

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

<p>IN RE: ZELIS REPRICING ANTITRUST LITIGATION</p> <p>This Document Relates To:</p> <p>All Associated Cases</p>	<p>Lead Action Case No.: 1:25-cv-10734-BEM</p> <p><i>Consolidated with Case Nos.:</i></p> <p><i>1:25-CV-11092-BEM</i></p> <p><i>1:25-CV-11167-BEM</i></p> <p><i>1:25-CV-11537-BEM</i></p>
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**PLAINTIFF DENNIS C. AYER, DDS, LLC’S MEMORANDUM IN OPPOSITION
TO DEFENDANT AETNA, INC.’S MOTION TO COMPEL ARBITRATION
WITH RESPECT TO PLAINTIFF DENNIS C. AYER, DDS, LLC**

INTRODUCTION

Defendant Aetna, Inc. (“Aetna”) moves to compel Dr. Dennis C. Ayer, DDS, LLC (“Ayer”) to arbitrate his claims based on a contract that governs only in-network dental services. But Ayer’s antitrust claims relate only to out-of-network (“OON”) dental services, which, by definition, are not governed by contract. Indeed, the decision to perform dental services on an OON basis is an affirmative decision to not be subject to a contract. Thus, Ayer’s antitrust claims against Zelis and Commercial Payers are plainly outside the scope of the arbitration agreement as they do not “arise out of or relate to” his agreement with Aetna to perform in-network dental services. As a result, Aetna’s motion is beyond the scope of the Federal Arbitration Act (“FAA”), which makes arbitration agreements enforceable only to the extent they mandate arbitration of disputes “arising out of” the contract containing the arbitration provision. Courts regularly decline to grant similar motions because courts have no authority to compel arbitration where the FAA does not apply. Additionally, Aetna’s motion fails as a matter of contract formation because the parties did not agree to arbitrate this dispute. Ayer thus respectfully requests that the Court deny Aetna’s motion.

RELEVANT BACKGROUND

Ayer alleges that the Commercial Payer Defendants¹ conspired with Zelis² and others to suppress OON payments to healthcare service providers (“Providers”) in violation of Section 1 of the Sherman Act. ECF No. 39, at ¶1. The conspiracy is unconcerned with in-network claims, which—unlike OON claims—are governed by contract and heavily-discounted fee schedules that the Provider agrees to accept to gain access to a network’s members. *Id.* at ¶¶ 3-4. A driving force behind performing dental services on an OON basis is to be unbound by such network contracts. Defendants’ joint motion to dismiss, joined by Aetna, explicitly acknowledges that OON payments are not governed by contract:

- "To the extent Plaintiffs have chosen to be OON, they have ***no contractual relationship with the MCOs***; rather, the patient contracts with the MCO, and the MCO’s obligation, if any, is only to the patient." ECF No. 97 at 3 (emphasis added).
- "Importantly, whenever a patient receives care from an OON provider, that ***provider does not have a contract or negotiated in-network rates with the MCO***, and thus has not agreed to abide by the health plan’s terms and conditions or quality guidelines." ECF No. 97 at 7 (emphasis added).³

Aetna’s “Dental Provider Agreement” with Ayer relates to in-network payment and claim submission, referred to therein as “Covered Services.” Ayer Decl., Ex. A. The relevant text of the arbitration clause in Section 8.3 of the agreement reads: “Any controversy or claim arising out of

¹ The Commercial Payer Defendants include Aetna, Inc., the Cigna Group, The Elevance Health Companies, Inc., Humana, Inc., and UnitedHealth Group, Inc. ECF No. 39, ¶¶ 34-39.

² “Zelis” or the “Zelis Defendants” refers to Zelis Healthcare, LLC, Zelis Claims Integrity, LLC, and Zelis Network Solutions, LLC. ECF No. 39, ¶¶ 30-33.

³ Aetna also admitted in other litigation that OON claims are not governed by contract: “Aetna admits that some healthcare providers are ‘in-network’ with Aetna meaning they have a contract with Aetna to provide services for a mutually agreed upon negotiable rate. **Aetna also admits that some healthcare providers do not have any such contract with Aetna where they have an agreed upon rate for services and are thus ‘out-of-network’ for that service.**” *See In Re MultiPlan Health Ins. Provider Litig.*, 1:24-cv-06795, MDL No. 3121, ECF No. 473, (N.D. Ill., Aug. 12, 2025) (Answer to Plaintiffs’ Consolidated Class Action Complaint) (emphasis added).

or relating to this Agreement, including breach, termination, or validity of this Agreement, except for temporary, preliminary, or permanent injunctive relief or any other form of equitable relief, shall be settled by binding arbitration.” *Id.* at 14. The agreement contains a “ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁴ The agreement’s arbitration clause applies to in-network claims submission and payment—not to Ayer’s claims concerning a conspiracy to reprice OON claims. *Id.*

I. Legal Standard

Aetna, as the party attempting to compel arbitration, has the burden to show that (1) a valid arbitration agreement exists, (2) it is entitled to invoke the arbitration clause, (3) Ayer is bound by that clause, and (4) the claim asserted comes within the clause’s scope. *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003). Courts apply the summary judgment standard in deciding motions to compel arbitration under the Federal Arbitration Act (“FAA”). *Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, 21 F.4th 168, 175 (1st Cir. 2021). Under this standard, the facts are construed in the light most favorable to the non-moving party and all reasonable inferences are drawn in his favor. *Id.* “If the non-moving party puts forward materials that create a genuine issue of fact about a dispute’s arbitrability, the district court ‘shall proceed summarily’ to trial to resolve that question.” *Id.* (quoting 9 U.S.C. §4).

II. Argument

Ayer does not dispute the existence of a contract between himself and Aetna for the

⁴ Ayer Decl., Ex. A at 24-26; *id.*, Ex. B.

performance of in-network dental services. Instead, he asserts that his antitrust claims—arising from a conspiracy to suppress OON pricing—do not arise out of or relate to his network agreement with Aetna and are thus not subject to arbitration.

A. Aetna’s Motion Should be Denied Because Ayer’s Claims are Outside the Scope of the Arbitration Clause.

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit.” *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582 (1960)). Whether a claim is outside the scope of an arbitration clause is a question of law for the district court’s determination. *Combined Energies v. CCI, Inc.*, 514 F.3d 168, 171 (1st Cir. 2008) (affirming claims were outside scope of arbitration clause because “the gravamen of [plaintiff’s] allegations ... reverberate far beyond the [agreement] and would stand regardless of the parties’ rights and responsibilities as defined by that contract.”).⁵ “To determine whether [the plaintiff’s] claims fall within the scope of the arbitration clause, [courts focus] on the factual allegations underlying [the] claims in the [c]omplaint.” *Id.*

Ayer’s antitrust claims concern a conspiracy to suppress payment to Providers for OON dental services. The agreement between Ayer and Aetna is for payment of in-network claims, or individuals covered by or enrolled in a Plan (Members) for Covered Services.⁶ Tellingly, the single covenant in the agreement explicitly contemplates only Aetna’s payments for in-network services:

⁵ See *Combined Energies v. CCI, Inc.*, 484 F.Supp.2d 186, 189 (D. Me. 2007) (finding claims outside the scope of a purchase order agreement (“POA”) because “[t]he Complaint does not claim any disputes between CCI and CE about the work CE performed under the POA, about payment in accordance with that work, about change orders, delay, quality of workmanship, or the myriad of other commonplace controversies between general contractors and subcontractors.”).

⁶ “

“**WHEREAS**, Company contracts with certain dental providers to provide dental services to Members and in return for the provision of dental services by providers, Company will pay or arrange for the payment of claims for Covered Services under the terms of this Agreement.”

Ayer Decl., Ex. A at 3.

Aetna’s sole argument that Ayer’s claims “arise out of or relate to” the agreement is based on a single, inapplicable sentence in Section 4.3.1 (Permitted Billing of Members) of the agreement:

“Provider may bill or charge Members [for] (d) services that are not Covered Services only if (i) the Member’s Plan provides and/or Company confirms that the specific services are not Covered Services; (ii) the Member was advised in writing prior to services being rendered that the specific services may not be Covered Services; and (iii) the Member agreed in writing to pay for such services after being so advised.”

Ayer Decl., Ex. A at 9-10.

As Aetna is well aware, this provision refers to a practice known as balance billing, where a Provider bills a patient directly out-of-pocket for OON healthcare services that are not covered by their insurance provider. *See* ECF No. 39, p.4, ¶5. Ayer’s complaint relates to Commercial Payers’ and Zelis’ manipulation of payment made to OON Providers—not whether or how Ayer may balance bill his patients. There is no ambiguity as to the scope of the arbitration clause: it does not relate to Ayer’s claims.

B. The Arbitration Clause is Beyond the Scope of the FAA and Cannot Be Enforced.

Aetna asserts that the FAA and related substantive law govern the enforceability of the agreement. In making its argument, Aetna overlooks a fundamental limitation in the text of the FAA itself: “[t]he FAA’s scope is limited to “agreements to arbitrate controversies that ‘*arise out of*’ the parties’ contractual relationship.” *Davitashvili v. Grubhub Inc.*, 131 F.4th 109, 119 (2d Cir. 2025) (emphasis added). Aetna’s motion thus similarly fails because the dispute it asks the Court to compel to arbitration under the FAA is beyond the scope of the Act.

As discussed above, the claims Aetna improperly seeks to arbitrate do not “arise out of or relate

to” Ayer’s network agreement in any way. In *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), the Court explained that this language “normally refers to a causal relationship.” *Id.* at 652 n.4; *see also Davitashvili*, 131 F.4th at 119 (“The FAA’s scope is limited to ‘agreements to arbitrate controversies that ‘arise out of’ the parties’ contractual relationship’—that is, controversies that were ‘cause[d]’ by the relationship.”). No such causal relationship exists here.

Davitashvili is instructive. There, the plaintiffs alleged that Grubhub and other online ordering platform defendants conspired to violate the antitrust laws by inducing restaurants to set artificially high prices. 131 F.4th at 113. Grubhub moved to compel arbitration, arguing that the plaintiffs’ claims were “related to Plaintiffs’ ‘access and use of Grubhub’ and thus ... within the scope [its] arbitration provision.” *Id.* at 119. The Second Circuit disagreed, reasoning:

Plaintiffs’ claims—that Defendants violated federal and state antitrust law by inducing restaurants to agree to NPCCs—have nothing to do with Plaintiffs’ individualized use of Grubhub’s website or mobile application. Rather, their claims concern their access and use of *other* platforms and restaurants; they allege that they pay higher prices when ordering from these entities because of Grubhub’s anticompetitive practices.

Id. That rationale applies even more forcefully here. Ayer’s antitrust claims—that Aetna conspired with Zelis and the other Commercial Payer Defendants to suppress *out-of-network* payments to Providers—have nothing to do with his network agreement, governing his *in-network* relationship with Aetna. Rather, Ayer’s claims relate to suppressed OON payments received from Aetna and other Commercial Payer Defendants as a result of anticompetitive practices. Any in-network payments Ayer received from Aetna under the network agreement are, by definition, outside the scope of this dispute.

To illustrate this point, the Second Circuit observed that “Plaintiffs who never used Grubhub are just as much class members as those who have. Indeed, Grubhub does not dispute that at least some plaintiffs have ‘well-plead[ed]’ claims despite never having used any of the [D]efendants’

platforms.” *Id.* at 120. The same is true here. Consider a hypothetical plaintiff who never had a network participation agreement with *any* Commercial Payer Defendant. *All* of the payments that plaintiff received from the Commercial Payer Defendants would be at issue in this lawsuit because they would all be out-of-network. Accordingly, the fact that Ayer has a network agreement with Aetna “is purely coincidental.” *Id.*

As a result, a series of dominos fall. Ayer’s lawsuit does not “aris[e] out of” his network agreement. The arbitration clause is therefore outside the scope of the FAA with respect to this dispute. And because the FAA is inapplicable, so too is the body of Supreme Court case law interpreting the FAA. *See Calderon v. Sixt Rent a Car, LLC*, 5 F.4th 1204, 1214 (11th Cir. 2021). (concluding that *Moses H. Cone* does not apply where lawsuit does not arise out of the agreement containing the arbitration clause); *McFarlane v. Altice USA, Inc.*, 524 F. Supp. 3d 264, 277-78 (S.D.N.Y. 2021) (declining to apply *Concepcion* and the FAA policy favoring arbitration where arbitration clause purported to require arbitration of disputes “wholly unrelated to the contract in which it is contained”); *Davitashvili*, 131 F.4th at 124 (Pérez, J. concurring) (“Where claims do not ‘arise out of’ the contract at issue, that means no [*Moses H. Cone*] federal presumption of arbitrability ... and no [*Concepcion*] preemption of state law perceived as hostile to arbitration.”).

In *Davitashvili*, the Second Circuit went on to hold that, because the plaintiffs’ antitrust claims did not arise out of the agreement containing the arbitration clause within the meaning of the FAA, it could not compel arbitration of their antitrust claims. *Id.* at 120. As Judge Pérez elaborated in her concurrence:

[I]mportant consequences follow where the FAA does not apply due to a lack of nexus. First, the FAA gives federal courts “no power to compel arbitration” in such cases.... Because Grubhub moved to compel only under the FAA, that is sufficient to resolve the issue for now.

Id. at 124. Because Aetna has only moved to compel arbitration under the FAA,⁷ the Court should reach the same conclusion here and deny Aetna’s motion.

C. The Parties Did Not Agree to Arbitrate Ayer’s OON Claims at Issue.

Courts generally apply state-law contract formation principles to determine whether the parties agreed to arbitrate a particular dispute. *Combined Energies*, 514 F.3d at 171. Under Kansas law, which governs Ayer’s network agreement with Aetna (*see* Ayer Decl., Ex. A at 15 (§ 9.3)), formation of a binding contract requires the evidence to show with reasonable definiteness that “the minds of the parties met upon the same matter and agreed upon the terms of the contract.” *Duling v. Mid Am. Credit Union*, 530 P.3d 737, 745 (Kan. App. 2022) (quoting *Steele v. Harrison*, 552 P.2d 957 (Kan. 1976)). Kansas interprets this as what a reasonable person would have understood the contract to mean under the circumstances. *First Nat. Bank of Lawrence v. Methodist Home for the Aged*, 309 P.2d 389, 392 (Kan. 1957) (looking to “what a reasonable person, in the position of the other party to the agreement, would have understood them to mean under the existing conditions and circumstances”).

No reasonable person would think that signing Aetna’s network agreement would force them to arbitrate out-of-network disputes. Rather, a reasonable person would be expressing, at most, an intent to agree to arbitrate disputes connected in some way to the network agreement. But as previously demonstrated,⁸ there is no connection whatsoever between Aetna’s network agreement and Ayer’s OON antitrust claims. Accordingly, should the Court reach this issue,⁹ the Court should

⁷ *See* Aetna’s Mot. Compel. Abr., ECF No. 101 (moving to compel “pursuant to the Federal Arbitration Act (“FAA”) (9 U.S.C. § 1 et seq.)”); Aetna’s Br., ECF No. 103-1, pp1-2 (same).

⁸ *See supra* Section II. A.

⁹ As discussed in the previous section, because Aetna has only moved to compel under the FAA, and Aetna seeks to compel a dispute that is outside the FAA’s scope, that is a sufficient basis to deny Aetna’s motion. *See supra* Sec. IV.A.

hold that the arbitration clause is unenforceable with respect to Ayer's claims as a matter of contract formation.

D. Even if Ayer's Claim Was Arbitrable, Any Stay Should be Limited.

Should the Court find that the dispute is arbitrable, any stay should be limited to claims between Ayer and Aetna, excluding any claims for temporary, preliminary, permanent injunctive relief, and equitable relief per the terms of the arbitration clause. Ayer Decl. Ex. A at 15. While Aetna does not appear to argue that any proceedings should be stayed as to Zelis and the remainder of the Commercial Payer Defendants, any such argument should be rejected as those parties are not signatories to the agreement, and a stay would be futile.

CONCLUSION

Aetna has not met its burden to show that Ayer's claims are within the scope of the agreement, which concerns the submission and payment of in-network dental claims. The Court should deny Aetna's motion to compel arbitration.

Dated: September 22, 2025

Respectfully submitted,

/s/ Richard M. Paul III

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**UNITED STATES DISTRICT COURT
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**DECLARATION OF DENNIS C. AYER IN SUPPORT OF
MEMORANDUM IN OPPOSITION TO DEFENDANT
AETNA, INC.'S MOTION TO COMPEL ARBITRATION**

DECLARATION OF DENNIS C. AYER

I, Dennis C. Ayer, hereby declare and state as follows:

1. I am the owner of Plaintiff Dennis C. Ayer, DDS, LLC. I have personal knowledge of the matters stated herein, and if asked to testify thereto, I would do so competently. I submit this declaration in support of Plaintiffs' Memorandum in Opposition to Defendant Aetna, Inc.'s Motion to Compel Arbitration.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Dental Provider Agreement between Aetna, Inc., and Dennis C. Ayer ("Aetna Agreement").

3. Attached hereto as **Exhibit B** is a true and correct copy of the Aetna Dental Fee Schedule 311 provided to Plaintiff Dennis C. Ayer, DDS, LLC pursuant to the Aetna Agreement attached to Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 18th of September, 2025.

A handwritten signature in cursive script that reads "Dennis C. Ayer". The signature is written in black ink and is positioned above a horizontal line.

Dennis C. Ayer

EXHIBIT A

REDACTED PUBLIC VERSION

DENTAL PROVIDER AGREEMENT

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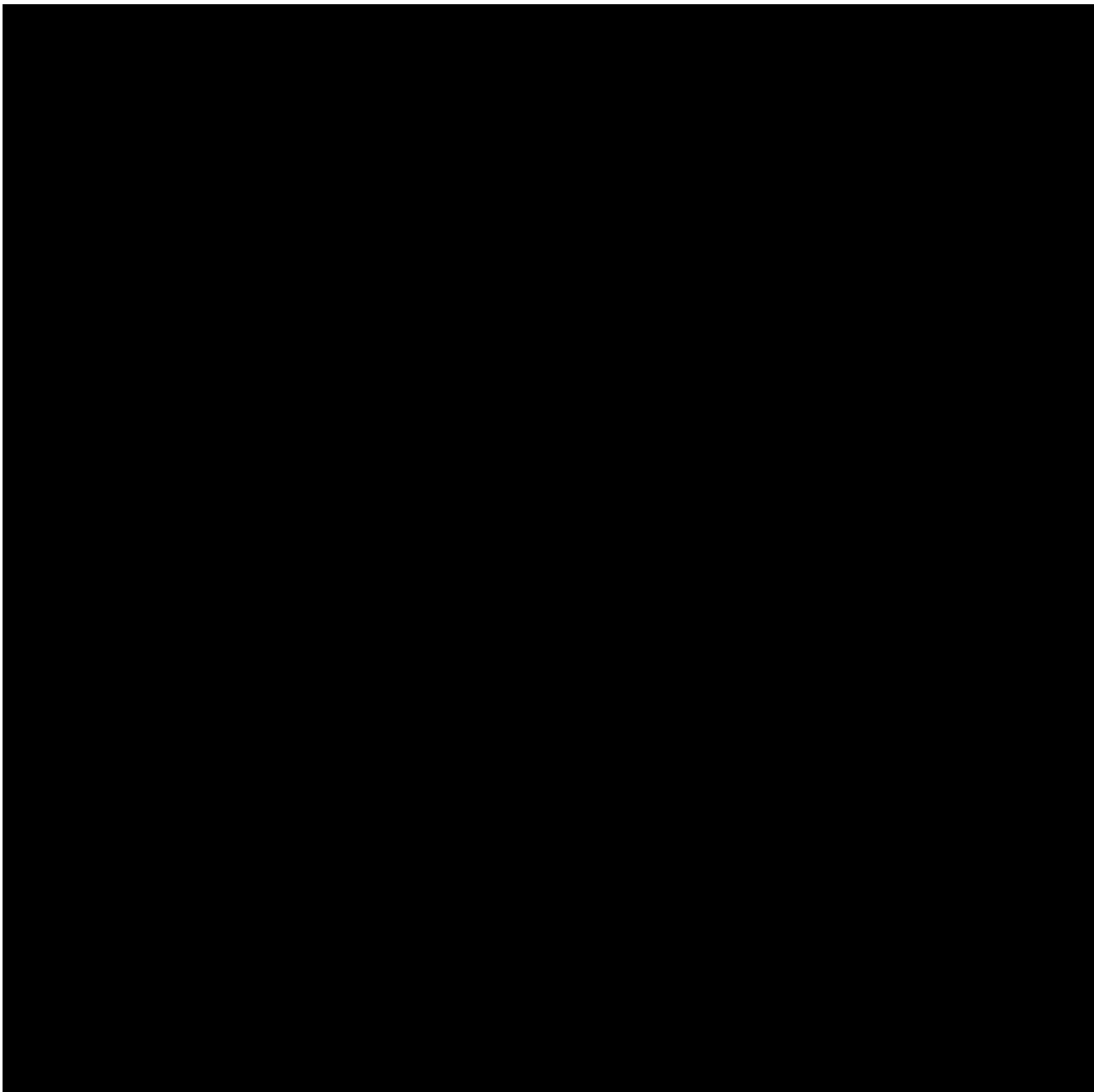
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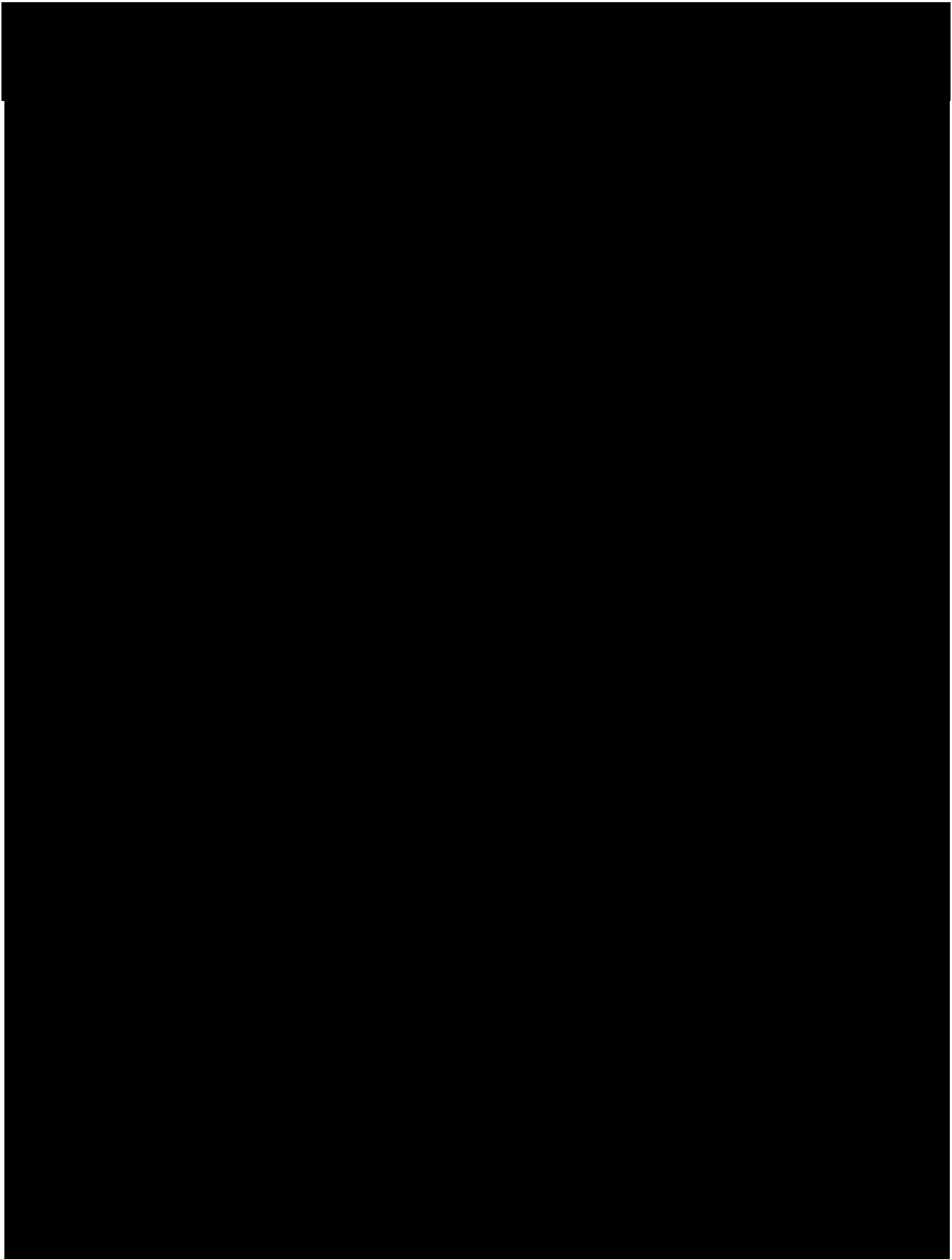
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DENTAL PROVIDER AGREEMENT

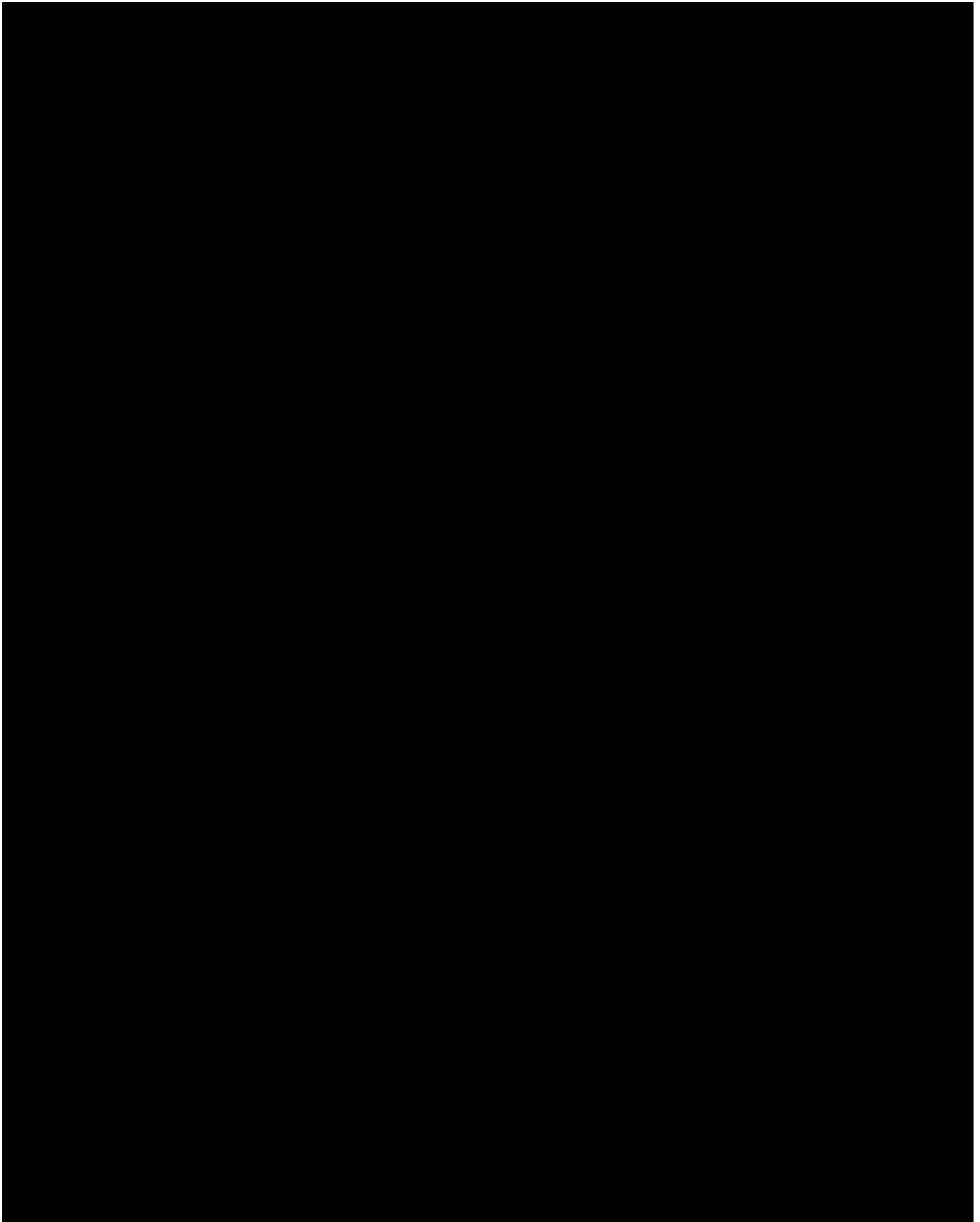
This Dental Provider Agreement ("Agreement") is made and entered into as of _____, 20__ ("Effective Date") by and between Aetna Health Inc., a Pennsylvania corporation, on behalf of itself and its Affiliates (hereinafter "Company") and _____ Dennis Ayer (hereinafter "Provider"). The **Regulatory Compliance Addendum** attached to this Agreement as Exhibit A is expressly incorporated into this Agreement and is binding upon the parties to this Agreement. In the event of any inconsistent or contrary language between the Regulatory Compliance Addendum and any other part of this Agreement, including but not limited to exhibits, attachments or amendments, the parties agree that, to the extent applicable, the provisions of the Regulatory Compliance Addendum shall prevail.

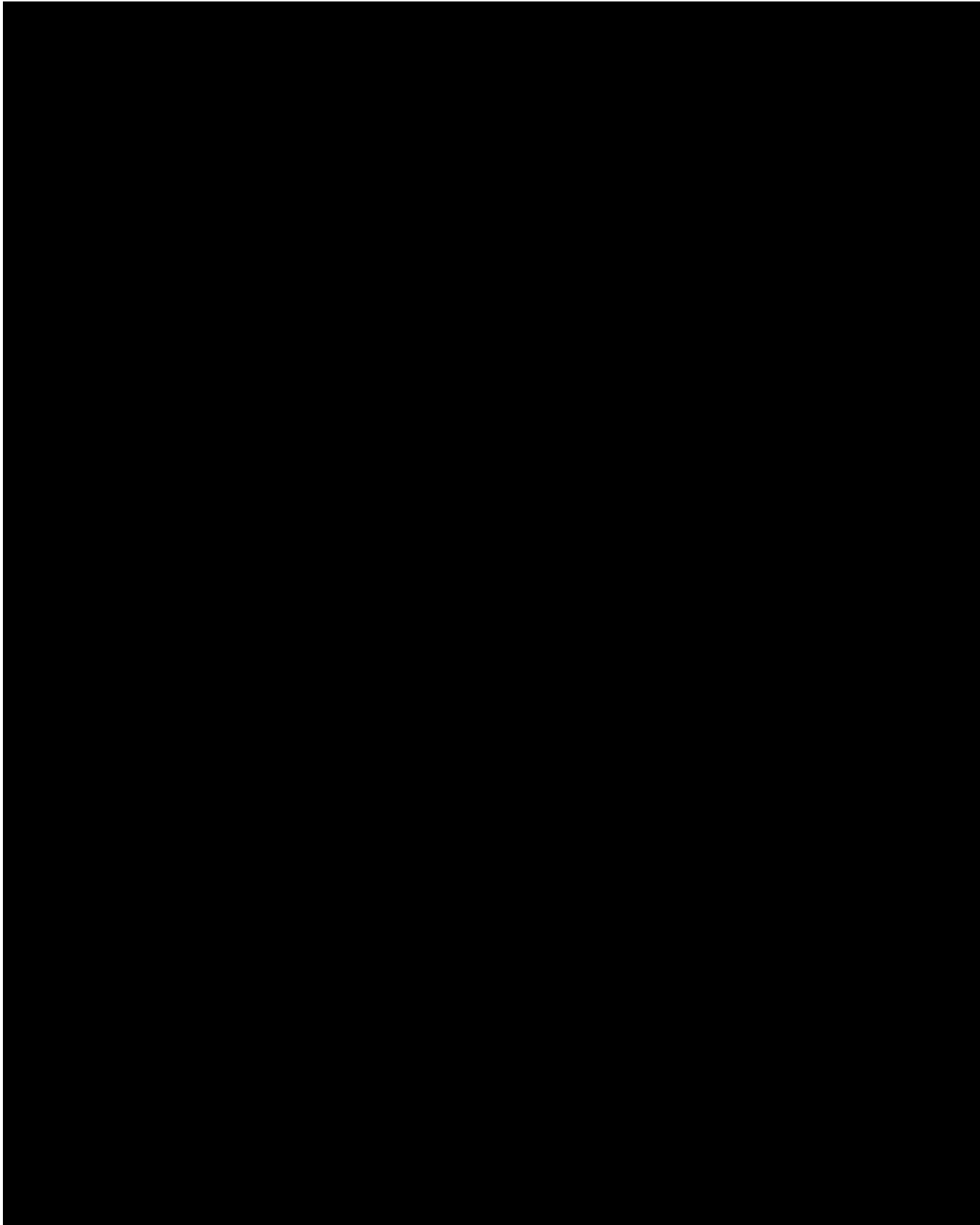


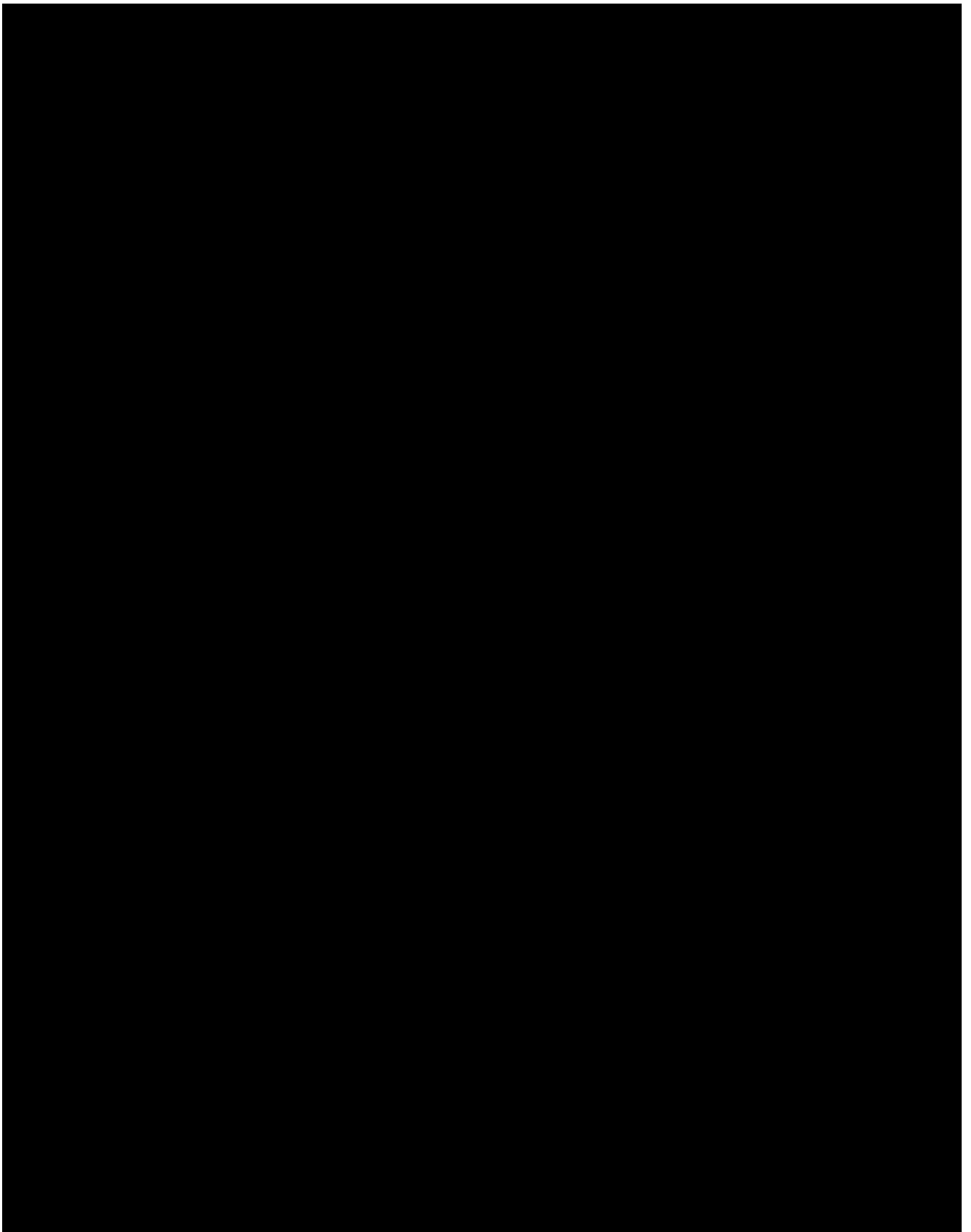


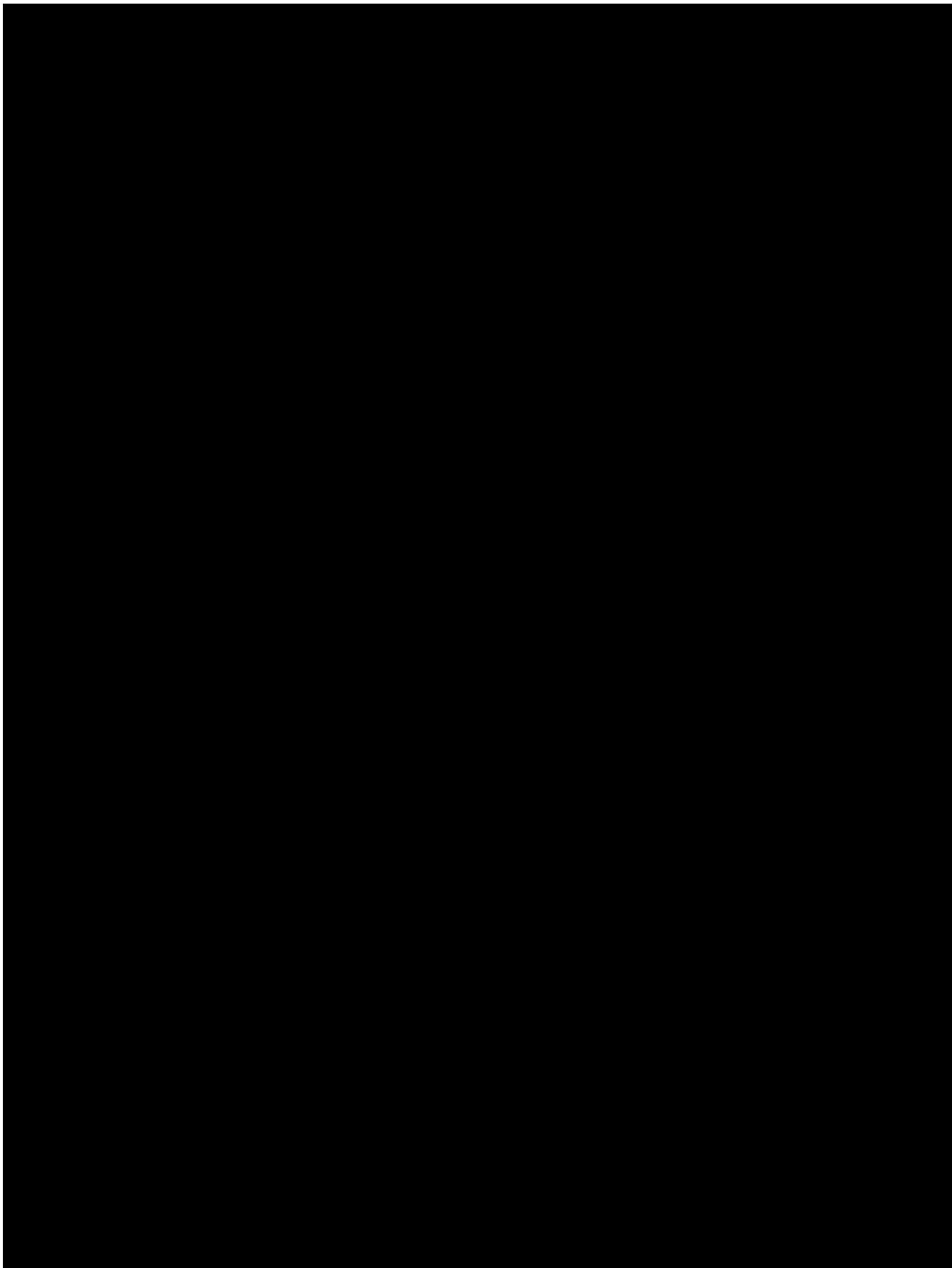
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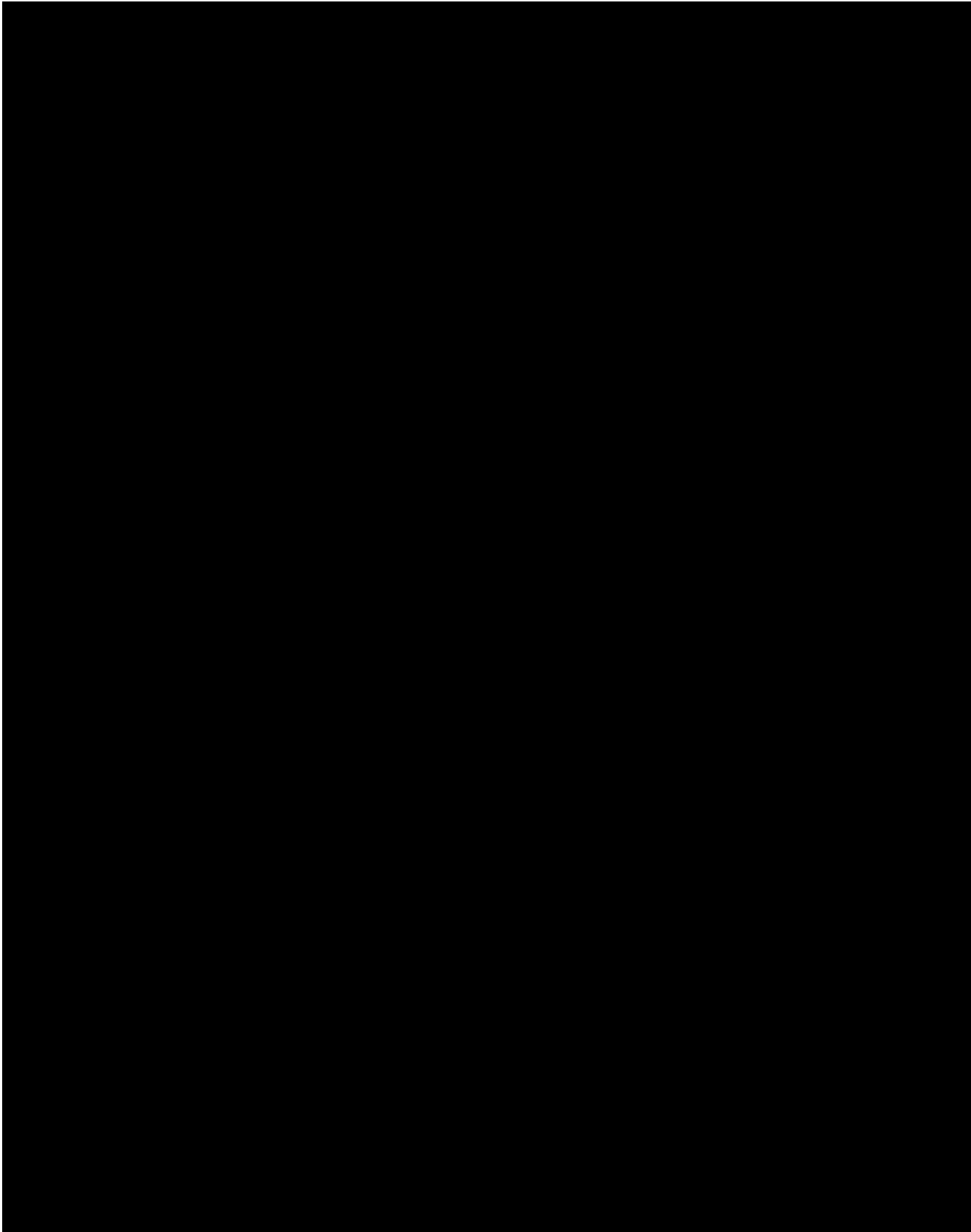


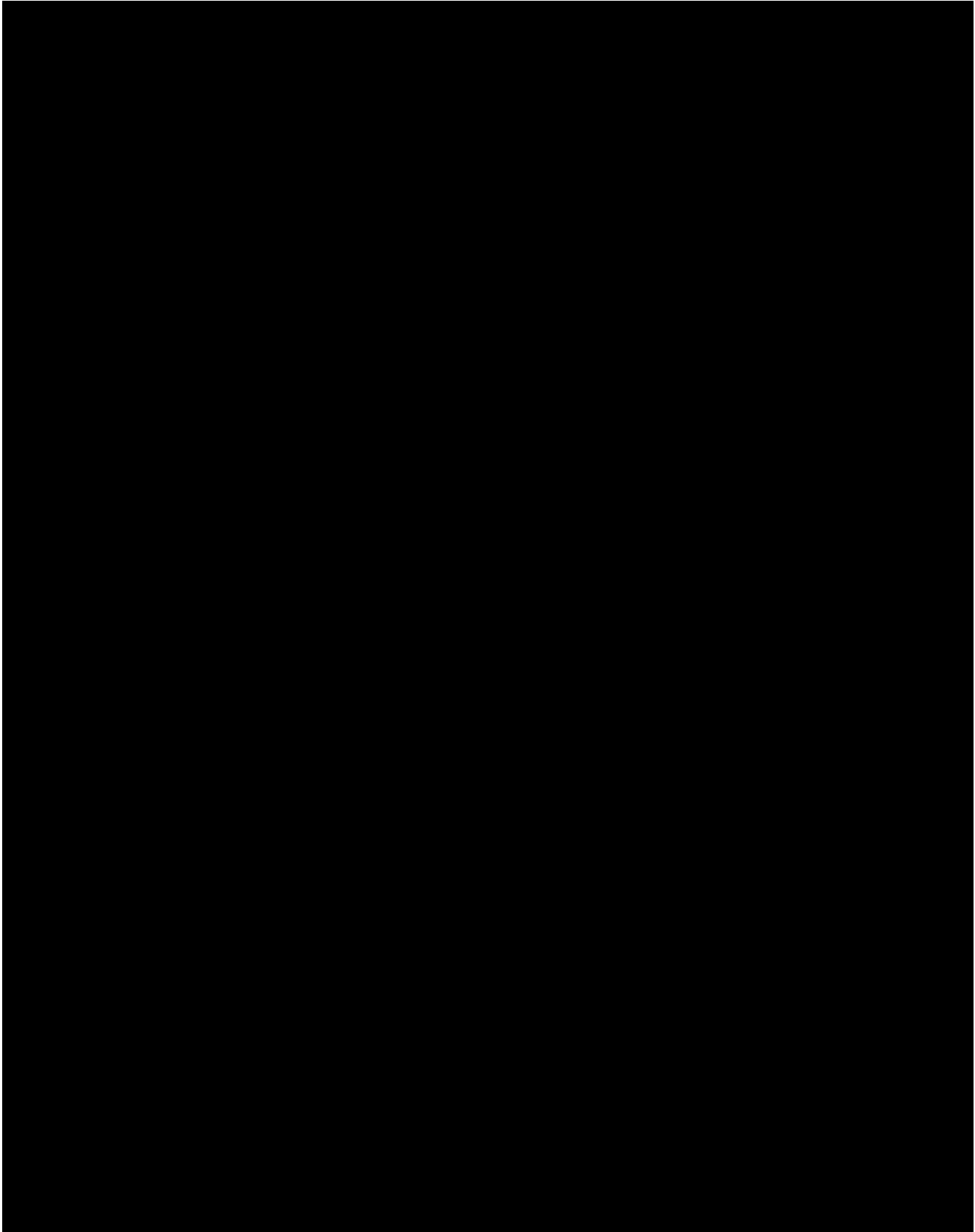


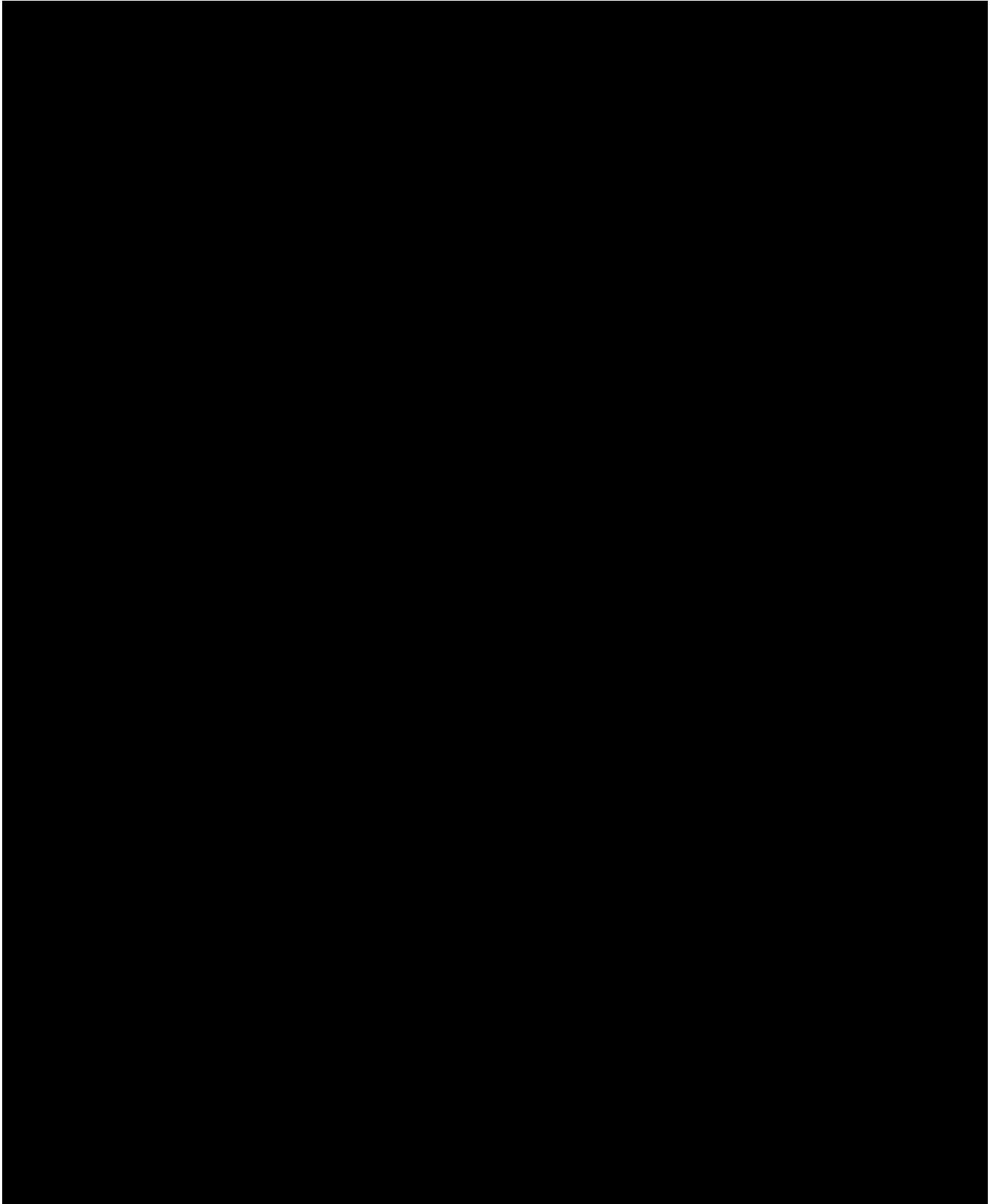


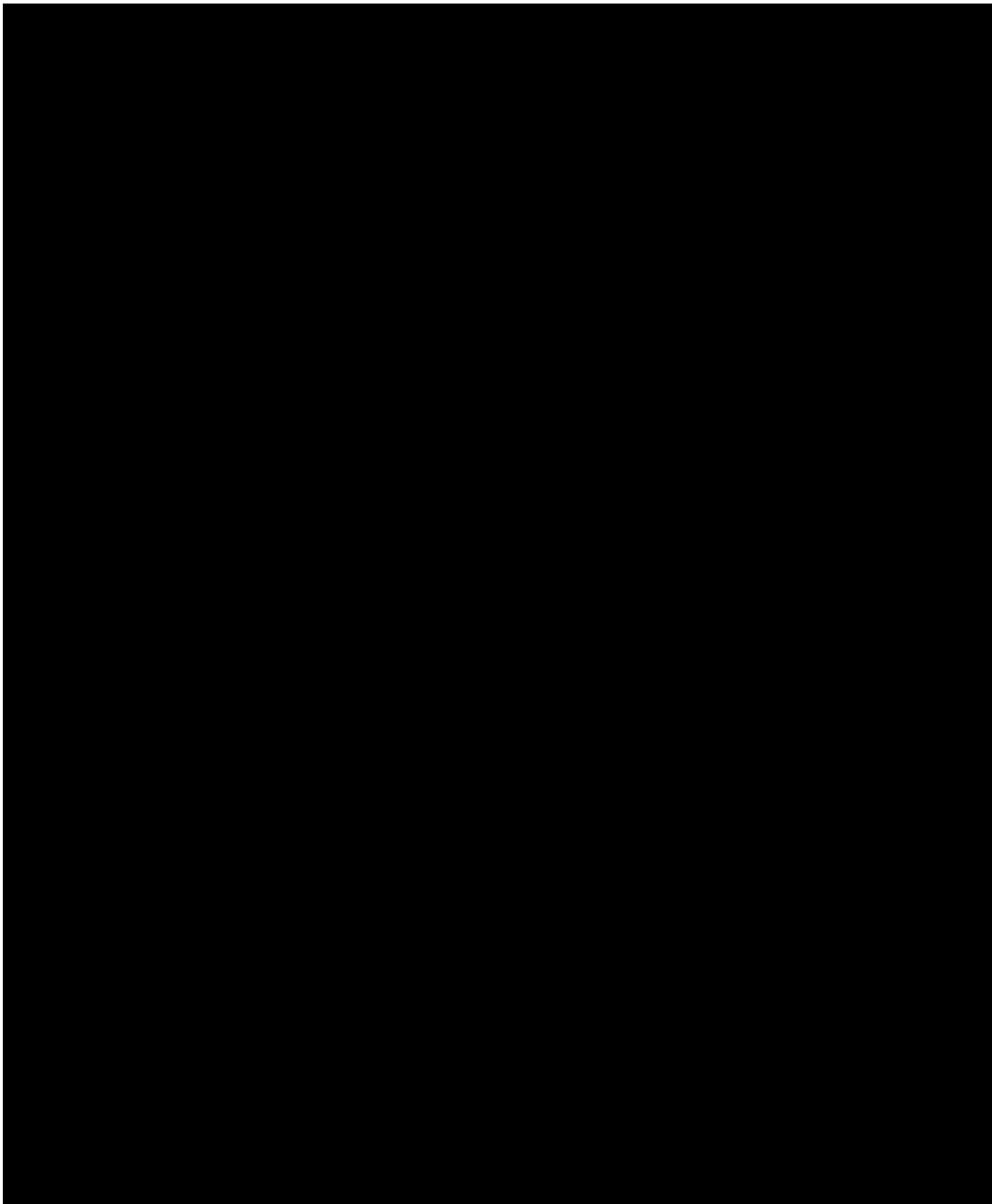


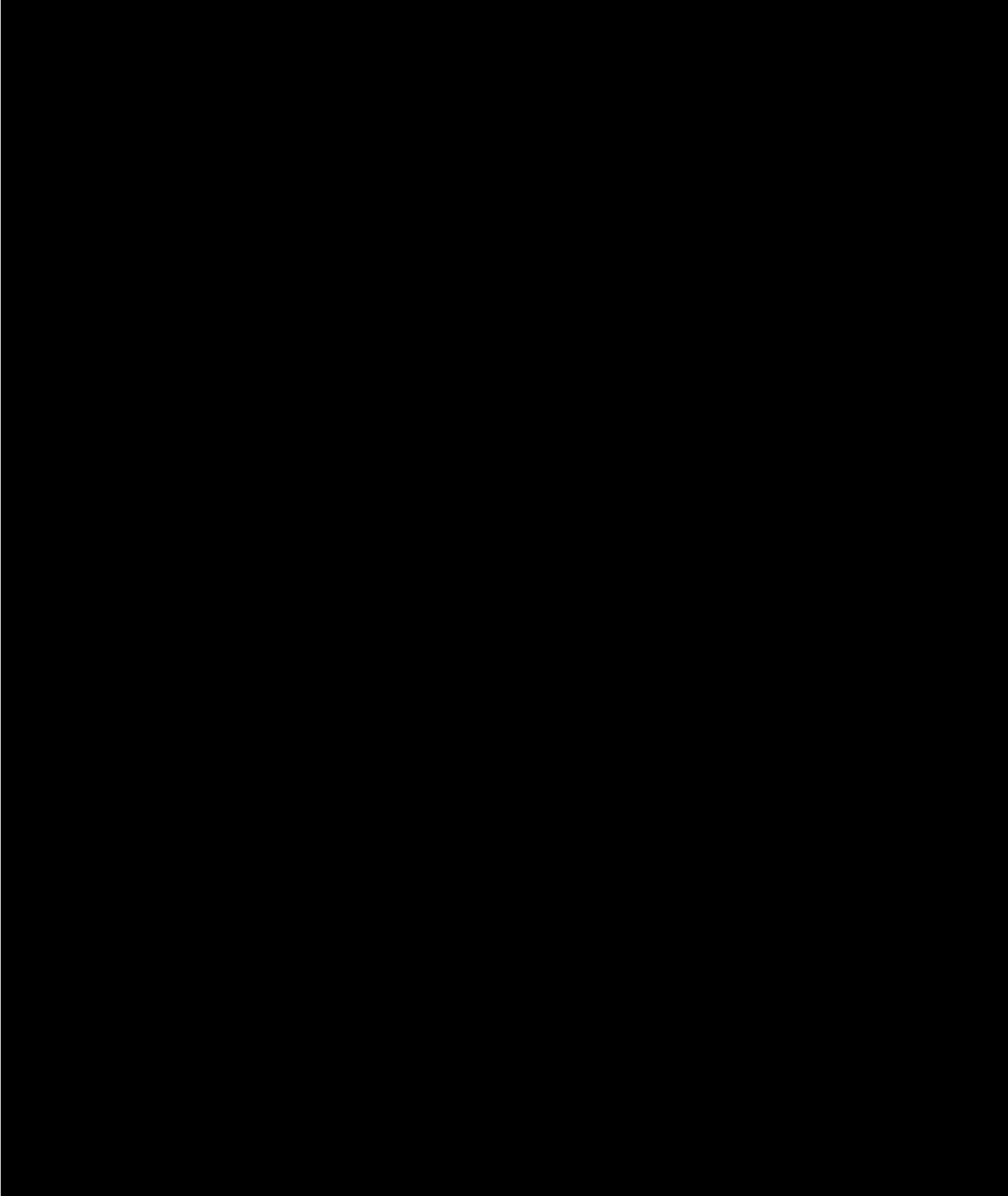


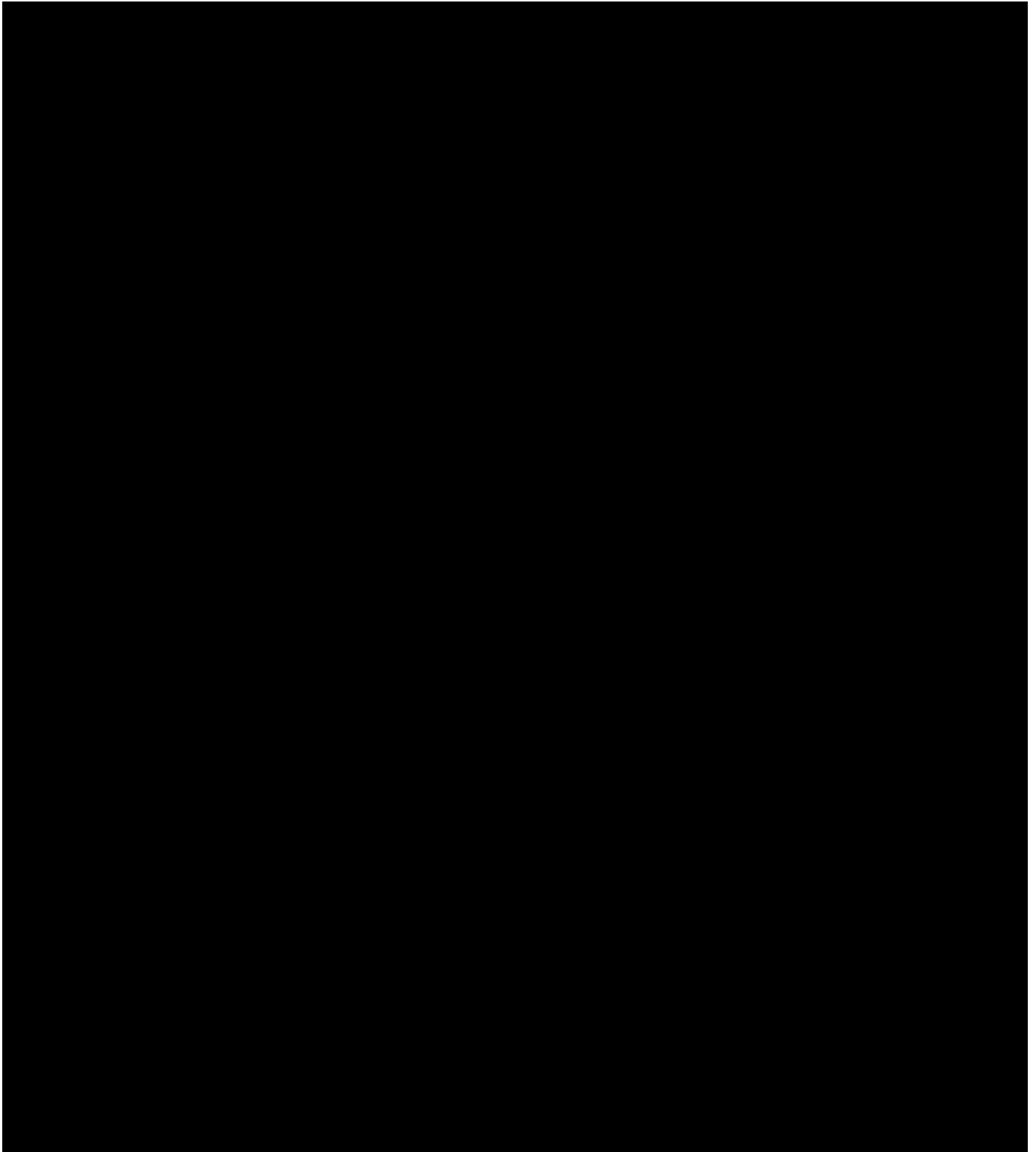


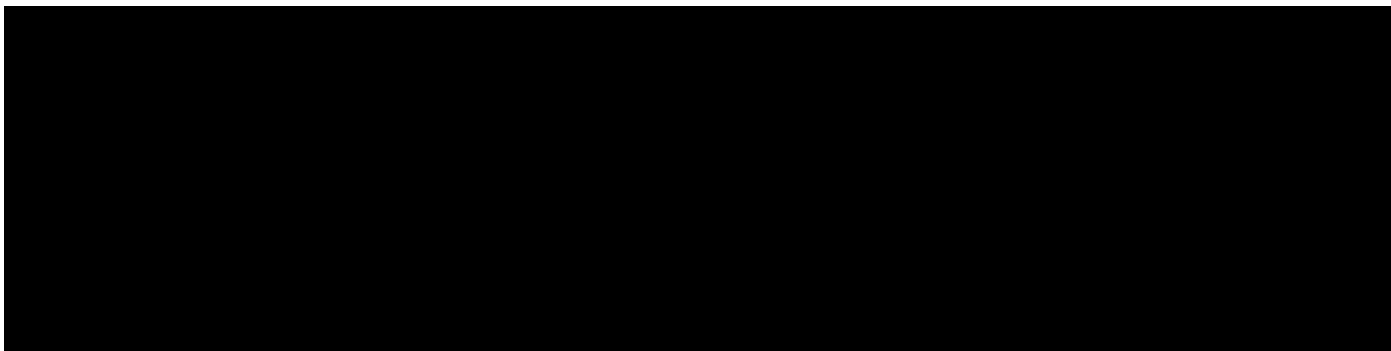












PROVIDER

Signature:

Printed Name: Dennis Ayer

Title: DDS Owner

Ex: DDS, DMD, TIN Owner etc.

Date: 11/8/2018

FEDERAL TAX I.D. NUMBER: 

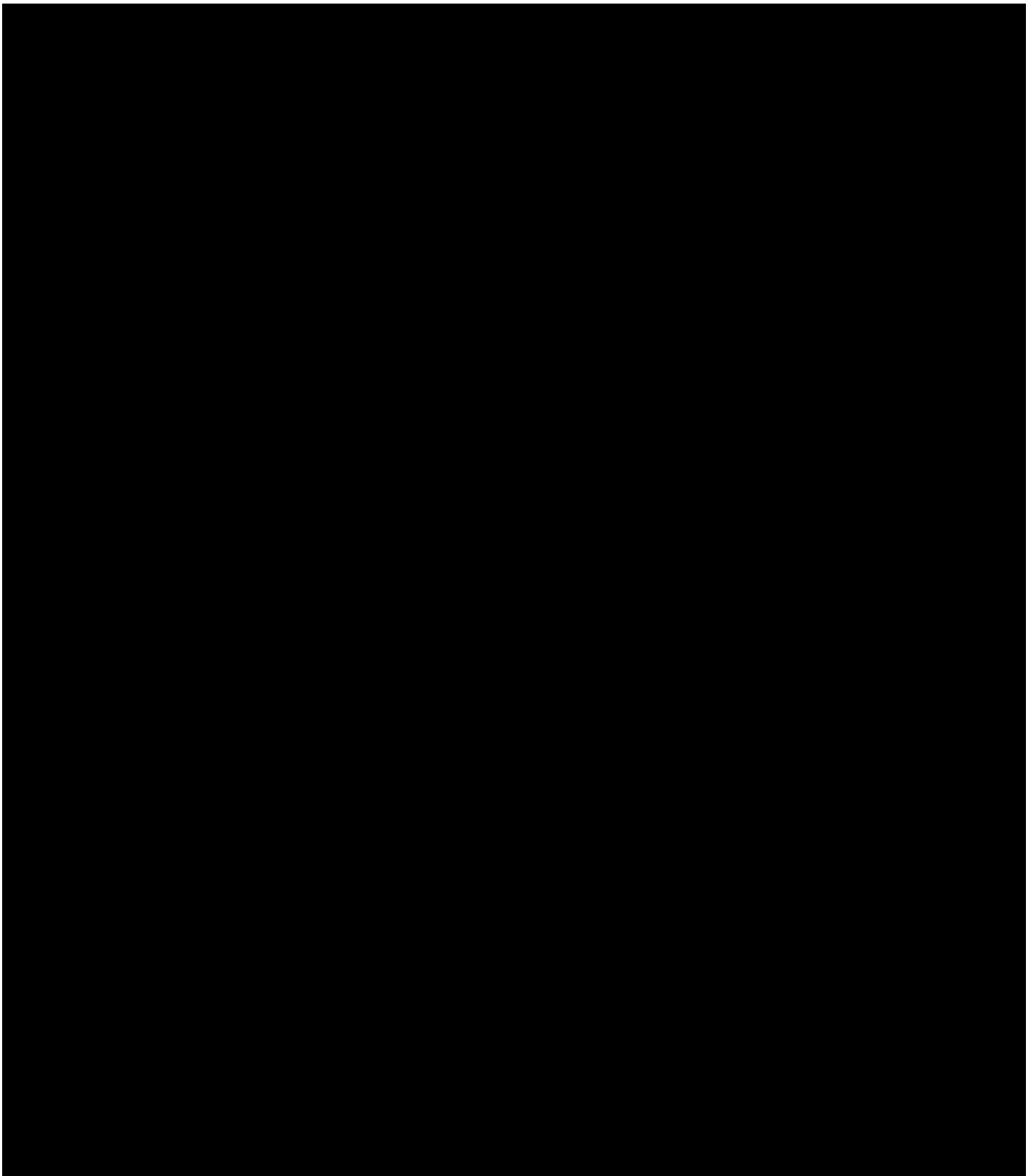
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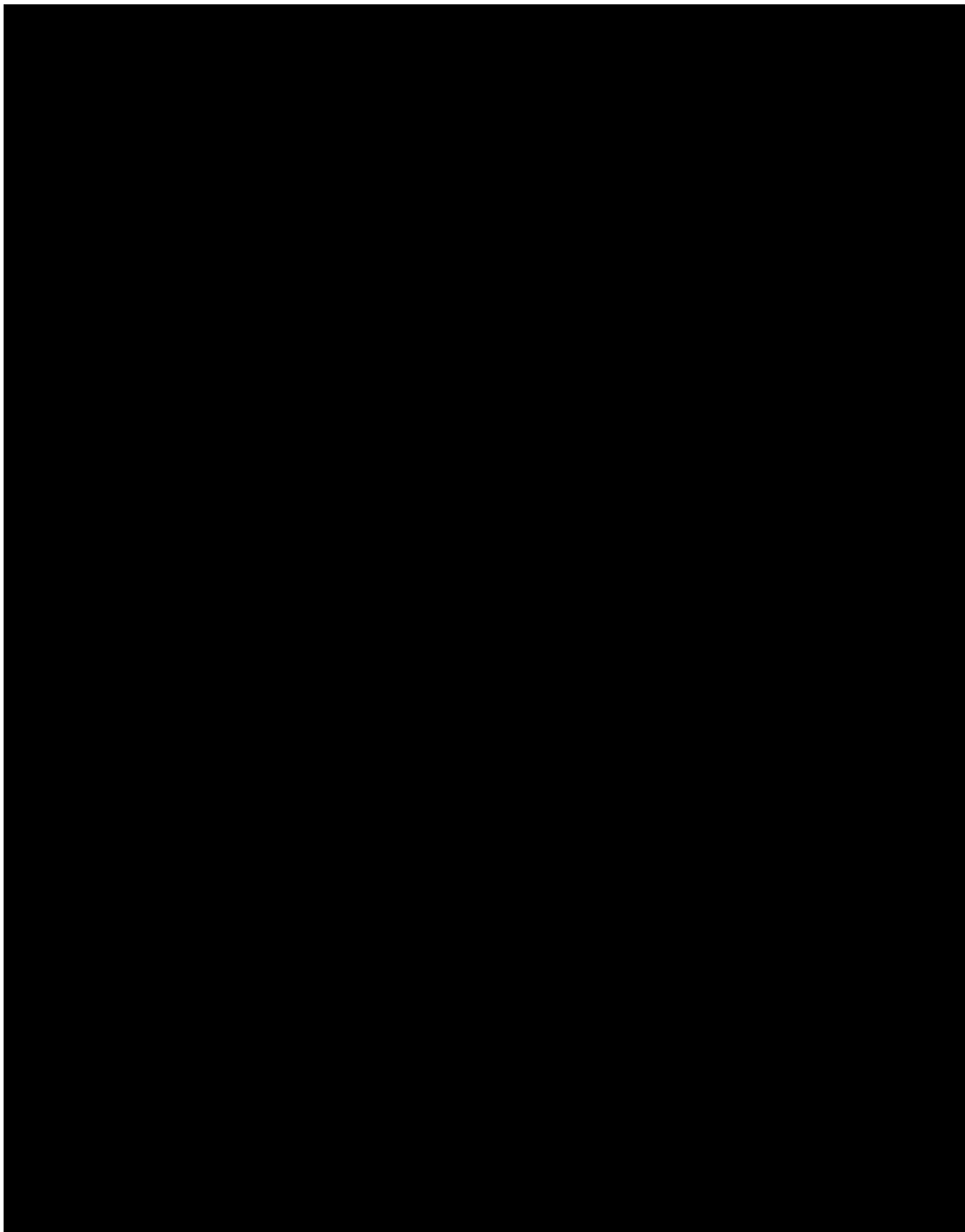
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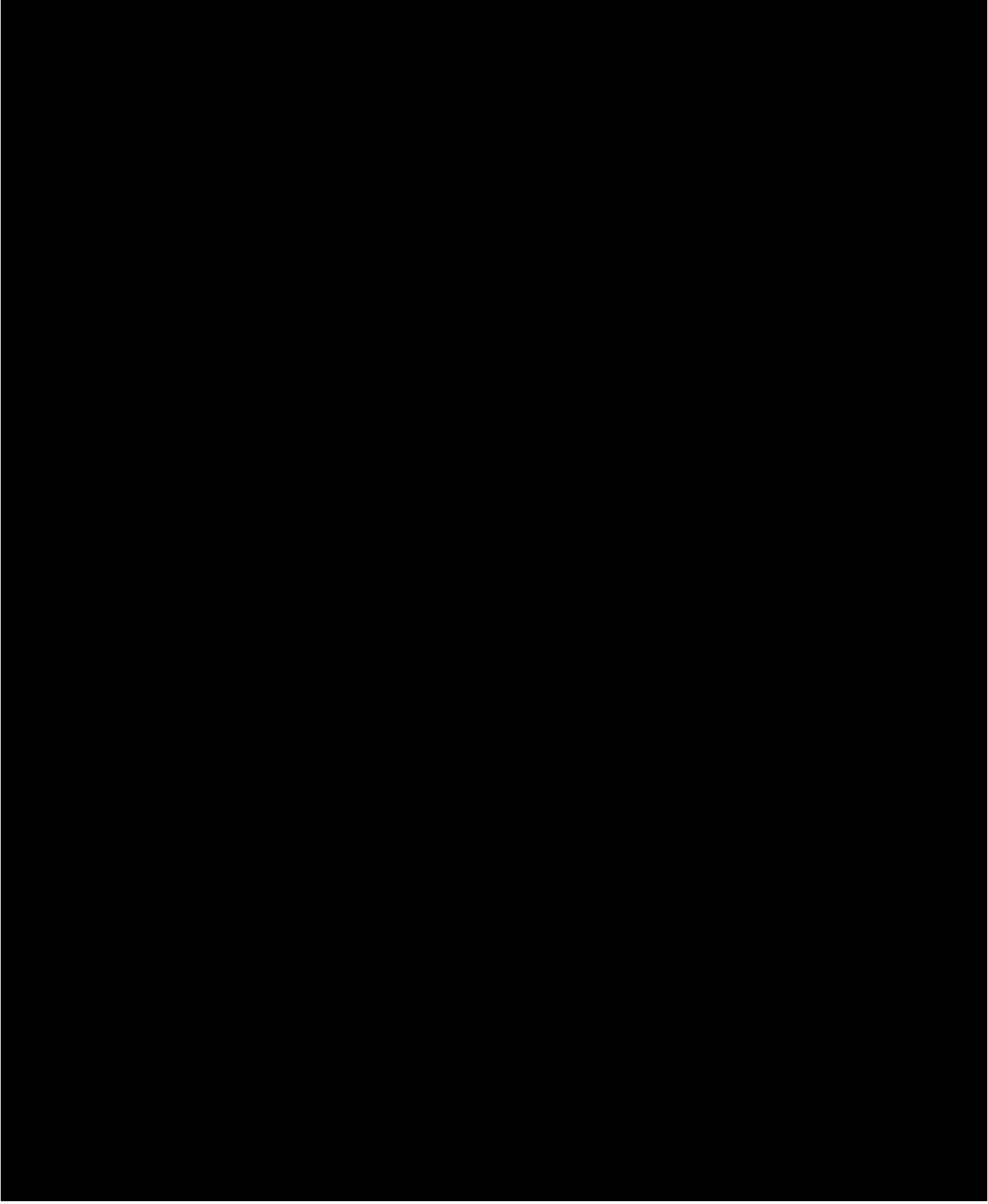
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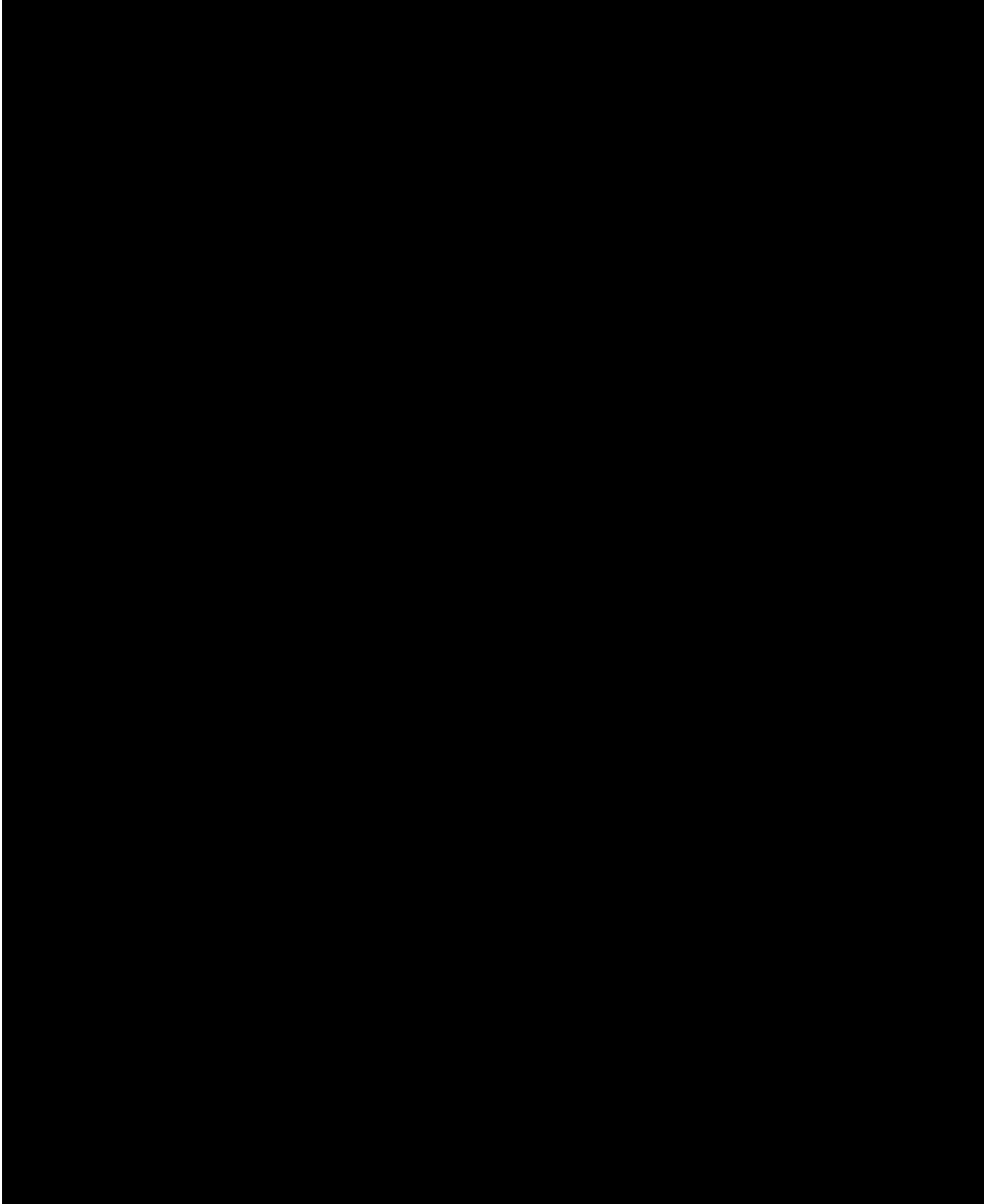
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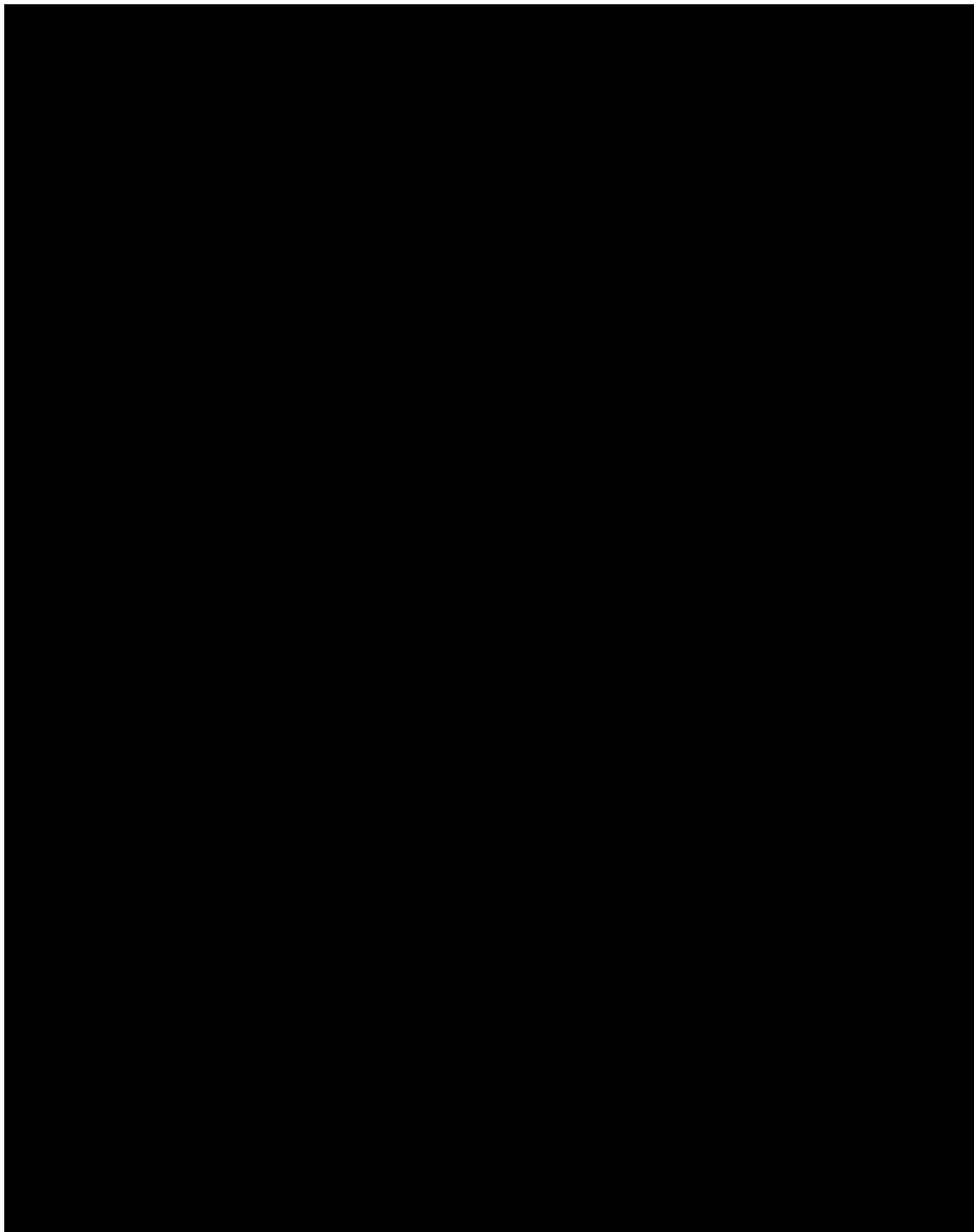
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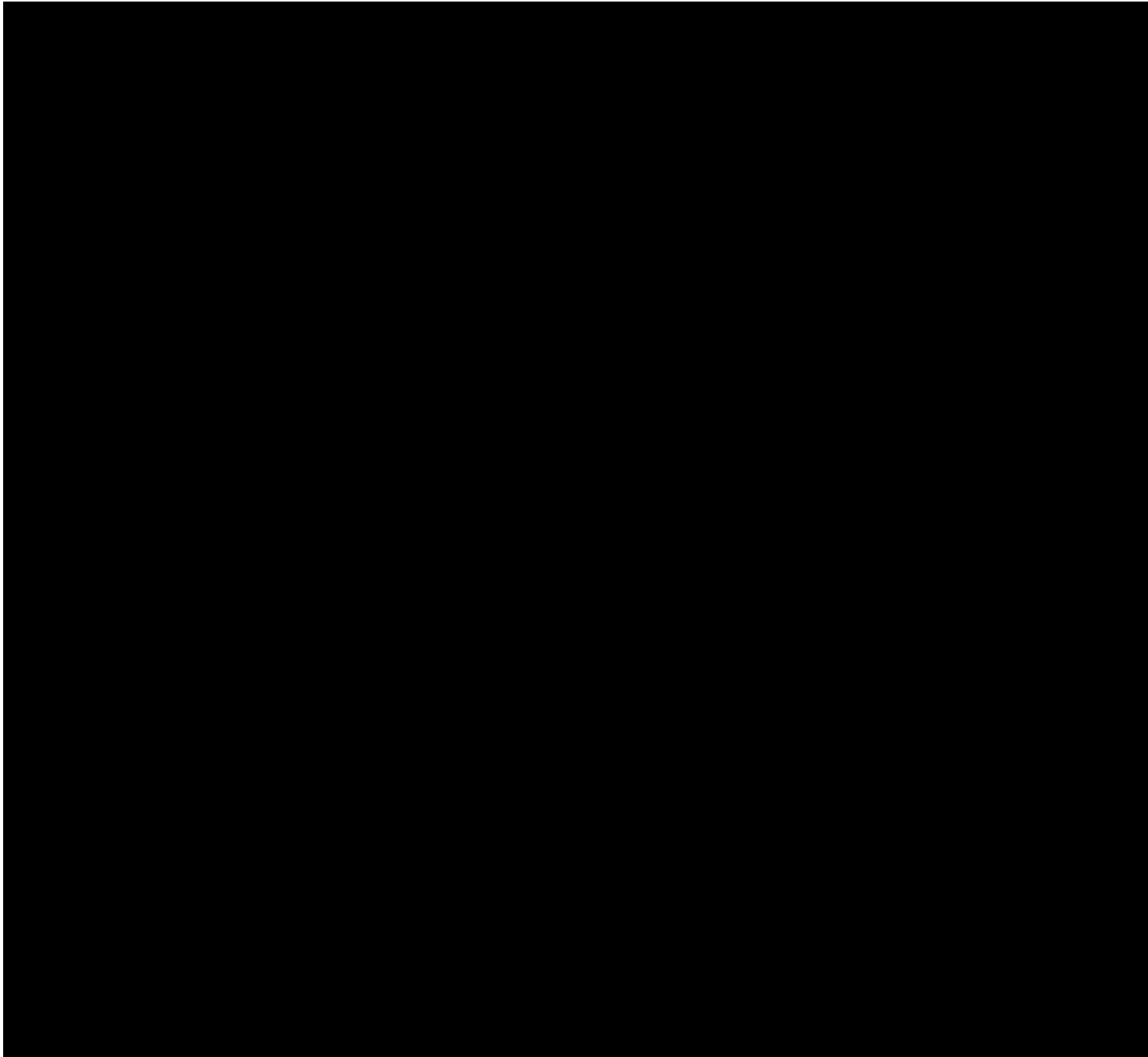


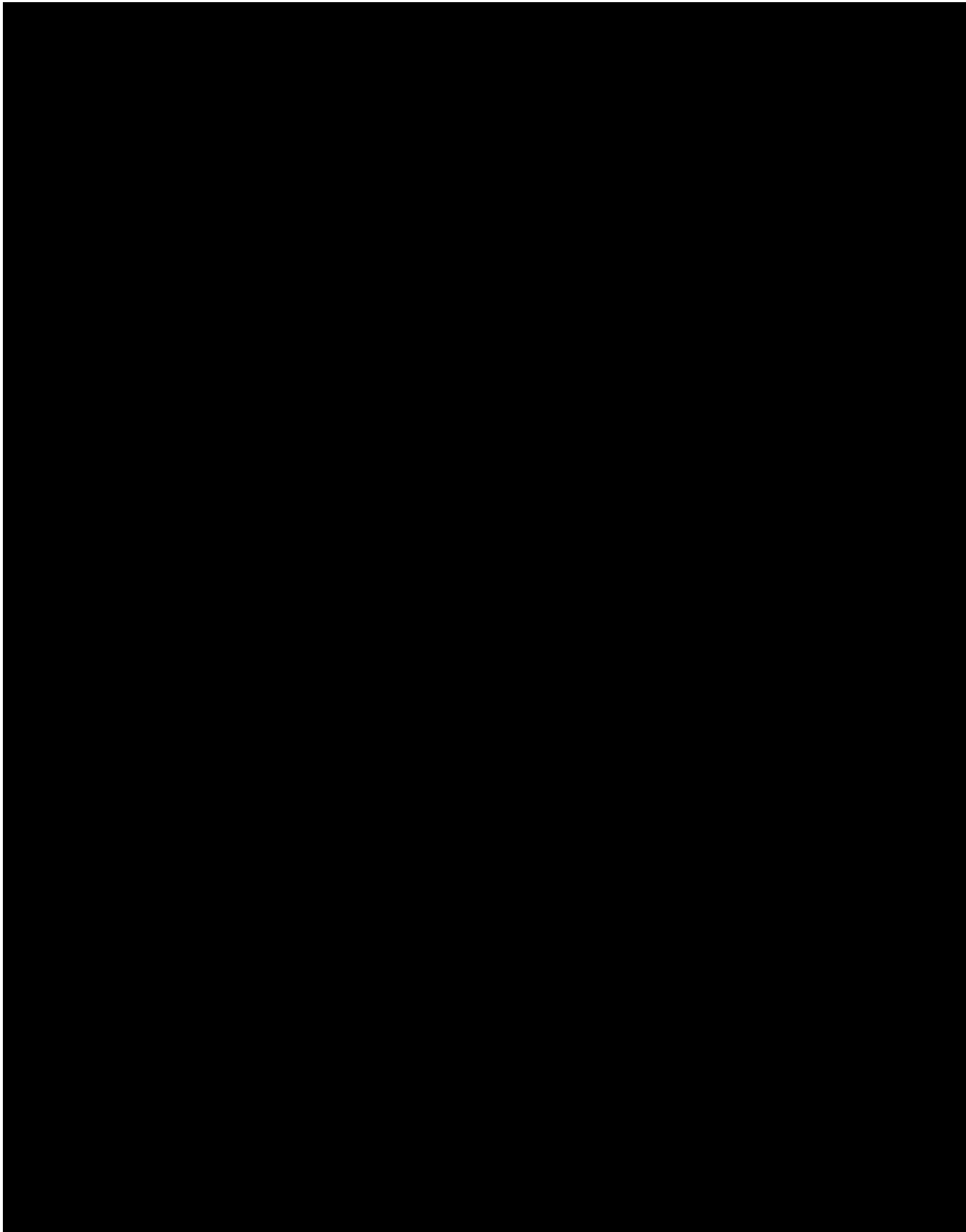














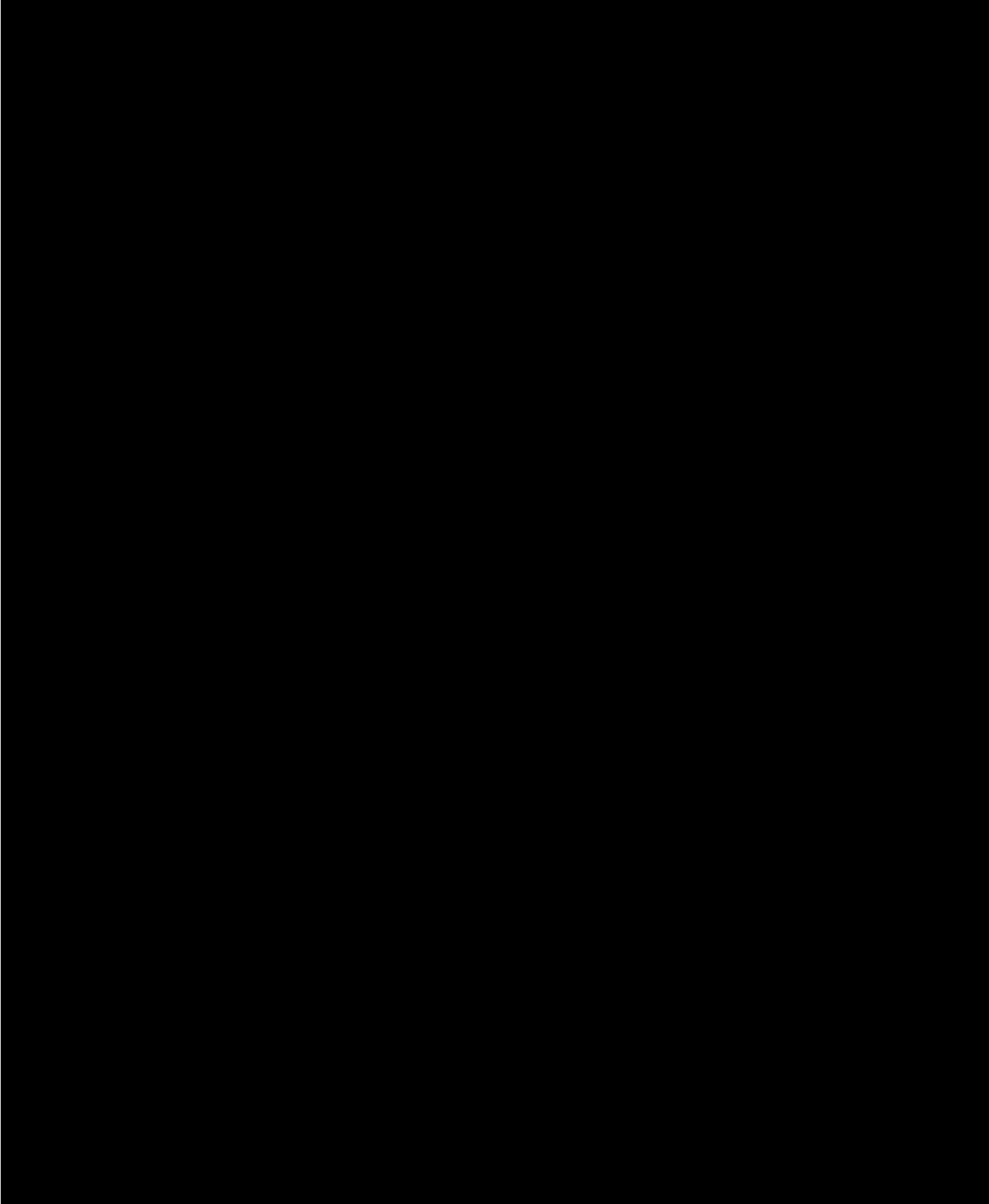
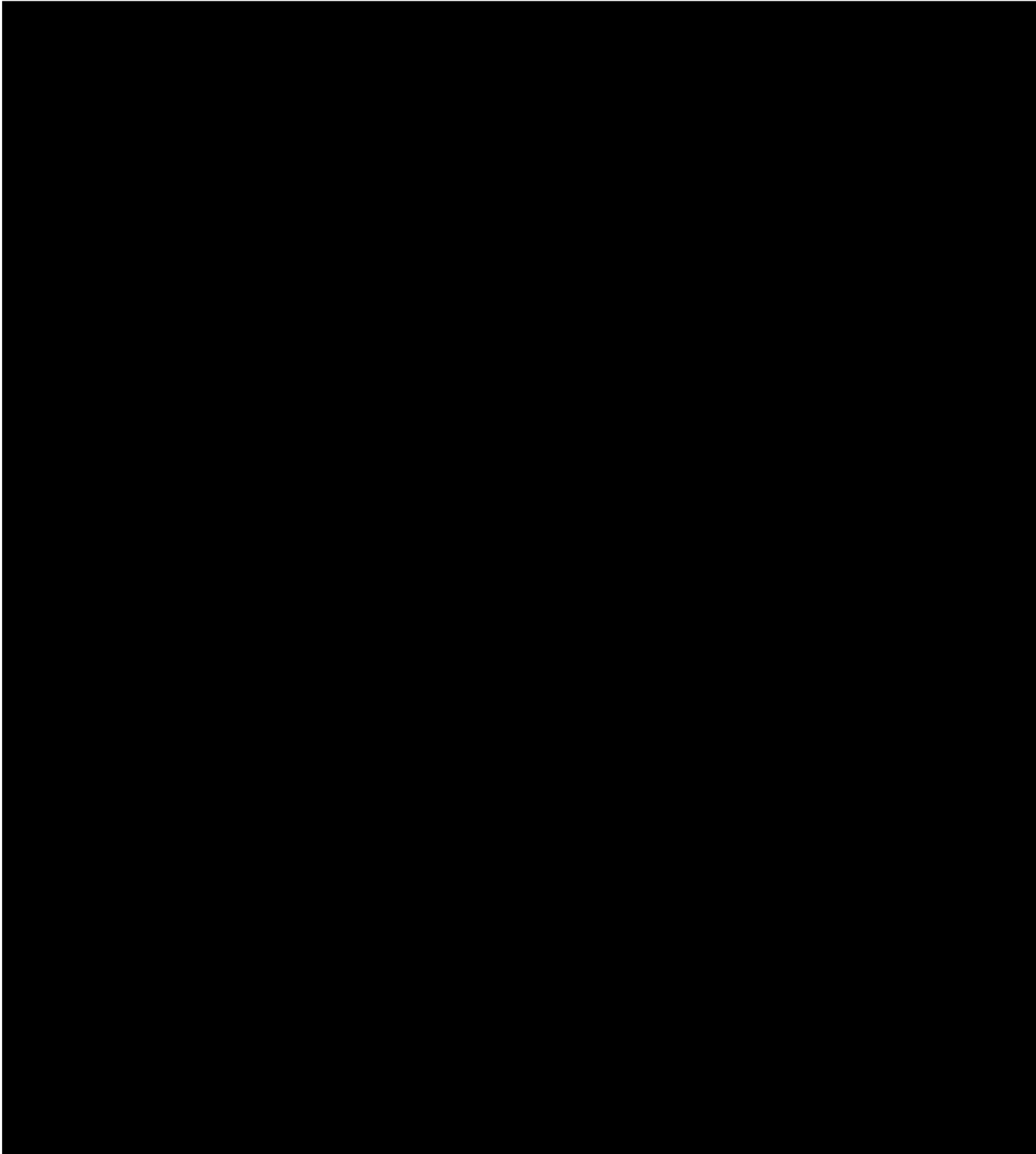


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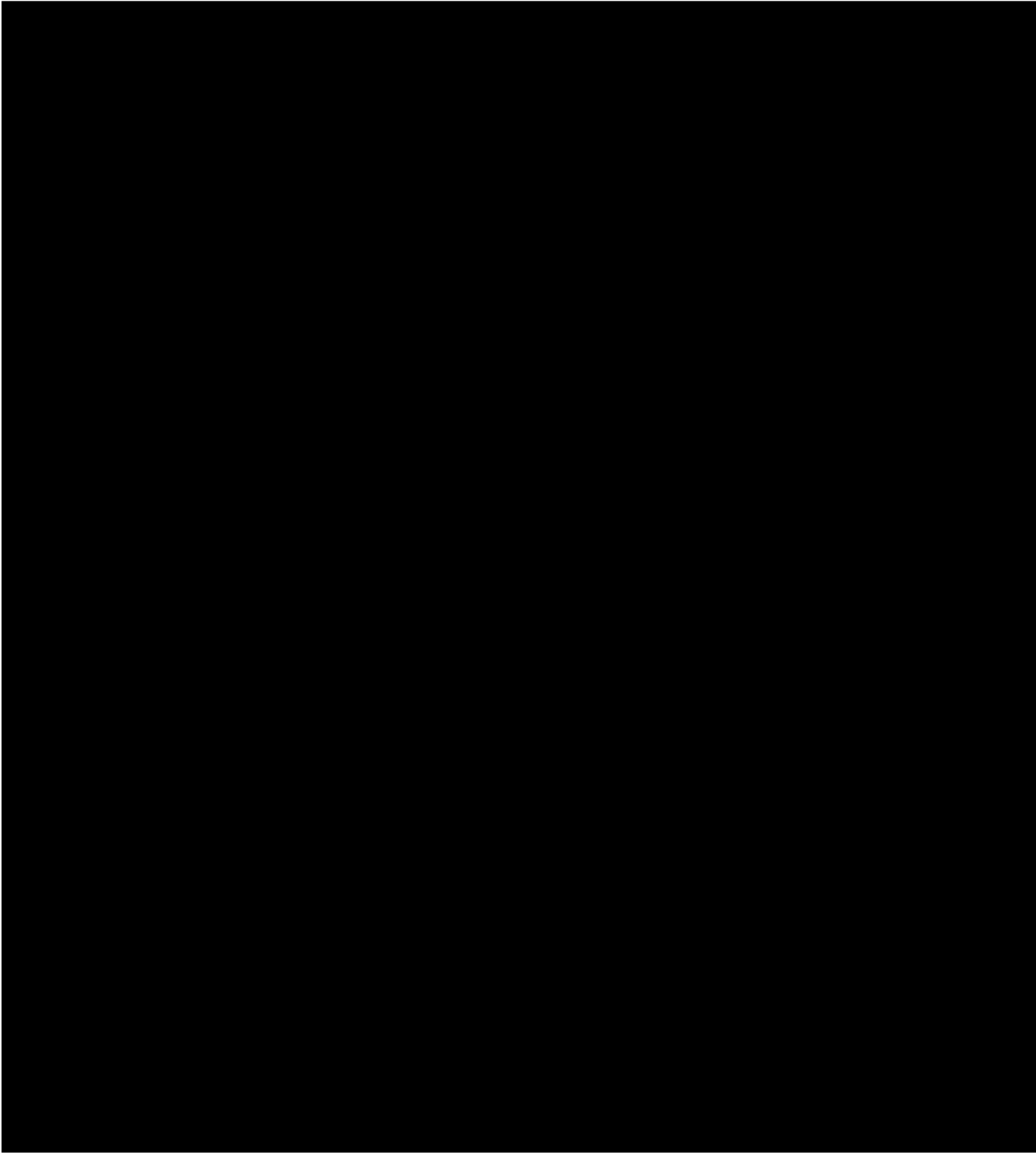
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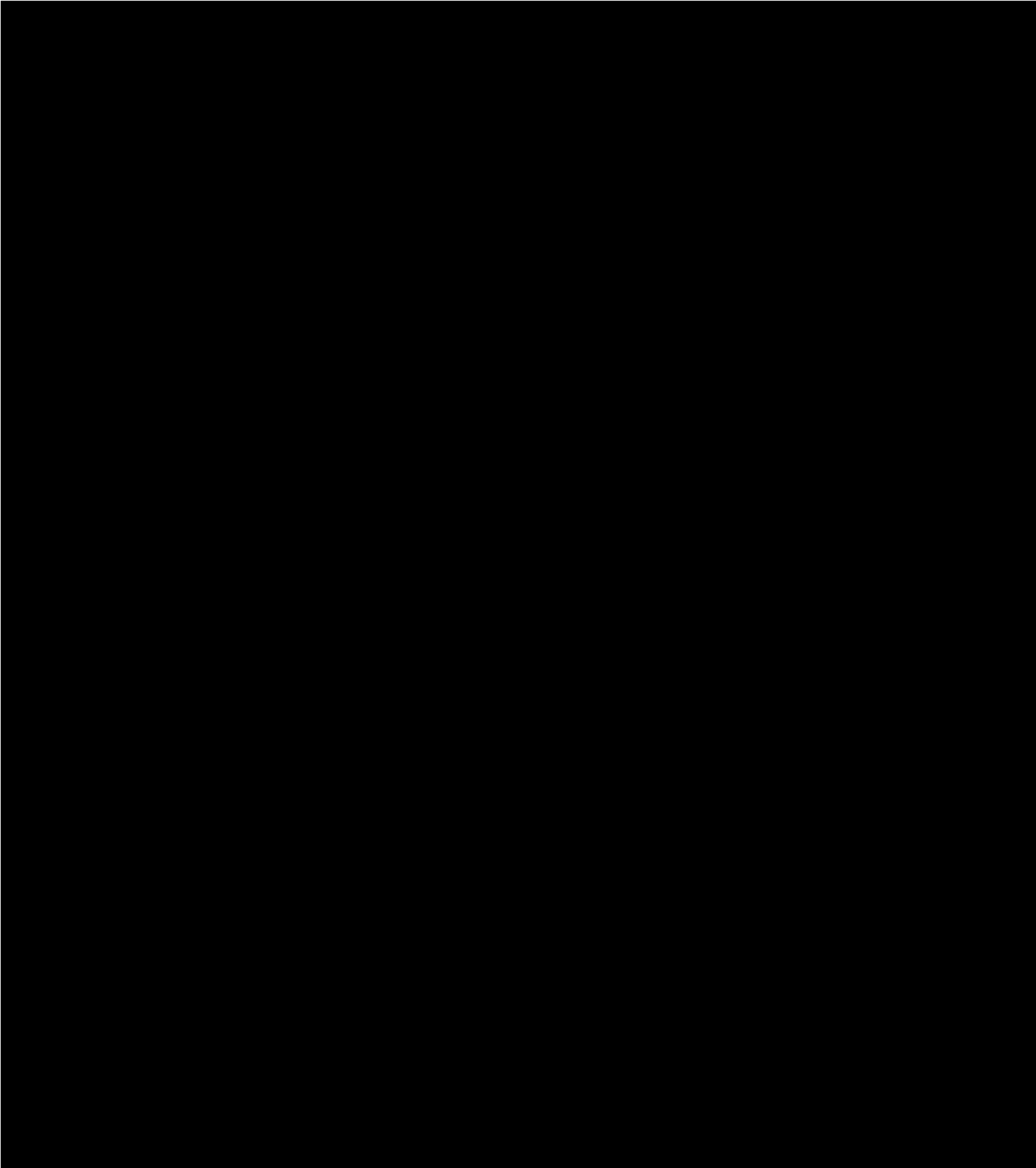
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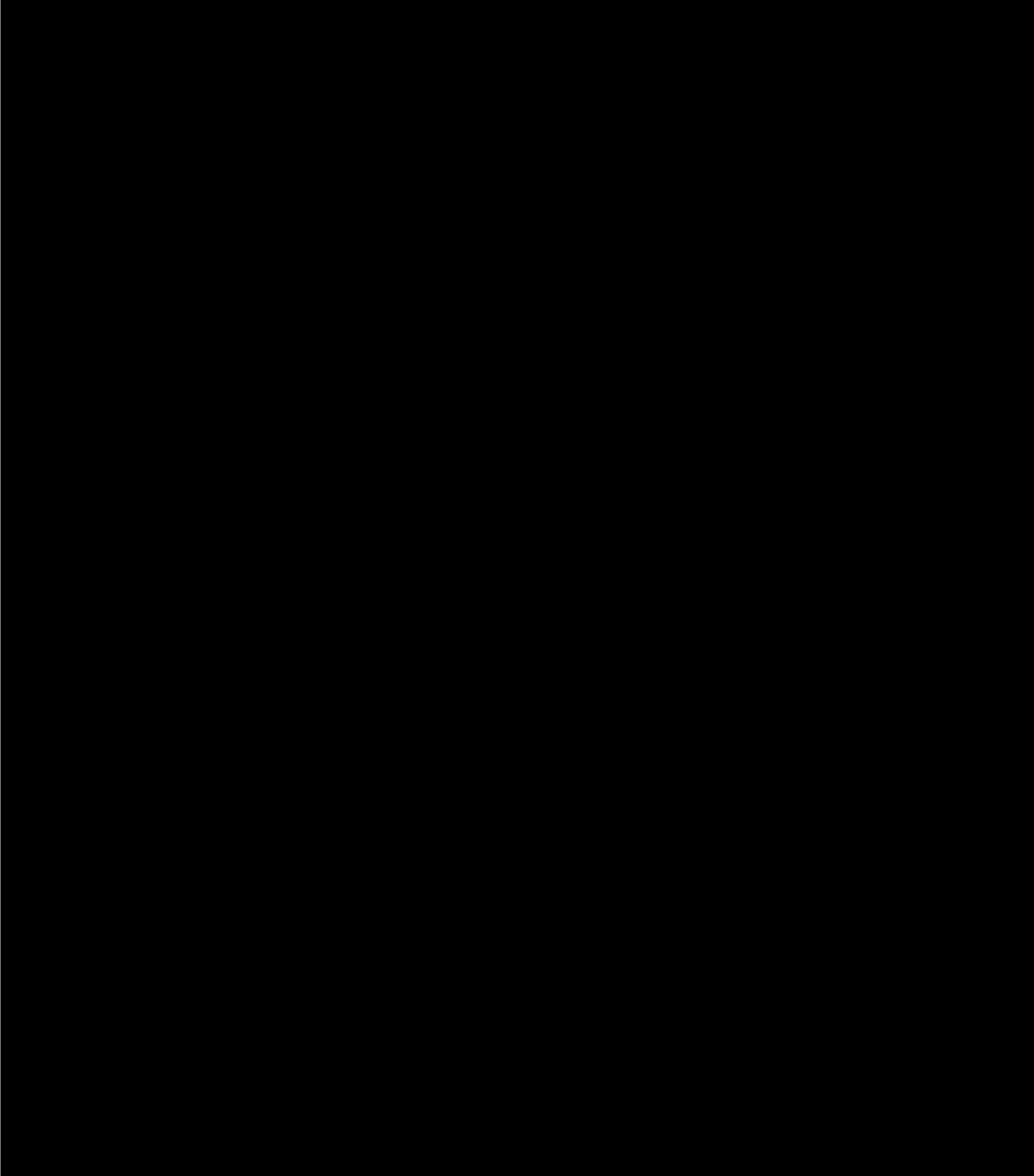


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REDACTED PUBLIC VERSION

DENTAL PROVIDER AGREEMENT

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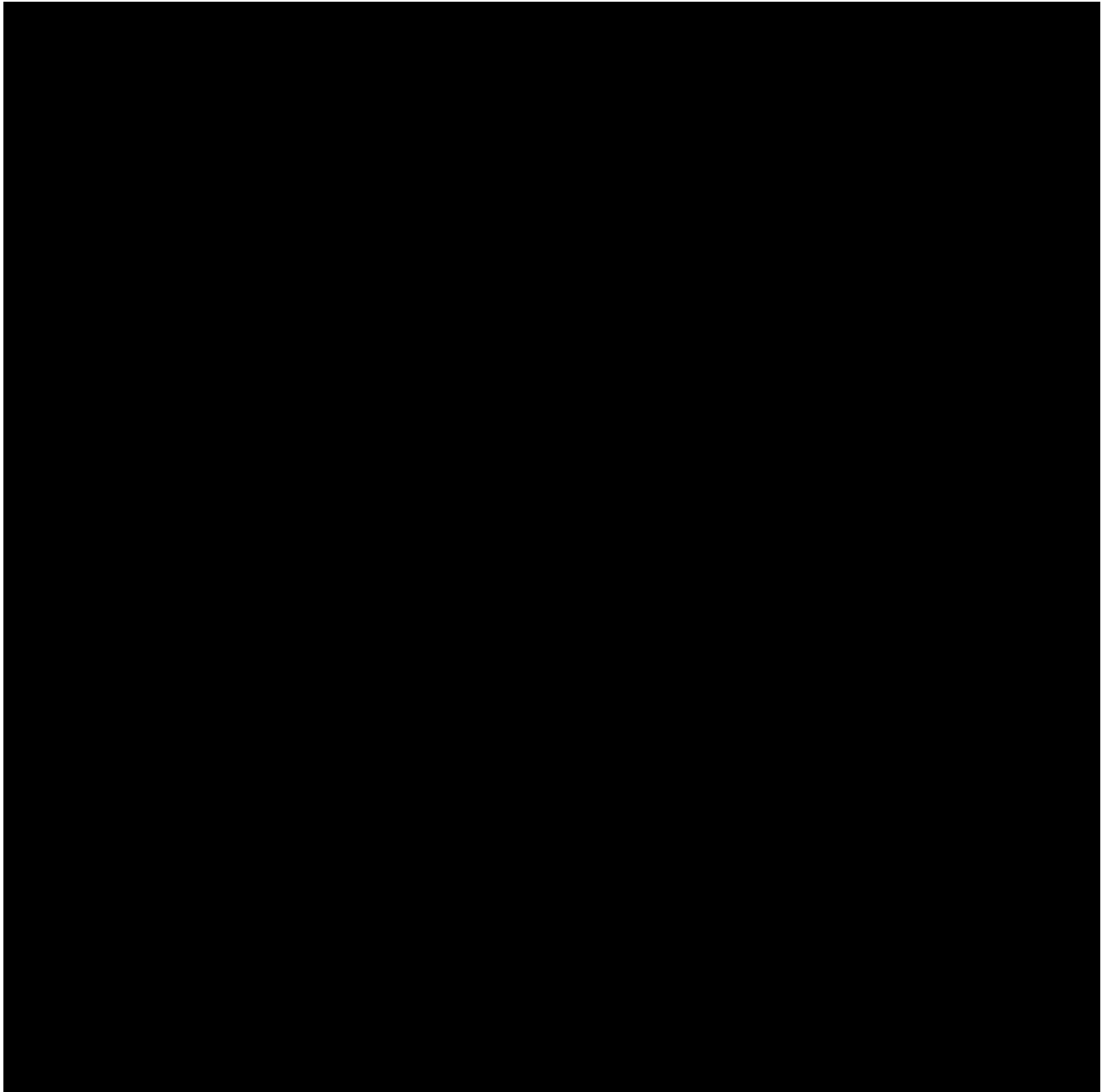
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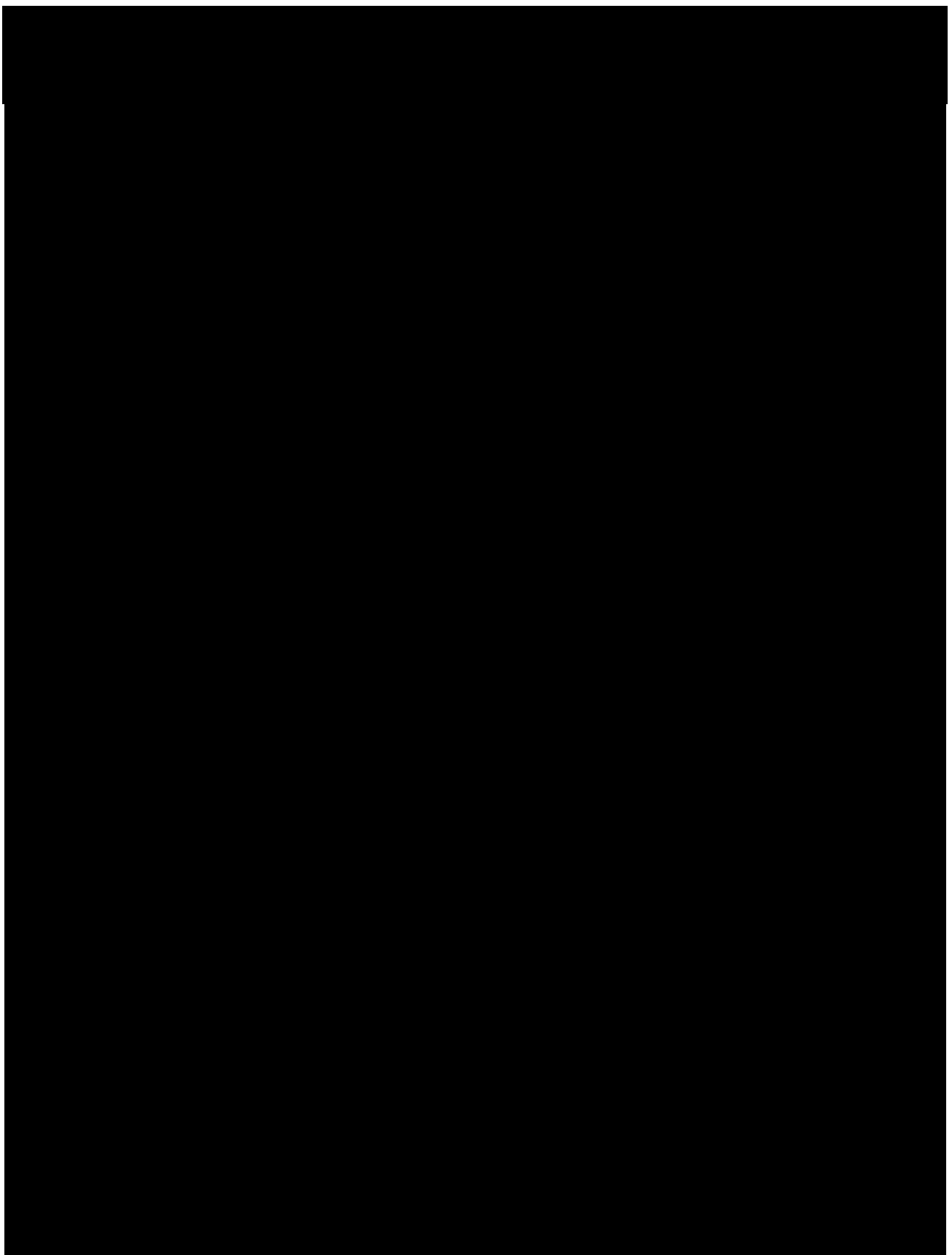
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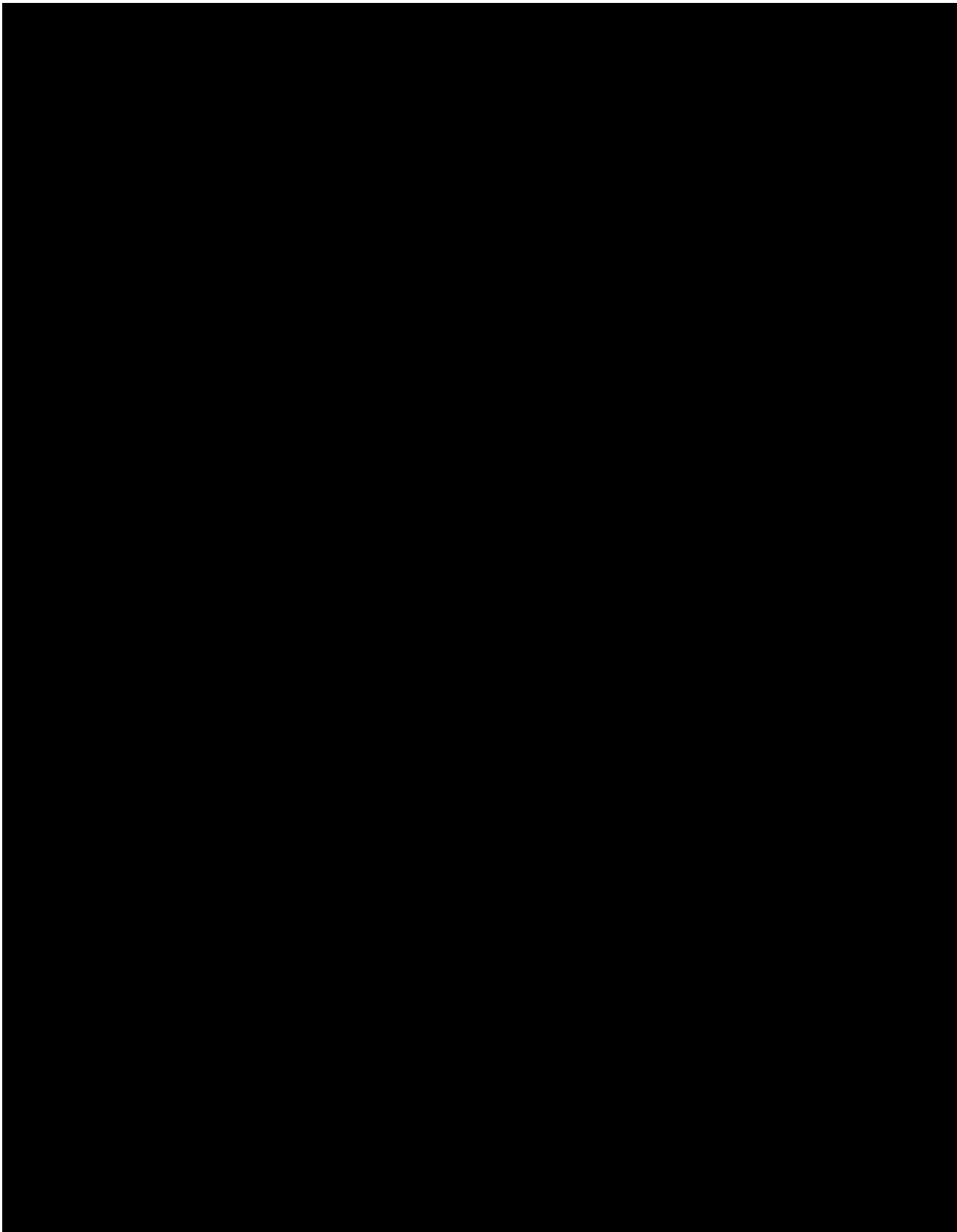
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DENTAL PROVIDER AGREEMENT

This Dental Provider Agreement ("Agreement") is made and entered into as of _____, 20__ ("Effective Date") by and between Aetna Health Inc., a Pennsylvania corporation, on behalf of itself and its Affiliates (hereinafter "Company") and _____ Dennis Ayer (hereinafter "Provider"). The **Regulatory Compliance Addendum** attached to this Agreement as Exhibit A is expressly incorporated into this Agreement and is binding upon the parties to this Agreement. In the event of any inconsistent or contrary language between the Regulatory Compliance Addendum and any other part of this Agreement, including but not limited to exhibits, attachments or amendments, the parties agree that, to the extent applicable, the provisions of the Regulatory Compliance Addendum shall prevail.

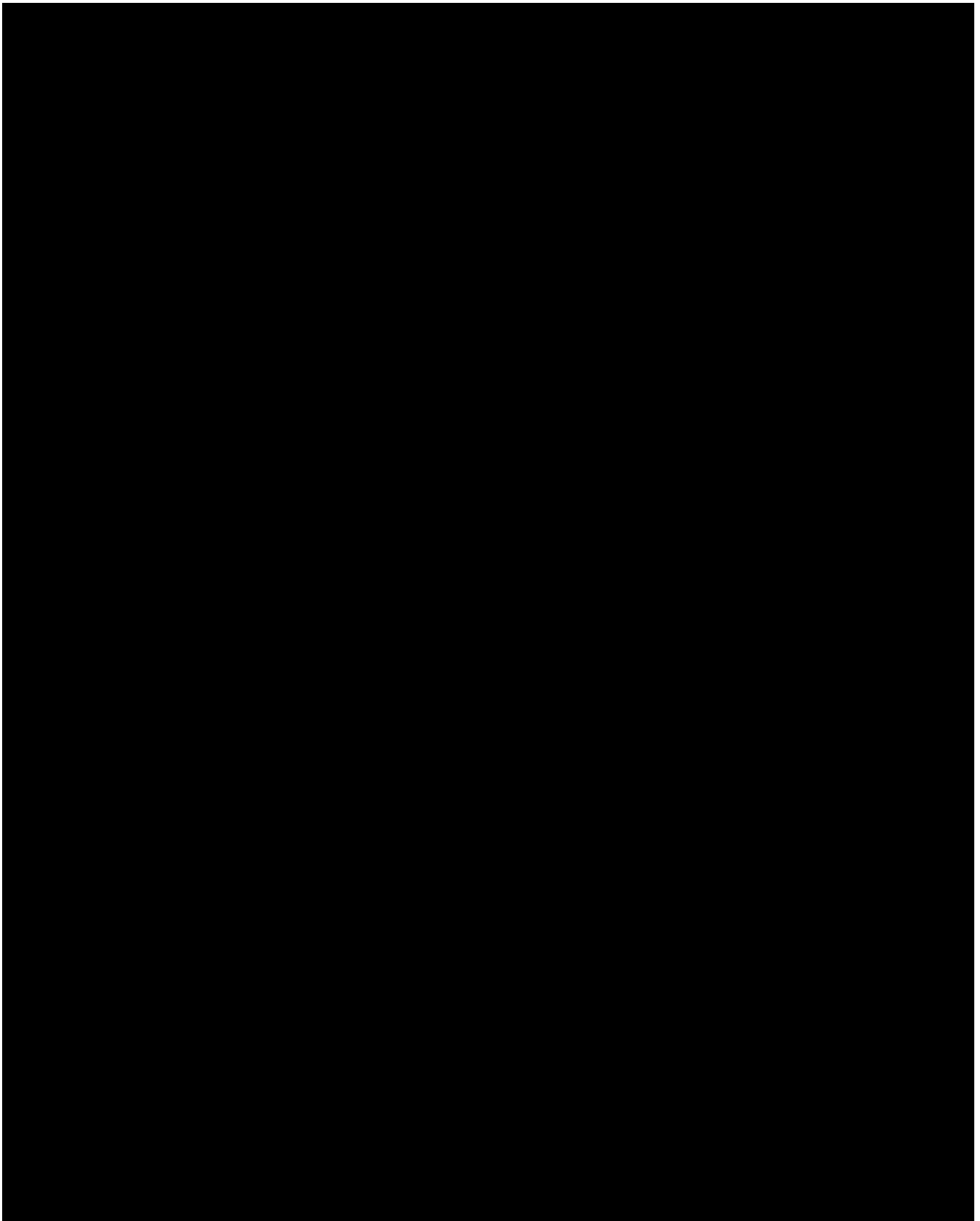


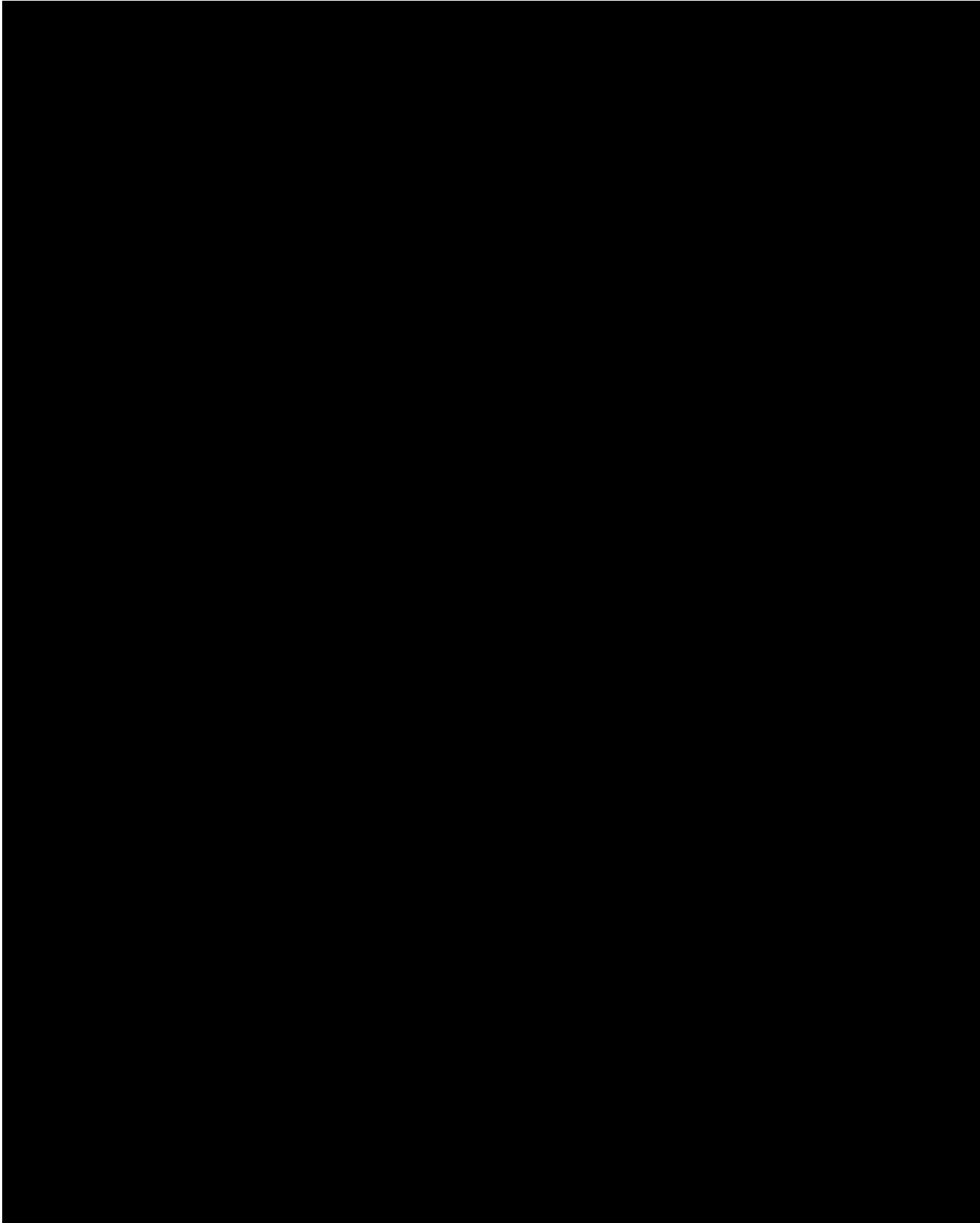


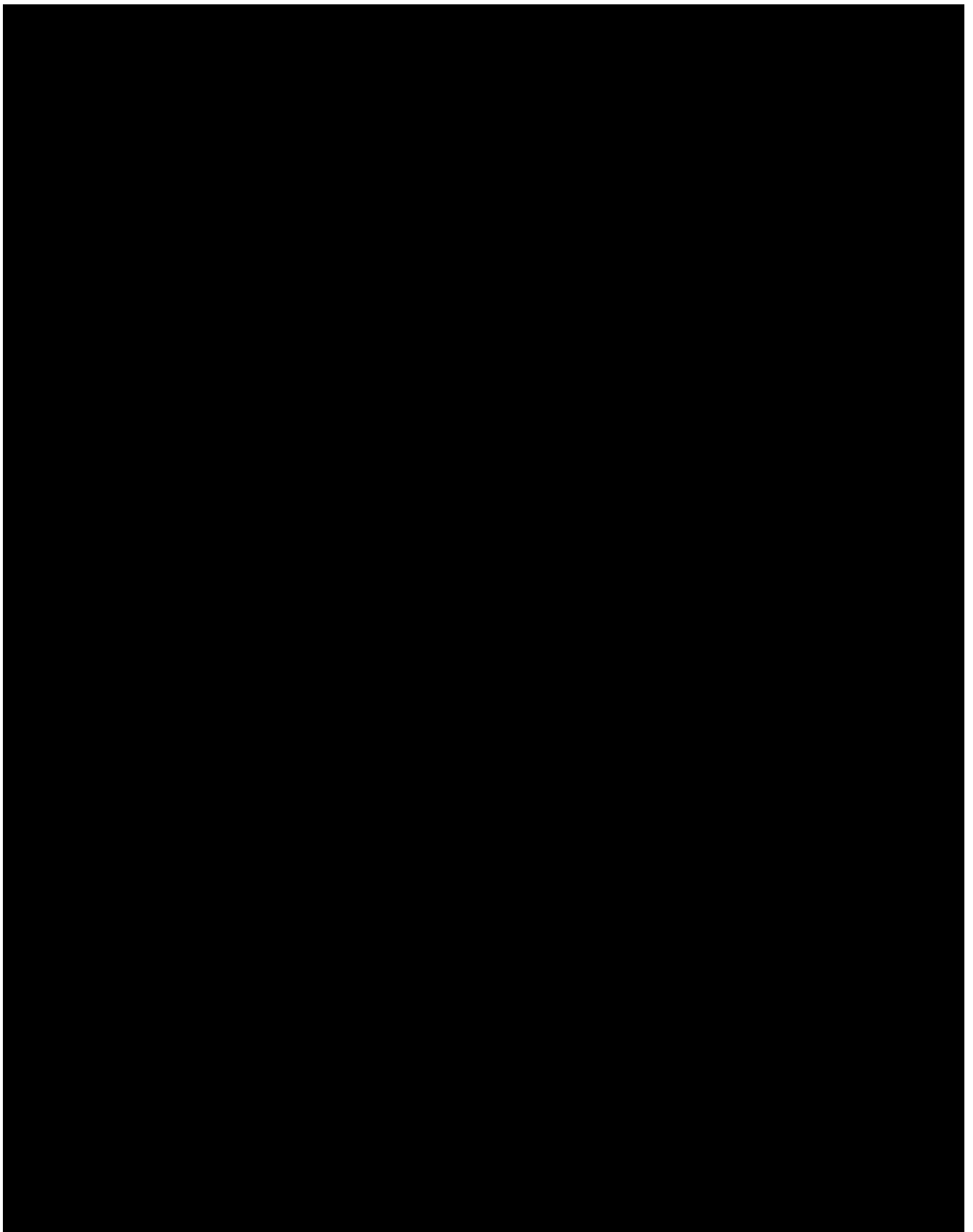


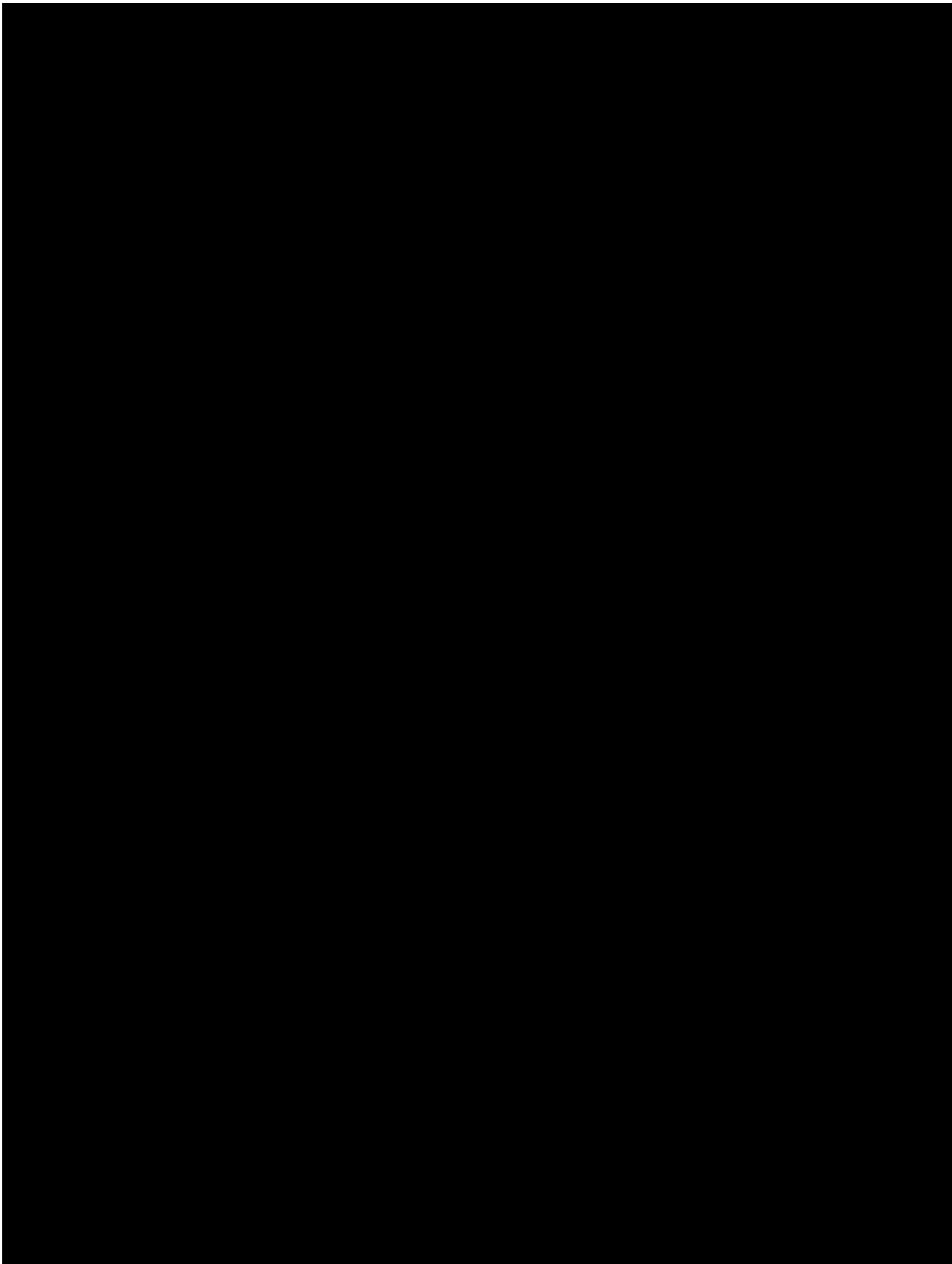
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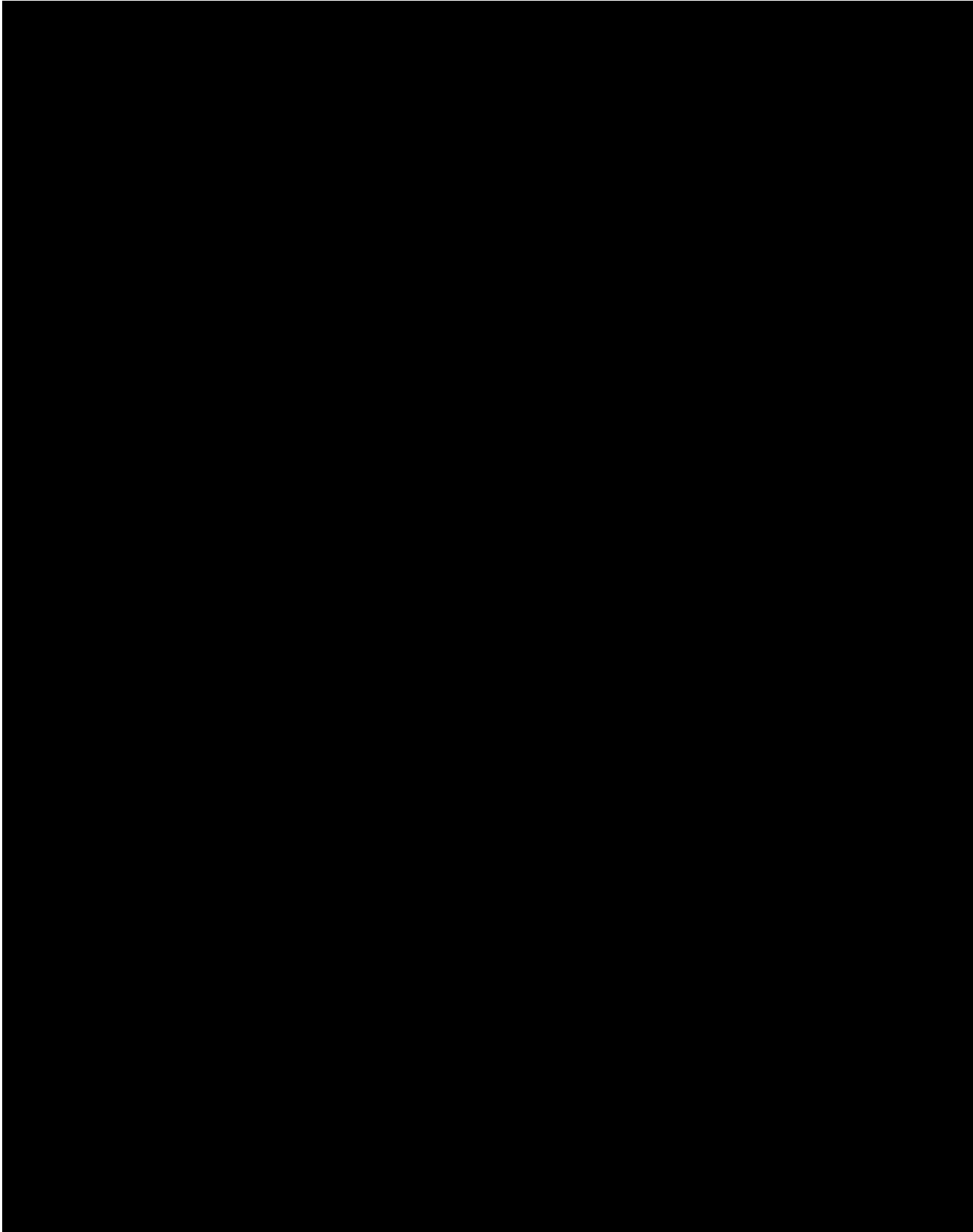


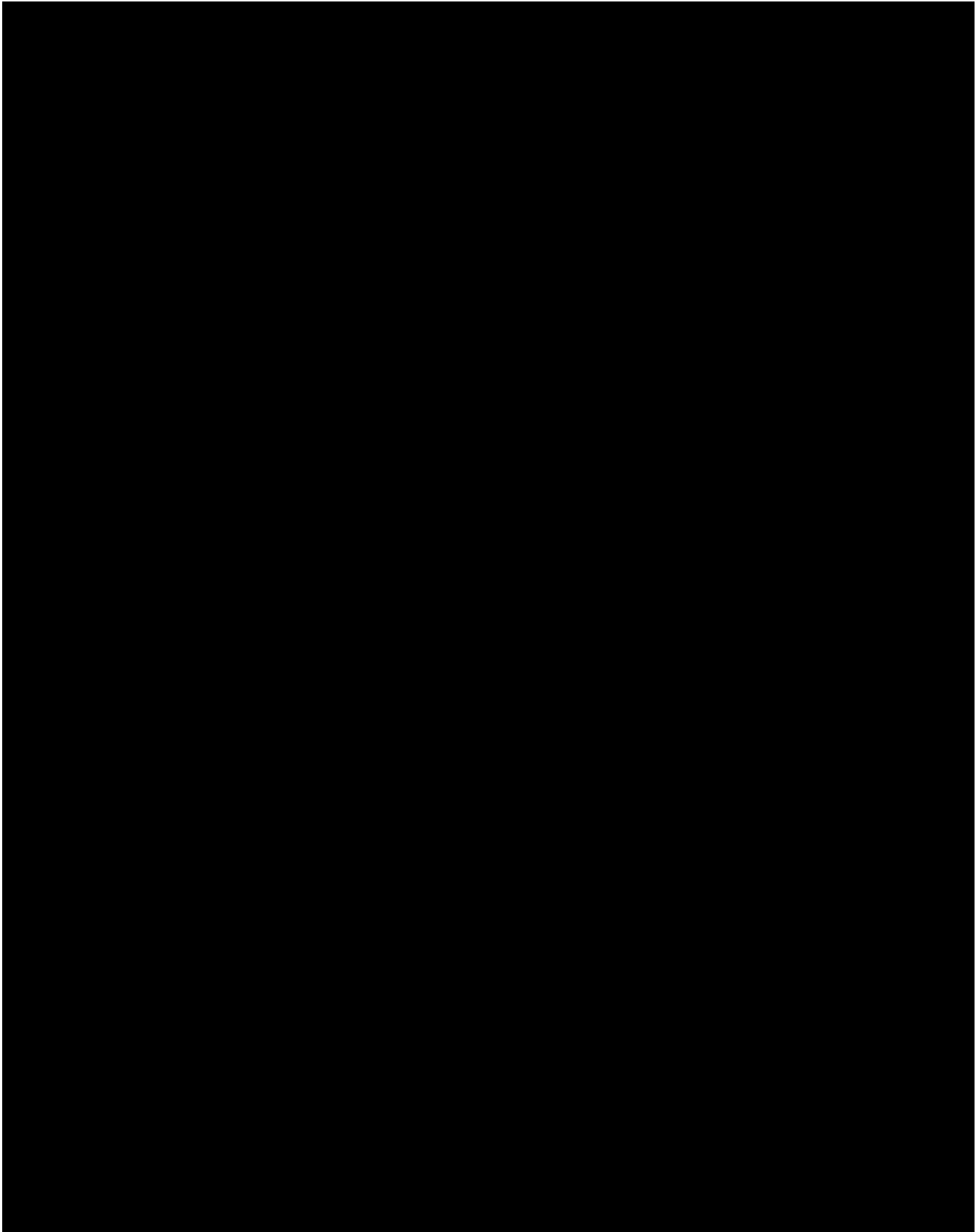


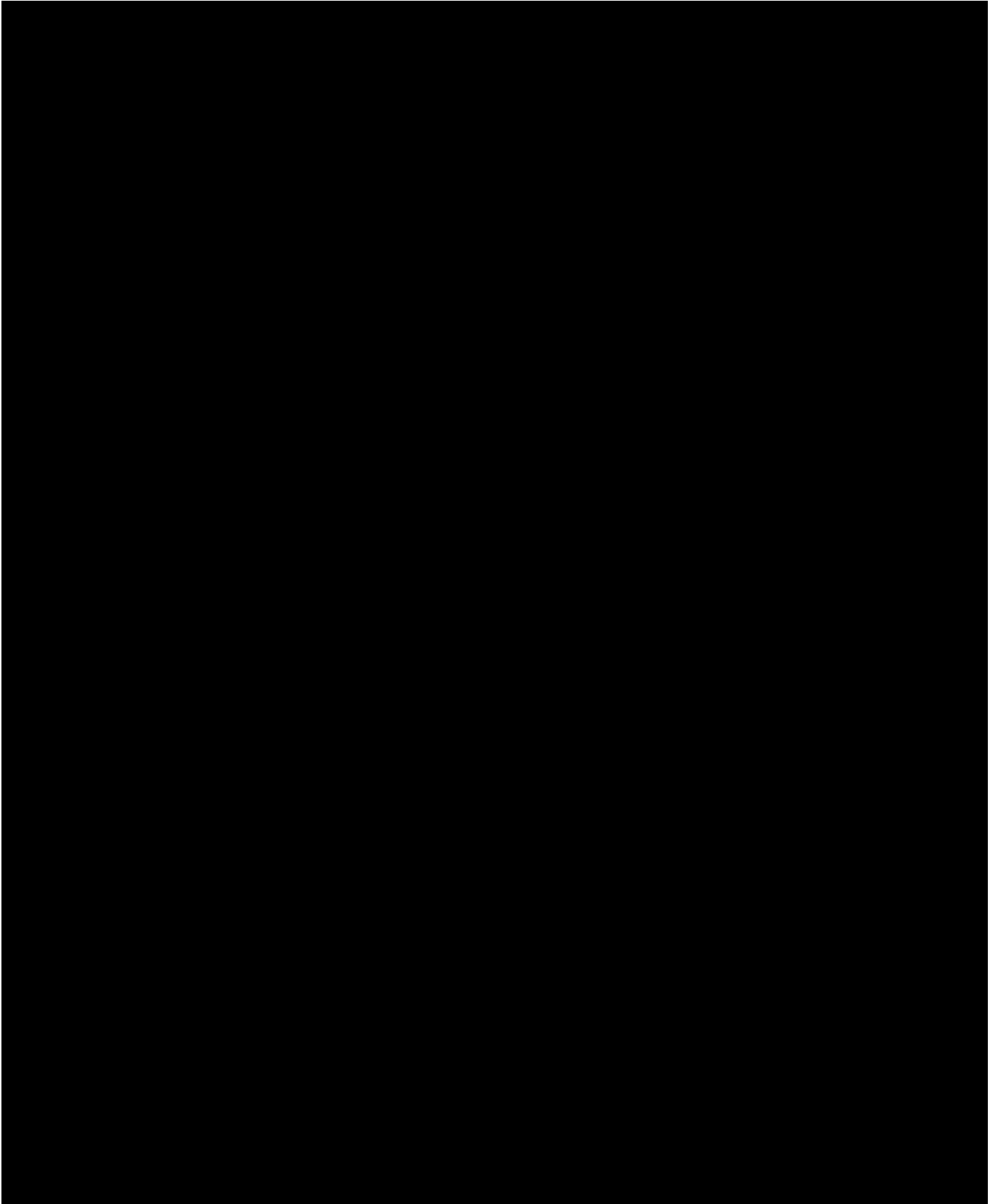


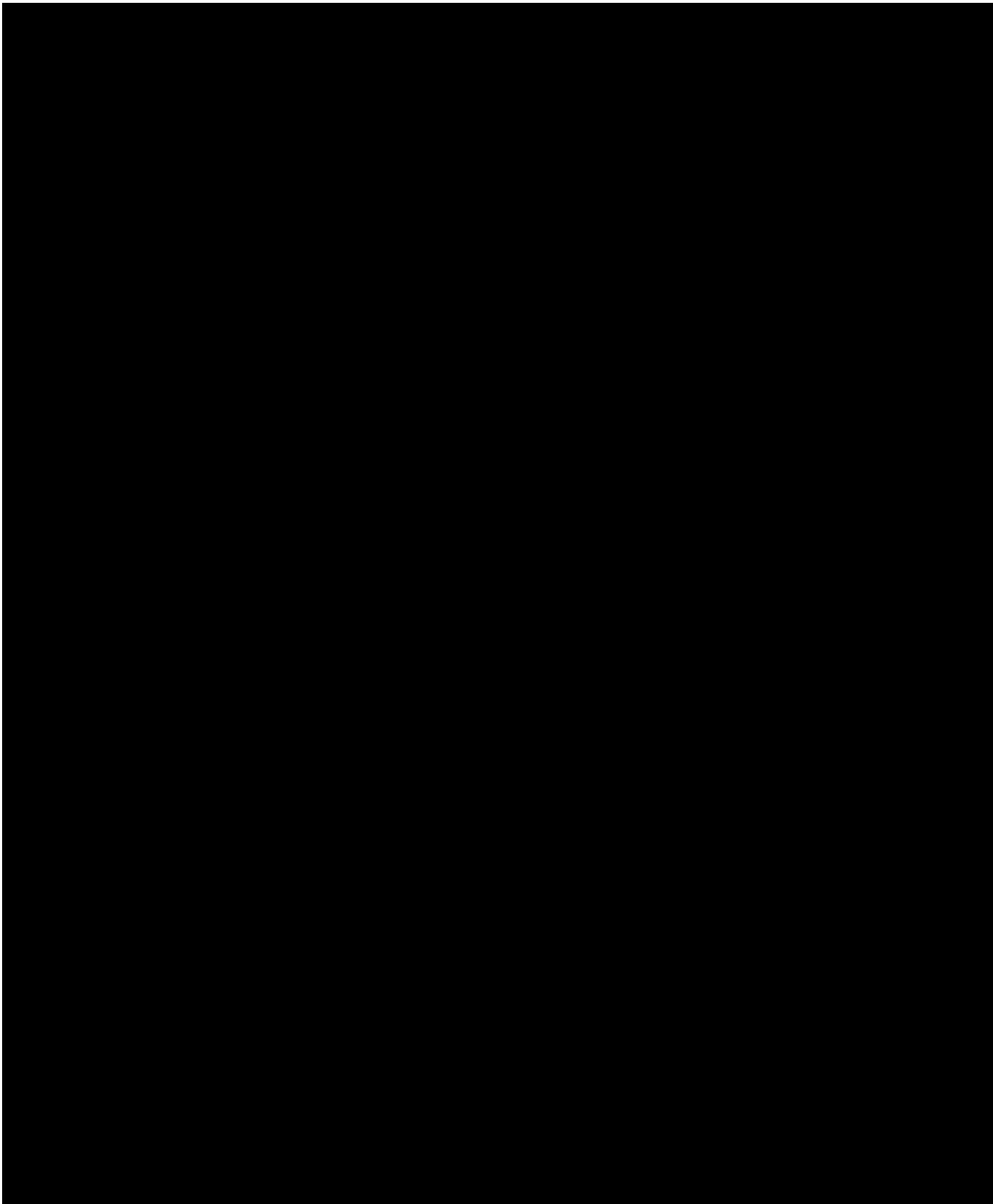


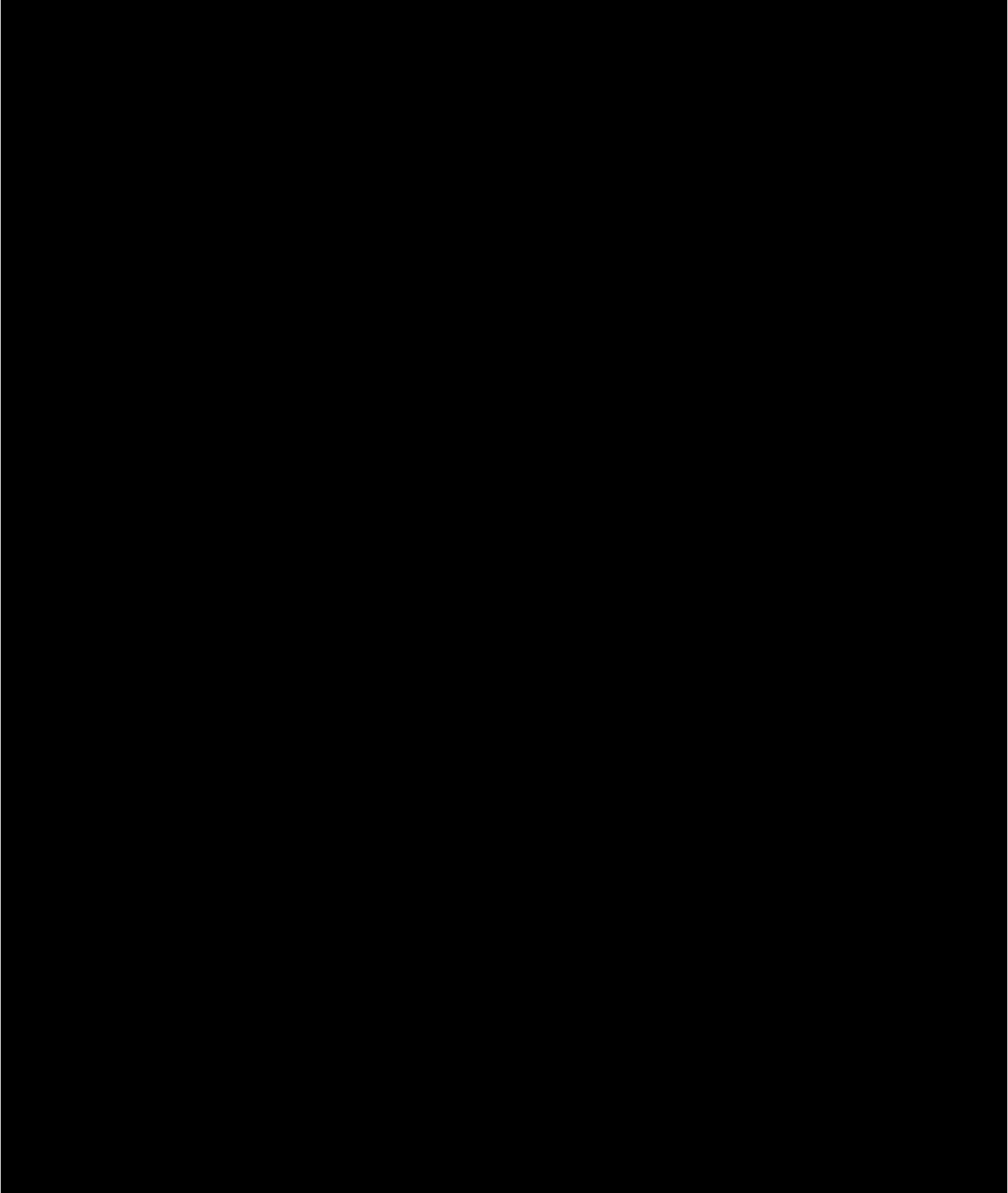


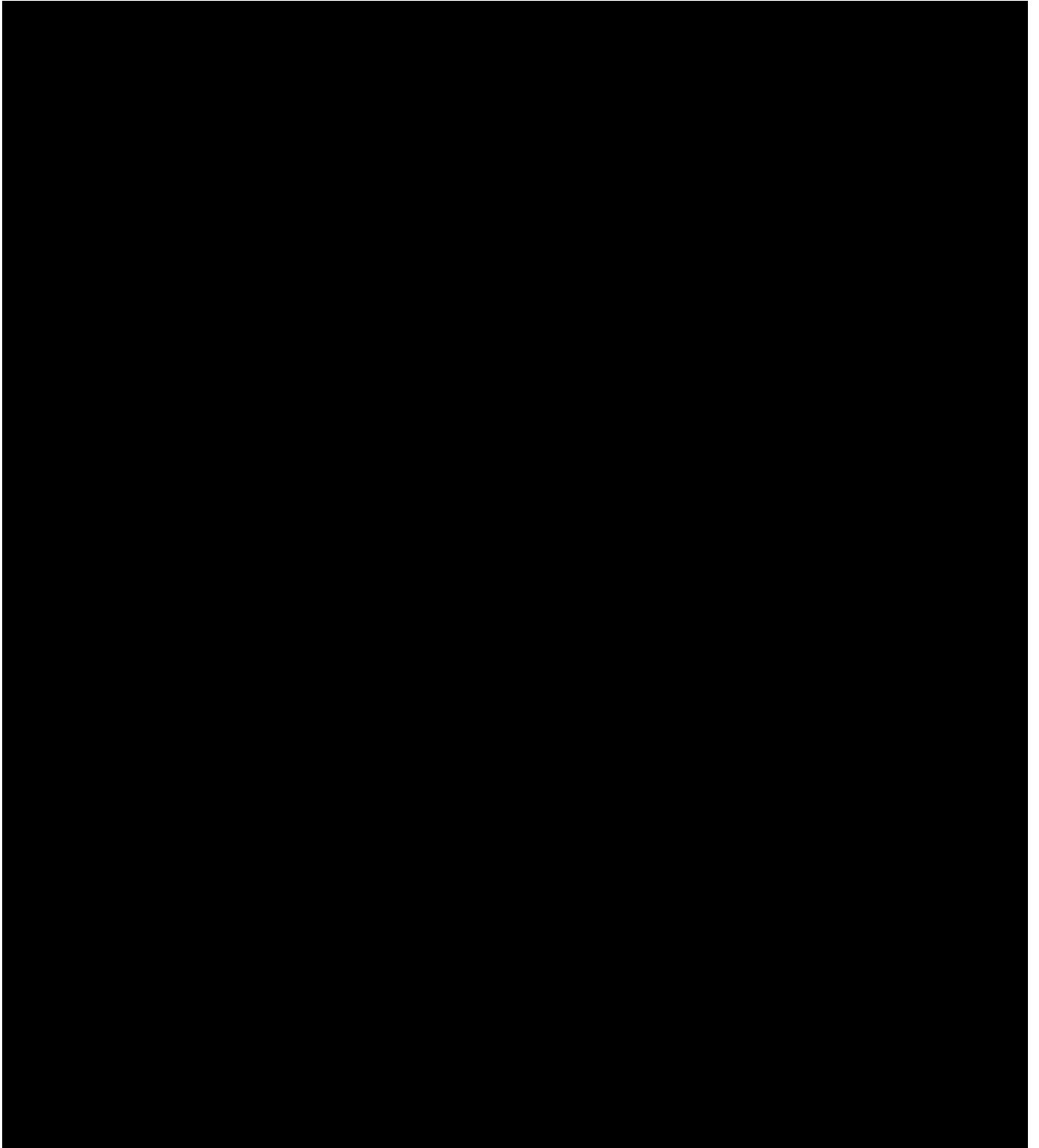














PROVIDER

Signature:

Printed Name: Dennis Ayer

Title: DDS Owner

Ex: DDS, DMD, TIN Owner etc.

Date: 11/8/2018

FEDERAL TAX I.D. NUMBER: 

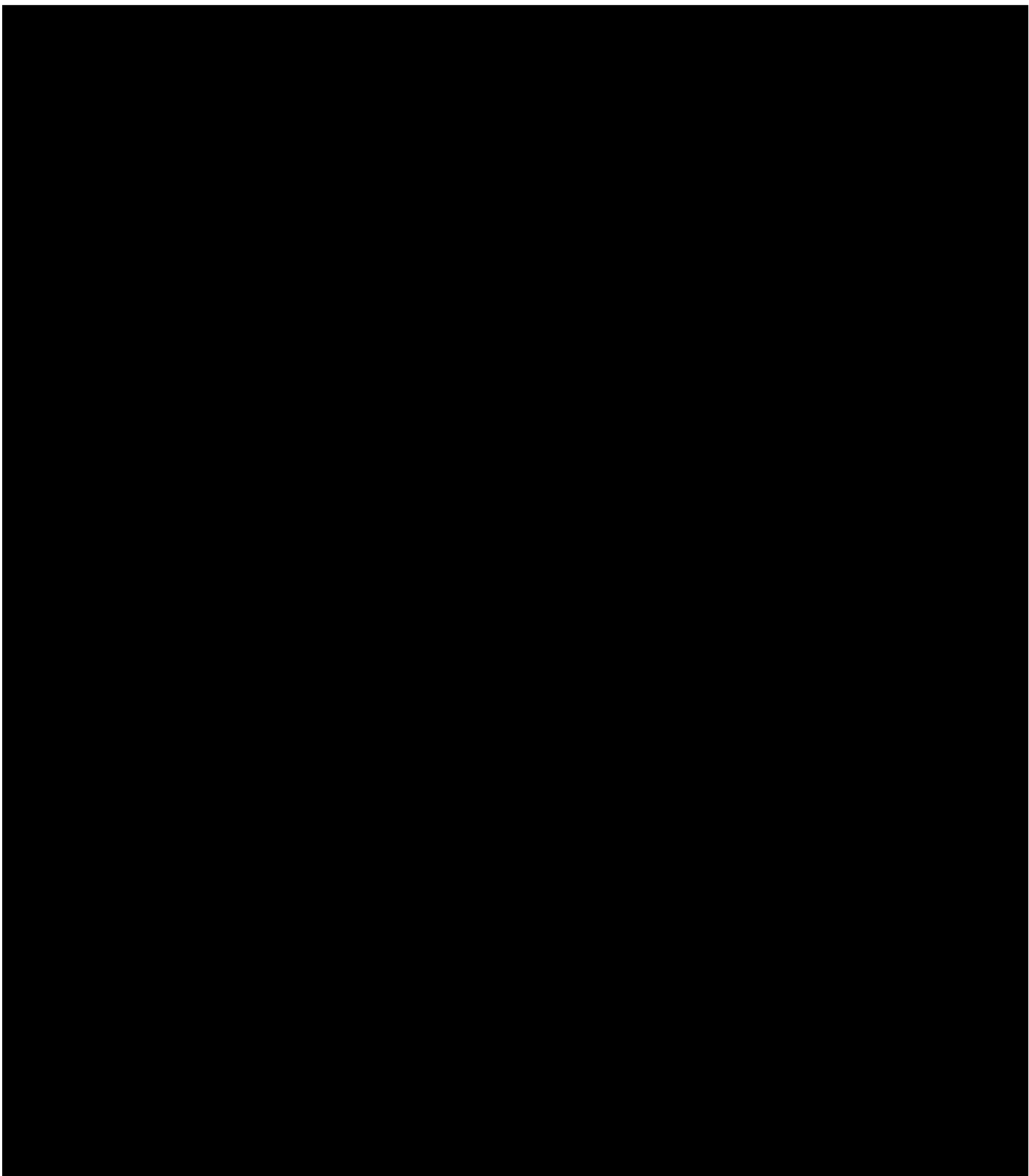
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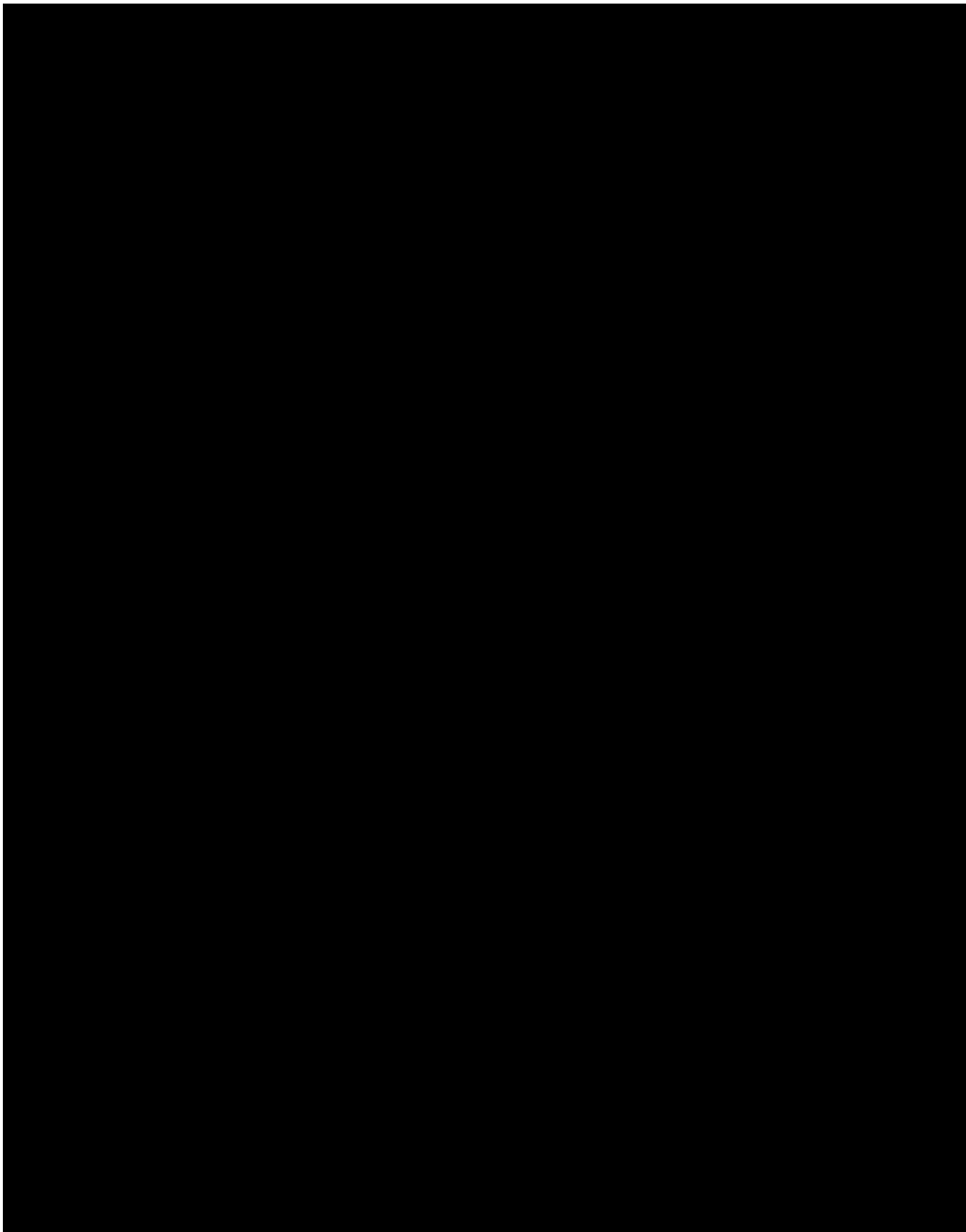
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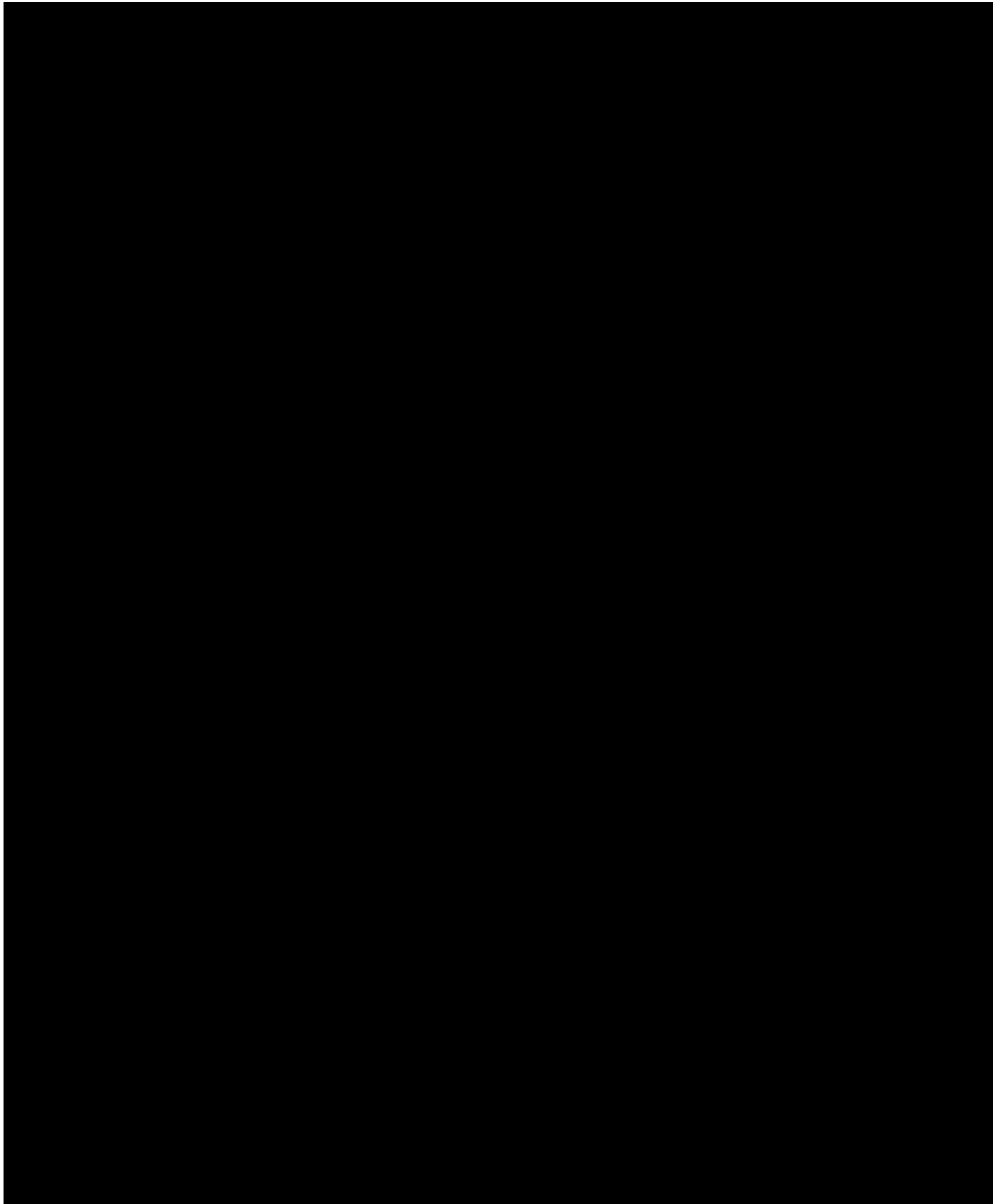
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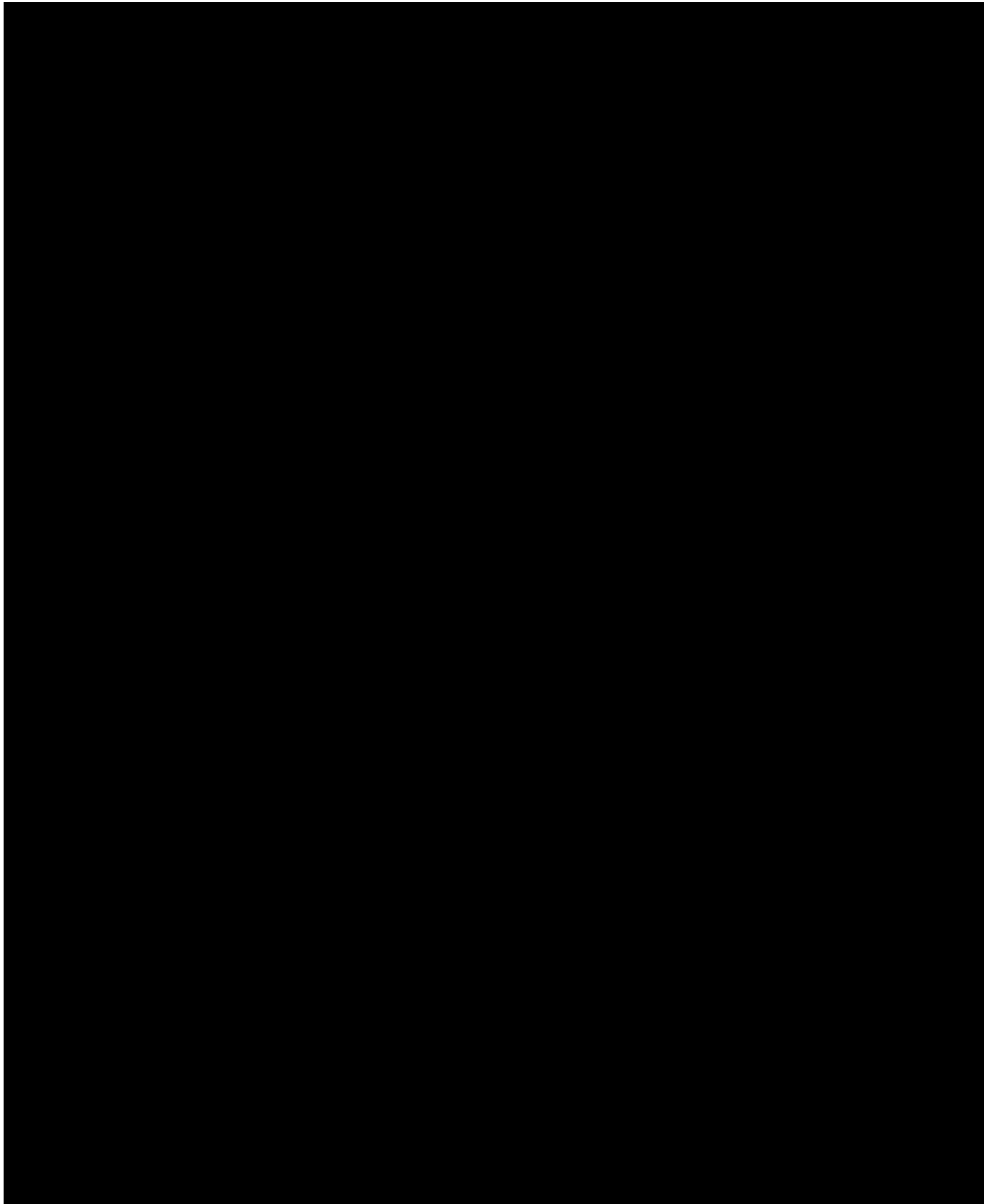
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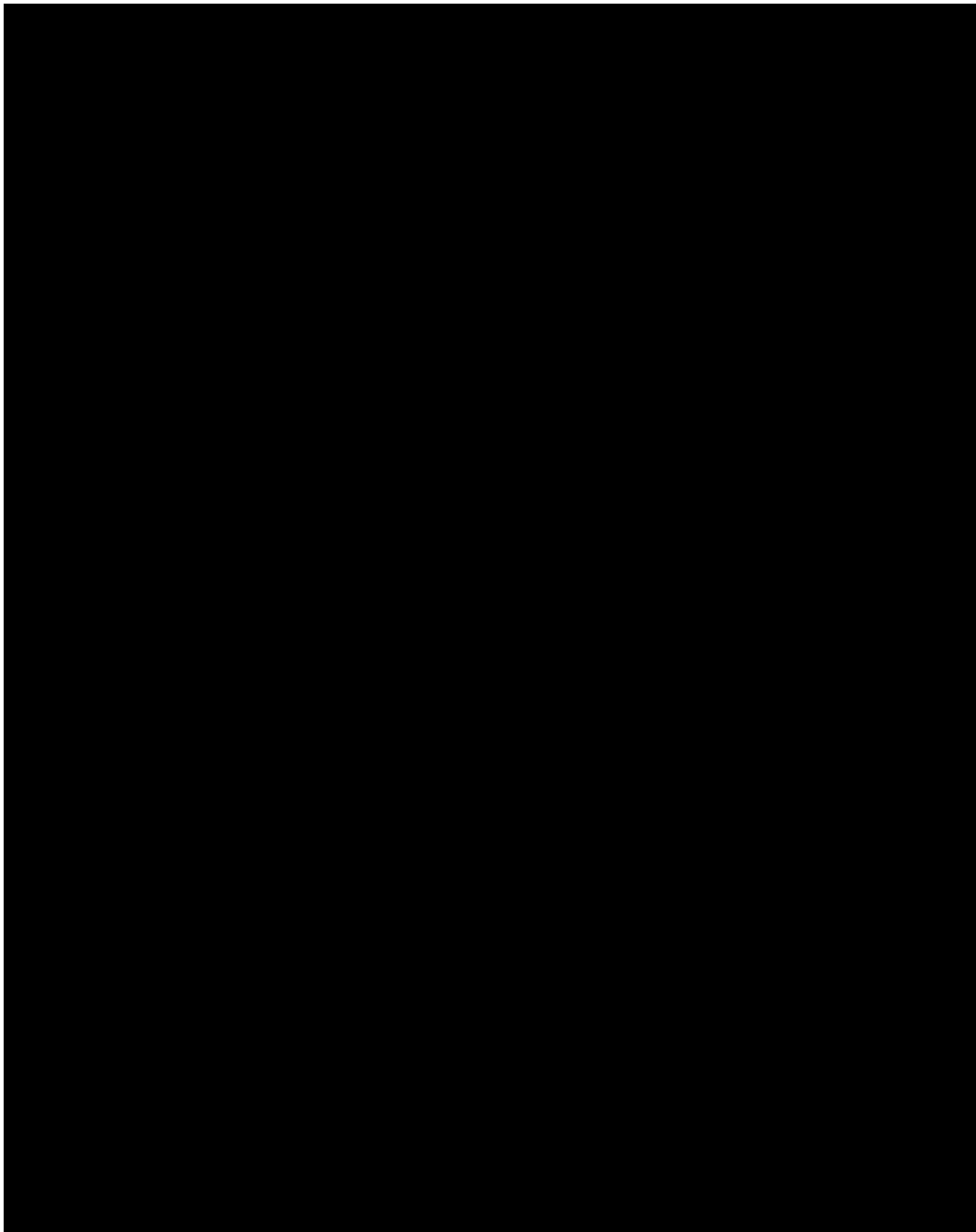
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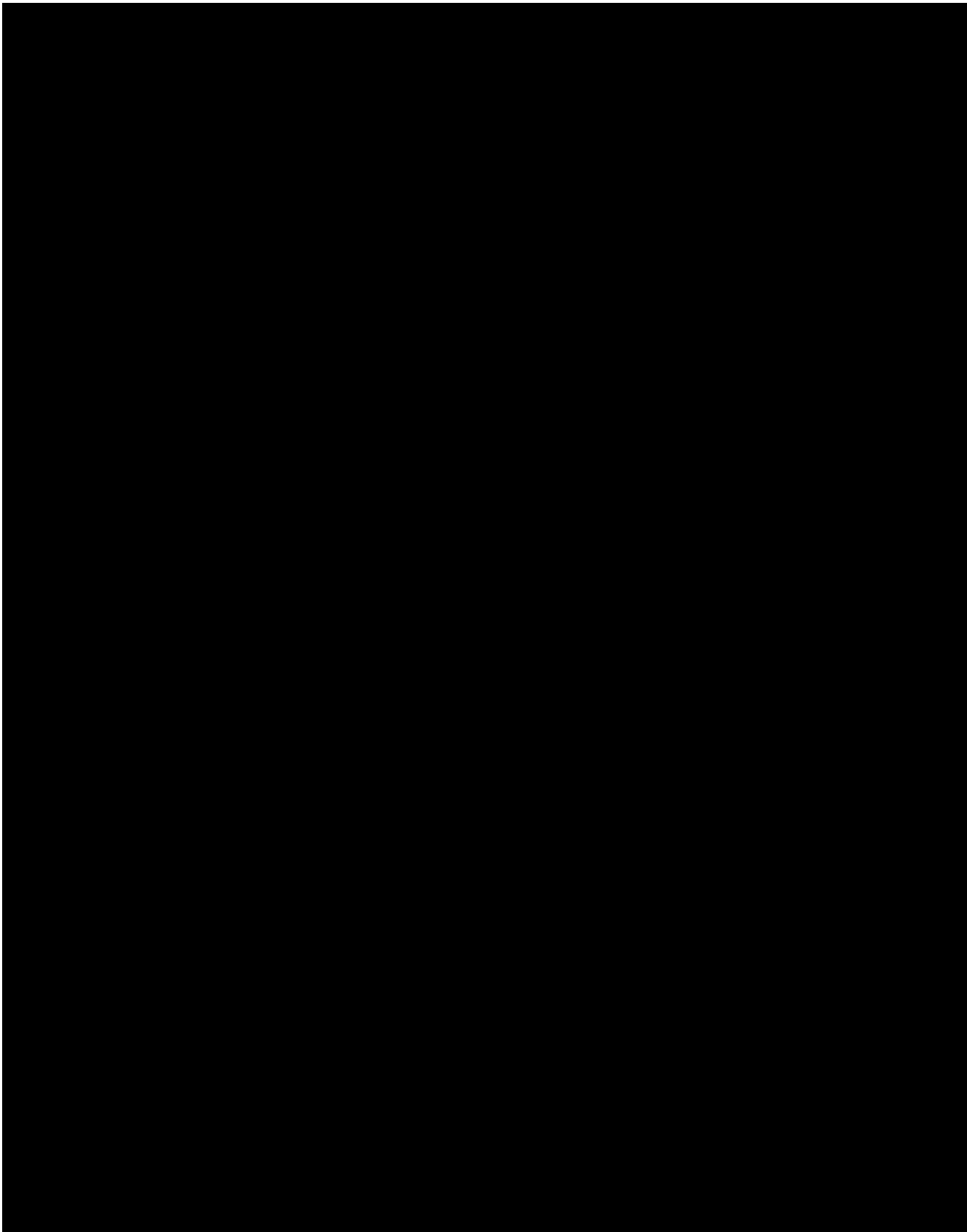


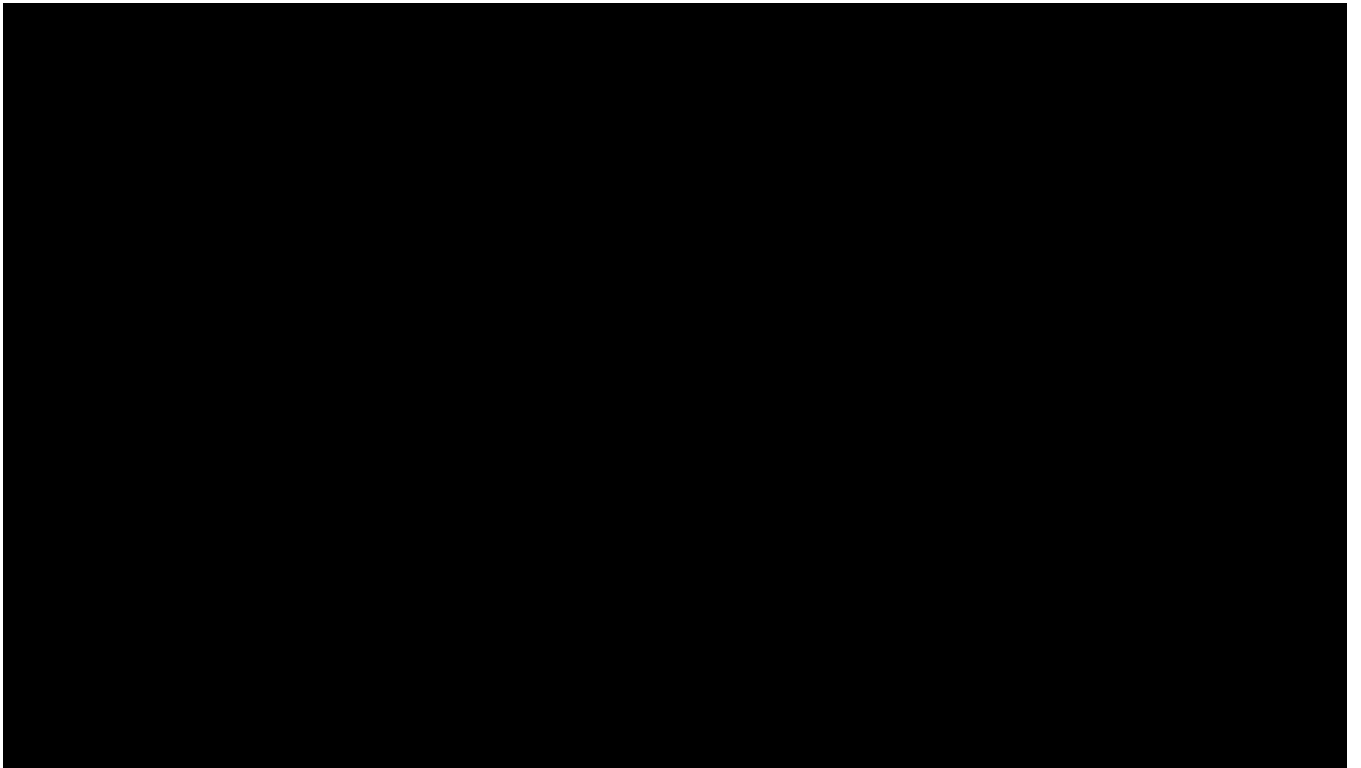












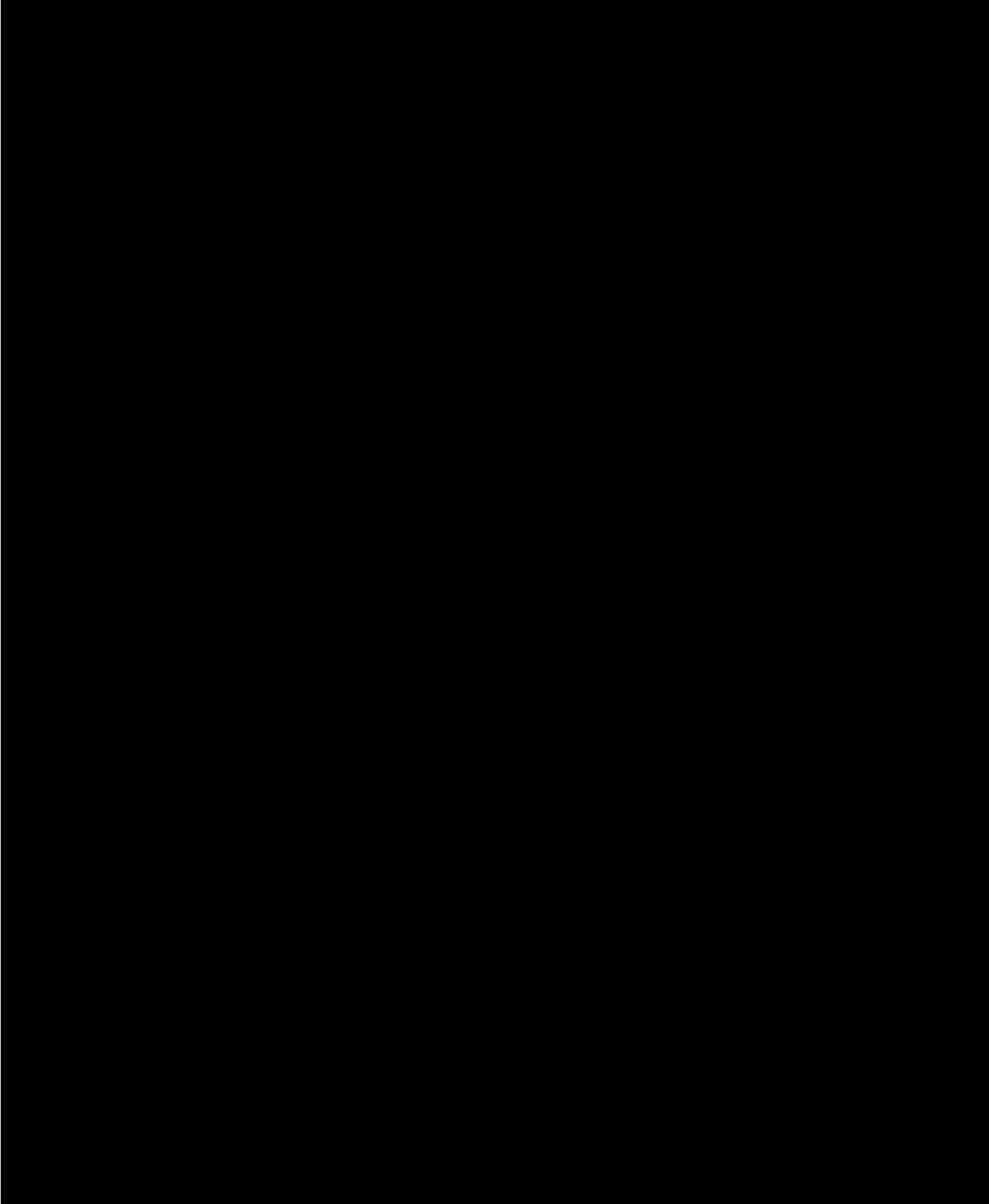
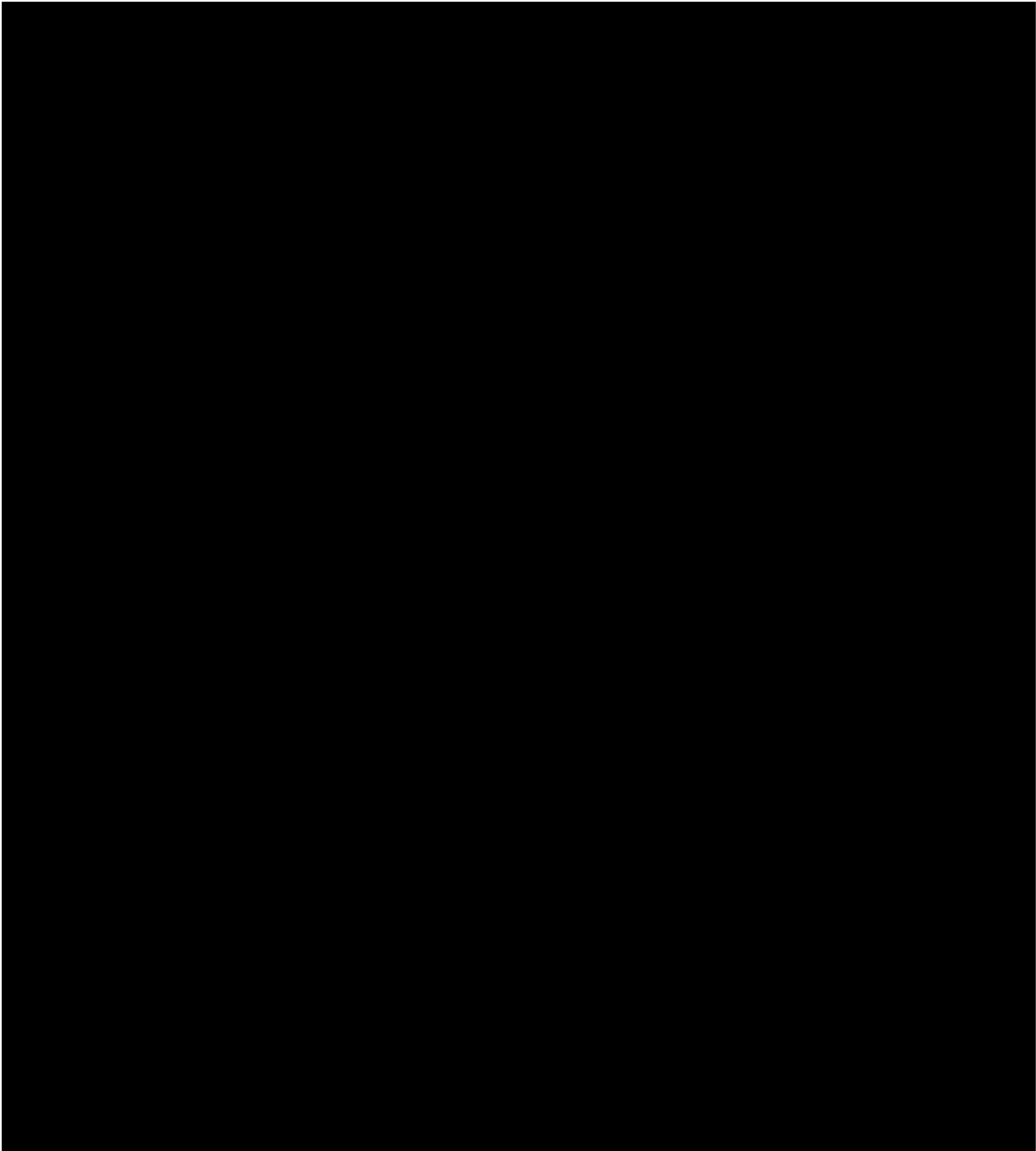


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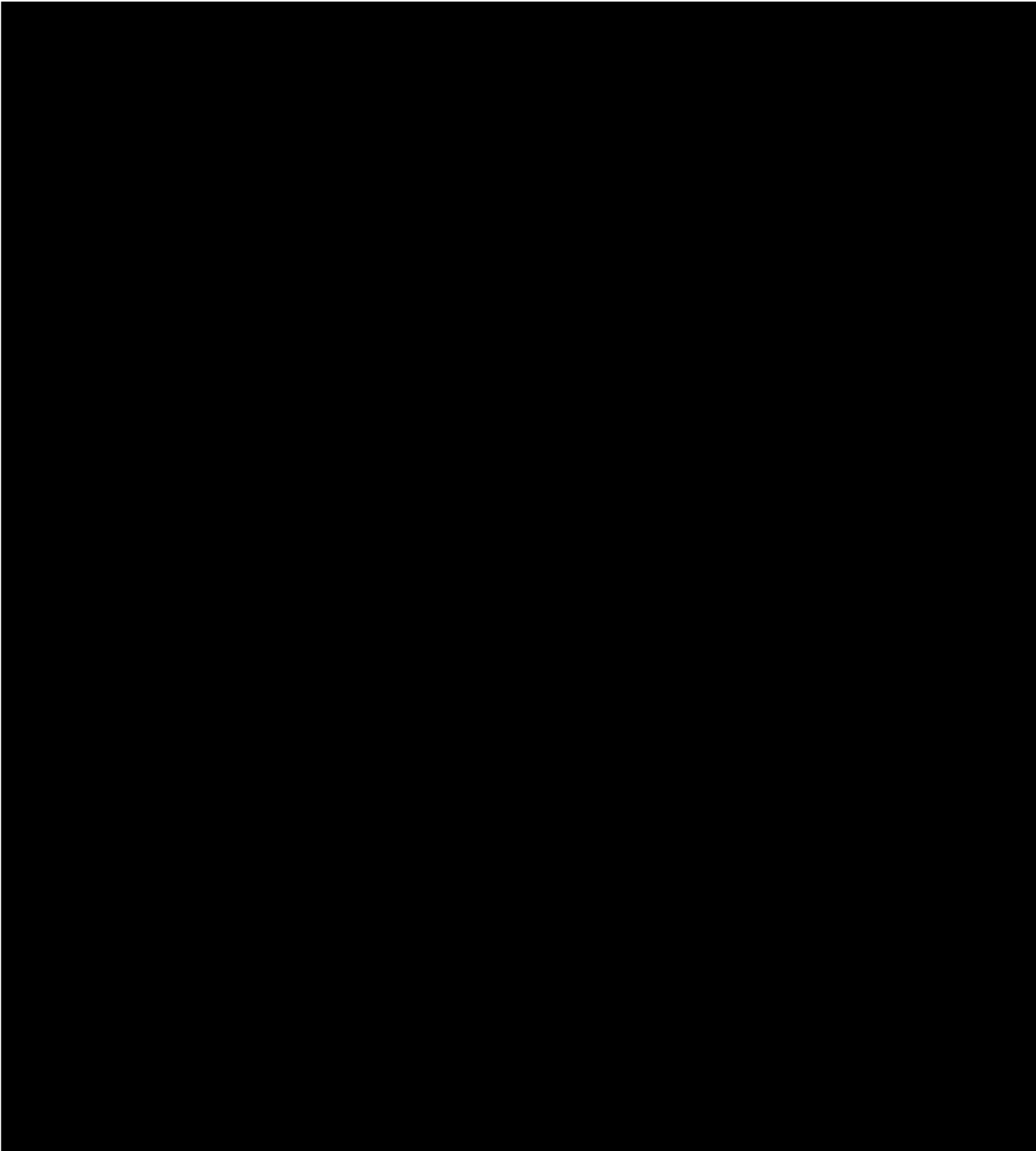
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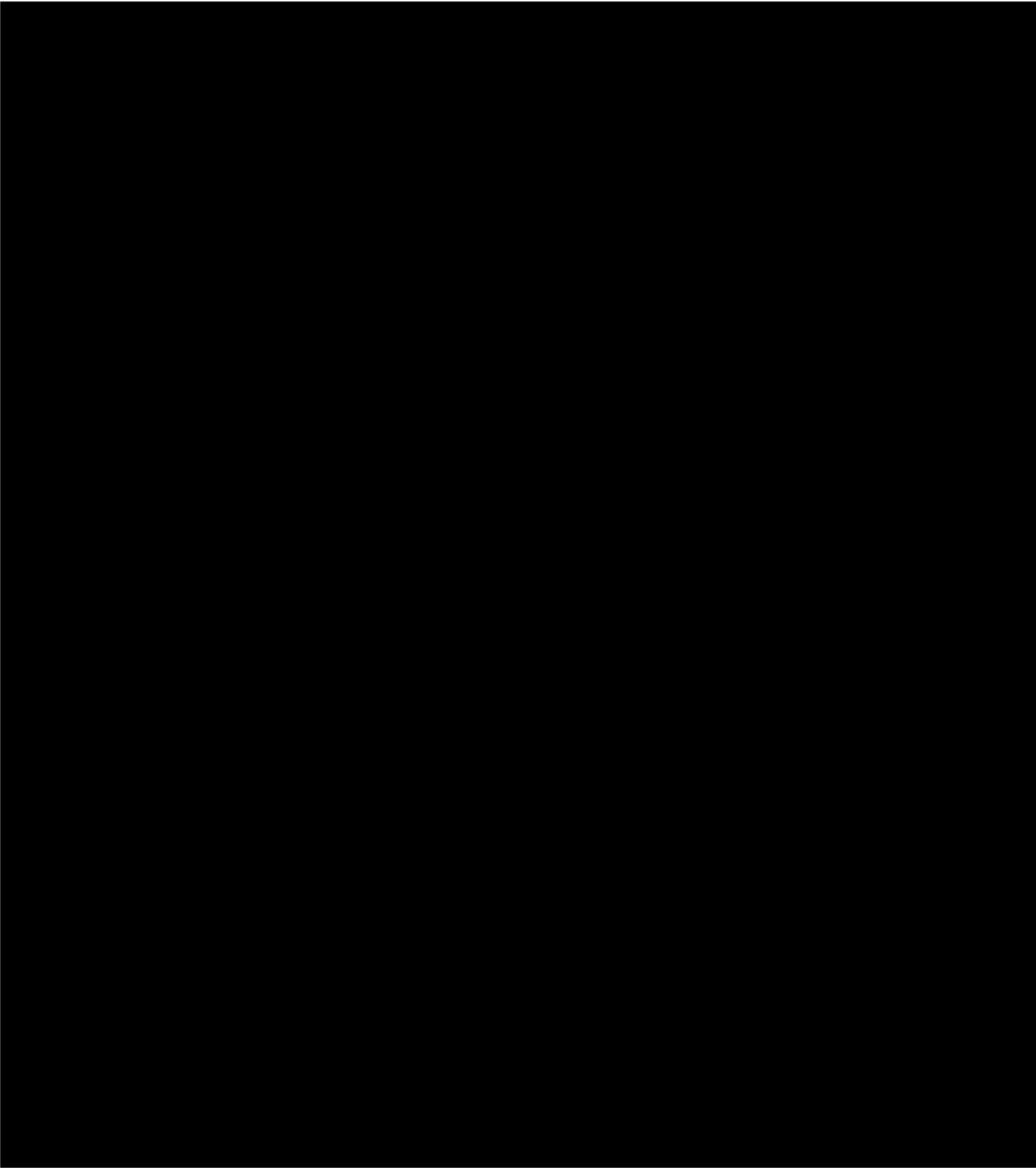
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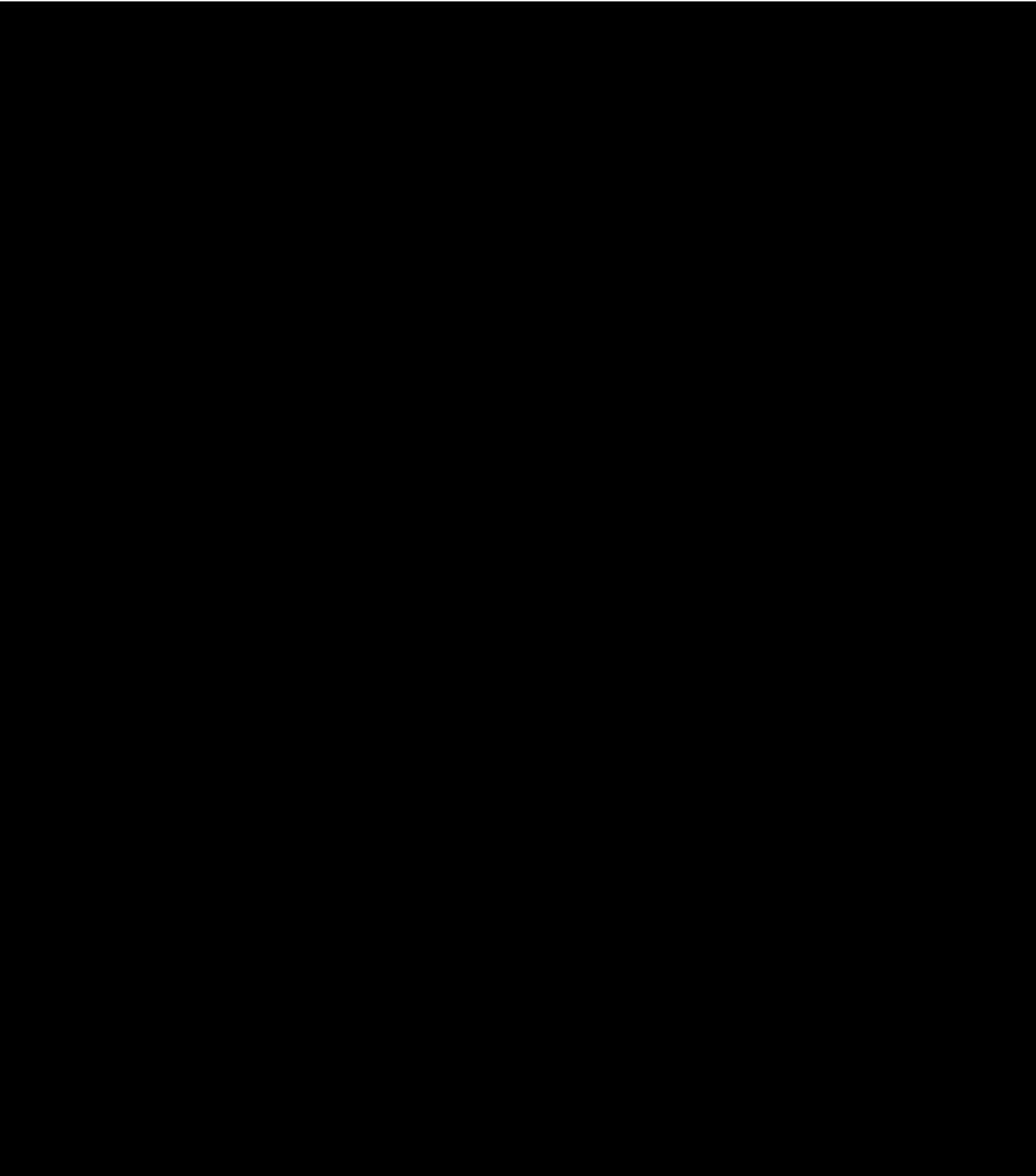


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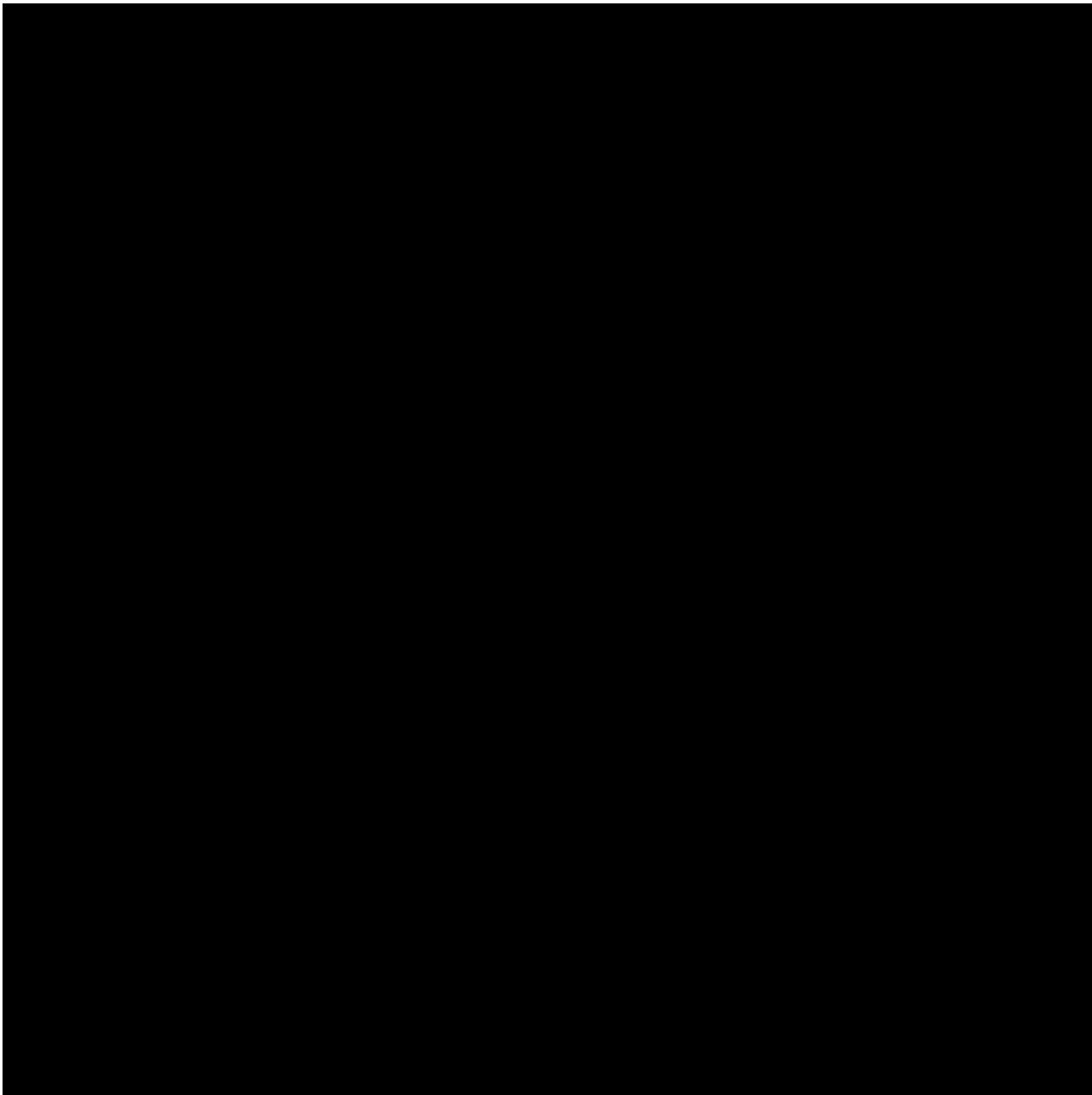
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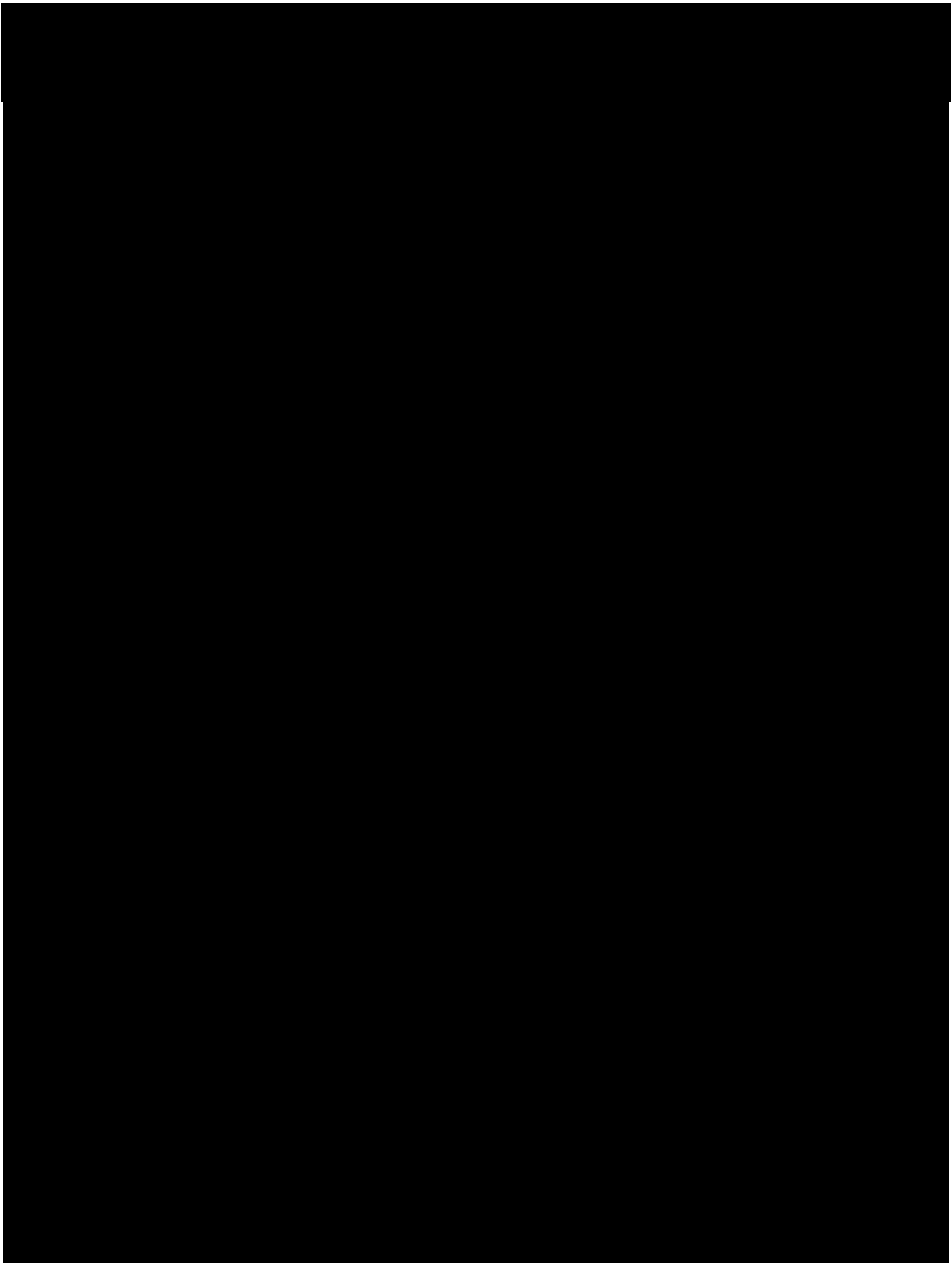
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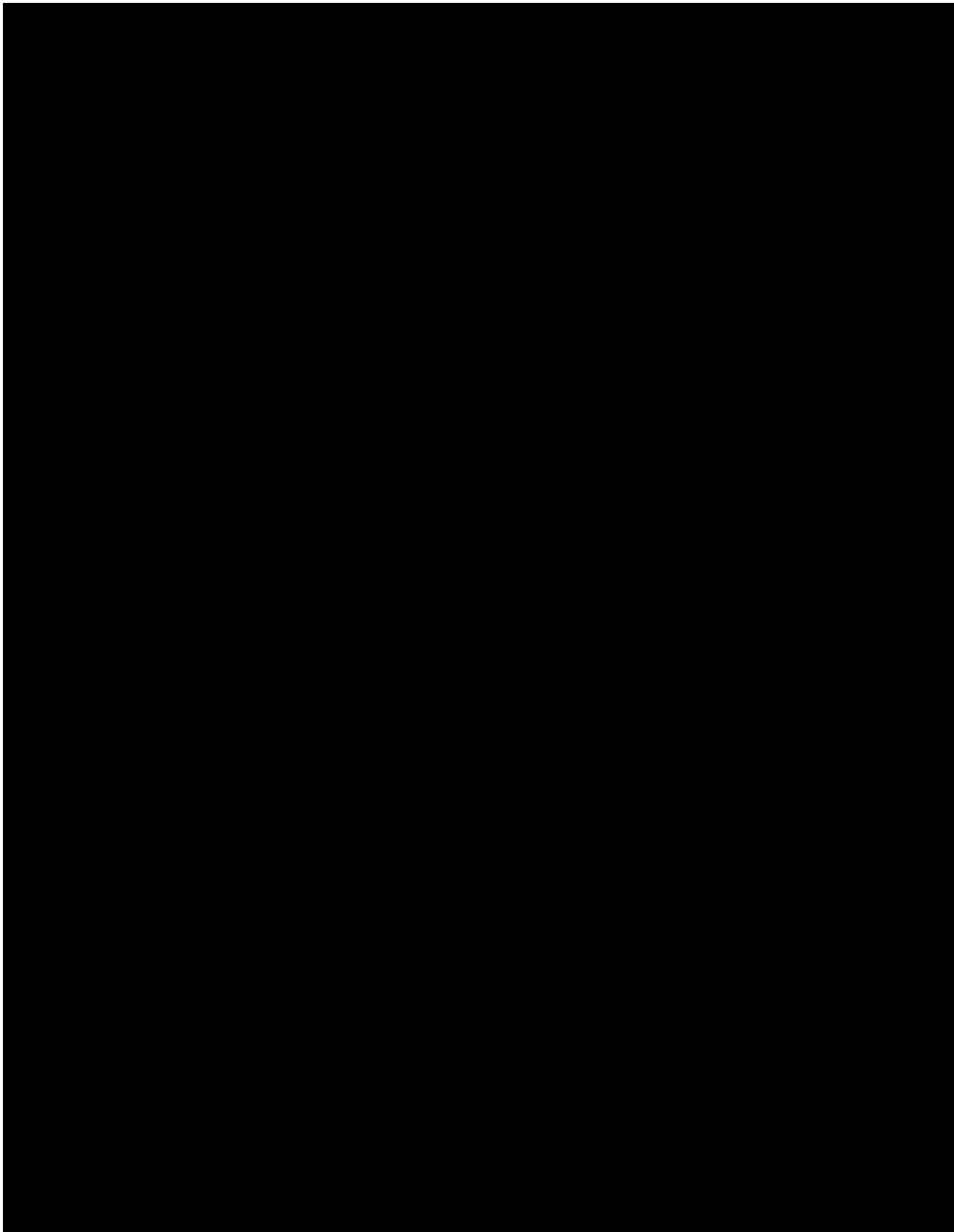
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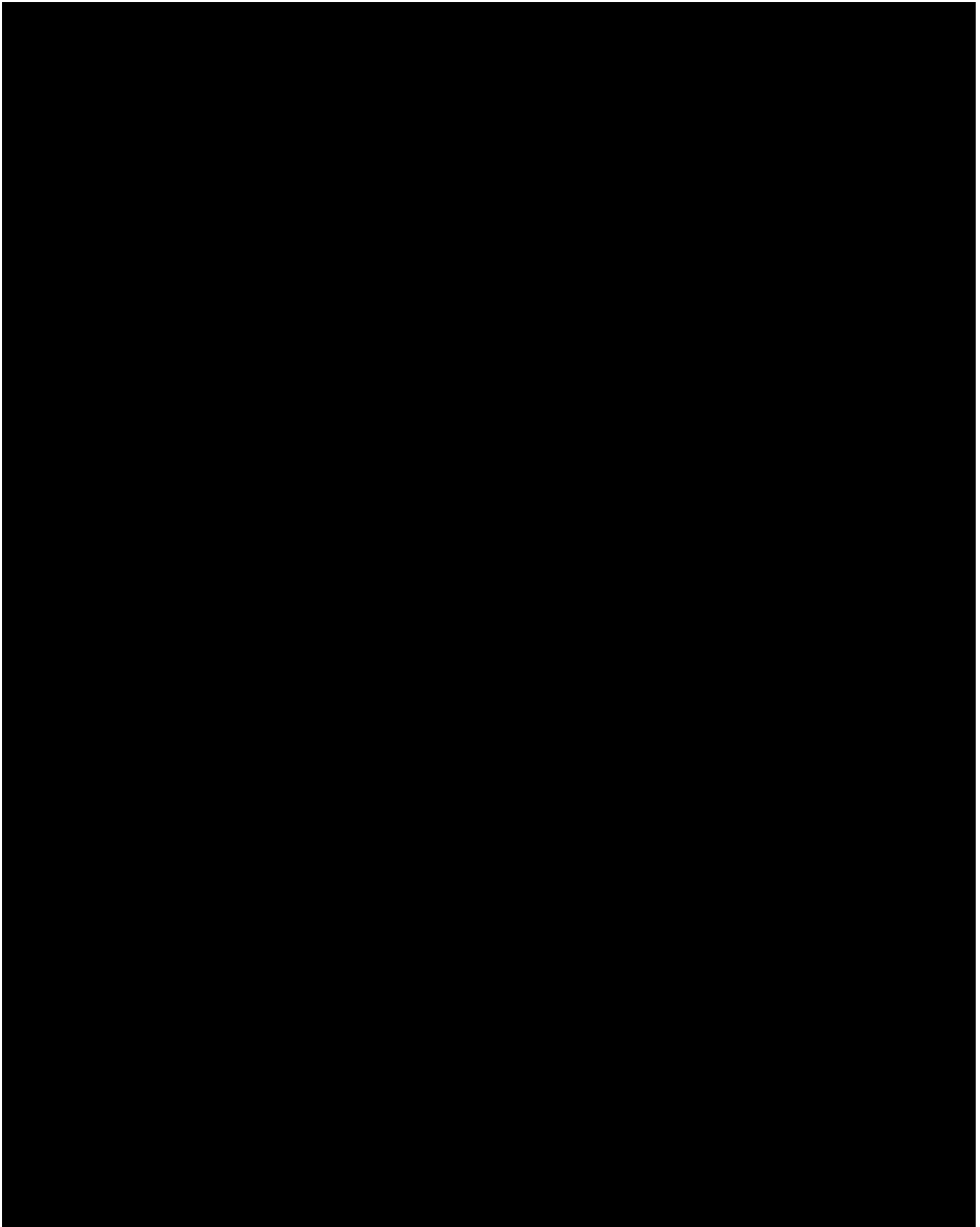


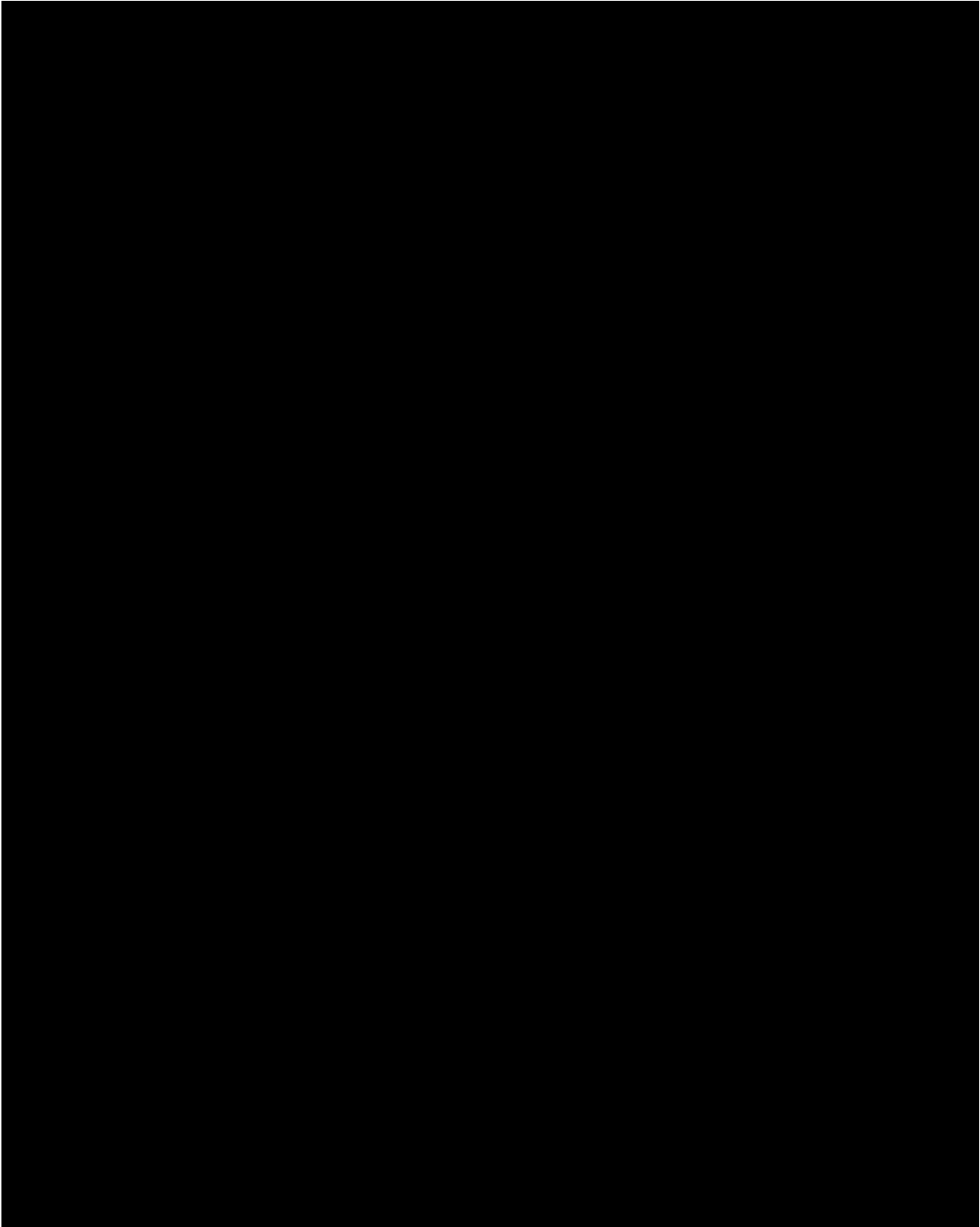


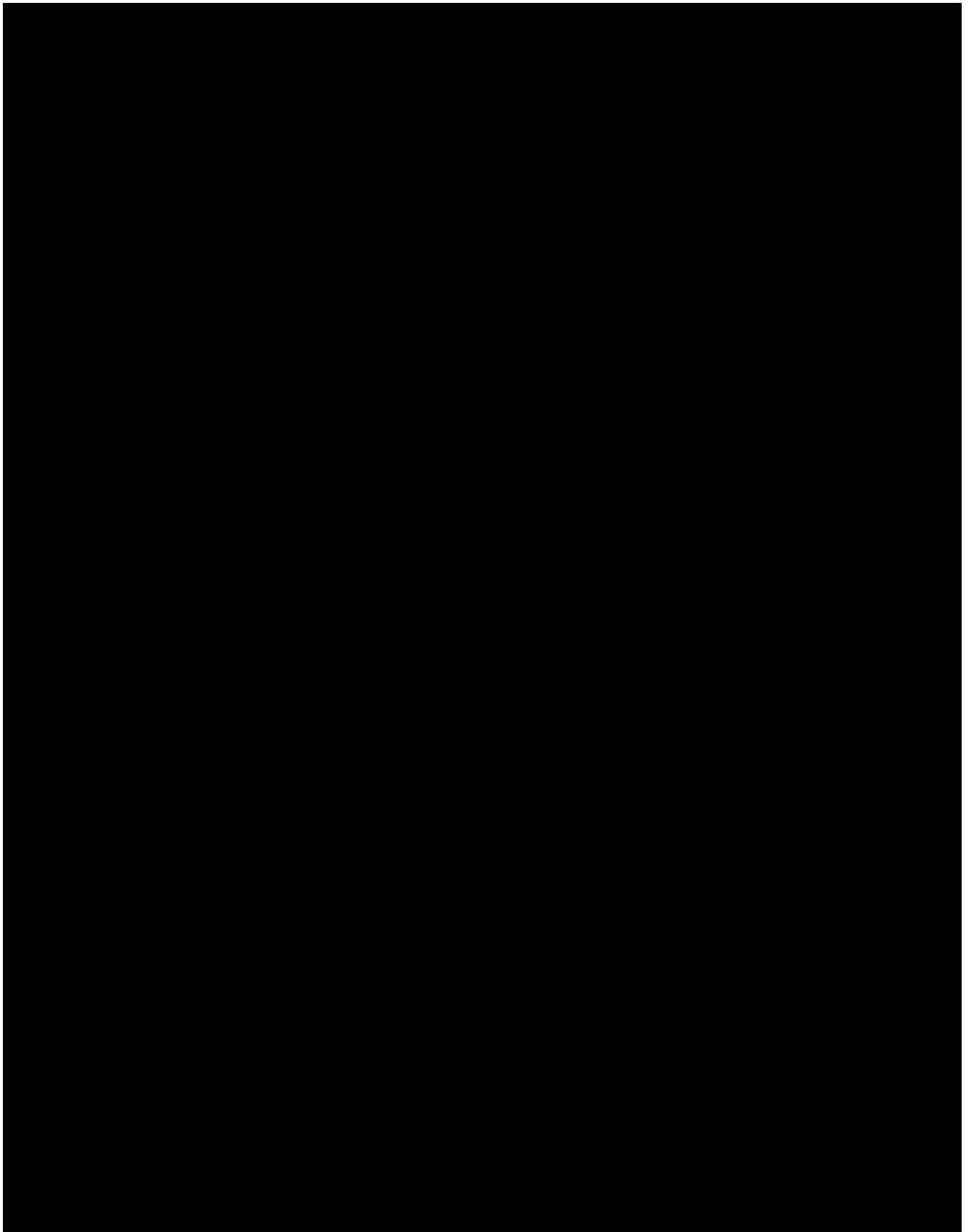


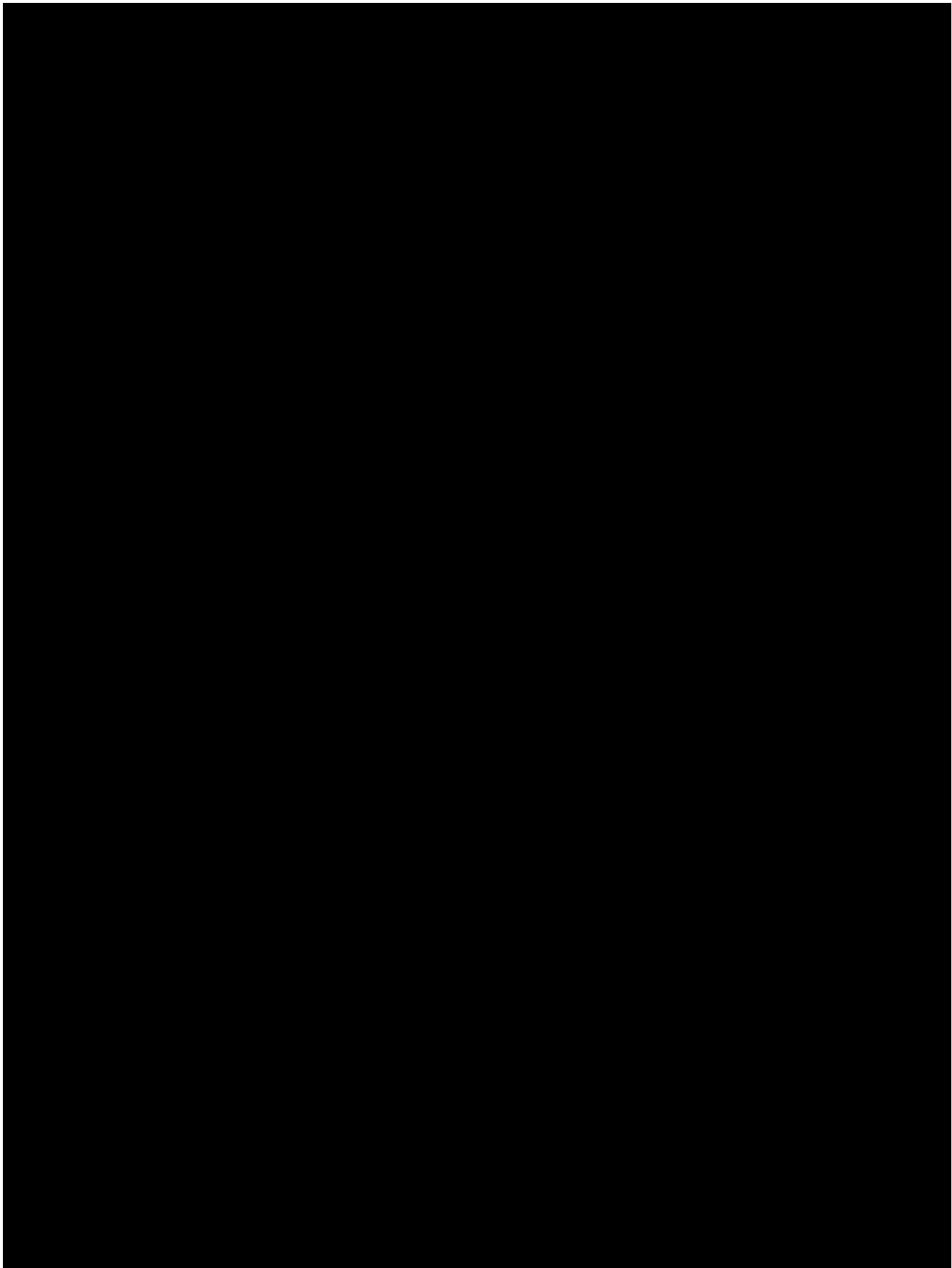
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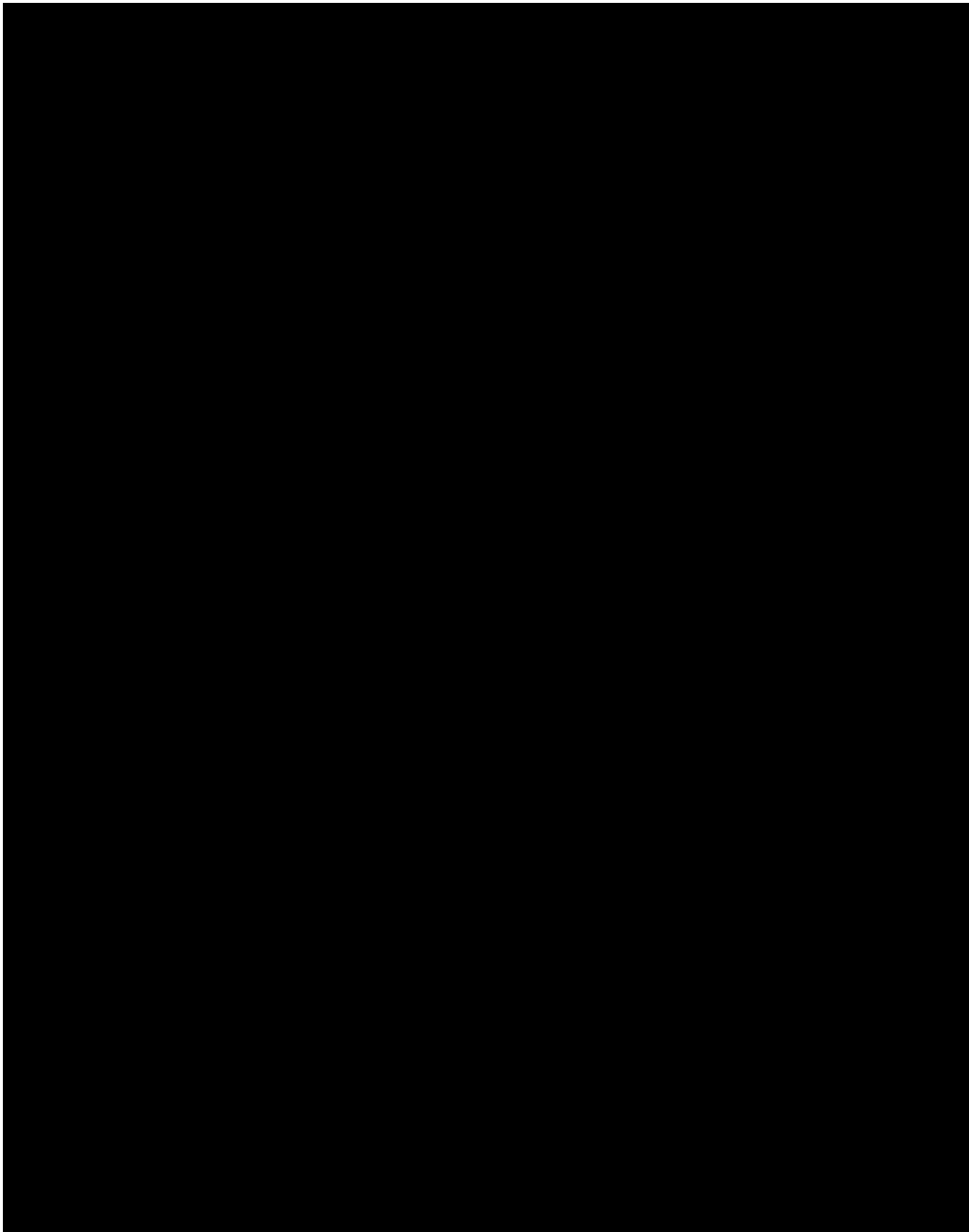


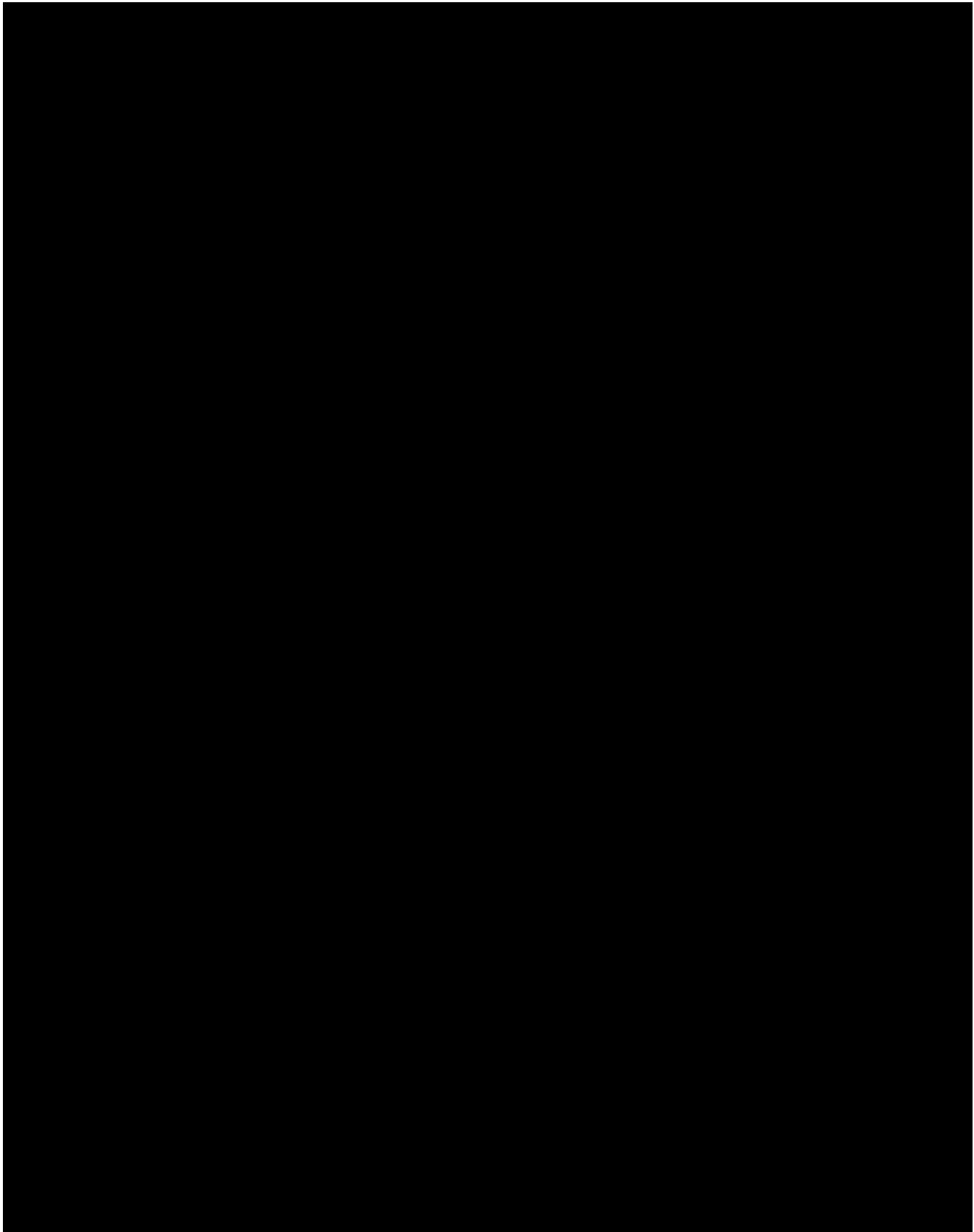


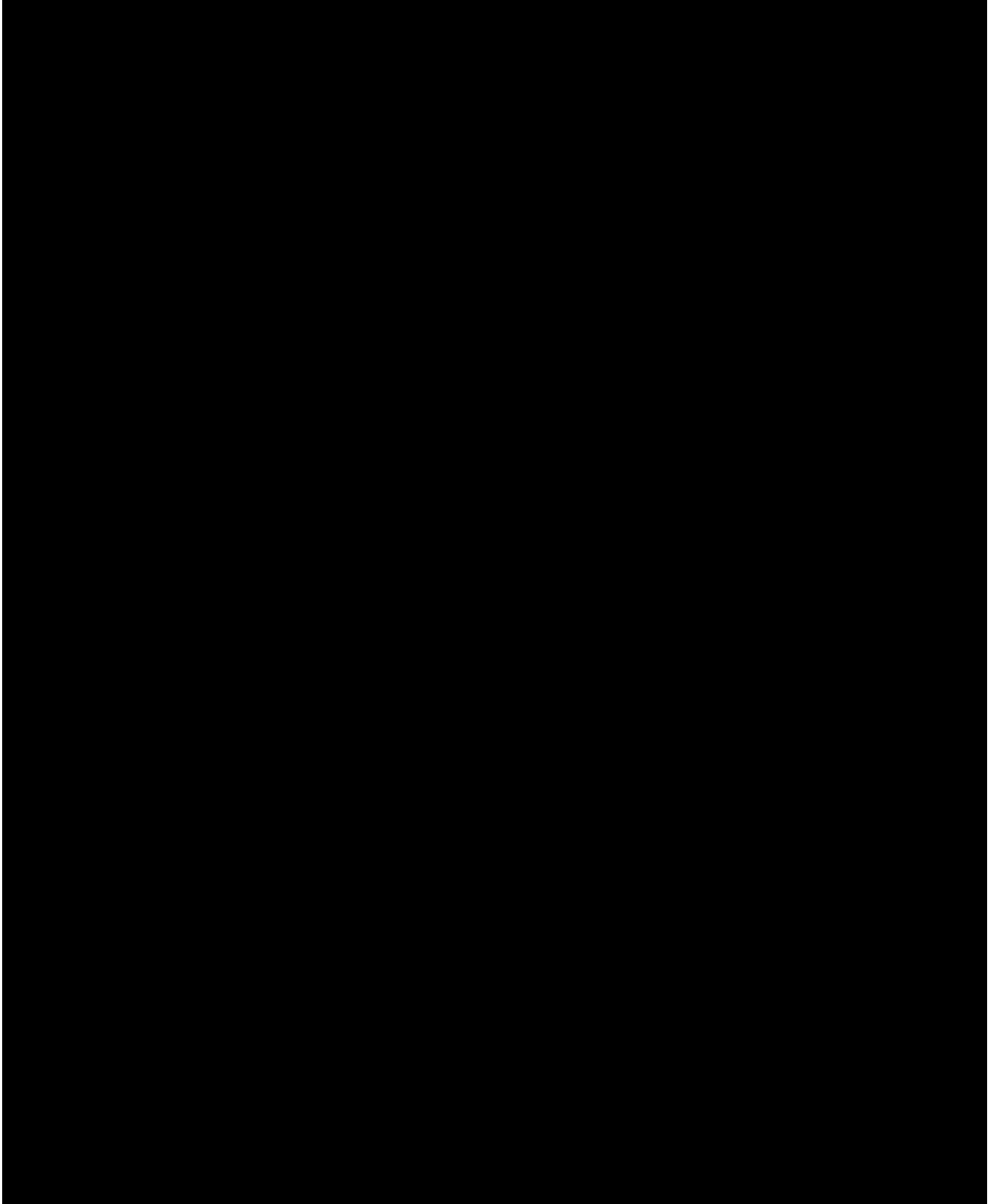


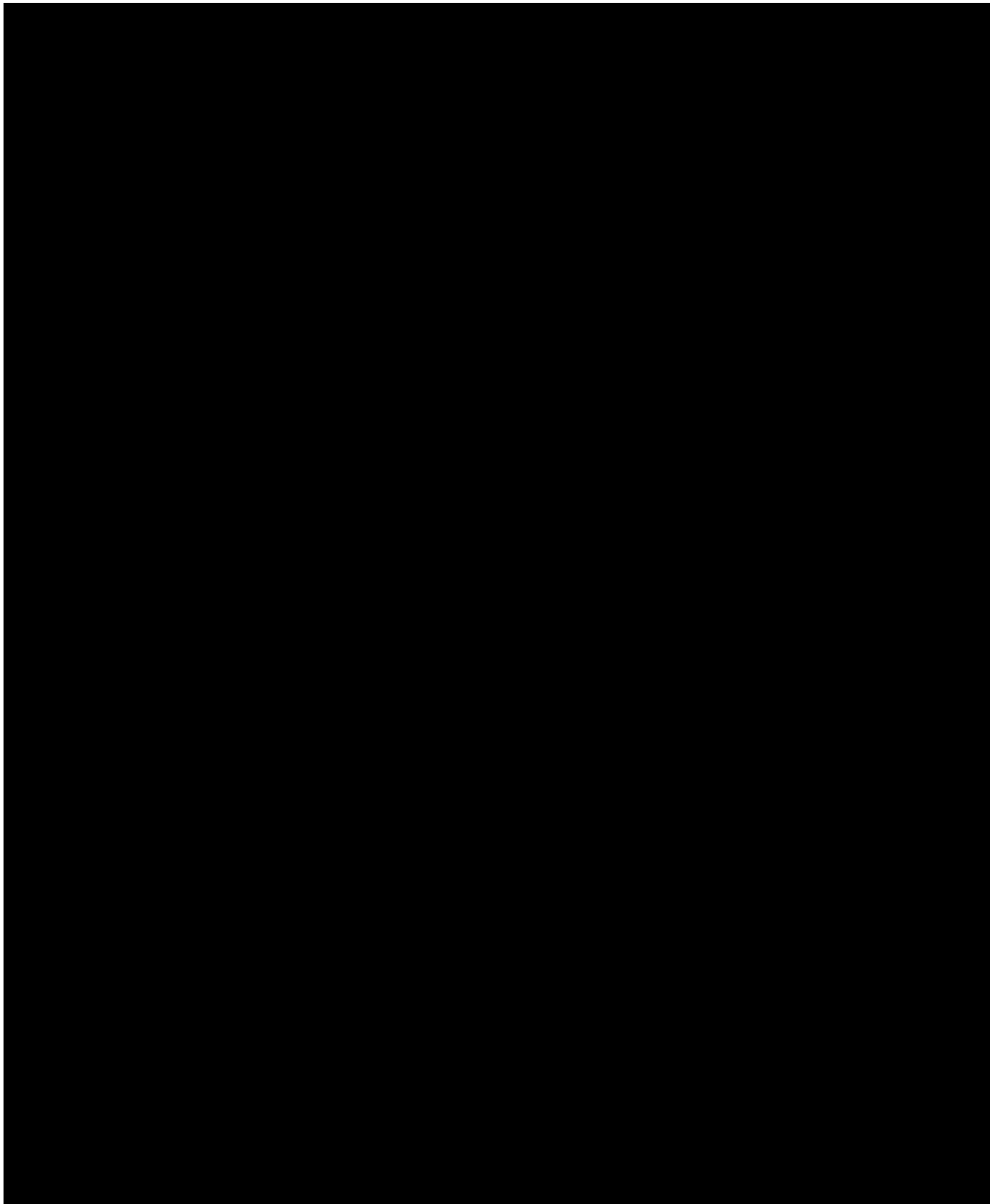


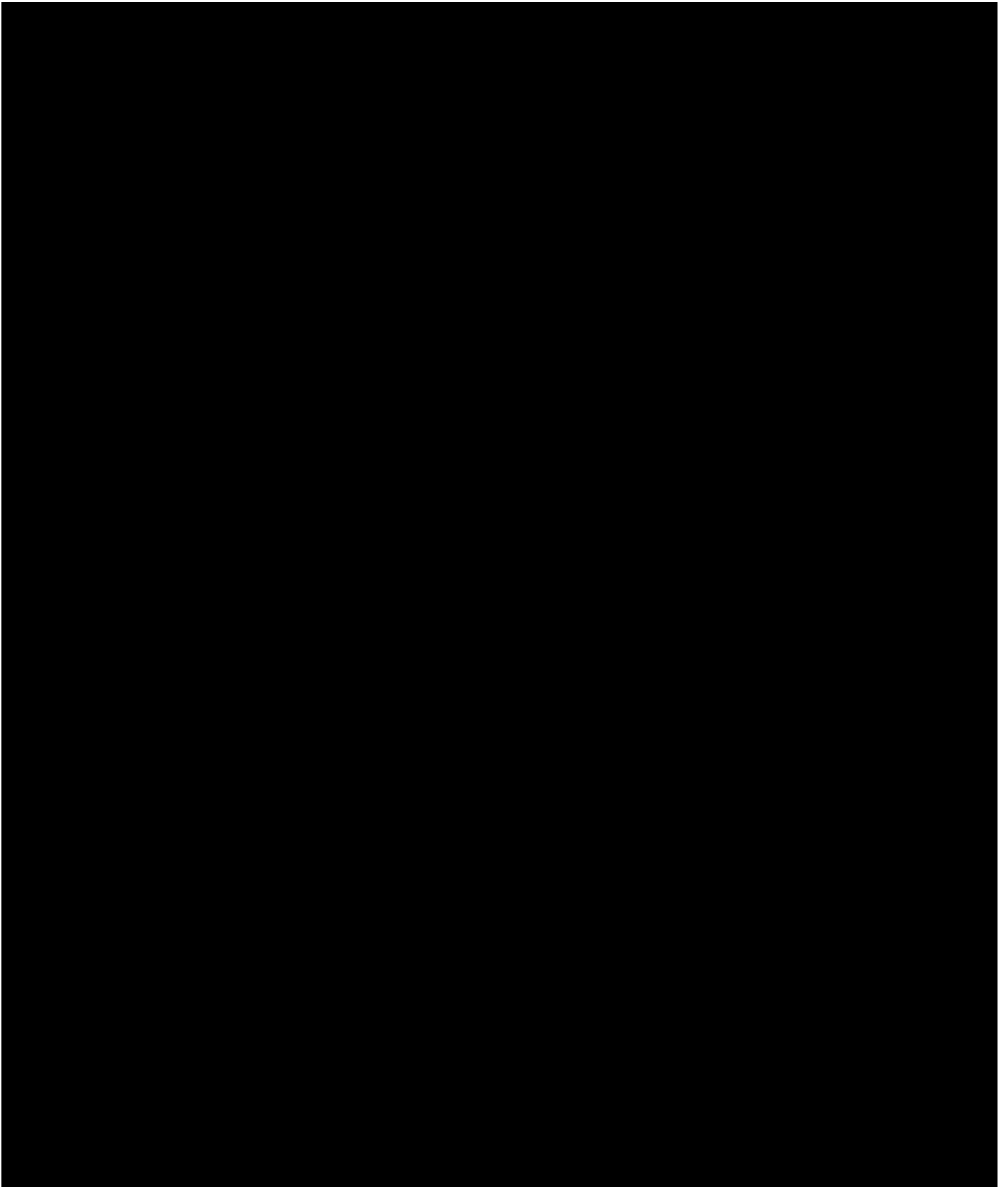


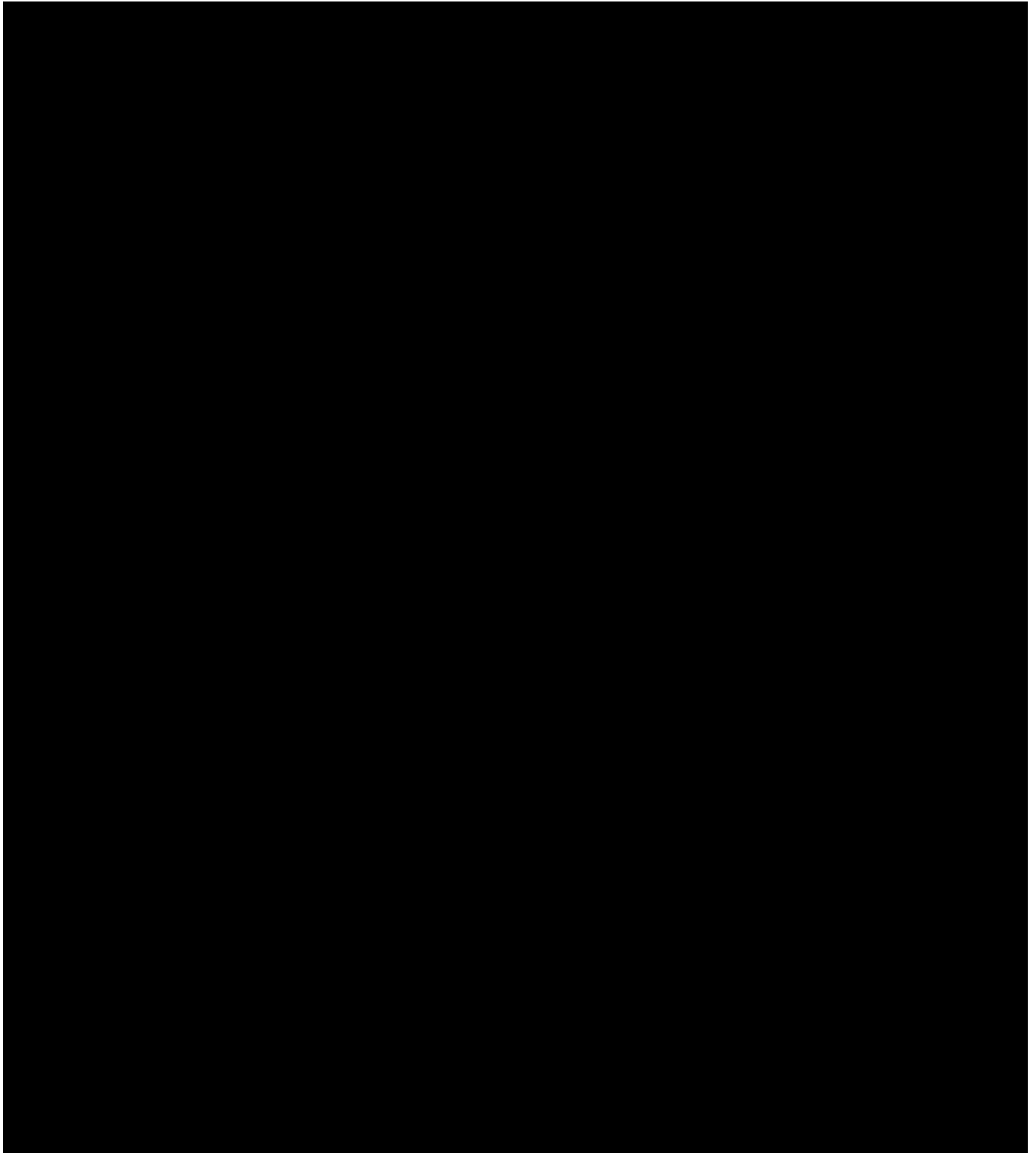


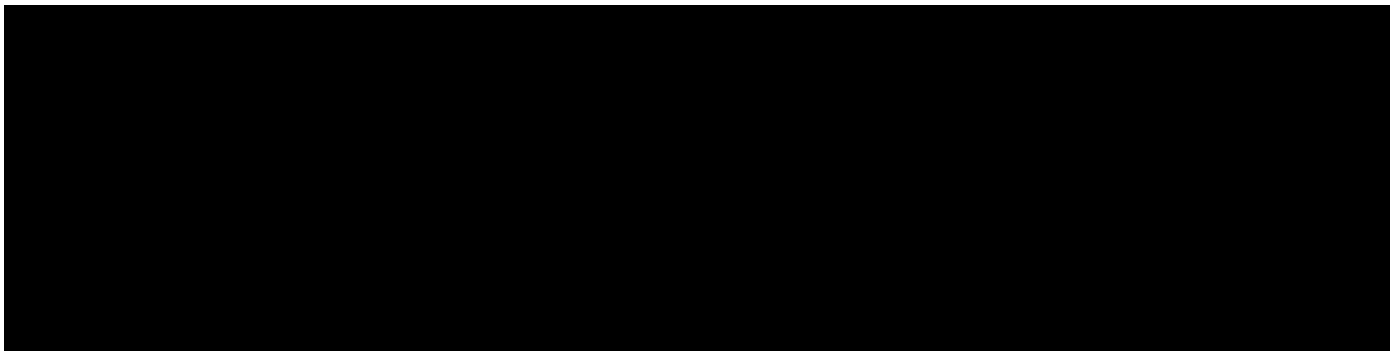












PROVIDER

Signature:

Printed Name: Dennis Ayer

Title: DDS Owner

Ex: DDS, DMD, TIN Owner etc.

Date: 11/8/2018

FEDERAL TAX I.D. NUMBER: 

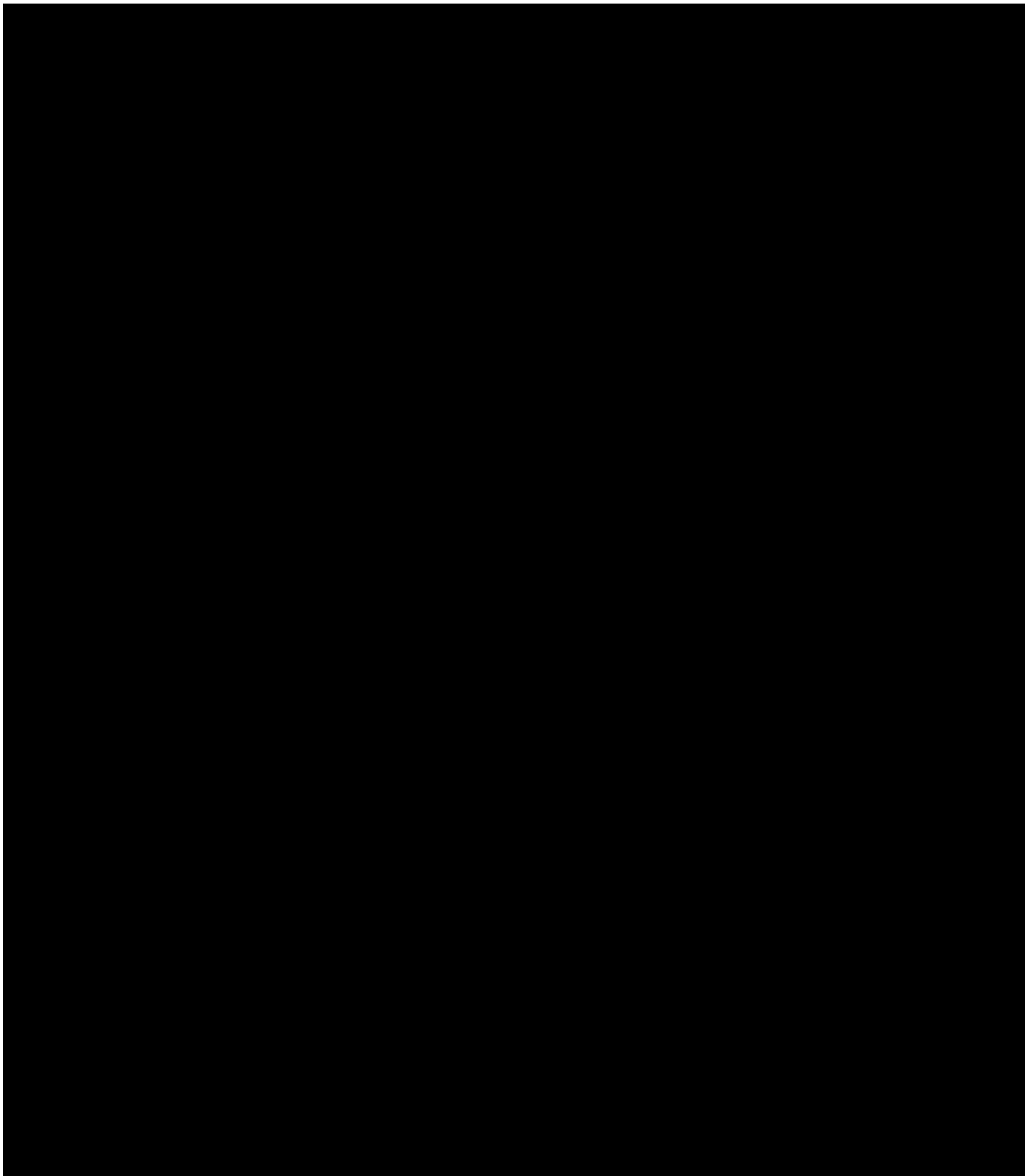
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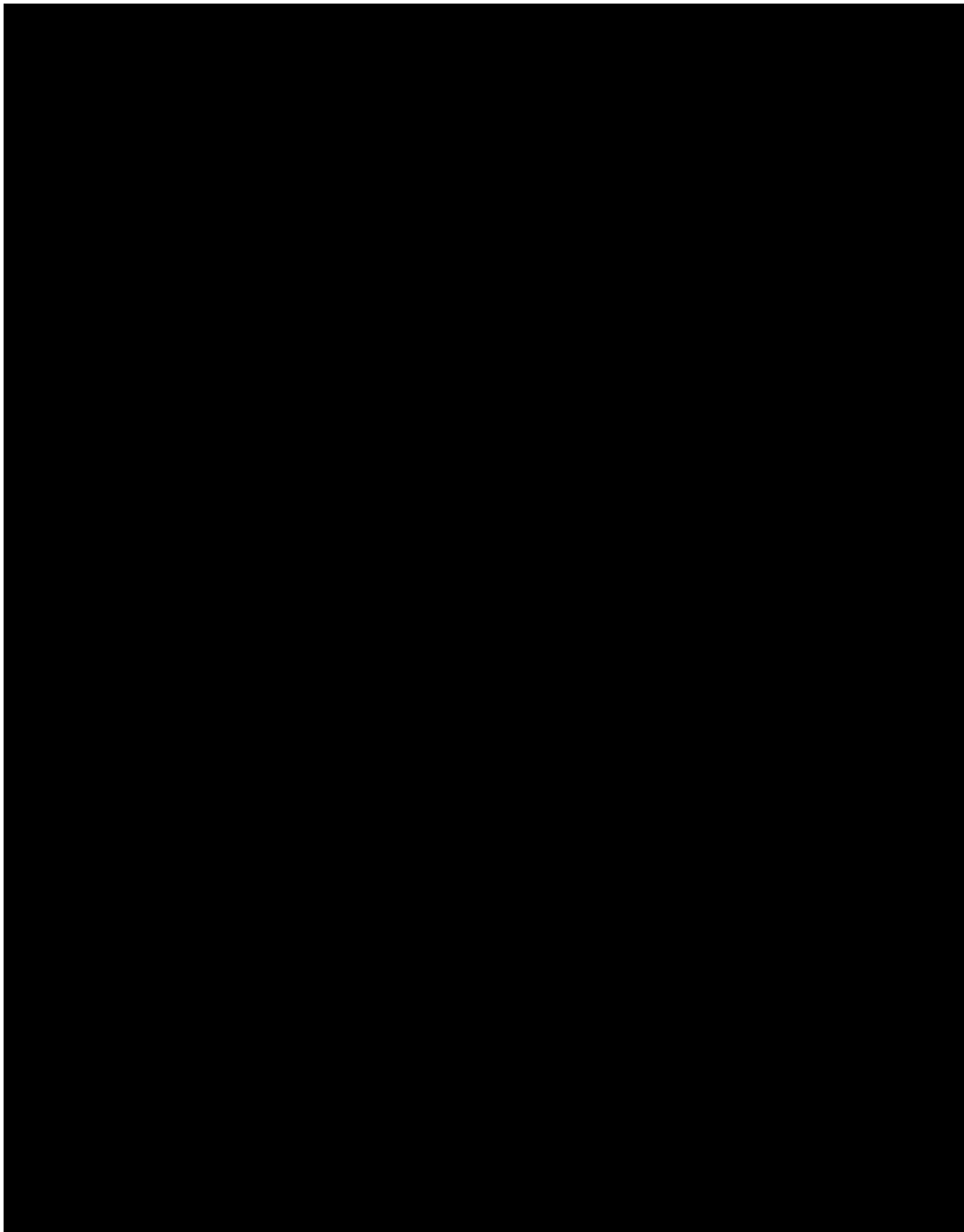
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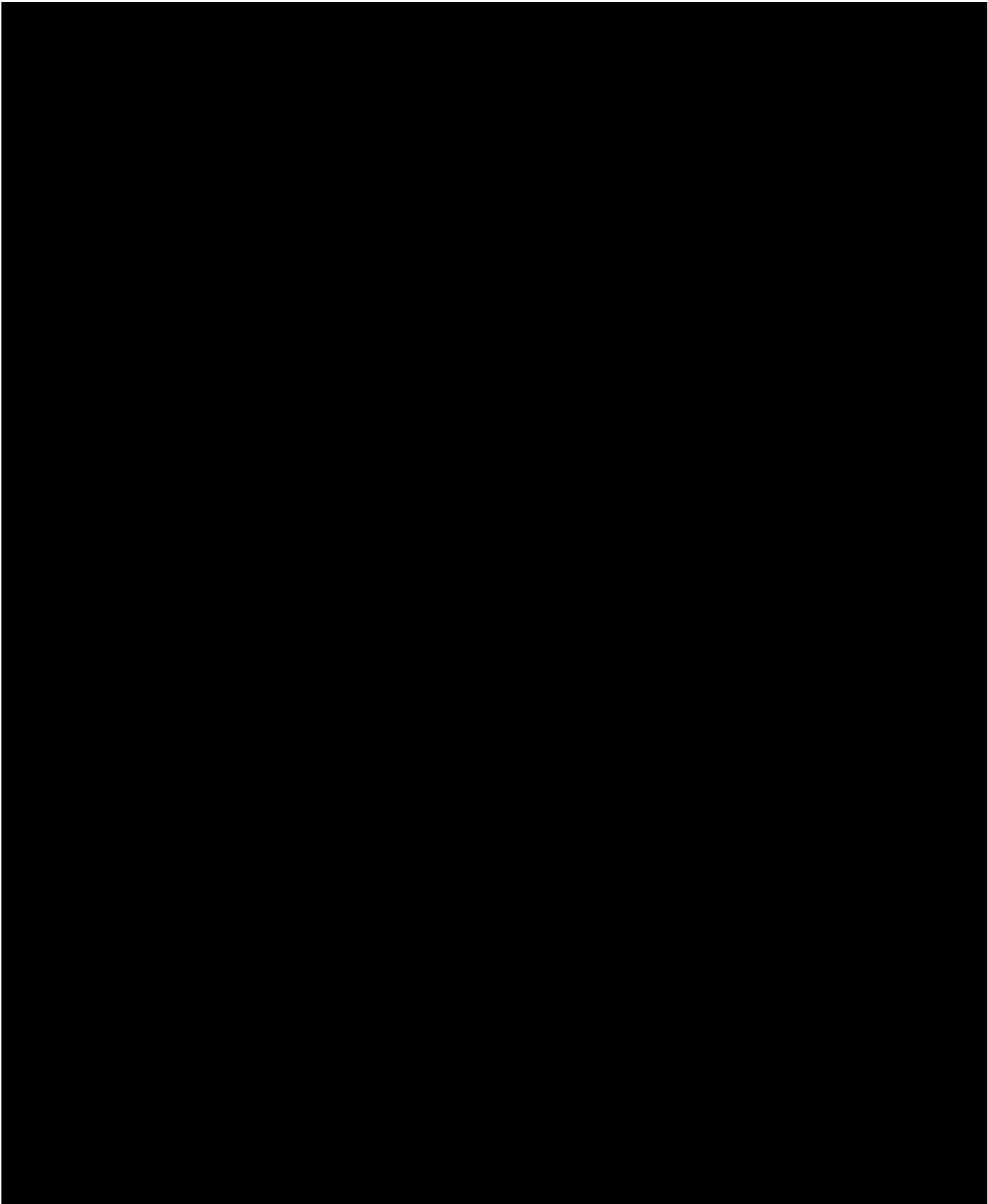
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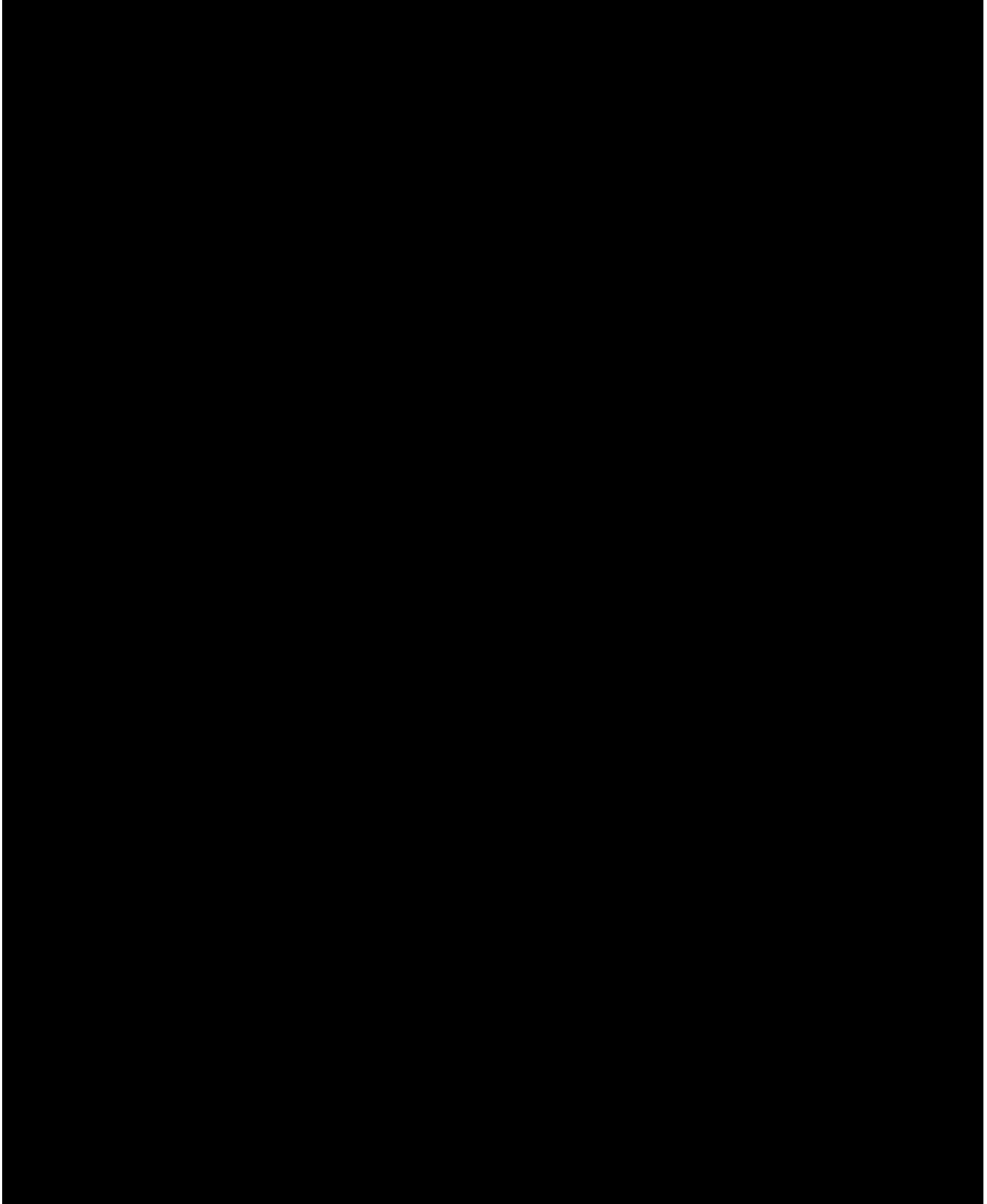
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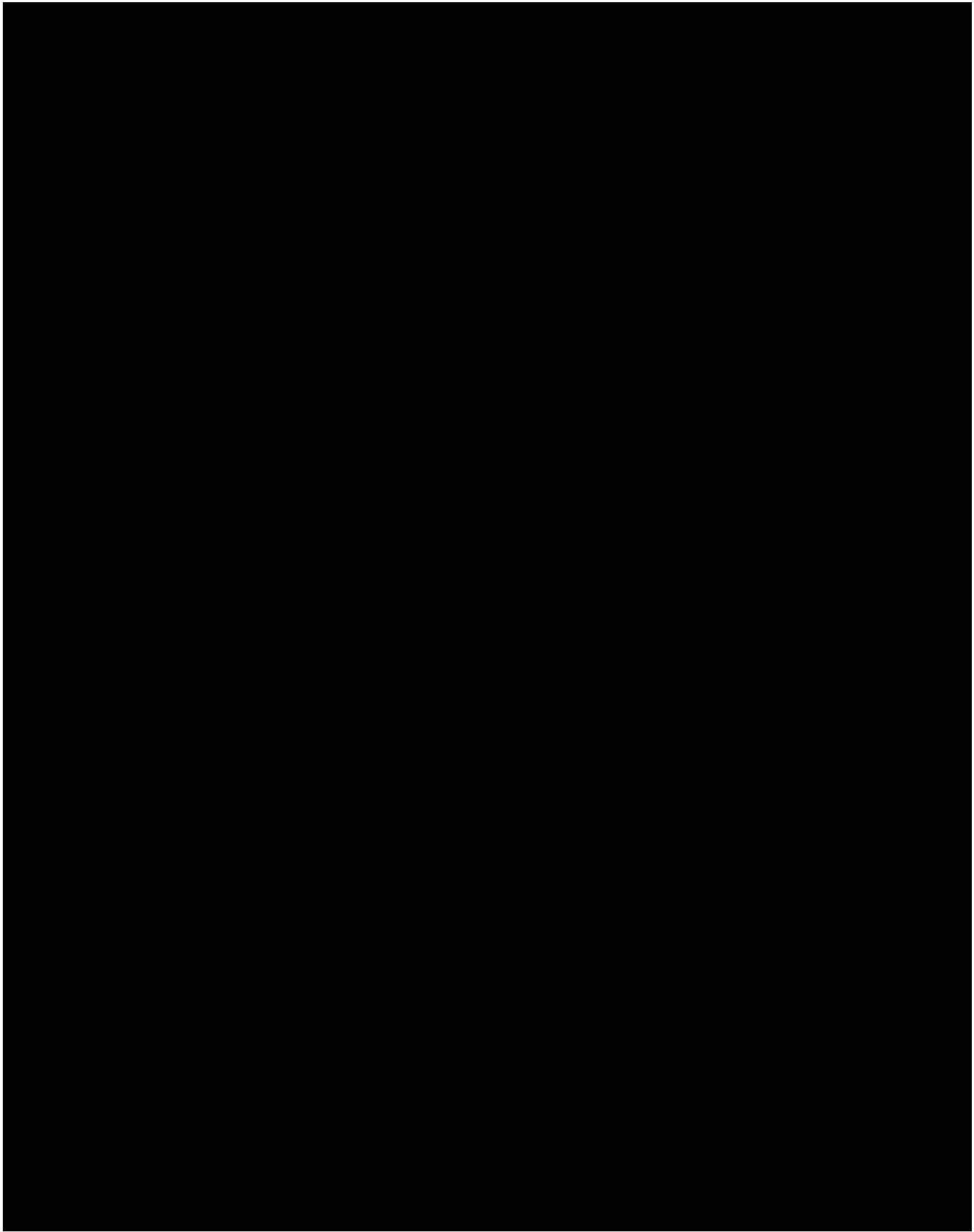
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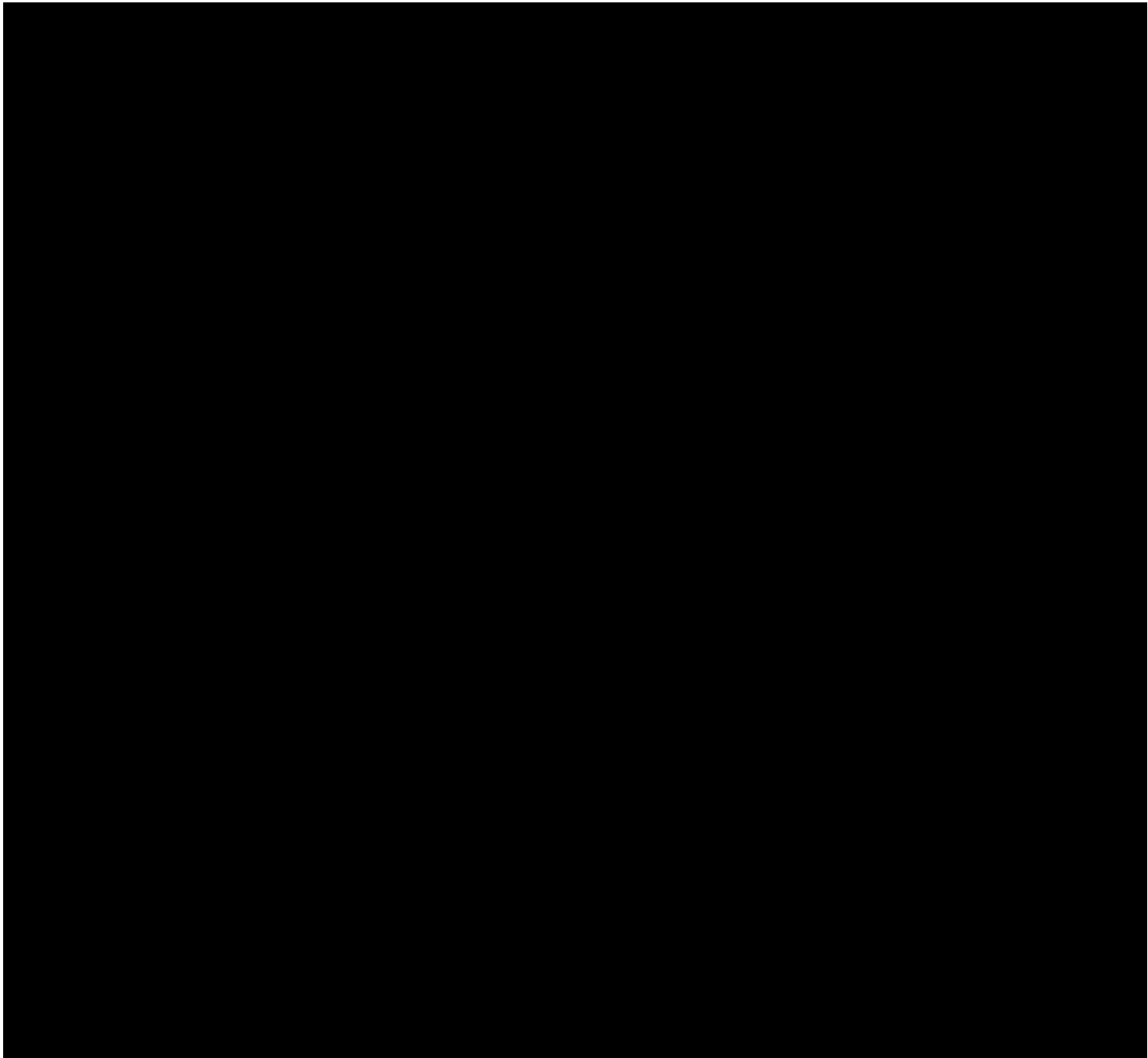


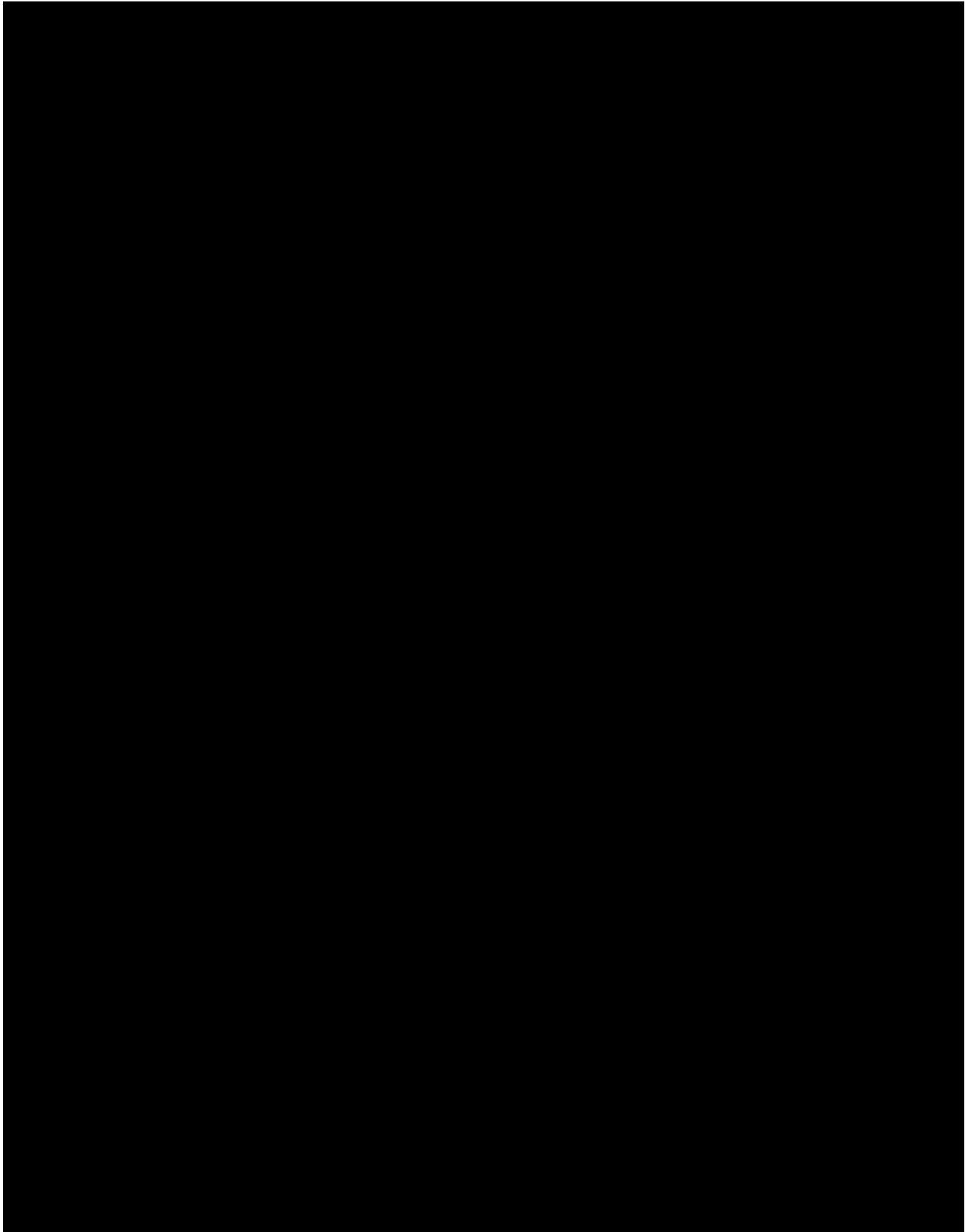


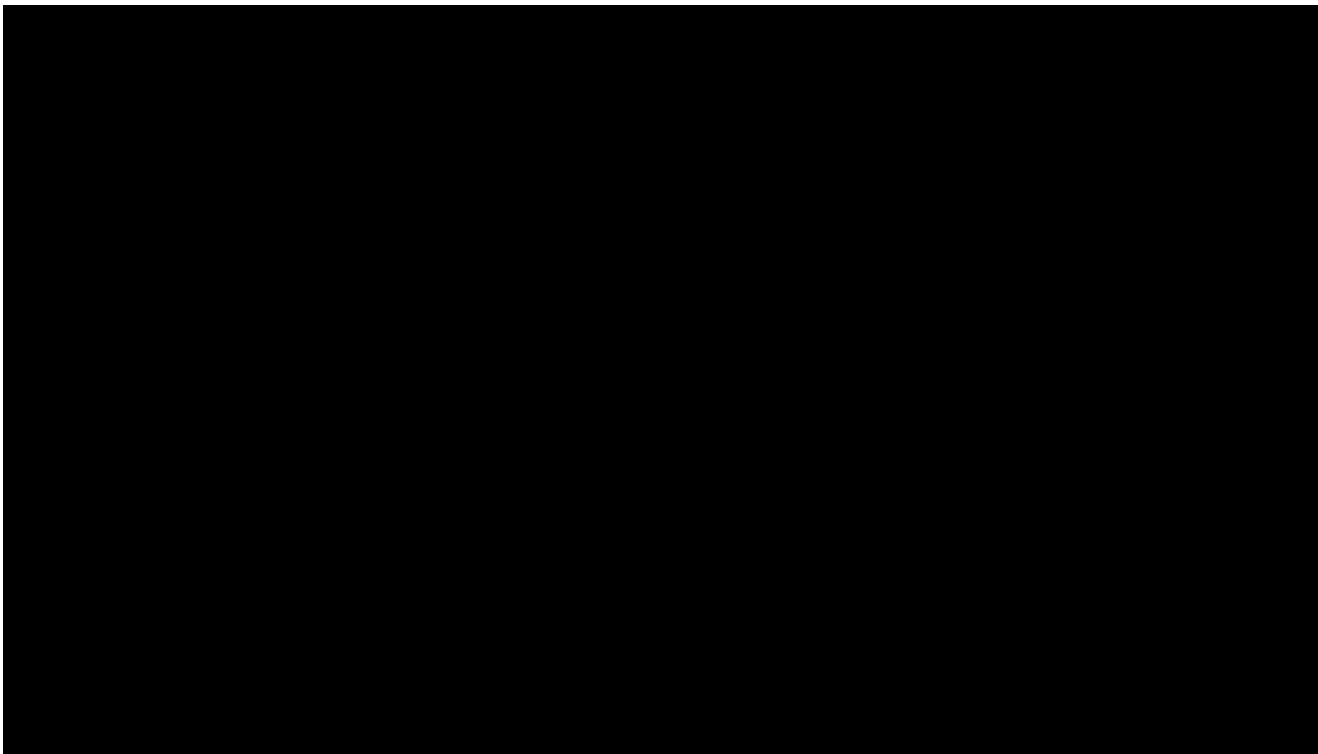












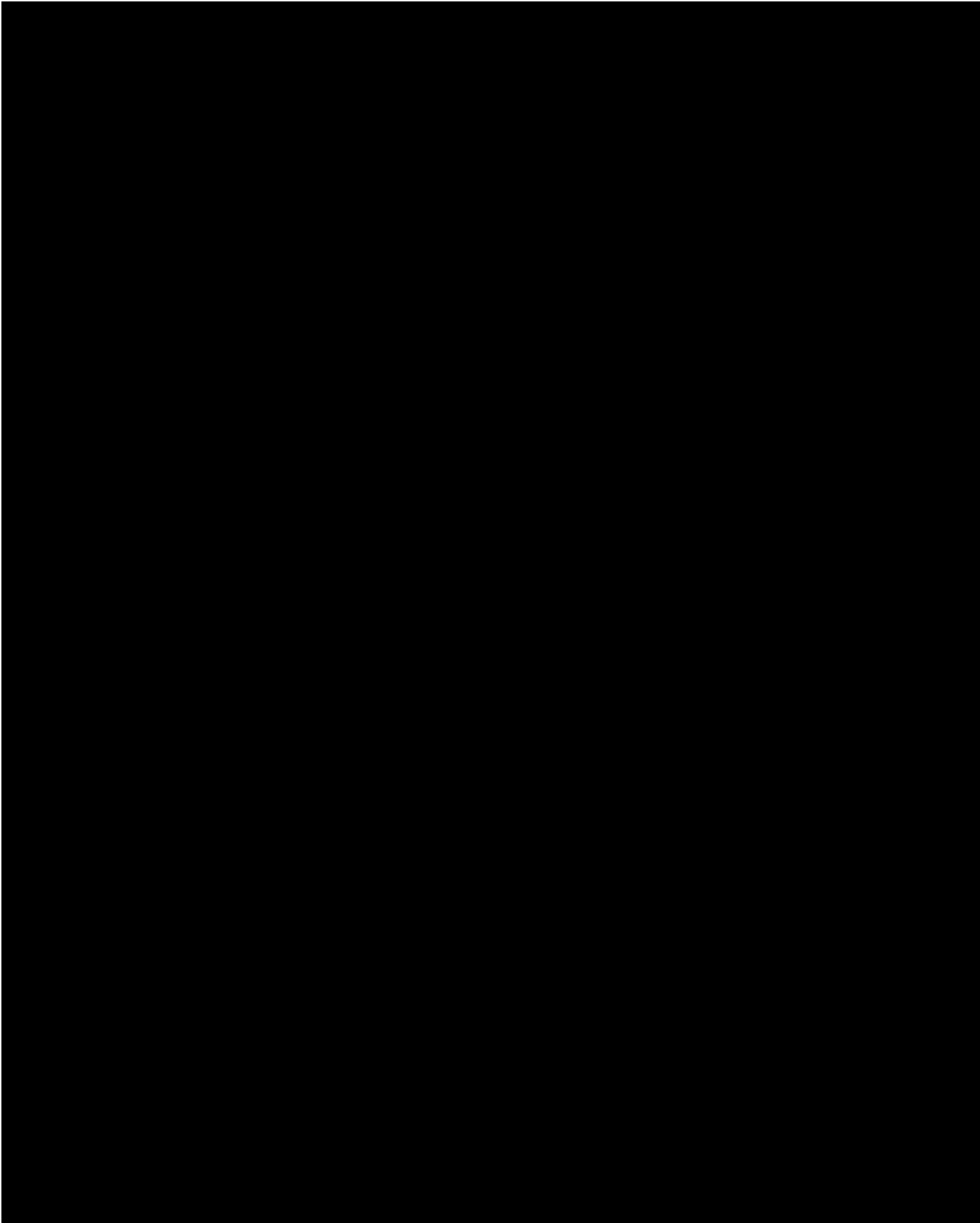
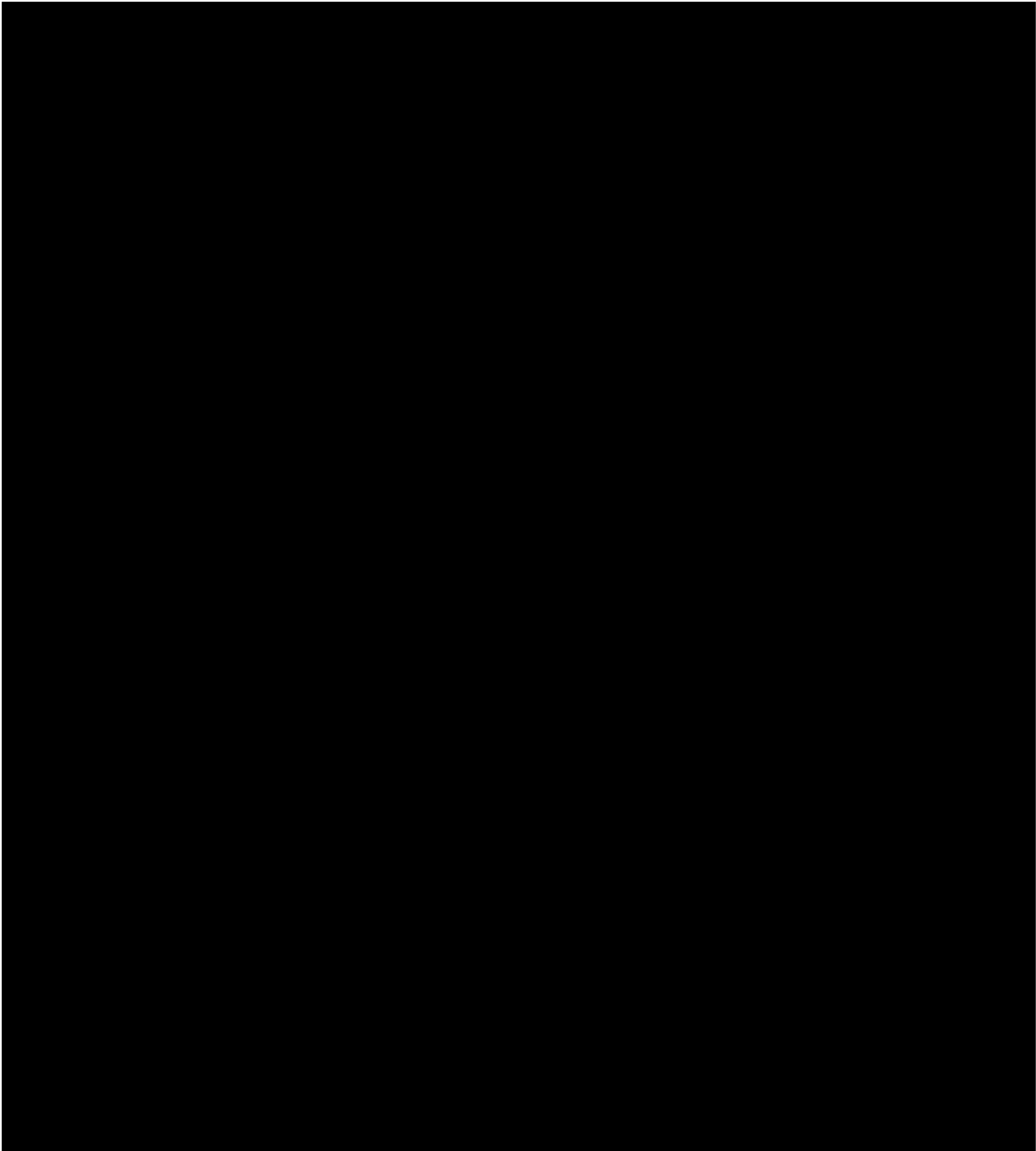


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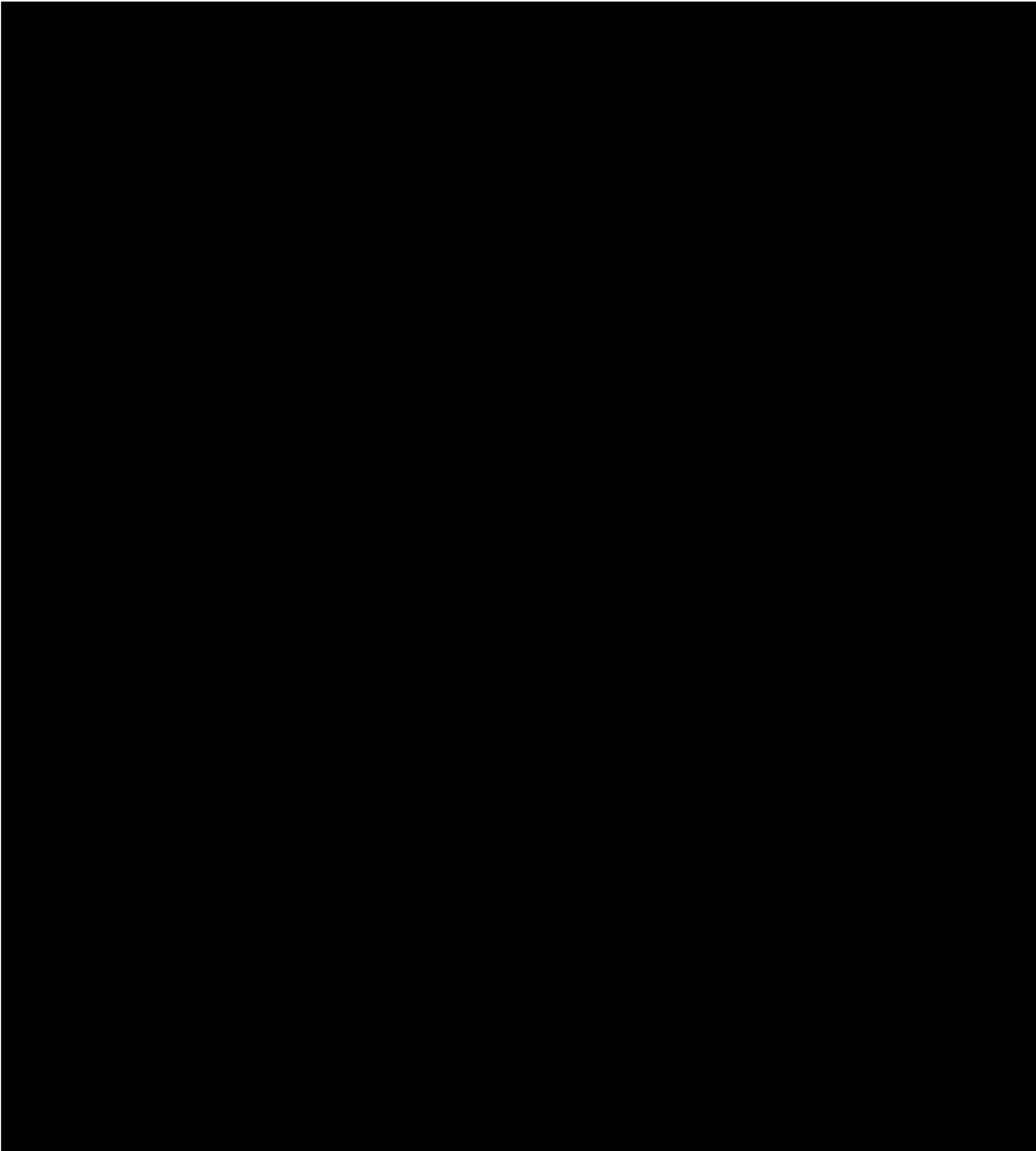
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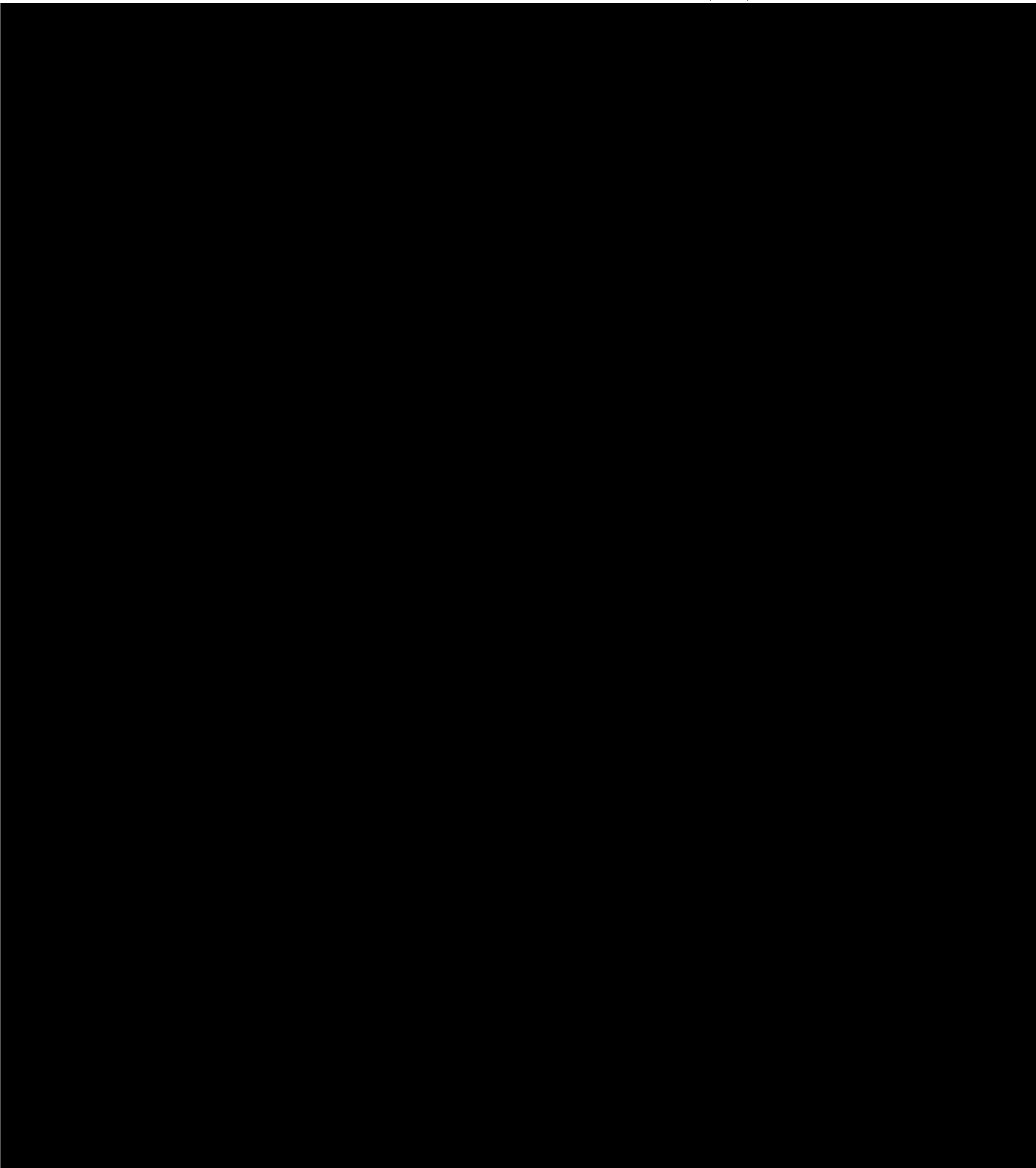


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AETNA DENTAL[®]
FEE SCHEDULE 311 FOR:
AETNA DENTAL PREFERRED PROVIDER ORGANIZATION (PPO) PLANS*

