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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DIVISION OF CALIFORNIA
 12

13 JOHN TEIXEIRA, STEVE NOBRIGA,
 14 GARY GAMAZA, CALGUNS
 FOUNDATION (CGF), INC., SECOND
 15 AMENDMENT FOUNDATION (SAF), INC.,
 16 and CALIFORNIA ASSOCIATION OF
 FEDERAL FIREARMS LICENSEES (Cal-
 17 FFL),

18 Plaintiffs,

19 v.

20 COUNTY OF ALAMEDA, ALAMEDA
 21 BOARD OF SUPERVISORS (as a policy
 making body), WILMA CHAN in her official
 22 capacity, NATE MILEY in his official
 23 capacity, and KEITH CARSON in his official
 capacity,

24 Defendants.
 25

Case No.: CV12-3288 (SI)

**DEFENDANTS' SUPPLEMENTAL
 BRIEF IN SUPPORT OF MOTION TO
 DISMISS**

DATE: February 22, 2013
 TIME: 9:00 a.m.
 DEPARTMENT: Ctrm 10, 19th Floor

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I. INTRODUCTION

1
2 This case does not represent the next advance in the emerging field of Second
3 Amendment jurisprudence. Rather, it is a routine dispute by owners who tried and
4 failed to open a gun store at a location that does not comply with a presumptively valid
5 Alameda County ordinance regulating where commercial sales of guns may occur.

6 After the Alameda County Board of Supervisors (the "Board") denied their
7 conditional use permit and variance, Individual Plaintiffs failed to file a writ of mandamus
8 in state court challenging the Board's legal and factual findings. Plaintiffs' due process,
9 equal protection, and as-applied Second Amendment challenges are based entirely on
10 allegations that the West County Board of Zoning Adjustments ("WBZA") applied the
11 Ordinance improperly and arbitrarily and that the Board improperly considered an
12 untimely appeal. A writ was their only remedy to challenge such findings. As the
13 statute of limitations for filing a writ has long since passed, Plaintiffs are precluded from
14 challenging the WBZA finding, which was affirmed by the Board, on the distance
15 between the proposed gun store and the nearest residentially zoned district, and the
16 Board's findings as to whether the San Lorenzo Village Homes Association ("SLVA")
17 filed a timely appeal. Because Plaintiffs failed to challenge the WBZA's and the Board's
18 determinations, those determinations have preclusive effect. Plaintiffs' due process,
19 equal protection, and as-applied Second Amendment claims must be dismissed as a
20 matter of law because they are premised on the validity of findings that have been
21 conclusively established in the County's favor.

22 The Complaint should also be dismissed simply because Plaintiffs have failed to
23 sufficiently plead any of their claims. The due process claim must fail because Plaintiffs
24 do not have an enforceable property right in a conditional use permit and variance, and
25 even if they did, Plaintiffs received all the process that they were due. The equal
26 protection claim must fail because Plaintiffs have failed to identify specific similarly
27 situated businesses that were treated differently. Plaintiffs have also failed to
28

1 sufficiently state either an as-applied or facial Second Amendment challenge to the
2 Ordinance. There is not a single case that holds that a zoning ordinance which
3 regulates where commercial sales of firearms may occur imposes a substantial burden
4 on Second Amendment rights. In fact, the United States Supreme Court precedent
5 makes clear that certain regulations are “presumptively lawful” including “those laws
6 imposing conditions and qualifications on the commercial sale of arms.” Because the
7 Ordinance is simply a presumptively lawful regulation that imposes conditions on the
8 commercial sale of arms, it does not impose a substantial burden on Second
9 Amendment rights and the Court’s inquiry should end. For all these reasons, Plaintiffs’
10 Complaint must be dismissed as a matter of law in its entirety.

11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 In Fall 2010, Plaintiffs John Teixeira, Steve Nobriga, and Gary Gamaza,
13 (“Individual Plaintiffs”) formed a business partnership named Valley Guns and Ammo
14 (“VGA”) for the purpose of opening a gun store in the unincorporated area of Alameda
15 County. (Complaint at ¶ 17.) To do so they were first required to obtain a conditional
16 use permit (“CUP”) in compliance with Alameda County Ordinance § 17.54.131 (the
17 “Ordinance”). The Ordinance provides that no CUP for firearms sales shall issue unless
18 certain findings are made by the West County Board of Zoning Adjustments (“WBZA”),
19 including:

20 “[t]hat the subject premises is not within five hundred (500) feet of any of
21 the following: Residentially zoned district; elementary, middle, or high
22 school; pre-school or day care center; other firearms sales business; or
liquor stores or establishments in which liquor is served.”

23 Alameda County Ordinance § 17.54.131. On December 14, 2011, the WBZA held a
24 hearing on VGA’s CUP application. (Complaint at ¶ 30.) Individual Plaintiffs argued at
25 the hearing that the 500-foot distance should be measured from the front door of the
26 proposed location to the front door of the nearest residence, which would have resulted
27 in a measurement over 500 feet. (Doc. #13-3 at 7-9.) The WBZA held that the
28 Ordinance required that the 500 foot distance be measured from the building wall of the

1 proposed location to the property line of the nearest residence in the residentially zoned
2 district, and found that the proposed gun store was within 500 feet of the nearest
3 residentially zoned district. (Doc. #13-3 at 7-9.) The WBZA adopted Resolution No. Z-
4 11-70, which states:

5 WHEREAS VALLEY GUNS & AMMO and STEVE NOBRIGA have filed
6 for VARIANCE and CONDITIONAL USE PERMIT PLN-2011-00096, to
7 allow the operation of a gun shop, and at a distance of less than 500 feet
8 from a residentially zoned district, where 500 feet is required, in a FA
(Freeway Access) District according to the *Ashland and Cherryland*
Business District Specific Plan, ...

9 (Doc. #13-3 at 13) (emphasis added). Resolution No. Z-11-70 specified certain findings
10 made pursuant to Alameda County Ordinance §§ 17.54.130 and 17.54.131, including
11 that “the site proposed with [VGA’s] application is approximately 446 feet from a
12 residentially zoned district.” (*Id.* at 15.) Because the proposed location did not comply
13 with the requirements of the Ordinance, the WBZA held that VGA must obtain a
14 variance in addition to the CUP. (*Id.* at 9.)

15 Alameda County Land Use Ordinance § 17.54.080 provides that before granting
16 a variance, the WBZA must make additional findings, including:

17 That there are special circumstances including size, shape, topography, location
18 or surroundings, applicable to the property which deprive the property of
privileges enjoyed by other property in the vicinity under the identical zoning
classification.

19 Alameda County Land Use Ordinance § 17.54.080. After additional discussion, the
20 WBZA found that special circumstances did apply to the proposed gun store, including:
21 “Highway 880, multi-lane thoroughfare Hesperian Boulevard, and walls and fences
22 create a physical obstruction that does not allow direct traversable access at a distance
23 less than 500 feet from the site to a residentially zoned district.” (*Id.* at 14.) Because it
24 found special circumstances apply, WBZA granted the variance. (*Id.*)

25 On December 16, 2011, WBZA informed VGA that Resolution No Z-11-70 would
26 become effective on the eleventh day following December 14, 2011 (i.e. December 25,
27 2011) unless an appeal was filed with the Alameda County Planning Department.
28

1 (Complaint at ¶ 33.) Appeals from WBZA decisions are heard by the Alameda County
2 Board of Supervisors (the “Board”). Alameda County Ordinance § 17.54.670.
3 Individual Plaintiffs did not appeal the WBZA’s finding that the gun store did not comply
4 with the Ordinance.

5 On December 22, 2011, the San Leandro Village Homes Association (“SLVA”)
6 filed an appeal with the Alameda County Planning Department. (Doc. #13-3 at 38-42.)
7 On February 23, 2012, the Alameda County Planning Department informed VGA that
8 SLVA filed an appeal. (Complaint at ¶ 34.)

9 On February 28, 2012, the Board held a planning meeting to consider SLVA’s
10 appeal. (Complaint at ¶ 37.) Relying on WBZA’s findings, the Board held that despite
11 the obstructions between the proposed location and the nearest residentially zoned
12 district, the proposed gun store was located within 500 feet of the district and therefore
13 did not comply with the Ordinance. The Board sustained SLVA’s appeal and denied
14 VGA’s application for a CUP and variance. (Complaint at ¶ 39.) Individual Plaintiffs did
15 not file a writ of mandamus appealing the Board’s findings and decision.

16 On June 25, 2012, the Individual Plaintiffs along with Calguns Foundation, Inc.
17 (CGF), Second Amendment Foundation, Inc. (SAF), and California Association of
18 Federal Firearms Licensees (Cal-FFL) (“Organizational Plaintiffs”) filed a Complaint for
19 Damages, Injunctive Relief, and/or Declaratory Judgment (the “Complaint”). The
20 Complaint alleges four Claims for Relief: (1) denial of due process based on an
21 enforceable right to a CUP and variance and the Board’s consideration of an untimely
22 appeal (Complaint at ¶ 48);¹ (2) denial of equal protection based on Defendants
23 allegedly having applied different measurement criteria for similarly situated businesses
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¹ In Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, Plaintiffs state that they are asserting a substantive due process claim that the Board failed to follow its own laws regarding the appeal and that the Ordinance is vague. (Doc. #22 at ¶ 18.) Defendants contend that this is not the same theory of due process that was plead in the Complaint and that these new allegations asserted for the first time in Plaintiffs’ Opposition should be disregarded and Plaintiffs’ due process claims should be dismissed on this basis alone. *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

1 and/or having granted CUPs and variances to similarly situated businesses (Complaint
2 at ¶ 50); (3) the Ordinance is irrational on its face and in violation of Plaintiffs' Second
3 Amendment rights (Complaint at ¶ 52); (4) the Ordinance is irrational as applied to the
4 facts of this case and in violation of Plaintiffs' Second Amendment rights. (Complaint at
5 ¶ 54.)

6 On September 27, 2012, Defendants brought a Motion to Dismiss (Doc. #13),
7 which has been fully briefed. (Docs. ## 22; 24.) On November 5, 2012, Plaintiffs filed a
8 Motion for Preliminary Injunction (Doc. #21), which has also been fully briefed. (Docs.
9 ## 23; 27.) In Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for
10 Preliminary Injunction, Defendants argued that Plaintiffs are precluded from bringing
11 their claims because they failed to challenge the WBZA's or the Board's determinations
12 by filing a writ of mandamus in state court. (Doc. #13-1 at 5-8; Doc. #23 at 5-7.)
13 Plaintiffs have not meaningfully addressed these arguments. On December 18, 2012,
14 the Court ordered the parties to file supplemental briefs regarding the preclusive effect,
15 if any, Plaintiffs' failure to seek review of the WBZA's decisions has on this Court's
16 authority to decide the factual questions and/or legal claims in the Complaint. (Doc.
17 #30.)

18 III. LEGAL ARGUMENT

19 A. Federal Courts Must Give Preclusive Effect To Administrative Decisions 20 in Subsequent § 1983 Actions

21 Although a plaintiff need not exhaust judicial or state remedies as a prerequisite
22 to bringing an action under 42 U.S.C. § 1983, both the Supreme Court and the Ninth
23 Circuit have held that an administrative agency's factfinding is entitled to preclusive
24 effect in a subsequent Section 1983 action. The preclusive effect applies to both the
25 legal and factual findings of the administrative agency. Thus, unless the administrative
26 decision is challenged, it binds the parties on the issues litigated, and if those issues are
27 fatal to a civil suit, a plaintiff cannot state a viable cause of action.
28

1 In *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), an employment
2 discrimination action, the Supreme Court considered whether state administrative
3 factfinding is entitled to preclusive effect in section 1983 actions. The Court found that
4 affording preclusive effect to administrative factfinding constitutes sound policy. *Id.* at
5 797. Affording preclusive effect serves the general principle of collateral estoppel by
6 avoiding the costs of repetitive litigation and conserving judicial resources. *Id.* at 798.
7 Precluding subsequent litigation also serves the underlying purpose of the Full Faith
8 and Credit clause because it prevents different forums from reaching conflicting results.
9 *Id.* at 799. Thus:

10 when a state agency “acting in a judicial capacity . . . resolves disputed
11 issues of fact properly before it which the parties have had an adequate
12 opportunity to litigate,” [] federal court must give the agency’s factfinding
the same preclusive effect to which it would be entitled in the State’s
courts.

13 *Id.* (citing *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

14 In *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), the Ninth Circuit
15 held that the preclusive effect extends to “administrative adjudications of legal as well as
16 factual issues, even if unreviewed, so long as the state proceeding satisfies the
17 requirements of fairness outlined in [*Utah Construction*].” *Id.* at 1032-33 (emphasis
18 added). The threshold inquiry when determining whether preclusive effect applies is
19 whether the proceeding in question “was conducted with sufficient safeguards to be
20 ‘equated with a state court judgment.’” *Miller*, 39 F.3d at 1033 (quoting *Plaine v.*
21 *McCabe*, 797 F.2d 713, 719 (9th Cir. 1986)). Because California has adopted the *Utah*
22 *Construction* standard when determining preclusive effect, the Court need not look
23 beyond California’s preclusion law. *Id.*

24 The threshold inquiry for this Court is whether the December 14, 2011 WBZA
25 hearing and the February 28, 2012 Board hearing satisfied the requirements of
26 California law such that a California court would have afforded their determinations
27 preclusive effect.
28

1 **B. California Courts Would Have Given the WBZA and the Board's**
2 **Findings Preclusive Effect**

3 In California, a two-part test determines the preclusive effect of administrative
4 agency determinations. *Eilrich v. Remas*, 839 F.2d 630, 633 (9th Cir. 1988) (citing
5 *People v. Sims* (1982) 32 Cal.3d 468, 479). First, the court must determine whether the
6 proceeding satisfies the *Utah Construction* requirements. *Id.* Second, the court
7 analyzes the claims under traditional collateral estoppel analysis. *Id.*

8 **1. The *Utah Construction* requirements are satisfied**

9 Plaintiffs do not and cannot dispute that the hearings on VGA's CUP and
10 variance application satisfy the *Utah Construction* fairness requirements; i.e: (1) the
11 administrative agency acted in a judicial capacity; (2) the agency resolved disputed
12 issues of fact properly before it; and (3) the parties had an adequate opportunity to
13 litigate. *Miller*, 39 F.3d at 1033 (citing *Utah Constr.*, 384 U.S. at 422).

14 The WBZA and the Board clearly acted in a judicial capacity. An administrative
15 agency acts in a judicial capacity when it "applie[s] an established rule to specific
16 existing facts rather than establishing a rule of law applicable to future cases . . ."
17 *Eilrich*, 839 F.2d at 634. Here, the Board acted in a judicial capacity by determining
18 whether VGA complied with the established requirements set forth in the Ordinance.
19 The application of the general standard of the Ordinance to VGA's specific proposed
20 gun store is a "classically adjudicatory function . . ." *Briggs v. City of Rolling Hills*
21 *Estates* (1995) 40 Cal.App.4th 637, 648 (citing *Horn v. County of Ventura* (1979) 24
22 Cal.3d 605, 614; *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 176).

23 The WBZA and the Board resolved disputed issues of fact. At both hearings, the
24 Alameda County Planning Department and Individual Plaintiffs presented evidence
25 regarding how the distance between the proposed gun store and the nearest
26 residentially zoned district should be measured. (Doc. #13-3 at 8-9; Doc. #20-15 at 4-6;
27 Doc. #20, Ex. T.) The WBZA resolved the disputed issues of fact and held that the
28 measurement must be taken from the building wall of the gun store to the boundary line

1 of the nearest residentially zoned district, resulting in a measurement of less than 500
2 feet. (Doc. #13-3 at 8-9, 13.) The Board affirmed the WBZA's determination. (Doc.
3 #20, Ex. T.) By considering the SLVA appeal, the Board implicitly held that it was
4 timely. Therefore, both the WBZA and the Board resolved factual disputes before them.

5 Plaintiffs had an adequate opportunity to litigate. For an administrative
6 proceeding to provide a plaintiff with an adequate opportunity to litigate, the
7 administrative proceeding "need do no more than satisfy the minimum procedural
8 requirements of the Fourteenth Amendment's Due Process Clause . . ." *Kremer v.*
9 *Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982). "The fundamental requirement of
10 due process is the opportunity to be heard "at a meaningful time and in a meaningful
11 manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted).

12 The proceeding need not require formal trial procedures to constitute an
13 adequate opportunity to litigate. *Miller*, 39 F.3d 1030, 1036 n.6 ("[T]he absence of
14 formal trial procedures has not historically prevented California courts from according
15 preclusive effect to administrative decisions.") For example, there is no requirement
16 that witnesses must testify under oath nor that plaintiffs must be given an opportunity to
17 cross-examine witnesses. *Club Moulin Rouge LLC v. City of Huntington Beach*, No.
18 CV04-10546, 2005 WL 5517234 at *7-9 (C.D. Cal. June 22, 2005). The hearing need
19 not include safeguards such as provided for by the California Administrative Protective
20 Act. *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 412
21 (citing *Briggs, supra*, 40 Cal.App.4th 637) ("The protective provisions of the California
22 APA do not define the minimum procedural safeguards which must be afforded before
23 the California courts will accord an administrative decision preclusive effect. . . .
24 [A]dministrative preclusion has been acknowledged in cases involving public agencies
25 not encompassed by the [] APA, such as cities.") Courts have held that City Council or
26 Board of Supervisor meetings afforded plaintiffs an adequate opportunity to litigate.
27 *See e.g., Valley Wood Preserving, Inc. v. Paul*, 785 F.2d 751, 754 (9th Cir. 1986)

1 (holding that a Board of Supervisors' hearing precluded a subsequent § 1983 claim
2 even though "the Board conducted the hearings in an informal fashion, allowing
3 witnesses to speak who were not competent or even sworn" and "receiving information
4 casually an on an ex parte basis."); *Club Moulin Rouge LLC*, 2005 WL 5517234 at *12.

5 Here, Plaintiffs Teixeira and Nobriga personally argued before both the WBZA
6 and the Board. (Doc. #13-3 at 7; Doc. #20, Ex. T.) Individual Plaintiffs were
7 represented by counsel, who also addressed the Board. (Doc. #20, Ex. T.) Several
8 witnesses who supported Plaintiffs' proposed gun store also addressed the Board. (*Id.*;
9 Doc. #13-3 at 8.) Plaintiffs clearly had an adequate opportunity to litigate.

10 Even if Individual Plaintiffs had procedural objections to the hearings, they still
11 had an adequate opportunity to litigate. Plaintiffs had the opportunity, yet failed to raise,
12 any procedural objections before the Board. *Club Moulin Rouge*, 2005 WL 5517234 at
13 *10 (quoting *Valley Wood*, 785 F.2d at 753) ("had appellant raised its objections before
14 the Board of Supervisors, this would have allowed the Board an opportunity to modify its
15 procedures, perhaps obviating [plaintiff's] concerns"). Moreover, Individual Plaintiffs
16 had the opportunity for judicial review, which they chose not to exercise, by filing a writ
17 in state court, where they could have presented evidence demonstrating any alleged
18 procedural irregularities by the Board. *Wehrli v. County of Orange*, 175 F.3d 692, 694
19 (9th Cir. 1999) (citing *Misischia v. Pirie*, 60 F.3d 626, 630 (9th Cir. 1995)).

20 Because the WBZA and the Board acted in a judicial capacity, resolved disputed
21 issues of fact properly before it, and Plaintiffs had an adequate opportunity to litigate,
22 the *Utah Construction* fairness requirements are satisfied.

23 **2. Collateral Estoppel Applies**

24 Collateral estoppel bars relitigation of an issue if: "(1) the issue necessarily
25 decided at the previous [proceeding] is identical to the one which is sought to be
26 relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and
27 (3) the party against whom collateral estoppel is asserted was a party or in privity with a
28

1 party at the prior [proceeding].” *Eilrich*, 839 F.2d at 633 (quoting *Sims, supra*, 32 Cal.3d
2 at 484). “The ‘identical issue’ requirement addresses whether ‘identical factual
3 allegations’ are at stake in the two proceedings, not whether the ultimate issues or
4 dispositions are the same.” *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511-
5 12 (citation omitted).

6 Two issues lie at the heart of the Complaint: (1) whether the WBZA properly
7 applied the Ordinance to the measurements provided by the Planning Department and
8 (2) whether the SLVA filed a timely appeal. (Doc. #22 at ¶¶ 10-11.) During the
9 December 14, 2011 hearing, the WBZA held that the appropriate measurement
10 methodology under Ordinance from the building wall of the proposed gun store in a
11 straight line to the property line of the nearest residentially zoned district. (Doc. #13-3 at
12 8-9.) Measuring the distance from the building wall, Plaintiffs’ proposed gun store was
13 within 500 feet of the nearest residentially zoned district, in violation of the Ordinance.
14 (*Id.*) The WBZA’s ruling is reflected in Resolution Z-11-70. (*Id.* at 13-15.) The Board
15 relied on WBZA’s determination when it denied Plaintiffs’ CUP and variance. (Doc. #20,
16 Ex. T.) Accordingly, the WBZA and the Board found that the measurement utilized was
17 appropriate and that Plaintiffs’ proposed gun store was located within 500 feet of the
18 nearest residentially zoned district, in violation of the Ordinance.

19 Although the WBZA found that the proposed gun store did not comply with the
20 Ordinance, it nevertheless granted VGA a variance based on special circumstances.
21 (Doc. #13-3 at 13-18.) On December 22, 2011, SLVA filed an appeal arguing that
22 special circumstances did not apply to VGA’s proposed gun store location. (*Id.* at 38-
23 42.) The Board considered SLVA’s appeal on February 28, 2012. (Complaint at ¶ 37.)
24 By hearing and sustaining SLVA’s appeal, the Board necessarily held that the appeal
25 was timely. At no time prior to the filing of the instant complaint did Plaintiffs contend
26 that the SLVA appeal was untimely.

1 The Board's decision became final when Plaintiffs failed to appeal it to the
 2 California superior court pursuant to the California Code of Civil Procedure within the
 3 statutory period. *See Eilrich*, 839 F.2d at 632 (citing Cal. Civ. Proc. Code §§ 1094.5,
 4 1094.6). Individual Plaintiffs were the parties involved in the WBZA and Board
 5 hearings. (Complaint at ¶ 17.)

6 Because the *Utah Construction* requirements and the traditional collateral
 7 estoppel criteria are met, California courts would give preclusive effect to the Board's
 8 findings. *Valley Wood*, 785 F.2d at 753-54 (holding that review of a land use application
 9 by a county board of supervisors was sufficient to apply claim preclusion); *Club Moulin*
 10 *Rouge*, 2005 WL 5517234 at *3,12. Accordingly, this Court must give preclusive effect
 11 to the Board's findings.

12 **C. Because the WBZA and the Board's Findings Are Final, Plaintiffs' Due**
 13 **Process, Equal Protection and As-Applied Second Amendment Claims**
 14 **Should Be Dismissed**

15 Claim preclusion applies to Plaintiffs' due process, equal protection, and as-
 16 applied Second Amendment claims. Issues central to each of these claims were before
 17 and resolved by the WBZA and the Board. Plaintiffs cannot continue to litigate these
 18 issues by simply recasting their claims in constitutional terms.

19 **1. Plaintiffs' Due Process Claim Is Precluded**

20 Here, Individual Plaintiffs assert their due process rights were violated in two
 21 respects: (1) the Board acted beyond its jurisdiction when it considered an allegedly late
 22 appeal; and (2) the County used "unreasonable measurements" to determine whether
 23 the gun store was in compliance with the Ordinance. (Doc. #1 at ¶ 48; Doc. #21, at ¶ 9;
 24 Doc. #22 at ¶ 18.)

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1 a. The “Untimely” SLVA Appeal

2 Plaintiffs assert that the Board committed a procedural error because the SLVA
 3 appeal was allegedly untimely. Even if the SLVA appeal were untimely,² Plaintiffs’ due
 4 process claim would still be precluded. The Board implicitly found that the SLVA appeal
 5 was timely by considering and granting it. Individual Plaintiffs could have objected to
 6 the Board’s hearing the appeal and sought a writ of mandate in the California Superior
 7 Court challenging the Board’s consideration of an allegedly untimely appeal. Cal. Code
 8 Proc. § 1094.5. This is precisely the type of issue a writ is meant to address. Cal. Code
 9 Proc. § 1094.5(b). In fact, the only way to challenge such a finding would have been by
 10 seeking a writ of mandamus. Cal. Civ. Proc. Code § 1094.5; Cal. Gov. Code, § 65009,
 11 subd. (c)(1)(E). Plaintiffs cannot now assert that the appeal was untimely and that they
 12 were denied due process, when they should have filed a writ to address that very issue.

13 In *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), the Ninth Circuit affirmed the
 14 dismissal of a section 1983 lawsuit where the plaintiff “had an opportunity, which he
 15 chose not to take, for judicial review, and even for the presentation of evidence in the
 16 reviewing court to demonstrative procedural irregularities by the board.” *Id.* at 630. The
 17 court noted that “[i]f an adequate opportunity for review is available, a losing party
 18 cannot obstruct the preclusive use of the state administrative decision simply by
 19 foregoing [the] right to appeal.” *Id.* (quoting *Eilrich v. Remas*, 839 F.2d 630, 632 (9th
 20 Cir. 1988)). Here, Plaintiffs were provided adequate due process to address the
 21 timeliness of the appeal. They chose not to pursue the procedurally proper option.
 22 Thus, the fact that the appeal was timely is conclusively established.

23 b. The “Unreasonable” Measurement

24 Any due process claim based on the 500-foot measurement is similarly
 25 precluded. To prove a substantive due process claim, Plaintiffs must first establish that
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 28 ² The SLVA appeal was timely. It was filed on December 22, 2011, and thus, was well within the 10 day
 timeline for appeals. (Doc. #13-3 at 38-44; Alameda County Land Use Ordinance § 17.54.670.)

1 the Ordinance was unreasonably applied. Here, the question of how to measure
2 distances pursuant to the Ordinance was considered by the WBZA and affirmed by the
3 Board. (Doc. #13-3 at 6-9; Doc. #20 Ex. T.) The WBZA necessarily found that the
4 Planning Department properly interpreted the Ordinance when it held that the proposed
5 gun store was 446 feet from the nearest residentially zoned district. (Doc. #13-3 at 8,
6 15.) If the Individual Plaintiffs disagreed with the WBZA's application of the Ordinance
7 and its final measurement, they could have appealed those findings to the Board.
8 Alameda County Ordinance § 17.54.670. Presumably because the WBZA granted a
9 variance, Individual Plaintiffs decided not to appeal the WBZA's finding concerning the
10 measurement methodology. The Board then accepted the distance calculation in
11 Resolution Z-11-70, and on that basis denied VGA's CUP and variance. (Doc. #20, Ex.
12 T.)

13 The issues which would necessarily have to be decided in evaluating Individual
14 Plaintiffs' due process claim have already been considered by the WBZA and the
15 Board. The Board's determinations are final because Plaintiffs did not file a writ of
16 mandamus. Accordingly, Plaintiffs' due process claim is precluded.

17 **2. Plaintiffs' Equal Protection Claim Must Be Dismissed**

18 Individual Plaintiffs assert that they have been denied equal protection because
19 the Defendants have not employed the same measurement methodology with similarly
20 situated businesses. (Complaint at ¶ 50.)

21 In order to prove their equal protection claim, Plaintiffs must first establish that
22 the measurement methodology used by the Planning Department and accepted by both
23 the WBZA and the Board was "unreasonable." Essentially Plaintiffs must show that the
24 measurement was not made in compliance with the Ordinance, or that the Ordinance
25 was improperly applied in this instance. This issue, however, has been conclusively
26 established. The WBZA found that the methodology used by the Planning Department
27 to calculate the distance was proper (Doc. #13-3 at 8-9), and the Board relied on that
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1 measurement and determination in denying VGA's CUP and variance. (Doc. #20, Ex.
2 T.) Thus, an issue which would be necessary to finding an equal protection violation
3 has already been conclusively decided in the County's favor. Plaintiffs' are precluded
4 from bringing an equal protection claim based on a theory that the measurement was
5 "unreasonable."

6 Plaintiffs also base their equal protection claim on the theory that Defendants
7 have granted conditional use permits and variances to similarly-situated businesses.
8 (Complaint at ¶ 50.) Although this issue was not directly before the WBZA or the Board,
9 Plaintiffs are still precluded from asserting this claim since it was an issue that Plaintiffs
10 could have, but failed to, bring before the Board or writ to the California superior court.
11 *Miller*, 39 F.3d at 1034 (citing *Swartzendruber v. City of San Diego* (1992) Cal.App.4th
12 896, 909).

13 Plaintiffs' equal protection claim must also fail because it is insufficiently pled.
14 They fail to identify specific similarly-situated businesses. *Vogt v. City of Orinda*, No.
15 C11-2595 CW, 2012 WL 1565111 at *3 (N.D. Cal. May 2, 2012). Courts have
16 consistently held that where a plaintiff makes a class of one claim, there is a higher
17 premium for a plaintiff to identify how he or she is similarly situated to others. *Ruston v.*
18 *Town Bd. for the Town of Skaneateles*, 610 F.3d 55, 59-60 (2d Cir. 2010). Plaintiffs'
19 conclusory allegations will not suffice. *See Vogt*, 2012 WL 1565111 at *3 (granting a
20 motion to dismiss where plaintiff failed to allege specific similarly situated businesses);
21 *see also Scocca v. Smith*, No. C11-1318, 2012 WL 2375203 at *5 (N.D. Cal. June 22,
22 2012) (holding conclusory allegations that the plaintiff was similarly situated were
23 insufficient to defeat motion to dismiss). For all these reasons, Plaintiffs' equal
24 protection claim must be dismissed.

25 **3. Plaintiffs Are Estopped From Challenging The Ordinance As** 26 **Applied**

27 Plaintiffs also assert that the Ordinance's 500 foot distance requirement is
28 irrational as applied to the facts of the case. (Complaint at ¶ 54.) To prove that the

1 Ordinance is unconstitutional as applied, Plaintiffs would necessarily have to establish
2 that the methodology used to measure the distance between the proposed gun store
3 and the nearest residentially zoned district was improper. However, both the WBZA
4 and the Board have decided this issue, and found that the methodology used by the
5 Planning Department to calculate the distance was correct. (Doc. #13-3 at 9-8; Doc.
6 #20, Ex. T.)

7 California courts give preclusive effect to zoning determinations in subsequent
8 as-applied constitutional challenges. In *Briggs, supra*, 40 Cal.App.4th 637, the court
9 upheld summary judgment, holding that plaintiff's failure to file a writ challenging a
10 planning commission's denial of a variance precluded plaintiff from challenging the
11 ordinance as applied. "Plaintiffs could and should have sought direct judicial review of
12 the [Board's] decision by administrative mandamus; if the condition to which plaintiffs
13 objected was improperly imposed, it could have been vacated pursuant to section
14 1094.5. Plaintiffs completely bypassed the proper procedure and instead sought
15 damages and injunctive relief by this independent action." *Id.* at 645. "A proceeding
16 under Code of Civil Procedure section 1094.5 is the exclusive remedy for judicial review
17 of the quasi-adjudicatory administrative action of the local-level agency. . . . The proper
18 method to challenge the validity of conditions imposed on a building permit is
19 administrative mandamus under Code of Civil Procedure section 1094.5 . . ." *Id.*
20 (quoting *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718-719
21 (emphasis added)).

22 Because the validity of the WBZA's measurements was at issue in the prior
23 administrative proceeding, Plaintiffs' failure to contest the decision by filing a writ of
24 mandamus estops them from now relitigating the same issue. *Id.* Put another way,
25 Plaintiffs are collaterally estopped from challenging the WBZA and the Board's
26 decisions because those decisions have "achieved finality due to the aggrieved party's
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1 failure to pursue the exclusive judicial remedy for reviewing administrative action.” *Id.* at
2 646 (emphasis in original).

3 **D. Although Plaintiffs’ Second Amendment Facial Challenge May Not Be**
4 **Precluded, It Still Must Be Dismissed As A Matter of Law**

5 While Plaintiffs’ facial Second Amendment challenge may not be precluded, as
6 argued in the Motion to Dismiss, the Ordinance is nevertheless constitutional on its
7 face.

8 As detailed in the moving papers, in order to determine whether Plaintiffs have
9 stated a Second Amendment claim, the Court should employ a two-pronged approach.
10 (Doc. #13-1 at 12-14.) Applying the two-pronged approach, the Court must find the
11 Ordinance passes constitutional muster.

12 **1. The Ordinance does not impose a substantial burden on the**
13 **Second Amendment**

14 The Ordinance, unlike the regulations at issue in the cases cited by Plaintiffs,
15 merely restricts where the commercial sale of firearms may occur in unincorporated
16 Alameda County. The Second Amendment, as construed in *District of Columbia v.*
17 *Heller*, 554 U.S. 570 (2008), protects “the right to possess a handgun in the home for
18 the purpose of self-defense.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050
19 (2010); *see also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)
20 (the Second Amendment encompasses the right to “keep[] operable handguns at home
21 for self-defense”). The *Heller* court specifically warned that “[n]othing in our opinion
22 should be taken to cast doubt on . . . laws imposing conditions and qualifications on the
23 commercial sale of arms.” *Heller*, 554 U.S. at 626-27. Thus, the very law at issue in
24 this case is a “presumptively lawful regulatory measure[].” *Id.* at 627 n.26.

25 The Ordinance permits Plaintiffs to locate a gun store on a site that is more than
26 500 feet from a residentially zoned district, elementary, middle, or high school, pre-
27 school or daycare, other firearms sales business, liquor store or establishments in which
28 liquor is served. Alameda County Ordinance § 17.54.131. Restricting the commercial

1 sale of firearms in residential and other sensitive areas does not substantially burden
2 the core “right of law-abiding, responsible citizens to use arms in defense of hearth and
3 home.” *Heller*, 554 U.S. at 635. Thus, it does not impose a substantial burden on
4 Second Amendment rights. Because the Ordinance does not impose a substantial
5 burden on Second Amendment rights, the Court’s inquiry should end, and it should
6 dismiss Plaintiffs’ claim as a matter of law. *United States v. Marzzarella*, 614 F.3d 85,
7 91& 91n.6 (3d Cir. 2010); *Hall v. Garcia*, No. C 10-03799, 2011 WL 995933 at *2 (N.D.
8 Cal. Mar. 17, 2011).

9 **2. Even If the Ordinance substantially burdens a core right, it**
10 **survives constitutional scrutiny**

11 Even if this Court were to find that the Ordinance substantially burdened Second
12 Amendment rights, it should nevertheless be held constitutional. Plaintiffs assert that a
13 citizen’s Second Amendment right includes the right to acquire firearms. (Doc. #22 at
14 ¶ 36.) Even if such a right exists, it is irrelevant to the Court’s inquiry. Unlike the
15 ordinance at issue in *Ezell v. City of Chicago*, 651 F.3d 684, 708-709 (7th Cir. 2011),
16 which prohibited all firing ranges in the City of Chicago, the Ordinance does not impose
17 an outright ban on the commercial sale of firearms in unincorporated Alameda County.
18 Rather it imposes reasonable limits on where gun stores may be located. The
19 Ordinance is more akin to a content-neutral time, place, and manner regulation on the
20 commercial sale of firearms; it, therefore, need only pass a type of intermediate
21 scrutiny: it must be designed to serve a substantial government interest and allow for
22 reasonable alternatives. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50
23 (1986).

24 The Ordinance serves several substantial County interests, including its
25 substantial interest in preventing the deleterious secondary effects of commercial sales
26 of firearms. While Plaintiffs aver that only law-abiding individuals purchase firearms,
27 gun stores “can be targets of persons who are or should be excluded from purchasing
28 and possessing weapons.” *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1132.

1 Therefore, it is reasonable to regulate them such that they are located away from
2 residential areas. *Id.* By prohibiting gun sales near certain well-defined areas, the
3 County promotes public safety and prevents harm in populated, well-traveled, and
4 sensitive areas such as residential districts or schools.

5 The Ordinance also allows the County to preserve the quality of its residential
6 neighborhoods, commercial districts, and the overall quality of urban life. (Doc. #20-15
7 at 7-8.) This interest is “vital.” *Renton*, 475 U.S. at 48, 50. The sale of firearms, like the
8 sale of any product, is a commercial activity, and municipalities are entitled to confine
9 commercial activities to certain districts. *Village of Euclid v. Ambler Realty Co.*, 272
10 U.S. 365, 395 (1926). In the First Amendment context, the Supreme Court has
11 endorsed geographic restrictions on certain businesses in order to disperse them
12 throughout a city or county and not have them located within close proximity to sensitive
13 places such as residential neighborhoods, schools, or churches. *Renton*, 475 U.S. at
14 52.

15 The Ordinance also allows for reasonable alternatives. Although Plaintiffs argue
16 that the Ordinance effectively zones gun stores out of existence, allowing for no
17 alternative venues to open and operate a gun store, these allegations find no basis in
18 fact. Ten³ other businesses sell firearms in the County, including the Big 5 Sporting
19 Goods located only 607 feet from Plaintiffs’ proposed gun store. (Doc. #20-15 at 6.)
20 Even Plaintiff John Teixeira must recognize that there are alternatives, as he owned and
21 operated a gun store in Alameda County for several years. (Doc. #20 at ¶ 5.) Given
22 the number of gun stores operating in the County in compliance with the Ordinance, the
23 Court cannot find that the County has effectively denied gun stores a reasonable
24 opportunity to open and operate within the County limits.

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28 ³ Three gun stores operate in the unincorporated area of the County; ten gun stores operate in the County
if one counts the stores that operate in the incorporated cities.

1 The Ordinance is a presumptively lawful measure and not subject to a facial
2 Second Amendment challenge. Even if the Ordinance were not outside the scope of
3 the Second Amendment, it nevertheless survives constitutional scrutiny.

4 **IV. CONCLUSION**

5 Plaintiffs' due process, equal protection, and as-applied Second Amendment
6 challenges are precluded because Plaintiffs failed to seek writ review of the WBZA and
7 the Board's decisions. Plaintiffs have failed to sufficiently state any of their claims. For
8 the foregoing reasons, Defendants respectfully request that this Court grant their Motion
9 to Dismiss and dismiss Plaintiffs' Complaint For Damages, Injunctive Relief and/or
10 Declaratory Judgment with prejudice.

11
12 DATED: January 25, 2013

DONNA R. ZIEGLER,
County Counsel in and for the
County of Alameda, State of California

13
14
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