

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-3486

MARIKO L.A. BENNETT, *et al.*,
Plaintiffs-Appellants,
v.

SOUTHWEST AIRLINES CO.,
THE BOEING COMPANY, and
CITY OF CHICAGO,
Defendants-Appellees.

On Petition for Rehearing

DECIDED JUNE 27, 2007

Before EASTERBROOK, *Chief Judge*, and BAUER and WOOD, *Circuit Judges*.

PER CURIAM. Southwest Airlines' petition for rehearing asserts that it presented an argument that our opinion overlooked: "whether the 1958 Federal Aviation Act, 49 U.S.C. § 40101 *et. [sic] sec. [sic]*, preempts State authority to establish non-uniform and individual State standards for aviation safety."

We had not overlooked this argument; we just thought it too feeble to require comment. Southwest does not rely on any particular section of the Federal Aviation Act, so this argument collapses to the contention, which our opinion considered at length, that the FAA's establish-

ment of uniform federal standards for many aspects of air transportation means that the suit arises under federal law.

Restated as an argument for preemption—but not “complete preemption” of the field, as Southwest does not deny that state law controls damages, if not other subjects—the contention is weaker than the one our opinion addressed. For it has long been understood that preemption is an affirmative defense. An argument that one or another state law is preempted does not permit removal, because the arising-under jurisdiction depends on the claim for relief rather than potential defenses. See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830-32 (2002); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983); *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914); *Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901 (7th Cir. 2004). Nothing in *Grable* changes that rule.

The petition for rehearing is denied, and no judge has asked for a vote on the petition for rehearing en banc.*

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

*Judge Flaum did not participate in the consideration or decision of this case.