforcement Target); Amanda Silberling, *Buried in Meta's $18B Settlement Is a Legal Pass on Kids' Data*, TechCrunch (Aug. 27, 2026), https://techcrunch.com/2026/08/27/ (last visited Aug. 28, 2026) (analyzing the one-year development obligation and the COPPA release).

41. Irina Ivanova, *Former Meta Engineer on the Child Safety Settlement*, Fortune (Aug. 27, 2026), https://fortune.com/2026/08/27/meta-settlement-child-safety/ (last visited Aug. 28, 2026) (quoting Arturo Béjar: "The age assurance section is reasonably good because it has measurement, has independent testing, has goals," and describing the third-party tools, regular outside audits, and network-propagation checks); Settlement Agreement, *supra* note 39, § II.A.6(b)(i)(B), (D) (requiring, within the U13 enforcement process, a presumption that a reported user is under thirteen absent reliable contrary indicia, and review of deleted accounts' friend networks to identify additional under-13 users); *see also* Lauren Feiner, *Meta Agrees to Heavy Restrictions on Teen Users*, The Verge (Aug. 26, 2026) (reporting the thresholds and the default two-hour daily limit and overnight notification suspension for teens). Reports differ on the number of settling jurisdictions: contemporaneous coverage of the executed agreement described twenty-nine litigating attorneys general, while the announcement described fifty-two

changes no behavior it does not price in, and Meta booked the expected expense as a single quarterly legal charge.[42] The engineering commitment cannot be amortized. It is a warranty of capability, measured, audited, and scheduled, and a party cannot warrant what it maintains is impossible.

Measure the warranted discipline against Part II, with the metrics kept honest: a false-positive rate on age classification is not the same quantity as a retail violation rate, and the comparison this Article draws is between regimes, never between raw numbers. The comparison is stark enough on those terms. The celebrated retail regimes were never held to specified error ceilings, certification, or independent audit at all; Synar's steady state is a 9 to 10 percent violation rate under federal mandate,[43] and the ESRB's best surveyed year leaked 13 percent, with neither regime subject to third-party testing of its method.[44] The industry did not merely concede feasibility; it contracted into a measurement-and-audit discipline the physical world never imposed on its most celebrated gates. Every future assertion that platform-side age assurance is infeasible, unduly burdensome, or a fundamental alteration of the service must now be read against a signed instrument in which the industry's largest firm priced that exact capability and accepted goals, testing, and a schedule.

B. The Operational Admission

The contractual admission has an operational twin, and it predates the settlement by a year. On July 29, 2025, YouTube announced, and on August 13, 2025 began rolling out in the United States, a machine-learning age-estimation model that infers whether a user is under eighteen from behavioral signals, the categories of videos watched, the searches run, the longevity of the account, and applies teen protections automatically to inferred minors.[45] The company stated that

participating; the discrepancy reflects the difference between trial plaintiffs and total signatories and does not affect the terms discussed here.

42. CNBC Settlement Report, *supra* note 3.

43. *See supra* notes 24–25.

44. FTC 2013 Survey, *supra* note 2.

45. James Beser, *Extending Our Built-In Protections to More Teens on YouTube*, YouTube Off. Blog (July 29, 2025), https://blog.youtube/news-and-events/extending-our-built-in-protections-to-more-teens-on-youtube/ (last

it had used the approach "in other markets for some time, where it is working well," and adults misclassified by the model may correct the inference with a government identification, a credit card, or a selfie check.[46]

Read the operational admission for what it concedes. The self-attested birthday, the mechanism whose porousness anchored two decades of infeasibility argument, is being deprecated by the industry's own hand, on its own initiative, in production, with a stated track record in other markets. A capability deployed at consumer scale is not a research aspiration, and its deployment forecloses the softer variant of the defense, that assurance is possible in principle but not in practice. It also collapses the defense's last redoubt, the claim that assurance requires intrusive documentary verification of everyone: the deployed architecture infers age passively for the population and reserves documentary verification for the marginal case of the misclassified adult who asks.[47]

C. The Doctrinal Weight of Admission

The infeasibility family of defenses, whether pleaded as undue burden, fundamental alteration, technical impossibility, or their statutory cousins, shares a single evidentiary posture: the defendant asserts a fact about its own capabilities, a fact peculiarly within its knowledge, and asks the tribunal to defer. The retail record was always available to rebut the deference; what the 2025 and 2026 admissions add is the end of the assertion itself. A settlement commitment to audited false-positive goals and a production deployment of inference-based estimation are statements about the precise fact question, made by the parties with the best access to it.

One closure is required here, because settlement evidence carries a rule. Federal Rule of Evidence 408 restricts the use of compromise offers and acceptances to prove or disprove the

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visited Aug. 28, 2026) ("This technology will allow us to infer a user's age and then use that signal, regardless of the birthday in the account, to deliver our age-appropriate product experiences and protections."); *YouTube to Launch AI-Powered Age Verification Across U.S. Starting August 13*, ID Tech (Aug. 5, 2025), https://idtechwire.com (last visited Aug. 28, 2026); Todd Spangler, *YouTube Launches AI Age-Verification in U.S.*, Variety (Aug. 13, 2025), https://variety.com/2025/digital/news/ (last visited Aug. 28, 2026).

46. Beser, *supra* note 45; Spangler, *supra* note 45 (describing the verification fallback for misclassified adults).

47. *See* Beser, *supra* note 45; Spangler, *supra* note 45.

validity or amount of a disputed claim, and nothing in this Article's argument runs through that prohibited use.[48] The claim is anterior to admissibility in any particular posture: the question "can it be done" now has a public answer supplied by the defendants, and the litigation-relevant question becomes what it should always have been, namely what is owed, by whom, at which point in the design.

IV. Objections and Boundaries

A. The First Amendment Boundary

The obvious objection arrives wearing *Brown*. If the Constitution forbids mandating the very gate the ESRB built, does it not forbid mandating gates generally? The answer requires holding two cases at once, and 2025 supplied the second. *Brown* invalidated a content-based restriction on protected speech: California defined a category of expression, violent video games, and restricted minors' access to it, and the Court held that speech which is neither obscene as to youths nor within a traditional proscription "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[49] A content-based restriction survives only strict scrutiny, an actual problem and actual necessity.[50]

Free Speech Coalition, Inc. v. Paxton then sustained Texas's requirement that commercial websites publishing material obscene to minors verify the age of their visitors, holding that the statute "triggers, and survives, review under intermediate scrutiny because it only

48. Fed. R. Evid. 408(a). The rule permits admission "for another purpose," Fed. R. Evid. 408(b), and the use made here, as public evidence of technical capability bearing on a different defense in different disputes, and as legislative fact for policy design, is outside the exclusion's core in any event. The argument is rhetorical and legislative before it is evidentiary: the settlement's existence and terms are public facts about what the industry has represented it can build.

49. *Brown*, 564 U.S. at 794–95 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 213–14 (1975)); *see also* Ginsberg v. New York, 390 U.S. 629 (1968) (sustaining a prohibition on selling sexually explicit material obscene as to minors), *distinguished in Brown*, 564 U.S. at 792–94; Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (recognizing the State's power to protect children), *cited in Brown*, 564 U.S. at 794.

50. *Brown*, 564 U.S. at 799 (citing United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 822–23 (2000)).

incidentally burdens the protected speech of adults."[51] Under that standard, a statute survives if it advances important governmental interests unrelated to the suppression of speech and does not burden substantially more speech than necessary, and it "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[52] The two cases mark the channel. What government may not do is define disfavored protected content and wall minors from it; what it may do, on a traditional and incidental-burden rationale, is require age verification where the underlying power to keep the material from minors exists.

The boundary is not hypothetical; the Ninth Circuit has been policing it in real time, and the results confirm the channel's shape from both banks. California's Age-Appropriate Design Code, drafted to reach all content "likely to be accessed" by minors and to compel providers to assess and mitigate content-driven harms, has been repeatedly enjoined, with its impact-assessment provisions held facially invalid and its coverage definition held content based.[53] California's separate social-media statute, by contrast, keys its obligations to whether the platform has "reasonably determined" a user is an adult, with age-verification regulations to be promulgated before 2027, and its architecture has proceeded through the same court.[54] The pattern is the Article's boundary rendered as case law: regimes drafted through content categories

51. *Paxton*, 606 U.S. at 461 (syllabus of the holding); *id.* ("The power to verify age is a necessary component of the power to prevent children's access to content that is obscene from their perspective.").

52. *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997), and Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)). The Court reasoned that in-person age-verification requirements are "traditional and widely accepted as legitimate," a line whose evidentiary base is precisely the retail record assembled in Part II. The dissent would have applied strict scrutiny, treating the verification requirement as a direct content-based burden on adult access. *Id.* (Kagan, J., dissenting). *Paxton* thereby recalibrated the framework of Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004), which had treated filtering as the less restrictive alternative to verification in the dial-up era.

53. NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024) (affirming the injunction as to the data protection impact assessment provisions); NetChoice, LLC v. Bonta, No. 25-2366 (9th Cir. Mar. 12, 2026) (subsequent proceedings; district court held the "likely to be accessed by children" coverage definition content based and the statute likely failing strict scrutiny).

54. NetChoice, LLC v. Bonta, 152 F.4th 1002 (9th Cir. 2025) (describing the Protecting Our Kids from Social Media Addiction Act's default application to all users absent a reasonable adult determination and the age-verification regulations due before January 1, 2027).

die on the content-based trigger; regimes drafted through age determination and defaults litigate on design ground.

The duty-allocation claim of this Article requires neither holding to move, because it sits below both. It regulates no category of expression and restricts no one's access to ideas. The design obligations at issue, accurate age determination, protective defaults for identified minors, configuration architecture, run to conduct and product design, the way a seatbelt obligation runs to the car rather than to the destinations it can reach. The retail record is used here strictly as feasibility evidence about gates, and Part II was built to make that separation load-bearing: nothing in the argument depends on what the gated product contains, which is precisely why the best evidence comes from an industry whose product was constitutionally immunized in 2011 and kept the gate anyway.[55] The boundary must nonetheless be policed honestly, because age assurance can be conscripted as a content-restriction tool, and a duty-allocation regime that quietly conditions minors' access to protected expression walks back into *Brown*. The claim defended here stops where the design stops.

B. The Credentialed-Adult Failure Mode

The second objection is empirical: retail gates leak, so platform gates will leak, so the enterprise is futile. The premise is correct and the conclusion does not follow, because the leak has a shape. Across every regime surveyed in Part II, the stable residual failure mode is never the stranger who defeats the gate; it is the adult with credentials who carries the product through it. The ten-year-old playing a Mature-rated game did not defeat the register; a custodian bought the game past the rating, the signage, and the prompt.[56] The minor on an adult's streaming profile did not defeat the maturity ceiling; the account holder never configured it, and the settlement's own implementation details concede the point from the platform side: most of the new safeguards deploy automatically to teen accounts, while autoplay and algorithmic-feed changes must be

55. *See supra* notes 15–19 and accompanying text.

56. *See* FTC 2013 Survey, *supra* note 2 (measuring, by design, only the unaccompanied minor; the accompanied purchase is outside the instrument because it is outside the gate's jurisdiction).

disabled manually by parents or teens, a division between default and optional protection that researchers immediately flagged as the difference that will determine uptake.[57]

The credentialed-adult failure mode is not a defect in age assurance; it is the boundary of it, and it converts directly into the design question of Part V. A gate cannot stop a keyholder. What design can do is govern the condition of the keys: whether protective configuration is unavoidable or optional, whether the default state of a new account is open or closed, whether handing a child an adult session requires an affirmative act or mere inaction. Retail teaches that roughly 90 percent is what gates achieve against strangers;[58] the remaining margin belongs to defaults. One more concession belongs here, stated before anyone else states it. The FTC's shopper series ended in 2013, and the register whose performance it measured is a shrinking venue; game distribution has migrated substantially to digital storefronts whose native gate is the self-attested birthday this Article has spent Part III watching the industry deprecate. The retail record's evidentiary role survives the migration untouched, because the record was never offered to prove that registers are where commerce happens; it proves that gate-at-point-of-access architectures perform at scale when structurally maintained. The point of access moved, and Part III is the documentation of the gate moving with it: from the clerk's age inquiry to the model's age inference, with the settlement's testing and audit apparatus standing where the mystery shopper stood.[59]

C. The Perfection Objection, Inverted

The final objection holds that platform assurance must be rejected because it will misclassify, sweeping some adults into minor status and missing some minors. The retail record inverts this objection. No surveyed regime in thirty years approached perfection; the celebrated ones leak 9

57. CNBC Safeguards Report, *supra* note 38 (reporting the automatic-versus-manual division and quoting researcher Laura Edelson on the added burden of opt-in protections); *see also id.* (describing Edelson's June 2026 study finding that nearly 60 percent of social media safety features across the industry failed to effectively protect young users).

58. *See supra* notes 10–13, 24–25.

59. *See supra* Parts II.A, III.A–III.B. The migration strengthens rather than weakens the sequence: the FTC instrument measured the gate at the era's dominant point of access, and the successor instruments, third-party certification and independent audit under the settlement, measure the gate at the current one.

to 13 percent,[60] and they are celebrated anyway, because the alternative to an imperfect gate was never a perfect gate; it was no gate. The deployed architectures already price the misclassification cost and route it to the cheapest bearer: the wrongly flagged adult corrects the record with a document or a selfie in minutes,[61] while the settlement obligates measurement, audit, and false-positive goals on the platform side.[62] Perfection enters the debate only as a demand made of proposals and waived for the status quo, and an argument that survives only under asymmetric standards of proof is not an argument; it is a preference.

V. The Doctrinal Cash-Out

A feasibility record is only as valuable as the elements it decides. This Part walks the fact established in Parts II and III into the three doctrines where it is outcome-determinative, in ascending order of generality: the reasonable-alternative-design requirement of products liability, where a court has already opened the channel and named the missing proof; the undue burden and fundamental alteration defenses of accommodation law, where the statute places the demonstration burden on the entity that has now demonstrated the opposite; and constitutional tailoring, where feasibility evidence has quietly become the hinge of the scrutiny analysis itself.

A. Products Liability: The Element the Court Left Open

In the consolidated federal litigation, the court has already done the threshold work. Ruling on the platforms' omnibus motion to dismiss, the court held that a cluster of alleged defects, prominently including "[n]ot using robust age verification" and not providing effective parental controls, "do not implicate publishing or monitoring of third-party content and thus are not barred by Section 230," because they "can be fixed by defendants without altering the publishing of third-party content."[63] The court then held these functionalities are "products" for strict-liability

60. *See supra* notes 11, 24–25.

61. *See* Spangler, *supra* note 45.

62. *See supra* notes 39–40 and accompanying text.

63. In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig., 702 F. Supp. 3d 809 (N.D. Cal. 2023) (identifying the non-barred defect categories, including robust age verification and parental controls).

purposes, reasoning that "[m]yriad tangible products contain parental locks or controls to protect young children," from prescription-bottle caps to television channel locks, and that the alleged defects "primarily relate to the manner in which young users are able to access defendants' apps, including whether their age is accurately assessed during the sign-up process."[64] Neutral, non-expressive tools drew no First Amendment protection,[65] and the manufacturers owe users, in particular minor users, "the duty to design such products in a reasonably safe manner."[66]

The sweep of adverse authority must be stated plainly, because the strongest objection to this subsection is not doctrinal subtlety; it is a published Ninth Circuit decision. In *Doe v. Grindr*, the court held Section 230 barred design-defect and negligence claims faulting a platform for failing to keep minors and adults apart, because the pleaded duty "would require Grindr to monitor third-party content and prevent adult communications to minors," which is the publishing function by another name.[67] But the same opinion preserves the lane this Article's argument runs in: *Lemmon v. Snap* survives for duties "fully independent" of the publishing function, defects in what the product does rather than in what its users say.[68] The MDL court placed enrollment-flow age assurance on the *Lemmon* side of that line by its own reasoning, as a defect fixable "without altering the publishing of third-party content," and the distinction is principled rather than convenient: a gate at sign-up allocates who enters; a duty to police matches and messages allocates what is published. The claims that die under *Grindr* are the ones drafted through the publishing function, which is the Section 230 rendering of the same boundary Part IV.A drew in First Amendment terms. And the procedural ground has shifted under the whole line: sixteen days before the settlement, the Ninth Circuit held in the states' own enforcement

64. *Id.* (applying Restatement (Third) of Torts: Prods. Liab. § 19(a) (Am. L. Inst. 1998) and finding the age-assurance and parental-control functionalities content-agnostic and analogous to tangible products).

65. *Id.* (holding that tools the platforms did not create with expressive intent "are not entitled to First Amendment protection," while dismissing, by contrast, the notification-timing theory as protected editorial choice).

66. *Id.* (citing Restatement (Third) of Torts: Prods. Liab. § 1).

67. Doe v. Grindr Inc., 128 F.4th 1148 (9th Cir. 2025) (holding that the claims "necessarily implicate Grindr's role as a publisher of third-party content" because discharging the alleged duty would require monitoring content and suppressing communications between users).

68. *Id.* (distinguishing Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021), where the duty to avoid designing a product encouraging dangerous driving had "nothing to do with" editing, monitoring, or removing user content).

action that Section 230 “describes a defense, not an immunity,” a posture under which feasibility evidence reaches factfinders that immunity doctrine once kept it from.[69]

What the court did not decide, because a motion to dismiss could not present it, is the element on which these claims will actually be won or lost: whether a reasonable alternative design existed and was practically adoptable.[70] Under the Third Restatement’s formulation, which the court itself invoked, the plaintiff proves design defect by proving the foreseeable risk could have been reduced by a reasonable alternative design whose omission renders the product not reasonably safe.[71] Feasibility disputes of this kind are ordinarily fought with expert reconstruction of what could have been built. Here the record is stranger and stronger: the alternative design is not hypothesized. It is specified in an executed consent instrument with error ceilings, testing protocols, and a deployment schedule,[72] and its behavioral-inference variant has been running in production at a rival platform since August 2025, by the deployer’s own account after working “in other markets for some time.”[73] A defendant that has contracted to build the design, and an industry that has shipped it, will struggle to persuade a factfinder that the design was not practically adoptable; and the thirty-year retail record supplies the historical

69. State of Colorado v. Meta Platforms, Inc., No. 24-7265 (9th Cir. Aug. 10, 2026) (quoting the Supreme Court’s characterization and observing that § 230(c)(1) “does not provide immunity to internet service providers per se”); *see also* Estate of Carson Bride v. Yolo Techs., Inc., 112 F.4th 1168 (9th Cir. 2024) (permitting misrepresentation claims premised on specific promises to proceed).

70. The dismissal ruling addressed classification and immunity only; the feasibility and availability of alternative age-assurance designs remained unlitigated. *See* 702 F. Supp. 3d 809. On the governing element, *see* Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am. L. Inst. 1998) (a product “is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design”); *see also* Smith v. Louisville Ladder Corp., 237 F.3d 515 (5th Cir. 2001) (under § 2(b), the plaintiff need not produce a prototype; qualified testimony suffices if it reasonably supports the conclusion that a reasonable alternative design “could have been practically adopted at the time of sale”).

71. Restatement (Third) of Torts: Prods. Liab. § 2(b); *see also* Mai Thi Tran v. Toyota Motor Corp., 420 F.3d 1310 (11th Cir. 2005) (describing § 2(b)’s risk-utility balancing).

72. Settlement Agreement, *supra* note 39.

73. Beser, *supra* note 45.

corroboration that gate-at-enrollment architectures perform at scale.[74] The element the dismissal ruling left open is, on this record, the element the admissions close.

B. Accommodation Law: Defenses That Require Demonstration

The second slot is the one from which this Article's settlement argument originally came, and the statutory text does the allocating. Title III of the Americans with Disabilities Act defines discrimination to include failing to make reasonable modifications "unless the entity can demonstrate that making such modifications would fundamentally alter the nature" of what it offers, and failing to furnish auxiliary aids and services "unless the entity can demonstrate" fundamental alteration or "an undue burden."[75] The defense is an affirmative demonstration about the entity's own capacities and costs, a fact peculiarly within its knowledge, which is precisely why tribunals have historically extended deference to it.

The capability admissions strip that deference of its factual predicate wherever the demonstration concerns age-differentiated design. An entity that has represented, in an executed instrument, that it can identify minor users within audited error ceilings, or that operates inference-based age estimation in production, has fixed the frontier of its own capacity as a public fact. Demonstrations of burden must now be made against that frontier rather than against an asserted fog, and the thirty-year retail record forecloses the softer, systemic version of the defense, the claim that age-differentiated treatment at scale is unworkable in commerce generally.[76] None of this decides any particular accommodation dispute; fundamental alteration

74. *See supra* Parts II.A–II.B. New York has gone further and legislated accuracy minimums directly, grading acceptable age-assurance methods by false-positive rate bands under the Stop Addictive Feeds Exploitation (SAFE) for Kids Act, a statutory benchmark of the same design element. *See* Biometric Update, *supra* note 39 (comparing New York's graduated 0.1 to 15 percent bands with the settlement's thresholds).

75. 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii) (emphasis added). The demonstration burden sits in the statutory text itself; the entity, not the plaintiff, must make the showing. *See also* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (requiring an individualized inquiry into whether a requested modification would work a fundamental alteration); Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019) (applying Title III to a commercial website and app).

76. *See supra* Parts II–III. The structure of the argument travels wherever a defense turns on the defendant's asserted incapacity: the burden-allocation logic of § 12182(b)(2)(A) is replicated across accommodation and consumer-protection frameworks in which the entity must justify the denial of a protective modification.

remains an individualized inquiry.[77] What it decides is the vocabulary in which the dispute is conducted: capacity is no longer the entity's to assert.

C. Tailoring: Feasibility as the Hinge of Scrutiny

The third slot is constitutional, and it explains why the feasibility clock matters beyond tort and accommodation law. Tailoring analysis, at every tier, is a feasibility comparison in formal dress: strict scrutiny's least-restrictive-means inquiry asks what else could have worked, and even intermediate scrutiny's fit inquiry asks how much the chosen means burden relative to alternatives. The canonical demonstration is *Ashcroft v. American Civil Liberties Union*, where the Court in 2004 affirmed a preliminary injunction against the Child Online Protection Act on the ground that blocking and filtering software was a plausibly less restrictive alternative to server-side age verification.[78] Two decades later, *Paxton* reached the opposite arrangement on a transformed factual landscape, sustaining verification under intermediate scrutiny and observing that age-verification requirements are "traditional and widely accepted as legitimate."[79] The tradition the Court invoked is not an abstraction; its evidentiary content is the register-level record assembled in Part II, the daily operation of age gates across American retail for a generation. The feasibility facts moved, and the doctrine moved with them, in both directions: what filters did to verification in 2004, audited inference-based assurance is positioned to do to cruder architectures now. Litigants on every side of the coming statutes will be arguing from exactly the record this Article assembles.

The clock is also running in other jurisdictions, which supplies the comparative confirmation. The United Kingdom's Online Safety Act 2023 imposes duties on regulated services to use highly effective age assurance to keep children from designated harmful content, and Australia's Online Safety Amendment (Social Media Minimum Age) Act 2024 obligates platforms to take reasonable steps to prevent users under sixteen from holding accounts, a statute

77. *Martin*, 532 U.S. 661.

78. Ashcroft v. Am. C.L. Union, 542 U.S. 656 (2004). The holding was explicitly provisional on the technological record, and the Court remanded for factfinding on filter effectiveness.

79. *Paxton*, 606 U.S. 461; *see supra* notes 51–52 and accompanying text.

premised in its entirety on assurance being achievable.[80] Two peer legal systems have legislated past the feasibility question entirely; American doctrine is the last forum in which the question is still treated as open, and it is closing there by admission rather than by statute.

VI. Duty Allocation as Design

What remains, with feasibility closed, is allocation, and the retail record supplies the allocation principle as well. The regimes that held were the ones in which the gate was structural, maintained by parties for whom it was load-bearing: console licensure and chain stocking policy on the voluntary side,[81] block-grant conditions on the mandatory side.[82] The regimes that leaked were the ones in which protection was optional and downstream: alcohol's enforcement patchwork,[83] the unconfigured profile, the open default.[84] The generalization is that gates persist when the party that builds the enrollment flow bears the consequence of its defaults, and decay when the consequence is externalized onto the population the gate was meant to protect.

The August 2026 settlement is, read structurally, an attempt to build exactly this lattice by private ordering, and its most unusual term is the clearest evidence. Thirty percent of the settlement payment is contingent on Meta's principal rivals, YouTube and TikTok, adopting comparable youth-safety measures and paying a matching share.[85] The clause converts the defendant into a recruiting agent for industry-wide adoption, a private analogue of the console-licensing requirement that made the ESRB rating load-bearing: the gate is being wired into the competitive structure so that its maintenance no longer depends on any single firm's continuing goodwill. The same structural instinct runs through the instrument's interior. New

80. Online Safety Act 2023, c. 50 (UK); Online Safety Amendment (Social Media Minimum Age) Act 2024 (Cth) (Austl.). Contemporary commentary on the Meta settlement treated the Australian regime as the operating proof point: "Determined teens will find workarounds, but improvements will be material as they have been in Australia." Knox, *supra* note 37 (quoting Jason Kint).

81. *See supra* note 19.

82. *See supra* notes 20–23.

83. *See supra* notes 29–30.

84. *See supra* note 57 and accompanying text.

85. CNBC Settlement Report, *supra* note 3.

users who have not yet been assessed by an Age Assurance Method receive the agreement's Default Protections automatically, the protective state is the resting state, and Meta must incorporate reliable age signals from the Apple and Google operating systems and app stores into its framework, recruiting the platform ecosystem's own infrastructure the way the rating system recruited the consoles. Whether the wiring holds is an empirical question for the coming decade; that the drafters reached for structure rather than exhortation confirms the design lesson the retail record teaches.

Applied to platforms, the principle sorts the duty cleanly. The platform owns the enrollment flow, the configuration architecture, and now, by its own admissions, the capability to know which users are minors within audited error goals.[86] The parent owns the household and the credentials, and the credentialed-adult failure mode marks the true boundary of the parental duty: what a parent can meaningfully own is the decision to hand over the keys, and design determines how deliberate that handover must be. A protective-by-default architecture, in which identified minors receive protective settings automatically and adult access requires affirmative configuration, allocates to each party exactly the failure mode each controls. An open-by-default architecture allocates the platform's failure mode to the parent and then cites the parent's failure as proof that gating is futile, which is the argumentative structure this Article has been dismantling since Part II. The settlement's own implementation gradient, automatic teen-account protections beside opt-out autoplay, shows both architectures operating in a single instrument, and predicts its own uptake asymmetry.[87]

The doctrinal vehicles for that allocation, the negligence and product-design theories in the thousands of personal-injury and school-district cases still pending in the federal multidistrict litigation and its state coordination, the state age-appropriate design codes, and the

86. *See supra* Part III.

87. CNBC Safeguards Report, *supra* note 38; *see* Settlement Agreement, *supra* note 39, § II.A.1 (new users not yet assessed "shall receive the Default Protections pursuant to Section II.A.10 of this Agreement"); *id.* § II.A.5 (mandatory incorporation of reliable age signals from Apple and Google operating systems and app stores).

settlement architecture itself, are beyond this Article's scope and are deliberately left there.[88] The contribution claimed here is anterior to all of them: every such vehicle has, until now, been forced to spend its opening pages litigating whether assurance is possible. That question is closed, by thirty years of registers and one signature.

VII. Conclusion

In 1994, an industry under threat built a gate no law required. By 2011, the gate outperformed every mandated counterpart, and the Supreme Court removed the threat; the gate held anyway.[89] In 1992, Congress built the mandated counterpart, and after sixteen funded years it arrived at the same number from the other side.[90] In 2025, the platform industry shipped the inference machinery that makes birthdays obsolete,[91] and in 2026 its largest firm, which had spent the intervening decades pleading that such gates were impossible online, signed a commitment to build one under measurement, audit, and a schedule, and wired its rivals into the same structure.[92] The feasibility era of the age-assurance debate did not end in argument. It ended in a register total, a block-grant condition, and a settlement schedule. What the era's end exposes is the question feasibility was hired to hide: not whether platforms can know which of their users are children, but what they owe the ones they now cannot claim not to know about. That is a question about defaults, and defaults have owners.

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88. *See* OpenClassActions, *supra* note 38 (3,137 pending cases in MDL 3047 as of the Judicial Panel's August 3, 2026 report, alongside roughly 1,300 school-district suits, with federal school-district bellwethers set for February 2027).

89. *See supra* notes 15–19.

90. *See supra* notes 24–25.

91. *See supra* notes 45–46.

92. *See supra* notes 36–42, 85.

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