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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' OPPOSITION TO
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

DATE: December 21, 2012
 TIME: 9:00 a.m.
 DEPARTMENT: Ctrm 10, 19th Floor

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1 Defendants County of Alameda, Alameda Board of Supervisors, and Wilma
2 Chan, Nate Miley and Keith Carson, in their official capacities, respectfully submit this
3 Opposition to Plaintiffs' Motion for Preliminary Injunction.

4 I. INTRODUCTION

5 This case involves John Teixeira, Steve Nobriga, and Gary Gamaza's ("Individual
6 Plaintiffs") attempt to open and operate a gun store in unincorporated Alameda County.
7 Alameda County Land Use Ordinance § 17.54.131 (the "Ordinance") governs the
8 location of gun stores within the unincorporated area and, among other things, requires
9 a gun store to be located at least 500 feet from a residentially zoned district. The
10 location that Plaintiffs chose to open and operate the gun store is less than 500 feet
11 from a residentially zoned district. Plaintiffs were aware, at least as early as July 2011,
12 that the property they selected was not in compliance with the Ordinance. Rather than
13 seek out another location that complies with the Ordinance, Plaintiffs assert in a
14 Complaint filed on June 25, 2012 that Defendants have violated their due process,
15 equal protection, and Second Amendment rights by enforcing the terms of the
16 Ordinance. While Defendants' motion to dismiss the Complaint is pending, Plaintiffs
17 contend that they are entitled to a preliminary injunction.

18 A court should rarely grant a preliminary injunction's extraordinary relief,
19 especially in a case such as this one where the law remains unsettled. This case
20 centers on the amorphous contours of the Second Amendment as it may relate to the
21 right to sell and acquire firearms. *Post-Heller* standards for evaluating such Second
22 Amendment claims are still evolving. A Second Amendment claim of this type would
23 have been unheard of just five years ago. Yet, prior to any discovery, Plaintiffs demand
24 that this Court decide whether they are likely to succeed on the merits in the face of
25 nascent and continually-developing law.

26 Plaintiffs seek injunctive relief that would mandate Alameda County (the
27 "County") to permit them to operate a business that does not comply with its long-

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1 standing, presumptively valid zoning regulations. The Court is asked to override the
2 County's broad power to regulate commercial activity based solely on conclusory
3 allegations and self-serving declarations unsupported by any evidence whatsoever.
4 Plaintiffs have not sufficiently alleged any of their claims, let alone met their extremely
5 high burden to obtain a preliminary injunction. Accordingly, this Court must deny
6 Plaintiffs' Motion for Preliminary Injunction.

7 **II. FACTUAL and PROCEDURAL BACKGROUND**

8 As detailed in Defendants' Memorandum of Points and Authorities In Support Of
9 Motion to Dismiss ("Motion to Dismiss") (Doc. #13-1), Individual Plaintiffs sought to open
10 and operate a gun store in the unincorporated area of Alameda County. Alameda
11 County Ordinance § 17.54.131 (the "Ordinance") provides that no conditional use permit
12 for firearms sales shall issue unless certain findings are made by the West County
13 Board of Zoning Adjustments ("WBZA"), including that the subject premises is not
14 located within five hundred (500) feet of a residentially-zoned district. (Doc. #13-3 at p.
15 27.)

16 On or about May 6, 2011, during the pre-conditional use permit application
17 meeting, Rodrigo Orduña, Senior Planner for the Alameda County Community
18 Development Agency Planning Department, met with Plaintiff Nobriga regarding
19 Individual Plaintiffs' proposed gun store. (Declaration of Rodrigo Orduña at ¶21.) At the
20 pre-application meeting, Plaintiff Nobriga asserted that the distance between the
21 proposed location of the gun store to the nearest residence was over 500 feet. (*Id.* at
22 ¶22.) Mr. Orduña did not believe that Plaintiffs had measured the distance in
23 accordance with the Ordinance; he told Plaintiff Nobriga that he would confirm the
24 correct way to measure the distance and get back to him. (*Id.* at ¶23; Doc. #20-7.)

25 On July 1, 2011, at the conditional use permit application meeting, Mr. Orduña
26 informed Plaintiff Nobriga that pursuant to the provisions of the Ordinance, the correct
27 way to measure the distance was from the building wall of the proposed gun shop to the
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1 boundary line of the residentially zoned district, not the closest residential structure
2 within the district. (Declaration of Rodrigo Orduña at ¶24.) Applying the correct
3 measurements, the proposed location for the gun shop was located within 500 feet of
4 two residentially-zoned districts and was not in compliance with the Ordinance. (*Id.* at
5 ¶26, Exs. 1, 2.)

6 On December 14, 2011, the WBZA considered Plaintiffs' application for a
7 conditional use permit and found that Plaintiffs' proposed gun store was located at "a
8 distance of less than 500 feet from a residentially zoned district where 500 feet is
9 required, . . ." (Doc. #13-3 at 13.) Because the proposed gun store did not comply with
10 the Ordinance, the WBZA found that Plaintiffs would require a variance. (Doc. #20-17
11 at 6.) The WBZA made the necessary findings to approve a variance, including the
12 special circumstances that a multi-lane highway and walls and fences created a
13 physical obstruction between the proposed gun shop and the nearest residentially-
14 zoned districts. (*Id.*)

15 In Resolution No. Z-11-70, the WBZA granted Individual Plaintiffs' variance and
16 approved their conditional use permit. (Complaint at ¶32.) The San Lorenzo Village
17 Homes Association ("SLVHA") timely appealed the WBZA's decision to the planning
18 department. (Declaration of Albert Lopez at ¶13.) Thereafter, on February 28, 2012,
19 the Alameda County Board of Supervisors (the "Board") heard and sustained the
20 SLVHA appeal, finding that special circumstances did not apply to the proposed gun
21 store. (Doc. #20, Ex. T.) Although Plaintiffs now claim that the SLVHA appeal was
22 untimely, they never filed a writ of mandamus to challenge the Board's decision.

23 On June 25, 2012, Individual Plaintiffs, the Calguns Foundation, the Second
24 Amendment Foundation, Inc., and the California Association of Federal Firearms
25 Licensees filed a Complaint asserting four Claims for Relief: (1) due process claim
26 regarding the allegedly untimely appeal which led to the denial of a conditional use
27 permit and variance for a gun store; (2) equal protection claim regarding the application
28

1 of the Ordinance to Plaintiffs' proposed gun store; (3) Second Amendment facial
2 challenge to the Ordinance; and (4) Second Amendment challenge to the Ordinance as
3 applied to the Individual Plaintiffs.

4 On September 27, 2012, Defendants filed a Motion to Dismiss (Doc. #13) and
5 supporting documents.

6 On November 5, 2012, Plaintiffs filed a Motion for Preliminary Injunction seeking
7 an injunction ordering that the County comply with Resolution No. Z-11-70 and allow
8 their gun store to open. (Doc. #21.)

9 III. LEGAL STANDARD

10 A plaintiff seeking a preliminary injunction must make a clear showing that: (1) he
11 is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the
12 absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an
13 injunction is in the public interest. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d
14 1046, 1052 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
15 20 (2008)). A preliminary injunction is an "extraordinary remedy that may only be
16 awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555
17 U.S. at 22.

18 IV. ANALYSIS

19 Although not entirely clear from their moving papers, Plaintiffs apparently seek a
20 preliminary injunction compelling the County to implement WBZA Resolution No. Z-11-
21 70. (See Doc. #21 at ¶¶ 8, 21.) In effect, Plaintiffs request that this Court force the
22 County to allow Plaintiffs to open and operate a gun store in violation of the Ordinance,
23 prior to deciding the case on the merits. Because Plaintiffs cannot establish that they
24 are likely to succeed on the merits, that they are likely to suffer irreparable harm, that
25 the equities tip in their favor, or that an injunction would serve the public interest, the
26 Court must deny their motion for a preliminary injunction.

1 **A. Plaintiffs Cannot Show Likelihood of Success On The Merits**

2 As detailed in Defendants' Motion to Dismiss, not only are Plaintiffs not
3 likely to succeed on the merits, but this Court should dismiss their Complaint as a
4 matter of law.

5 **1. Plaintiffs are estopped from challenging both the timeliness of**
6 **the appeal and the methodology used in applying the**
7 **Ordinance**

8 Plaintiffs allege that Defendants violated their due process and equal protection
9 rights by considering and sustaining a purportedly untimely appeal and measuring
10 distances in an unreasonable manner. (Complaint at ¶¶ 48, 50.) Plaintiffs seek judicial
11 review of the Board's decision both to accept and sustain the appeal. (Doc. #21 at ¶¶ 9-
12 10.) Because Plaintiffs did not timely seek a writ of administrative mandate challenging
13 the Ordinance or any aspect of the WBZA's or the Board's decisions, Plaintiffs are
14 estopped from pursuing any claims whatsoever against Defendants, let alone
15 extraordinary injunctive relief.

16 The exclusive procedure for judicial review of administrative determinations is a
17 petition for a writ of mandate in accordance with California Code of Civil Procedure
18 section 1094.5. *Bullock v. Town of Woodside*, 64 F. App'x 18, 21 (9th Cir. 2003).
19 Before initiating a lawsuit in federal court for injunctive relief and damages, Plaintiffs
20 must first exhaust their judicial remedies regarding the Defendants' zoning
21 determinations. *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70-71. Because
22 Plaintiffs did not exhaust their judicial remedies, the WBZA and the Board's findings are
23 given "binding effect" and have "achieved finality due to the aggrieved party's failure to
24 pursue the exclusive judicial remedy for reviewing administrative action." *Id.* at 70
25 (internal citation omitted). Thus, the Board's decisions are final and are given
26 preclusive effect in both state and federal court. *Univ. of Tennessee v. Elliott*, 478 U.S.
27 788, 796-99 (1986); *Crippen v. City of Fresno*, 274 F. App'x 526, 528-29 (9th Cir. 2008);
28 *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th Cir. 1994). These decisions

1 are equivalent to a final state court judgment entitled to res judicata and collateral
2 estoppel effect. *Miller*, 39 F.3d at 1038.

3 That Plaintiffs allege constitutional claims pursuant to section 1983 does not alter
4 the analysis. *See Elliott*, 478 U.S. at 796-99. Because plaintiffs did not seek timely
5 review of WBZA's or the Board's decision, Plaintiffs are collaterally estopped from
6 relitigating this issue in the guise of a section 1983 action alleging violations of their
7 constitutional rights. *Miller*, 39 F.3d at 1034.

8 Plaintiffs' failure to timely writ the Board's decision is an incurable defect, as the
9 statute of limitations for filing such a writ has long since passed. Alameda County
10 Ordinance § 17.54.820 (45 day statute of limitations);¹ Cal Gov't Code § 65009(c)(1) *et*
11 *seq.* (90 day statute of limitations).

12 Even if the Court were to consider Plaintiffs' claims, the doctrine of claim and
13 issue preclusion would still bar those claims. *Embury v. King*, 191 F. Supp. 2d 1071,
14 1083 (N.D. Cal. 2001). Pursuant to 28 U.S.C. § 1738, federal courts are required to
15 give preclusive effect to state court reviewed administrative determinations. 28 U.S.C.
16 § 1738. In *Miller*, the Ninth Circuit held that the preclusive effect must also be given to
17 even unreviewed state administrative adjudications of legal as well as factual issues, so
18 long as the proceeding satisfies the fairness requirements of *United States v. Utah*
19 *Construction & Mining Co.*, 384 U.S. 394 (1966). *Miller*, 39 F. 3d at 1032-33; *Embury*,
20 191 F. Supp at 1083. As detailed in the Motion to Dismiss, because the WBZA and the
21 Board's administrative determinations comport with the fairness requirements of *Utah*
22 *Construction*, the Court must give collateral estoppel effect to the WBZA's and the
23 Board's findings. *Elliott*, 478 U.S. at 796-99; *Crippen*, 274 F. App'x at 528-29. (Doc.
24 #13-1 at pp. 6-8.)

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26
27 ¹ In its motion to dismiss Defendants afforded Plaintiffs the benefit of the doubt and afforded them the full
28 90 days under § 65009(c)(1). Defendants do not waive their argument that the 45 day statute of
limitations pursuant to Alameda County Ordinance § 17.54.820 governs this action.

1 The WBZA ruled that the methodology used to measure the distance between
2 the Plaintiffs' proposed gun store and the nearest residentially-zoned district was
3 correct, and that Plaintiffs' proposed gun store was within 500 feet of the nearest
4 residentially-zoned district in violation of the Ordinance. (Doc. #20-16 at 2; Doc. #20-17
5 at 5-6.) The Board relied on these determinations when it sustained the appeal and
6 denied Plaintiffs' conditional use permit and variance. (Doc. #20, Ex. T.) Because
7 Plaintiffs did not file a writ, which was their "exclusive remedy" for challenging these
8 determinations, the WBZA and Board determinations "bind[] the parties on the issues
9 litigated" because the Plaintiffs "cannot obstruct the preclusive use of the [WBZA's and
10 the Board's decisions] simply by foregoing [the] right to appeal." *Miller*, 39 F.3d at 1032.

11 **2. Plaintiffs' due process claim is not likely to succeed**

12 a. Plaintiffs do not have a protected property interest in the
13 conditional use permit and variance.

14 To state a procedural due process claim, Plaintiffs must show they have a
15 protected property interest in the conditional use permit and variance, and that the
16 County denied this protected interest without the process which was due under the
17 circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Bateson v.*
18 *Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988).

19 When a conditional use permit is conditioned on the approval of an agency or
20 governing body, and the applicable regulations impose no substantive limits on that
21 body's exercise of discretion, the governing body enjoys broad discretion, and an
22 applicant cannot establish a protectable property interest sufficient to assert a due
23 process violation. *Bateson, supra*, 857 F.2d at 1305; *see also Smith v. County of Los*
24 *Angeles* (1999) 211 Cal.App.3d 188, 198-99. As detailed in Defendants' Motion to
25 Dismiss, although specific requirements must be met to obtain a conditional use permit,
26 both the WBZA and the Board retain broad discretion to grant or deny a conditional use
27 permit; because Defendants enjoy broad discretion, Plaintiffs cannot claim a property
28 right in order to state a claim for a due process violation. (Doc. #13-1 at pp. 8-9.)

1 b. Plaintiffs received all the process they were due.

2 Even assuming that the Board's denial of the conditional use permit and
3 sustaining of the appeal amounted to a deprivation of a protected property interest,
4 Plaintiffs still received all the process that they were due under the Constitution. The
5 Due Process Clause requires notice and an opportunity to be heard before the
6 deprivation of a significant property interest. *Memphis Light, Gas & Water Div. v. Craft*,
7 436 U.S. 1, 13, 16 (1978). Even assuming that Plaintiffs had a property interest in their
8 conditional use permit, due process only requires notice to the permittee, a hearing,
9 proper reasons for the revocation, and some form of judicial review. *Makdessian v. City*
10 *of Mountain View*, 152 F. App'x 642, 644 (9th Cir. 2005). Here, Plaintiffs had notice of
11 and attended a public hearing before the Board; they argued their case before the
12 Board, and the Board gave their reasons for sustaining the appeal. (Complaint at ¶¶ 34,
13 37; Doc. #20, Ex. T.) Plaintiffs' remedy was a writ of mandate challenging the Board's
14 consideration of a purportedly untimely appeal. Cal. Code Proc. § 1094.5. This was the
15 one and only way to challenge such a finding. *Id.*; Cal. Gov. Code, § 65009, subd.
16 (c)(1)(E). Plaintiffs chose not to exercise that option. Having made that decision, they
17 cannot now seek redress in this court.

18 c. The SLVHA appeal was timely.

19 Plaintiffs claim their due process rights were violated because the Board
20 considered a purportedly untimely appeal. Plaintiffs claim that the SLVHA appeal had
21 to be filed by December 26, 2011, but that two date stamps on the appeal letter reflect
22 the dates of December 29, 2011 and January 3, 2012. (Doc. #21 at ¶ 8i.)

23 Pursuant to Alameda County Ordinance § 17.54.670, an appeal of a WBZA
24 decision must be filed within ten days after the date of the order. (Doc. #20-5 at 19
25 (Alameda County Ordinance § 17.54.670.)) The appeal may be taken by any property
26 owner or other party affected by the order. (*Id.*; Declaration of Albert Lopez at ¶5.) A
27 notice of appeal, specifying the grounds for such an appeal, may be filed with the clerk
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1 of the Board or the planning department. (Doc. #20-5 at 19 (Ordinance § 17.54.670.))
2 The Planning Department must receive a written communication of the appeal in order
3 for it to be considered timely. (Declaration of Albert Lopez at ¶7.)

4 On December 14, 2011 the WBZA approved Plaintiffs' conditional use permit and
5 variance in Resolution No. Z-11-70. On December 22, 2012, Albert Lopez, the Planning
6 Director for the Alameda County Community Development Agency Planning
7 Department, received an email from Kathy Martins, Administrator of SLVHA, attaching
8 the appeal letter. (Declaration of Albert Lopez at ¶¶ 9-10.) The SLVHA represents
9 property owners in San Lorenzo Village, which is a residentially-zoned district located
10 446 feet from the proposed gun shop. (Doc. #20-15 at 10.) Ms. Martins' December 22,
11 2011 email explained that she had earlier that day attempted unsuccessfully to hand
12 deliver the appeal to the Planning Department, and verified that the SLVHA's appeal
13 letter was being simultaneously transmitted via federal express. (Declaration of Albert
14 Lopez at ¶10; Ex. 1.) The Planning Department received the SLVHA appeal of the
15 WBZA decision in writing within ten days after the date of the WBZA order. (*Id.* at
16 ¶¶ 13-14.) The SLVHA appeal was timely, and the Board properly considered and ruled
17 on it.

18 Because SLVHA's appeal was timely, it is abundantly clear that Plaintiffs are
19 unlikely to succeed on a due process claim. For this reason alone, Plaintiffs' Motion for
20 Preliminary Injunction should be denied.

21 **3. Plaintiffs' equal protection claim is unlikely to succeed**

22 a. Plaintiffs fail to allege a class of one claim

23 Plaintiffs have not sufficiently alleged a class of one equal protection claim. To
24 adequately plead a "class of one" claim, Plaintiffs must sufficiently allege that the Board:
25 "(1) intentionally (2) treated them differently than other similarly situated property
26 owners, (3) without a rational basis." *Gerhart v. Lake County, Mont.*, 637 F.3d 1013,
27 1022 (9th Cir. 2011) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000));
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1 *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008)). A sufficient
2 allegation must identify specific similarly-situated businesses to which Defendants
3 granted variances or for which the distances were measured differently. *Vogt v. City of*
4 *Orinda*, No. C 11-2595 CW, 2012 WL 1565111 at *3 (N.D. Cal. May 2, 2012).

5 Courts have consistently held that where a plaintiff makes a class of one claim
6 there is a higher premium for a plaintiff to identify how he or she is similarly situated to
7 others. *See e.g., Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir.
8 2010). Plaintiffs' bald, conclusory allegations that merely assert on information or belief
9 that similarly-situated businesses were treated differently are insufficient to state a
10 claim. *See Vogt*, 2012 WL 1565111 at *3; *see also Scocca v. Smith*, C-11-1318 EMC,
11 2012 WL 2375203 at *5 (N.D. Cal. June 22, 2012). Because Plaintiffs fail to specifically
12 identify similarly-situated businesses that were treated differently, their class of one
13 equal protection claim must fail.

14 b. The methodology for applying the Ordinance is objective,
15 consistent, and based on the clear language of the
16 Ordinance.

17 Even if Plaintiffs could sufficiently allege an equal protection claim based on
18 allegedly “unreasonable measurements,” the methodology used to measure the
19 distance between the Plaintiffs’ proposed gun store to the nearest residentially-zoned
20 district was neither arbitrary nor subjective. Rather, the measurement methodology is
21 directly derived from the clear language of the Ordinance. (Declaration of Rodrigo
22 Orduña at ¶5.)

23 Ordinance § 17.54.131(B) requires, “That the subject premises is not within five
24 hundred (500) feet of any of the following: residentially zoned district ...” (emphasis
25 added). The Ordinance specifies on its face that the measurement must be taken from
26 the “subject premises.” (Declaration of Rodrigo Orduña at ¶7.) If there is only one
27 structure or business on the property, the term “premises” refers to the building
28 perimeter. (*Id.* at ¶8; Doc. #20-15 at 5.) However, when there is more than one

1 structure or business on the property, then “premises” must be defined as the specific
2 tenant space, or area of the structure, including the building walls, on the property. (*Id.*)
3 The proposed gun shop is one of two structures located on the same lot. (Doc. #20-15
4 at 2; Declaration of Rodrigo Orduña at ¶9.) Therefore, the measurement must be taken
5 from the building wall of the proposed gun store. (*Id.* at ¶10.)

6 The term “residentially zoned district” also has a specific meaning. (*Id.* at ¶12.)
7 A residentially zoned district consists of a polygon which outlines an area in
8 unincorporated Alameda County zoned for residential use. (*Id.*) Accordingly, the
9 Ordinance specifies that the measurement must be taken from the building wall of the
10 specific structure of the proposed gun shop to the property line of the nearest
11 residentially zoned district. (*Id.* at ¶¶ 7-13; Doc. #20-15 at 10.) That measurement is
12 always taken in a straight line. (Declaration of Rodrigo Orduña at ¶¶ 14-15.) In this
13 case, because of the unconventional wedge shape of the nearest residentially zoned
14 district, the County erred on the side of caution by taking the measurement from the
15 building wall of the proposed gun shop to a usable location inside the property line of
16 the nearest residentially zoned district. (Doc. #20-15 at 10; Declaration of Rodrigo
17 Orduña at ¶18, Ex. 2.) Even this generous measurement placed the proposed location
18 within 500 feet of a residentially-zoned district. (*Id.*)

19 The County has consistently used the above methodology to measure distances
20 to determine compliance with zoning ordinances.² (Declaration of Rodrigo Orduña at
21 ¶13.) Plaintiffs assert that they were denied equal protection because the methodology
22 to measure distances allegedly changed throughout the process. (Complaint at ¶¶ 23,
23 31, 50.) Plaintiffs were the only ones initially confused about the methodology.

24 _____
25 ² Plaintiffs’ bald assertions to the contrary, a “door to door” measurement is illogical and impractical for
26 several reasons. (Declaration of Rodrigo Orduña at ¶¶ 19-20.) The Planning Department does not keep
27 track of where doors on commercial or residential buildings are located. (*Id.* at ¶21.) Plaintiffs’
28 methodology would actually vest greater discretion in the Board because it would allow the County to
designate one door as the “main entrance” or “front door” when there is more than one entrance and exit
to a building. (*Id.* at ¶22.) Since doors on commercial buildings can be moved and replaced with relative
ease (*Id.* at ¶19), future applicants could be tempted to game the system.

1 (Declaration of Rodrigo Orduña at ¶25.) As Plaintiffs admit, on July 1, 2011, during the
2 application submittal meeting with the planning department, Mr. Orduña, a Senior
3 Planner, resolved that confusion. (Declaration of Rodrigo Orduña at ¶26; Complaint at
4 ¶22.) At that time, Plaintiffs were also advised that the proposed gun store did not
5 comply with the Ordinance. (Declaration of Rodrigo Orduña at ¶26.) Plaintiffs' initial
6 confusion was resolved five months prior to the December 14, 2011 WBZA hearing on
7 the conditional use permit and variance.

8 Even had Plaintiffs sufficiently alleged an equal protection claim, that claim would
9 fail, as Plaintiffs' business was treated in exactly the same manner as any similarly
10 situated business in the County.

11 **4. Plaintiffs' Second Amendment claims are unlikely to succeed**

12 Plaintiffs allege both a facial and an as-applied Second Amendment challenge.
13 The Supreme Court has yet to specify the level of constitutional review to be applied to
14 Second Amendment challenges. *District of Columbia v. Heller*, 554 U.S. 570, 635
15 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010).

16 While the Ninth Circuit has no published binding authority specifying the level of
17 constitutional review in Second Amendment challenges, several other Circuits have
18 used a two-pronged approach. *See United States v. Marzzarella*, 614 F.3d 85, 89 (3d
19 Cir. 2010). In the two-pronged approach, the court first considers whether the
20 challenged law imposes a substantial burden on conduct falling within the scope of the
21 Second Amendment's guarantee. If it does not, the Court's inquiry is complete. If the
22 law does impose a substantial burden, the Court applies a means-ends scrutiny, most
23 often intermediate scrutiny. *Id.*; *Heller v. District of Columbia*, 670 F.3d 1244, 1251–53
24 (D.C. Cir. 2011) ("*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 702–04 (7th Cir.
25 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v.*
26 *Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *see also Scocca v. Smith*, C-11-1318
27 EMC, 2012 WL 2375203 at *6 (N.D. Cal. June 22, 2012) (although the *Nordyke* panel
28

1 decision is no longer binding authority the reasoning of the panel decision is still
2 persuasive; i.e., that “heightened scrutiny does not apply unless a regulation
3 substantially burdens the right to keep and to bear arms for self-defense.”) (quoting
4 *Nordyke v. King*, 644 F.3d at 776, 783 (9th Cir. 2011)).

5 a. The Ordinance falls outside the scope of the Second
6 Amendment.

7 The Second Amendment, as construed in *Heller*, protects “the right to possess a
8 handgun in the home for the purpose of self-defense.” *McDonald*, 130 S. Ct. at 3050;
9 *see also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (the
10 Second Amendment encompasses the right to “keep[] operable handguns at home for
11 self-defense”). *Heller* established no more than this. Indeed, in *Heller*, the Supreme
12 Court cautions that “[n]othing in our opinion should be taken to cast doubt on . . . laws
13 imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554
14 U.S. at 626-27. Such laws are “presumptively lawful regulatory measures.” *Id.* at 627
15 n.26.

16 The Ordinance is a presumptively lawful regulatory measure imposing conditions
17 and qualifications on the commercial sale of arms. It permits Plaintiffs to locate a gun
18 store on a site that is more than 500 feet from a residentially zoned district, elementary,
19 middle, or high school, pre-school or daycare, other firearms sales business, liquor
20 store or establishments in which liquor is served. Ordinance § 17.54.131. Restricting
21 the commercial sale of firearms in residential and other sensitive areas does not
22 substantially burden the core “right of law-abiding, responsible citizens to use arms in
23 defense of hearth and home.” *Heller*, 554 U.S. at 635. The Ordinance merely imposes
24 conditions on the commercial sale of firearms by placing geographical limits on where
25 such sales may occur. Several gun stores operate in the County pursuant to the
26 Ordinance. (Doc. #20-15 at 6.) Because the Ordinance does not impose a substantial
27 burden on Second Amendment rights, the Court’s inquiry should end. *Marzzarella*, 614
28 F.3d at 91, 91n.6; *Hall v. Garcia*, No. C 10-03799, 2011 WL 995933 at *2 (N.D. Cal.

1 Mar. 17, 2011) (“Where a challenged statute apparently falls into one of the categories
2 signaled by the Supreme Court as constitutional, courts have relied on the
3 ‘presumptively lawful’ language to uphold laws in relatively summary fashion.”)

4 b. Even If the Ordinance substantially burdens a core right, it
5 survives constitutional scrutiny.

6 Even if this Court were to find that the Ordinance substantially burdened Second
7 Amendment rights, it would nevertheless pass constitutional muster. Several courts
8 have extrapolated general principles from First Amendment doctrine in weighing
9 Second Amendment challenges. See *Ezell*, 651 F.3d at 707-09. Borrowing from free
10 speech cases, Courts have held that the applicable standard of judicial review depends
11 on the nature and the degree of the governmental burden. *Id.* A severe burden on the
12 core right will require strict scrutiny, while laws that merely “regulate[] rather than
13 restrict[] . . . may be more easily justified.” *Id.* at 708.

14 Unlike the ordinance at issue in *Ezell*, which mandated firing-range training as a
15 prerequisite to lawful gun ownership yet prohibited all firing ranges in the city, the
16 Ordinance does not impose an outright ban on the commercial sale of firearms, but
17 rather limits where firearms dealers may be located. The Ordinance is more akin to a
18 content-neutral time, place, and manner regulation on the commercial sale of firearms.
19 In First Amendment jurisprudence, where a zoning ordinance constitutes a limitation on
20 the areas in which a business, such as an adult bookstore, may be located, it must pass
21 a type of intermediate scrutiny: the ordinance must be designed to serve a substantial
22 government interest and allow for reasonable alternative avenues of communication.
23 *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 50 (1986).

24 i. Substantial government interest

25 The Ordinance serves several substantial County interests. As in the adult
26 bookstore context, the County has a substantial interest in preventing the deleterious
27 secondary effects of commercial sales of firearms. While Plaintiffs aver that only law-
28 abiding individuals purchase firearms, gun shops “can be targets of persons who are or

1 should be excluded from purchasing and possessing weapons.” *Suter v. City of*
2 *Lafayette* (1997) 57 Cal.App.4th 1109, 1132. Therefore, it is reasonable to regulate
3 them such that they are located away from residential areas. *Id.* By prohibiting gun
4 sales near certain well-defined areas, the County promotes public safety and prevents
5 harm in populated, well-traveled, and sensitive areas such as residential districts or
6 schools.

7 Plaintiffs repeatedly attempt to undercut the substantial government interest in
8 the Ordinance by arguing that because individuals may lawfully possess a firearm in
9 their homes, a residential district cannot be designated as a sensitive place. (Doc. #17
10 at ¶10; Doc #21 at ¶21.) Plaintiffs’ argument avails them nothing. Individuals of
11 appropriate age have the right to possess adult books and alcoholic beverages in their
12 residences. It does not follow that the County cannot regulate adult bookstores and
13 liquor stores such that they may not be located in residential areas. In fact, it is a long-
14 standing principle that municipalities may implement those very regulations. *See e.g.,*
15 *Renton*, 475 U.S. at 50; *Diamond v. City of Taft*, 215 F.3d 1052, 1058 (9th Cir. 2000).

16 By limiting where gun sales take place the County also preserves the quality of
17 its residential neighborhoods, commercial districts, and the overall quality of urban life.
18 (Doc. #20-15 at 6-8.) This interest is “vital.” *Renton*, 475 U.S. at 48, 50. The sale of
19 firearms, like the sale of any product, is a commercial activity, and municipalities are
20 entitled to confine commercial activities to certain districts. *Village of Euclid v. Ambler*
21 *Realty Co.*, 272 U.S. 365, 395 (1926). In the First Amendment context, the Supreme
22 Court has already endorsed geographic restrictions on certain businesses in order to
23 disperse them throughout the County and not have them located within sensitive places
24 such as residential neighborhoods, schools, or churches. *Renton*, 475 U.S. at 52
25 (upholding an ordinance that imposed a 1000 foot zoning restriction, double the
26 distance Plaintiffs complain of in this case).

1 ii. Reasonable alternative avenues

2 Plaintiffs argue that the Ordinance effectively zones gun stores out of existence,
 3 allowing for no alternative venues to open and operate a gun store. Plaintiffs'
 4 allegations find no basis in fact. Ten³ other gun stores operate in the County, including
 5 the Big 5 Sporting Goods, selling both firearms and ammunition, located only 607 feet
 6 from Plaintiffs' proposed gun shop. (Doc. #20-15 at 5-6.) Plaintiff John Teixeira,
 7 himself, for many years owned and operated a gun store in Alameda County. (Doc.
 8 #20 at ¶5.)

9 Given the number of gun stores operating in the County in compliance with the
 10 Ordinance, the Court cannot find that the County has effectively denied gun stores a
 11 reasonable opportunity to open and operate within the County limits.

12 The Ordinance is a presumptively lawful measure and not subject to a facial
 13 Second Amendment challenge. Even if the Ordinance were not outside the scope of
 14 the Second Amendment, it nevertheless survives constitutional scrutiny. Even if there
 15 were some inchoate doubt as to the constitutionality of the Ordinance, there remains
 16 sufficient factual dispute that Plaintiffs cannot demonstrate that they are likely to
 17 succeed on the merits so as to entitle them to a preliminary injunction.

18 c. Plaintiffs Are Estopped From Challenging The Ordinance As
 19 Applied

20 Plaintiffs also challenge the Ordinance as unconstitutional as applied to the facts
 21 of this case. (Complaint at ¶54.) As noted above, Plaintiffs never sought to set aside
 22 either the WBZA's findings or the Board's decision by petitioning for a writ of
 23 administrative mandamus pursuant to Code of Civil Procedure section 1094.5. "A
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 25
 26

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

1 proceeding under Code of Civil Procedure section 1094.5 is the exclusive remedy for
2 judicial review of the quasi-adjudicatory administrative action of the local-level agency. .
3 . .” *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645 (quoting *City*
4 *of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718-719 (emphasis added)).
5 Because the propriety of the WBZA’s measurements were at issue in the underlying
6 administrative proceeding, Plaintiff’s failure to contest the decision by filing a writ of
7 mandamus estops them from now relitigating the same issue. *Id.* Put another way,
8 Plaintiffs are collaterally estopped from challenging the agency decision because that
9 decision has “achieved finality due to the aggrieved party’s failure to pursue the
10 exclusive *judicial* remedy for reviewing administrative action.” *Id.* at 646 (emphasis in
11 original); *Elliott*, 478 U.S. at 796-99; *Crippen*, 274 F. App’x at 528-29.

12 d. Even If Plaintiffs Were Not Collaterally Estopped From
13 Challenging The Ordinance, The Ordinance Is Constitutional
14 As Applied

15 As demonstrated above, the Ordinance does not impose a substantial burden on
16 Plaintiffs’ core Second Amendment rights. Even if it does, as applied to the facts of this
17 case, the Ordinance passes constitutional scrutiny.

18 Plaintiffs appear to base their “as-applied” challenge on the manner in which the
19 distance between their proposed gun shop and the nearest residentially zoned district
20 was calculated. (Complaint at ¶38; Doc #21 at ¶22.) Yet, Defendants’ substantial
21 interest in protecting against secondary effects is not dependent on whether the
22 measurement is taken from the door of the building or from the building wall. The
23 measurement from the proposed location to the residentially zoned district was made in
24 a manner consistent for all locations covered by the Ordinance. (Doc. # 20-15 at pp. 4-
25 6.) The measurements made are neither arbitrary nor subjective. The clear language
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1 of the Ordinance mandates how the measurement is to be made, and the measurement
2 was made in that manner.⁴

3 The Court should not accept Plaintiffs' invitation to explore whether the 500-foot
4 limit is appropriate given the barriers between the gun shop location and the
5 residentially-zoned districts. Any application of the 500-foot rule, or any other zoning
6 ordinance, will have varying effects in each situation. In many instances, even outside
7 the context of gun shops, there will be a proposed property that is close, but not quite, in
8 compliance with the zoning ordinance. That does not make the ordinance
9 unconstitutional as applied. It is immaterial that the current owner of the nearest
10 residential property does not object to the proposed location of the gun store. The
11 Ordinance was enacted to protect the entire community, not just one particular property
12 owner. The current owner's opinion means little when that particular property may
13 change hands in the future.

14 Nothing about the facts in this case distinguishes Plaintiffs' proposed gun store
15 from any other gun store, or any other property subject to a conditional use permit.
16 Under intermediate scrutiny, the strictest constitutional scrutiny that would apply, the
17 Ordinance need not be the least intrusive means available to accomplish its goal.
18 *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011). It must only be
19 substantially related to Defendants' interest in protecting public safety and creating a
20 safe zone around its residential neighborhoods and schools. While Plaintiffs may be
21 frustrated because their proposed site is just under the minimum distance required, the
22 Ordinance is nevertheless constitutional as applied.

23 **B. Plaintiffs Cannot Show That They Are Likely To Suffer Irreparable**
24 **Harm**

25 Plaintiffs bear the burden of demonstrating a "likelihood of irreparable injury-not
26 just a possibility-in order to obtain preliminary relief." *Winter*, 555 U.S. at 21. "[W]here a

27 _____
28 ⁴ Even if the County were to measure from the front door of Plaintiffs' proposed gun shop, it would still be

1 federal injunction is sought against a governmental entity, the party requesting relief
2 must show a threat of ‘great and immediate,’ not conjectural or hypothetical, irreparable
3 harm.” *Kaiser v. County of Sacramento*, 780 F. Supp. 1309, 1311 (E.D. Cal 1991)
4 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983); *Orantes–Hernandez v.*
5 *Thornburgh*, 919 F.2d 549, 557 (9th Cir. 1990)). Plaintiffs must show a likelihood of
6 “real, immediate and non-conjectural violations” of constitutional rights before the court
7 will apply the presumption of irreparable harm. *Id.* As Defendants’ Motion to Dismiss
8 conclusively demonstrates, Plaintiffs’ have failed even to state a constitutional claim.
9 Their conclusory allegations and self-serving declarations fail to meet this very high
10 burden.

11 Plaintiffs rely on *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). *Ezell*
12 is neither controlling nor binding on this court. *Ezell* is also clearly distinguishable from
13 the case at bar. *Ezell* involves a complete prohibition on conduct that the Seventh
14 Circuit found was within the scope of the Second Amendment. Here, the County is not
15 prohibiting the sale of guns outright, but merely regulating the location of commercial
16 sales of firearms, which the Supreme Court has already held is one of many
17 “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at 627 n.26. Thus, the
18 *Ezell* court’s holding that irreparable harm is presumed is inapplicable in this case.

19 Although Plaintiffs assert that without a preliminary injunction they may be
20 foreclosed from receiving monetary remedies, it is well established that economic injury,
21 by itself, is not considered irreparable harm. *See, e.g., Cal. Pharm. Ass’n v. Maxwell–*
22 *Jolly*, 563 F.3d 847, 852 (9th Cir. 2009) (“[E]conomic damages are not traditionally
23 considered irreparable because the injury can later be remedied by a damage award.”);
24 *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850–51 (9th Cir. 1985)
25 (“The possibility that adequate compensatory or other corrective relief will be available
26 at a later date, in the ordinary course of litigation, weighs heavily against a claim of

27
28 within 500 feet of the nearest residentially zoned district. (Doc. #20-15 at 5.)

1 irreparable harm . . . [P]urely monetary injury is compensable, and thus not
2 irreparable.”). Plaintiffs have failed to show irreparable harm will result if a preliminary
3 injunction does not issue.

4 **C. The Balance of Equities Tips In The County’s Favor**

5 The balance of equities tips in the County’s favor. This is a dispute over a zoning
6 ordinance. The County has broad power to enact all local, police, sanitary and other
7 ordinances not in conflict with general laws. *S.D. Myers, Inc. v. City & County of San*
8 *Francisco*, 336 F.3d 1174, 1177 (9th Cir. 2003) (citing Cal. Const. art. XI, § 7). If the
9 requested injunctive relief were granted, the Court would divest the County’s control
10 over whom they may permit to open a business. Any decision by this Court to overrule
11 the County on uniquely local matters should await a decision on the merits.

12 **D. An Injunction Is Not In The Public Interest**

13 A preliminary injunction is also inappropriate because it is not in the public
14 interest. The Ninth Circuit has mandated that, “[i]n cases where the public interest is
15 involved, the district court must also examine whether the public interest favors the
16 plaintiff.” *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *see also*
17 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“In exercising their sound
18 discretion, courts of equity should pay particular regard for the public consequences in
19 employing the extraordinary remedy of injunction.”). The public interest is involved
20 when “the impact of an injunction reaches beyond the parties, carrying with it a
21 potential for public consequences.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139
22 (9th Cir. 2009). “In considering the public interest, [the Court] may [also] consider the
23 hardship to all individuals . . . [and is] not limited to parties. . . .” *Golden Gate Rest.*
24 *Ass’n v. City of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). A plaintiff bears
25 the initial burden of showing that the injunction is in the public interest. *See Winter*,
26 555 U.S. at 20.

1 The public interest weighs heavily in the County’s favor. The County has a
2 strong interest in its ability to enforce local ordinances without federal court
3 interference, at least until the merits of the case are decided. The Court must be
4 mindful of the harm that might befall the community if a gun store is allowed to operate
5 in contravention of the Ordinance pending resolution of this matter. *Perkins v. City of*
6 *St. Paul*, 982 F. Supp. 652, 659 (D. Mn. 1997). No amount of money could cure the ill
7 effects to the community if Plaintiffs are allowed to open and operate an illegal firearm
8 sales business.

9 **V. CONCLUSION**

10 For the foregoing reasons, Defendants respectfully request that this Court deny
11 Plaintiffs’ Motion for Preliminary Injunction.

12
13 DATED: November 30, 2012

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