

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 95-2074

CITY OF BOERNE, PETITIONER v. P. F. FLORES,
ARCHBISHOP OF SAN ANTONIO, AND
UNITED STATES

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

[June 25, 1997]

JUSTICE SOUTER, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act, the Court measures the legislation against the free-exercise standard of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990). For the reasons stated in my opinion in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 564-577 (1993) (opinion concurring in part and concurring in judgment), I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence. These doubts are intensified today by the historical arguments going to the original understanding of the Free Exercise Clause presented in JUSTICE O'CONNOR's opinion, *ante*, at 5-21, which raises very substantial issues about the soundness of the *Smith* rule. See also *ante*, at 1-9 (JUSTICE SCALIA, concurring) (addressing historical arguments). But without briefing and argument on the merits of that rule (which this Court has never had in any case, including *Smith* itself, see *Lukumi*, *supra*, at 571-572), I am not now prepared to join JUSTICE O'CONNOR in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for reargument per-

SOUTER, J., dissenting

mitting plenary reexamination of the issue. Since the Court declines to follow that course, our free-exercise law remains marked by an “intolerable tension,” *Lukumi*, 508 U. S., at 574, and the constitutionality of the Act of Congress to enforce the free-exercise right cannot now be soundly decided. I would therefore dismiss the writ of certiorari as improvidently granted, and I accordingly dissent from the Court’s disposition of this case.