



LOCAL POLICING, LOCAL OPTIONS

REFORMING QUALIFIED IMMUNITY

Creating more-responsive, effective
community law enforcement

BY KEITH NEELY AND PATRICK TUOHEY



MISSION

***BCP uncovers ideas that work,
promotes realistic solutions and
forges partnerships that help people
in America's largest cities live free
and happy lives.***

CITIES AND COUNTIES HAVE OPTIONS FOR POLICING REFORM

Better Cities Project is proud to release three new publications focusing on municipal police reform. The reports, focusing on qualified immunity, civil asset forfeiture, federal task forces and collective bargaining transparency, show local leaders what they can do — without federal or state authorities — to increase accountability and trust in the institutions dedicated to public safety. These are not a panacea; the challenges to public safety are significant and often well beyond law enforcement policy. But to those interested in taking small measures to build public confidence and encourage honest debate, these reforms are a good start.

In this report, which focuses on qualified immunity reform, BCP worked with Keith Neely of the Institute for Justice to argue that city residents have recourse when their constitutional rights are violated. The police play a vital role in our society and every officer will tell you that they can only be effective when the community stands with them. But too often, bad police officers are shielded from the consequences of their actions by qualified immunity. Ending the use of qualified immunity creates an incentive for police to be more mindful.

Courts have ruled that local officers are considered federal agents even when agreements between local and federal authorities stated explicitly that this was not to be the case. Until the courts recognize such agreements, local authorities will be best served by avoiding them altogether.

These recommendations, as well as those in our companion reports, won't solve all the challenges of addressing crime and providing public safety. But for communities paralyzed by rancorous debates over policing, they offer the opportunity to work together on what can be done to help without waiting on state and federal legislatures.

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QUALIFIED IMMUNITY REFORM: ACCOUNTABILITY WITHOUT DEFUNDING

The police play a vital role in our society and every officer will tell you that they can only be effective when the community stands with them. Too often, wayward public servants are shielded from the consequences of their actions by a court-created legal principle called qualified immunity. Ending the use of qualified immunity creates an incentive for public employees — including the police — to be more mindful of individual civil rights, and will help institutions weed out bad apples.

As a result of qualified immunity reform in New York City, the nation's largest police union wrote to members that searches of individual or private property should be conducted only when the officer is, "clearly and unequivocally within the bounds of the law." That is a result everyone should cheer. The reform proposal in this book helps move us there.

Far too often, though, legal doctrines like qualified immunity protect government workers from accountability even when they blatantly violate people's constitutional rights. The result: trust and faith in government diminishes, and it becomes harder for the

government to do its job.

Well-intended efforts to reform qualified immunity have understandably focused on police. But these efforts, often coupled with calls to defund police departments, leave police officers feeling singled out, unsupported and cast as rogue.

By addressing qualified immunity for all government employees, cities address the problem of unaccountability at its core. Permitting victims of government misconduct to pursue legal action when their rights are violated can go a long way toward incentivizing better behavior and promoting trust between the gov-



ernment and the people it serves. Likewise, empowering local governments to fire bad-acting employees helps to ensure that repeat offenders are quickly shown the door.

What most cities have now is unsupportable: a vague and seemingly impossible legal standard for seeking redress of constitutional rights violations, a frustrated public that feels helpless and a community of sincere government professionals viewed as being no better than the worst among them.

There is a better way.

HOW DOES QUALIFIED IMMUNITY WORK?

No local, state or federal legislature set out to create a set of circumstances in which government employees could not be held legally responsible for violating an individual's constitutional rights. Indeed, for much of American history, government employees were held accountable when they violated a person's rights.¹ And Congress, in 1871, enacted a statute that is today codified as 42 U.S.C. § 1983 ("Section 1983"), which expressly authorized lawsuits against state and local officials who violate a person's constitutional rights.

But in 1967, the Supreme Court started to reverse course. In a landmark decision involving Section 1983, the Court for the first time introduced the doctrine of "qualified immunity".²

Fifteen years later, in 1982, the Court modified the doctrine into the version in effect today. Under the current doctrine, public officials are protected even when they

maliciously violate a person's constitutional rights as long as the rights they violated were not "clearly established."³ The doctrine applies to conduct performed

HIGHLIGHTS

- Qualified immunity creates an unsupportable situation for cities: A vague legal standard for seeking redress of constitutional rights violations, a frustrated public that feels helpless and a community of sincere government professionals viewed as being no better than the worst among them.
- BCP's recommended model ordinance allows cities to eliminate qualified immunity in their own jurisdictions.
- A victim of municipal misconduct could sue the government employer when one of its employees violates her constitutional rights. Qualified immunity is expressly barred as a defense.
- The ordinance empowers government employers to fire bad-acting employees. If a victim succeeds in their lawsuit under PECRO, that judgment establishes a presumption of "just cause" for termination of employment.
- The end result: victims of municipal misconduct are made whole, and bad-acting officials quickly lose their jobs.



**QUALIFIED
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by all government officials, including law enforcement, code inspectors, teachers and tax collectors.

Application of qualified immunity hinges on the meaning of “clearly established.” As it stands, victims of government misconduct seeking damages under Section 1983 must demonstrate not only that their constitutional rights were violated, but that the right was “clearly established” by a prior legal case with functionally identical precedent.⁴ As the American Bar Association explains, “In other words, it is entirely possible – and quite common – for courts to hold that government agents did violate someone’s rights, but that the victim has no legal remedy, simply because that precise sort of misconduct had not occurred in past cases.”⁵

THE PROBLEMS CAUSED

By placing such a high burden on the victims of government misconduct, qualified immunity not only shields public officials from bad behavior, which is itself a problem, but also erodes public trust in government institutions.

In 2019, for example, the Ninth Circuit Court of Appeals held that qualified immunity protected Fresno, California, police officers who falsified search-warrant inventory sheets to steal over \$225,000 in cash and rare coins from a criminal suspect. Even though the Court recognized that the officers’ conduct was “morally wrong,” it applied qualified immunity because the Ninth Circuit had never previously issued a decision involving the theft of property covered by the terms of a search warrant.⁶

Likewise, in 2020, the Ninth Circuit Court of Appeals held that qualified immunity protected a social worker accused of sexually harassing the legal guardian of a minor he was assigned to protect. Even though the Court held that the social worker violated the guardian’s constitutional rights, it awarded qualified immunity because past cases involved co-workers, supervisors, classmates and teachers, but not social workers.⁷

Lastly, in 2017, the Second Circuit Court of Appeals held that qualified immunity protected prison guards who kept an inmate in solitary confinement for over a year and forced him to wear leg irons and underwear while showering, all because the inmate once asked a guard to speak to the lieutenant about why he was not allowed to visit the commissary. Despite recognizing that the guards violated the prisoner’s constitutional rights, the Court awarded qualified immunity because it could identify no prior case involving the precise punishments employed by the prison.⁸

These cases are not outliers. In each of these cases – and countless others – victims of government misconduct were denied justice because the unique facts of their case did not precisely match prior precedent.

REFORM OPPORTUNITIES

The Supreme Court could end the doctrine it first created. But it has shown little interest in doing so.

Congress could remove qualified immunity as a defense for public officials who violate civil rights. But a recent effort failed.

States could reform qualified immunity, and some have. In 2020, Colorado enacted the Enhance Law Enforcement Integrity Act, which permits residents whose rights were violated to sue officers for damages in state court. Although the Act applies only to violations committed by law enforcement, it expressly forbids officers from using any immunity to defend themselves.⁹

In 2021, New Mexico followed suit by enacting the New Mexico Civil Rights Act. Unlike Colorado, the New Mexico Act applies to all state and local government employees, not just police. If, within the scope of their official duties, a government employee violates someone's rights, the victim can sue the government employer for damages under the state constitution. As with Colorado, this new law bars the use of immunity as a legal defense.

CITIES AND COUNTIES DON'T NEED TO WAIT FOR THE STATES

In March 2021, the New York City Council passed legislation barring qualified immunity for police officers accused of violating New Yorkers' rights in cases involving searches, seizures, or use of force. As a result, the world's largest municipal police union, the Police Benevolent Association, released a memo in which they "strongly caution" police officers to limit their searches of individuals or private property to cases where the officer is "clearly and unequivocally within the bounds of the law."¹⁰ When qualified immunity is removed as a protection, government employees like police have an incentive to take constituent rights more seriously.



PROTECTING EVERYONE'S CONSTITUTIONAL RIGHTS ORDINANCE – (PECRO)

Recognizing that meaningful reform often starts at a local level, the Institute for Justice recently released a model ordinance that cities can adopt to eliminate qualified immunity in their own jurisdictions. Called the Protecting Everyone's Constitutional Rights Ordinance (PECRO), it creates a municipal cause of action for violations of a person's constitutional rights.

Under PECRO, a victim of municipal misconduct can sue the government employer when one of its employees violates her constitutional rights. Qualified immunity is expressly barred as a defense. Importantly, though, PECRO goes one step further by empowering government employers to fire bad-acting employees. If a victim succeeds in their lawsuit under PECRO, that judgment establishes a presumption of "just cause" for the termination of the perpetrator's

employment.

The end result: victims of municipal misconduct are made whole, and bad-acting officials quickly lose their jobs.

ORDINANCE

A bill for an act relating to public safety; prohibiting immunity for government employees; proposing cod-



ing for a new Ordinance in Municipal Law.

BE IT ENACTED BY THE CITY COUNCIL OF THE MUNICIPALITY OF _____.

Subdivision 1: Definitions

1. "Government" means the municipality and its political subdivisions.
2. "Government employee" means an individual employed or contracted by a government employer.
3. "Governmental employer" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the municipality and its political subdivisions.

Subd. 2: State Cause-of-Action

1. Under this chapter, the government employer shall be liable for an injury caused by an act or omission of a government employee who, under color of law, violates a right under (a) the laws of the municipality, this State or the United States or (b) the constitution of this State or the United States.
2. An individual may seek legal, equitable, or other re-

lief in a court of this state for a violation of a right under (a) the laws of the municipality, this State or the United States or (b) the constitution of this State or the United States.

3. The proper defendant in an action is the government employer and not a government employee.
4. A government employee shall not be found financially liable for a violation of a right under (a) the laws of the municipality, this State or the United States or (b) the constitution of this State or the United States.
5. The government employer shall notify the government employee, whose act or omission is the subject of a claim under this chapter, within 10 days of the government employer being served. The government employee has an unconditional right to intervene in the action, as a third-party defendant, pursuant to this State's rules of civil procedure and court rules.
6. The plaintiff bears the burden of proving a violation of a right under (a) the laws of the municipality, this state or the United States or (b) the constitution of this State or the United States by a preponderance of the evidence.
7. The action is not subject to:

**THE END RESULT:
VICTIMS OF
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- A. Common law doctrines of immunity;
 - B. Federally-recognized doctrines of qualified immunity;
 - C. Sovereign immunity, governmental immunity, custom or policy; or
 - D. Statutory immunities and limitations on liability or damages.
8. Nothing in this chapter abrogates judicial or legislative immunity of the municipality and its political subdivisions.
 9. Notwithstanding this State's rules of civil procedure and court rules, a class action is prohibited under this chapter.
 10. A claim shall commence no later than three years from the date a claim can be brought for the deprivation of a right under (a) the laws of the municipality, this State or the United States or (b) the constitution of this State or the United States.

Subd. 3: Jurisdiction

1. An action under this chapter arises out of municipal law.
2. Jurisdiction is in a municipal or State court of competent jurisdiction pursuant to this State's laws and rules of civil procedure.

Subd. 4: Judicial Process

1. The court's order shall be supported by findings of facts and conclusions of law. The court shall make the findings of fact in a bench trial and the jury shall make them in a jury trial. The court shall make conclusions of law.

Subd. 5: Judicial Evaluation of the Use of Force

1. When evaluating a government employee's use of force under the constitution of this State or the United States, the court's determination of reasonableness must be made from the perspective of a reasonable government employee on the scene, rather than with the 20/20 vision of hindsight. It shall be an objective one based on the facts and circumstances confronting the government employee. It shall recognize a government employee often must make split-second decisions in tense, uncertain, and rapidly-evolving situations¹.

Subd. 6: Attorney Fees

1. In any proceeding in which a plaintiff's claim prevails, the government shall be liable for reasonable attorney fees and other litigation costs.
2. Reasonable attorney fees include those incurred on an hourly or

contingency basis, or by an attorney providing services on a pro bono basis.

3. The court shall recognize that a plaintiff's claim prevails if the plaintiff obtains any relief the plaintiff seeks in its complaint, whether the relief is obtained via judgment, settlement or the government's voluntary change in behavior.
4. Under this State's rules of civil procedure, the court may dismiss a frivolous claim and may award reasonable attorney fees and costs to the defendant for defending against a frivolous claim.

Subd. 7: Termination of Contract, Agreement or Employment

1. For any contract or agreement enacted after the effective date of this legislation and notwithstanding any other law, a court's finding that a government employee violated a right under (a) the laws of the municipality, this State or the United States or (b) the constitution of this State or the United States under this chapter is per se evidence that the government employer has just cause for terminating the employment of the government employee.
2. The government's termination of a contract, agreement or employment with the government employee shall not affect the government's liability under this chapter.

Subd 8: Public information

All documents, including complaints, judgments, settlements, and consent decrees, are subject to public disclosure.

Severability Clause

Effective Date

1. *Graham v. Connor*, 490 U. S. 386, 396 (1989) (Adopting the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and allowing for "the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.") A drafter may object to using the exact phrase from the case: "20/20 vision of hindsight." An acceptable alternative sentence is "A court must not determine reasonableness based on facts and circumstances of a claim that are later discovered."

Plumhoff v. Rickard, 572 U.S. 765, 777 (2014). (The Court has repeatedly emphasized that police officers "are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving.")

**GOVERNMENT'S
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OF RIGHTS.**



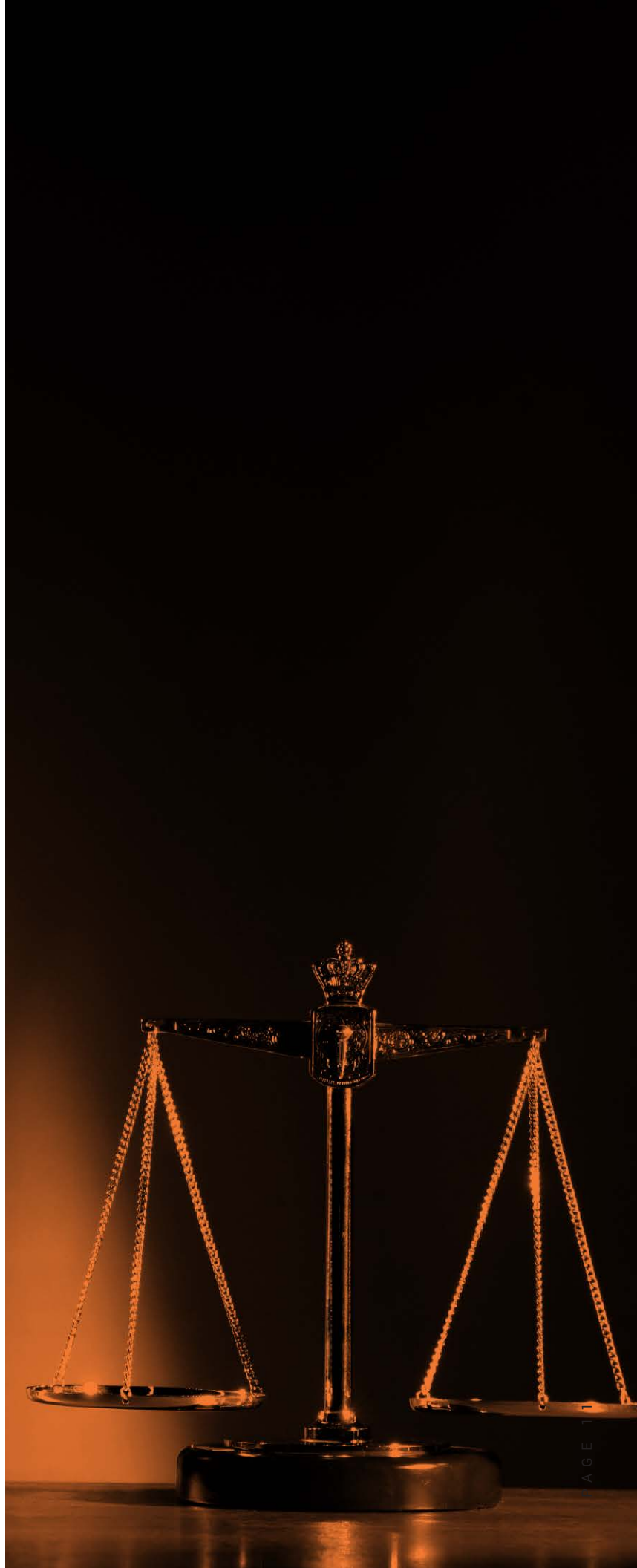
LEGISLATIVE FINDINGS

The following are useful guideposts to help legislators and courts develop practices regarding qualified immunity as well as make clear to everyone in the community that their individual civil rights are the most important consideration.

1. Government's most important responsibility is to protect rights under the laws and constitutions of this State and the United States.
2. Government's violation of rights diminishes the lives, liberty, property and pursuits of individuals.
3. Government's failure to remedy a violation of rights imposes an unjust cost on an injured individual.
4. Government's legitimacy is threatened by the absence of a meaningful civil process for an injured individual to seek redress of a violation of rights.
5. Government is responsible for hiring, training, supervising and retaining employees, and for ensuring they perform their duties consistent with rights under (a) the laws of the municipality, this State or the United States and (b) the constitutions of this State and the United States.
6. The U.S. Supreme Court has interpreted the U.S. Constitution to protect police officers and other government employees against claims of excessive force in an arrest, investigatory stop or other seizure under a standard of objective reasonableness. An objectively reasonable action does not violate the U.S. Constitution. The Court's interpretation of the 4th Amendment protects against second-guessing reasonable split-second decisions made by police officers. The legislature recognizes and agrees with the Supreme Court's precedent.
7. Courts can address frivolous lawsuits. Rules of civil procedure authorize judges (a) to grant a motion to dismiss and (b) to sanction an attorney who files a case to harass a defendant.
8. Courts must be free to engage in fact finding to determine whether a government employee's action violates a constitutional right. By making the government a defendant and the financially responsible party, the legislature wants to free courts to determine if an employee's action violated the constitution (a) unencumbered by doctrines that impede fact finding, like the federal doctrine of qualified immunity, and (b) without the employee being exposed to personal financial liability

END NOTES

1. See *Little v. Barreme*, 6 U.S. 170 (1804).
2. *Pierson v. Ray*, 386 U. S. 547 (1967). <https://case-law.findlaw.com/us-supreme-court/386/547.html>
3. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). <https://caselaw.findlaw.com/us-supreme-court/457/800.html>
4. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). <https://casetext.com/case/zadeh-v-robinson-3>
5. American Bar Association, “Qualified Immunity,” 2020. https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/
6. *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019). <https://law.justia.com/cases/federal/appellate-courts/ca9/17-16756/17-16756-2019-03-20.html>
7. *Sampson v. County of Los Angeles*, 974 F.3d 1012 (9th Cir. 2020). <https://law.justia.com/cases/federal/appellate-courts/ca9/18-55450/18-55450-2020-09-09.html>
8. *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017). <https://law.justia.com/cases/federal/appellate-courts/ca2/16-1443/16-1443-2017-11-22.html>
9. Sibilla, “Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way To Protect Civil Rights,” *Forbes*, 2020. <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=58d53844378a>
10. Reese, “New York’s qualified immunity reforms already paying dividends,” *Daily News*, 2020. <https://www.nydailynews.com/opinion/ny-oped-new-yorks-qualified-immunity-reforms-are-paying-dividends-20210428-iffw-gluk5hs3da6ryesoasxy-story.html>



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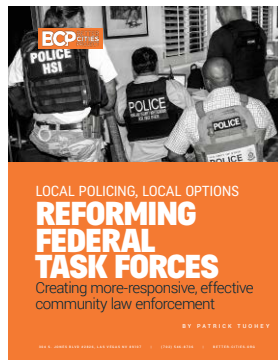
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Patrick’s essays have been published widely in print and online, including the Kansas City Urban League’s 2015 and 2019 “State of Black Kansas City.”



ADDITIONAL READING

This report is one of four created by Better Cities Project as part of its Municipal Policing Project. Each report details a specific, effective reform that creates a more responsive, responsible local law enforcement function without waiting on action from Washington or the statehouse.



bcp.fyi/forfeiture

bcp.fyi/taskforces

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NEXT STEPS
**WE
CAN
HELP.**

Whether you have an office at city hall, the county commission, a desk in a newsroom or a seat at the kitchen table as an informed citizen, BCP can help you explore these and other policy suggestions in depth.

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BCP can help identify specific research and recommendations relevant to your community's challenges, direct you to the right experts for answers and offer presentations related to these and other topics.

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