Congress enacts the Pornography Prevention Act, which reads as follows:

§ 1. All pornography is banned. Anyone who intentionally sends or receives pornography through interstate commerce, or who intentionally possesses or views pornography, is guilty of a misdemeanor and is subject to a fine of $100.

§ 2. If Department of Justice officials have cause to suspect that a person has violated any part of this statute, they may, in their discretion, initiate an investigation of that person. If they find that the violation is serious, they may prosecute that person in court.

§ 3. The Department of Justice shall develop standards to determine whether a given violation is "serious" within the meaning of § 3.

This is the entire statute, and there was no legislative history. Waldo Websurfer sues the Attorney General in federal court to enjoin enforcement of the statute, arguing that he has enjoyed looking at pornography online and that his fear of prosecution under the statute has made him switch to looking at Internet cat videos instead, which he enjoys less. He raises various constitutional challenges. Discuss any claims he or the Attorney General might raise.

The Commerce Clause, one of the most important grants of power to Congress found in the original Constitution, is at the base of much of modern American government. Before the New Deal, the Supreme Court interpreted the Commerce Clause narrowly, holding that only transactions that crossed state boundaries counted as interstate commerce; "production" or "manufacturing" were purely intrastate and did not count. However, partly in response to the popularity of Franklin D. Roosevelt's New Deal and FDR's threatened court-packing plan, the Supreme Court reversed course and adopted a new reading, under which any conduct "affecting interstate commerce" would also count as interstate commerce. It has never been clear whether this was an interpretation of the Commerce Clause itself, or whether it was an interpretation of the Commerce Clause as augmented by the Necessary and Proper Clause.

Thus, in Wickard v. Filburn (1942), the Supreme Court upheld federal agricultural quotas, though they penalized a farmer's entirely intrastate behavior: what mattered was that the behavior affected interstate commerce when aggregated with other similar conduct. Similarly, in Heart of Atlanta Motel v. United States (1964), the Supreme Court upheld the public accommodations provisions (Title II) of the Civil Rights Act of 1964, noting that segregation in public accommodations affected interstate commerce by affecting black people's willingness to engage in road trips.

If "substantial effect" after aggregation were sufficient, it would be difficult to imagine activity that would be beyond Congress's commerce power. However, the Supreme Court eventually cut back somewhat on the breadth of the Commerce Clause. In United States v. Lopez (1995) and United States v. Morrison (2000), the Court held that possessing a gun in a school zone, or sexual assault, were noneconomic activities and thus could not be aggregated to get the necessary substantial effect on interstate commerce; moreover, the statutes lacked jurisdictional elements, and the asserted connection to interstate commerce was too attenuated. The cases seemed to disagree on the importance of Congressional findings. Gonzales v. Raich (2005), however, upheld a prohibition on the possession of medical marijuana in a state where this was legal under state law, classifying the conduct as economic. Most recently, NFIB v. Sebelius (2012) held that Congress lacked power under the Commerce Clause to force participation in commerce, though such an exercise of power could be justified under the taxing power.

[Assume this is preceded by a similarly phrased section on the law of standing.]

Standing

Three factors for constitutional standing: (1) injury in fact, (2) causation, (3) redressability

Commerce Clause

Four factors for Commerce Clause: (1) is it economic activity or is it part of a comprehensive regulatory scheme?, (2) does it have a jurisdictional element?, (3) are there congressional findings?, (4) is the logical connection to interstate commerce attenuated?

Standing

Waldo lacks standing because he isn't injured: he stopped watching pornography, so there's no way he can be prosecuted under the statute.

Commerce Clause

Congress has no power to pass the statute because this is a blatant violation of First Amendment rights. Anyway, the statute makes explicit reference to interstate commerce so this falls within the commerce power.

Standing

- Without standing, no "case or controversy" and thus no Article III jurisdiction in federal court.
- Need three factors for constitutional standing:
    - Injury in fact: seems problematic
        - Waldo won't be prosecuted because he stopped looking at porn. But his avoidance costs (i.e., less happiness from looking at cat videos) should be sufficient injury provided he would have been injured if he hadn't stopped looking at porn.
        - But Waldo's prosecution for violating the statute (if he had continued watching porn) seems very conjectural at this point. DOJ officials would have to suspect him of violating, develop standards for "serious", and then find (after investigation) that his violations were "serious".
        - Perhaps more conjectural than "concern" in Laidlaw, plus the Laidlaw rule might be limited to environmental cases.
    - If he had an injury in fact, causation and redressability seem unproblematic: the injury was caused by threat of prosecution, and enjoining prosecution would redress the injury.

Commerce Clause

- Looking at porn might not be economic activity (Lopez), though under a Raich analysis maybe it is, because it involves dissemination of an item that has a market. If it is economic, then this is virtually automatically a valid exercise of commerce power, because then you can aggregate to get a substantial effect on interstate commerce.
    - Also, this is part of a comprehensive regulatory scheme that involves suppressing the interstate market, so reaching noneconomic intrastate viewing/possession may be Necessary & Proper to make the larger regulation effective, since any possessed pornography can easily be distributed.
- No jurisdictional element
    - But since most pornography is found online (Internet connections to out-of-state servers) or in print publications that are mostly sent through the mail, maybe all such porn is automatically interstate
- No legislative findings
    - But the importance of this is unclear (their presence didn't help in Morrison, and their absence didn't hurt in Raich).
- Is logical connection to interstate commerce attenuated?
    - Seems about as attenuated as in Lopez & Morrison, but on the other hand porn is a big business, and even amateur porn is a substitute for professional porn like homegrown wheat in Wickard.
- Result: Probably valid exercise of commerce power.
- (By the way, this probably can't be sustained as an exercise of the taxing power: while on the one hand the penalty is modest and purely monetary, on the other hand it's not administered by the IRS, it's defined as a criminal penalty, and it has a scienter requirement (which suggests that it's punitive not revenue-raising).)