

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**     **Lina M. Khan, Chair**  
                               **Rebecca Kelly Slaughter**  
                               **Christine S. Wilson**  
                               **Alvaro M. Bedoya**

In the matter of:

**Intuit Inc.,**  
     a corporation,  
  
     Respondent.

Docket No. 9408

**COMPLAINT COUNSEL’S OPPOSITION TO INTUIT INC.’S  
 MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO  
 COMPLAINT COUNSEL’S MOTION FOR SUMMARY DECISION**

Between August 22 and October 31, 2022, the parties fully briefed and argued Complaint Counsel’s Motion for Summary Decision. Intuit now seizes on a clerical error to ask for leave to file a new brief advocating that the Commission deny summary decision, or restart the entire summary decision process from scratch. Intuit argues that the delayed distribution of the Commission’s December 8, 2022 order extending its deadline to rule on summary decision (the “Extension Order”)<sup>1</sup> somehow entitles Intuit to put additional evidence before the Commission, specifically: (1) discovery materials, such as deposition of the Bureau of Consumer Protection – which Intuit had weeks before the Commission’s original December 30, 2022 deadline; and (2) Intuit’s own internal documents – which Intuit has had for months or years. The delayed release of the Commission’s extension order is unfortunate,<sup>2</sup> but it does not prejudice the parties nor justify denial of summary decision. Intuit’s Motion should be denied.

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<sup>1</sup> The Extension Order extended the Commission’s deadline to rule on summary decision from December 30, 2022, to January 31, 2023.

<sup>2</sup> Intuit avers that “nearly a month passed before the Order was issued and sent to Intuit or anyone else outside the walls of the FTC.” Proposed Surreply at 2. However, the face of the Order shows that it was issued on December 8, 2022; and Complaint Counsel can confirm that, like Intuit, it did not learn of or receive the Order until January 3, 2023, via an email from the Office of the Secretary to both parties.

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*First*, Intuit argues it should be allowed a surreply because the Office of the Secretary did not distribute the December 8, 2022 Extension Order until January 3, 2023. Intuit, conflating *service* of the Extension Order on January 3, 2023, with the *issuance* of the order on December 8, 2022, argues that because of this delay in service beyond December 30, the Commission failed to “render a decision ... until after the deadline for doing so passed,” Mot. at 1, such that the Extension Order is invalid. But aside from causing the parties’ attorneys some agita on the evening of December 30, 2022, Intuit fails to explain how it was harmed or prejudiced by the Office of the Secretary’s delay. Nothing in the Commission’s Rules requires the denial of a meritorious – and fully-briefed and argued – motion for summary decision simply because the Office of the Secretary was late to distribute a valid order extending the Commission’s deadline to render a decision.

In support of its position that the Commission’s Extension Order is invalid, the best Intuit can do is incorrectly cobble together two provisions of the Commission’s Rules that, properly read, have no bearing on this situation. Intuit is correct on two discrete points: (1) “an order to cease and desist under section 5 of the FTC Act *becomes effective* upon the sixtieth day after service” under Rule 3.56(a) (emphasis added), and (2) “[a]ll documents served by the Commission ... in adjudicative proceedings under part 3 ..., other than [complaints, initial decisions, final orders and other processes of the Commission under 15 U.S.C. 45,] shall be *deemed served* on the day of personal or electronic delivery,” under Rule 4.4(a)(2) (emphasis added). But Intuit is wrong that these two provisions have anything to do with one another or with the facts here. Rule 4.4 sets forth acceptable means of service and does not speak to when orders “become[] effective” in the same way that Rule 3.56 does (for a totally different type of order than the one in question here).

Even if Intuit’s reading of the Commission’s Rules were correct, the Commission’s Extension Order could rightly be considered a valid *nunc pro tunc* order.

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*See Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 701 (2020) (“Such a [nunc pro tunc] decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.”) (quoting *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390 (1912)). The Commission clearly ordered an extension on December 8, and the Office of the Secretary’s inadvertently delayed delivery of the Extension Order does not change that fact. Intuit is not entitled to a surrepley because of a clerical error.

*Second*, Intuit argues it should be allowed a surrepley to advocate for a chance to put additional facts before the Commission. Intuit bases this argument on two items, both of which were available to Intuit before the Commission’s original Summary Decision deadline on December 30, 2022: (1) the December 8, 2022 deposition of the Bureau of Consumer Protection’s Rule 3.33(c)(1) witness (the “BCP Deposition”),<sup>3</sup> and (2) “[i]nternal Intuit documents produced in discovery,” Surrepley at 4.<sup>4</sup>

Regarding the BCP Deposition, Intuit does not explain why it waited until January 6, 2023, to file a motion premised on a December 8, 2022 deposition, especially if it believed that the Commission would rule on summary decision by December 30,

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<sup>3</sup> According to Intuit: “On December 8, 2022, the Bureau of Consumer Protection was deposed pursuant to Rule 3.36.” Intuit likely meant to refer to Rule 3.33(c)(1), instead of Rule 3.36, as Intuit’s motion for discovery under Rule 3.36 was denied. *See In re Intuit Inc.*, 2022 WL 16960890 (F.T.C. Nov. 7, 2022). Further, Intuit avers that “Complaint Counsel have conceded under oath ... that there are disputed issues of fact,” Mot. at 2, though Intuit does not cite any specific purported concessions under oath. To the extent to which Intuit is referring to the BCP Deposition, that testimony did not come from Complaint Counsel, and Intuit’s tortured reading of the transcript is not correct. *See* Appendix A.

<sup>4</sup> While Intuit references “extensive discovery over the last several months, including the production of hundreds of thousands of pages of new documents and 30 depositions,” Intuit fails to put forward anything besides the BCP deposition and one of its own documents, which is decidedly not “new,” as it dates from September 2020. The discovery record in this matter includes consumer depositions taken at Intuit’s behest and thousands of documents produced by Complaint Counsel, seemingly none of which Intuit considered important enough to attach to its Proposed Surrepley. The rest of the record consists of testimony by Intuit employees (and one former employee) and documents provided by Intuit – information that has always been in Intuit’s own possession, custody, or control, and that Intuit could have put forward with its original opposition to summary decision.

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2022. Where the Part 3 Rules are premised on the parties filing papers in support or opposition to motions often within days, Intuit's delay in raising supposed exculpatory testimony from the BCP Deposition for nearly a month until it could shoe-horn it into another paper demonstrates the argument is superficial at best. Moreover, when Intuit's claims about what the deposition says are lined up against what was really said, Intuit's hype falls flat. *See* Appendix A (comparing Intuit's assertions to the actual evidence).

Regarding Intuit's own documents, Intuit does not explain why it failed to raise them in its summary decision opposition, which it filed after a multi-year investigation and multiple Commissioner meetings in which Intuit could have presented its best supposedly exonerating evidence. Intuit's sole offering on this front is a September 2020 presentation (Ex. C. to the Gringer Dec. attached to the proposed Surreply). Intuit filed its summary decision opposition brief nearly two years later, on August 30, 2022. Intuit's failure to offer a September 2020 presentation two years after its creation does not constitute "recent important developments ... that could not have been raised earlier in the party's principal brief," 16 C.F.R. §3.22(d), and a clerical error by the Office of the Secretary does not mean Intuit should now have a second chance to offer preexisting evidence it overlooked before.<sup>5</sup>

Finally, Intuit's decision to wait to ask to reopen the record until after learning of the Extension Order belies the sincerity of Intuit's request. When faced with the Complaint Counsel's Motion for Summary Decision, Intuit failed to seek "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." Rule 3.24(a)(4). In fact, in its presentation in opposition to summary decision, Intuit recited Rule 3.24(a)(4), but then told the Commission: "The appropriate action here is to deny the motion – not to order a continuance,"<sup>6</sup> even though such a continuance would

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<sup>5</sup> Moreover, far from exonerating Intuit, the September 2020 presentation contains significant evidence of deception. *See* Appendix A.

<sup>6</sup> *See* Respondent's Oral Argument Materials, at 43, *available at* [ftc.gov/system/files/ftc\\_gov/pdf/d09408\\_r\\_oral\\_argument\\_materials\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_r_oral_argument_materials_0.pdf).

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have allowed Intuit to do what it asks the Commission for now – a chance to further develop the summary decision record before the Commission through discovery. Intuit has waived its right to invoke Rule 3.24(a)(4).

*Conclusion.* The unfortunate clerical error by the Office of the Secretary that precipitated Intuit’s Motion is inconsequential and non-prejudicial. It does not merit the second bite at the apple that Intuit seeks, especially considering that Intuit asks to put forward information that it could have raised before December 30, 2022, and much of which it could have raised in its original summary decision opposition. Intuit’s Motion for leave to file an additional brief should be denied.

Respectfully submitted,

Dated: January 10, 2023

/s/ James Evans

**Roberto Anguizola**, IL Bar No. 6270874

**Rebecca Plett**, VA Bar No. 90988

**James Evans**, VA Bar No. 83866

**Sara Tonnesen**, MD Bar No. 1312190241

Federal Trade Commission

600 Pennsylvania Ave., NW, CC-6316

Washington, DC 20580

(202) 326-3284 / [ranguizola@ftc.gov](mailto:ranguizola@ftc.gov)

(202) 326-3664 / [rplett@ftc.gov](mailto:rplett@ftc.gov)

(202) 326-2026 / [james.evans@ftc.gov](mailto:james.evans@ftc.gov)

(202) 326-2879 / [stonnesen@ftc.gov](mailto:stonnesen@ftc.gov)

**Counsel Supporting the Complaint  
Federal Trade Commission**

APPENDIX A

Intuit's Premise	Evidence <sup>1</sup>	Response
<p>Contrary to the fundamental premise of its motion, the Bureau's designee admitted that there were numerous disputed issues of fact, including on the critical issue of the net impression from the ads. Ex. B at 222:6-9 (admitting the parties dispute what the net impression is from the challenged advertisements). Surreply, at 4.</p>	<p>Q. So the place in the auctioneer ad where Intuit said -- represents that TurboTax is free is when it says: "TurboTax Free Edition is free." Do I have that right?                      A. The entire impression of the ad, including the text and the voiceover and the title card at the end, is that TurboTax, whatever product name you want to give to it, is free. That's the bureau's position. I understand Intuit disagrees.  <b>Q. Right. The parties dispute right now what the net impression from the challenged advertisements is, correct?</b>  <b>A. Yes, that's right.</b>                      BCP Depo. 221:17-222:9.</p>	<p>Intuit makes the unremarkable observation that opposing parties in litigation disagree as to the legal significance of facts. Unless the parties stipulate to the entry of summary judgment against a defendant or respondent, this will always be the case. It is for the Commission, which can make a legal determination as to the net impression of an ad, to decide whether there is a genuine dispute of material fact. But the mere fact that Intuit doesn't think its ads were deceptive does not create a genuine dispute of material fact.</p>
<p>Internal Intuit documents produced in discovery further reflect that consumers understood Free Edition's qualifications from the challenged ads and were generally skeptical of free offers, thus undermining (and certainly disputing) Complaint Counsel's theory of net impression. Ex. C at 20, 27-28. Surreply, at 4.</p>	<p>See <b>pages 20 and 27-28 of Intuit's Exhibit C</b>, as well as additional pages cited in Complaint Counsel's response to the right.</p>	<p>This Exhibit shows that consumer takeaways from "free free free" ads included, inter alia:</p> <ul style="list-style-type: none"> <li>■ [REDACTED]</li> <li>■ [REDACTED]</li> </ul>

<sup>1</sup> Intuit's citations appear in bold. Additional context has been added where it would aid understanding of the cited portion. Objections have been omitted. The entire BCP Deposition transcript, GX-161, is attached.



Intuit's Premise	Evidence <sup>1</sup>	Response
		<p>[REDACTED]</p> <p>Intuit has had the opportunity to point out any other portions of its own document in its summary decision briefing. What is more, "[a]dvertising capable of being interpreted in a misleading way should be construed against the advertiser." <i>Resort Car Rental Sys., Inc. v. FTC</i>, 518 F.2d 962, 964 (9th Cir. 1975).</p>
<p>Similarly, despite representing to the Commission that there were no disputes on the question of what claims are made expressly or impliedly in the ads, the Bureau conceded the opposite under oath. Ex. B at 252:22-256:18 (admitting there are disputed issues of fact regarding both the express and implied claims made in the challenged advertisements as well as consumers' takeaways from the "free, free, free" advertisements). Surreply, at 4.</p>	<p>Q. Mr. Maxson, Intuit's position is that none of the challenged ads make the express claim TurboTax is free. Do you agree with that position?                      A. Do I agree that that's Intuit's position? That's my understanding.  <b>Q. Okay. Do you agree with Intuit's position that none of the challenged ads make the express claim TurboTax is free?</b>  <b>A. No, I don't believe I agree with that position.</b>  <b>Q. So there is a disputed issue of fact between Intuit and complaint counsel regarding the express claims that are made in the challenged ads, correct?</b>  <b>A. It's correct that I don't think we agree with your position about the express claims in the ads.</b>  <b>Q. Okay. And you agree that it's a dispute on a factual question what</b></p>	<p>Again, Intuit argues that because the parties "don't agree," there must be a genuine dispute of material fact. If mere disagreement between the parties were enough to defeat summary decision, it would never be granted. The Bureau's witness did not concede a genuine dispute of material fact. And courts and the Commission have no problem entering summary judgment notwithstanding disagreements between the parties. <i>See, e.g., FTC v. Fleetcor Techs., Inc.</i>, No. 1:19-CV-5727, 2022 WL 3273286, at *5 (N.D. Ga. Aug. 9, 2022) ("courts in this Circuit have on numerous occasions granted summary judgment to the FTC in assessing claims of deceptive and unfair acts under Section 5 of the FTC Act"); <i>In re California Naturel, Inc.</i>, 162 F.T.C. 1076 (2016); <i>In re Jerk, LLC</i>, 159 F.T.C. 885 (2015).</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p>are the express claims made in the challenged ads, correct?</p> <p>A. I agree that we don't agree on the express claims in -- in the ads that are discussed in the complaint, yes.</p> <p>Q. Intuit's position is that the ads do not make the implied claim that TurboTax is free. Do you agree with Intuit's position on that?</p> <p>A. I believe, yes, that that is Intuit's position.</p> <p>Q. That's not my question. Do you agree with Intuit's position that there is no implied claim in the challenged ads that TurboTax is free?</p> <p>A. No, I don't think I agree with that.</p> <p>Q. Okay. So there is a disputed issue of fact between Intuit and complaint counsel regarding the implied claims made in the challenged ads, correct?</p> <p>A. It's correct that I think complaint counsel and Intuit disagree about the implied claims in the ads.</p> <p>Q. It is Intuit's position that the ads do not make the implied claim consumers can file their taxes for free using TurboTax. Do you agree with Intuit's position?</p> <p>A. I'm sorry. Could you repeat that.</p> <p>Q. Sure. It is Intuit's position that the ads do not make the implied -- the challenged ads do not make the implied claim consumers can file their taxes for free using TurboTax. Do you agree with Intuit's position?</p>	

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p>A. I don't agree with Intuit's position. I agree that that -- I believe that is Intuit's position.</p> <p>Q. So there is a second disputed issue of fact between Intuit and complaint counsel regarding the implied claims made in the challenged ads, correct?</p> <p>A. I agree that I think Intuit and complaint counsel disagree about express and implied claims in the ads at issue.</p> <p>Q. Do you agree with Intuit that -- Intuit's position that consumers do not take away from the free, free, free ads that they can file their taxes for free using TurboTax?</p> <p>A. I'm sorry. Could you repeat that.</p> <p>Q. Sure. Do you agree with Intuit's position that consumers do not take away from the so-called "free, free, free ads" that they can file their taxes for free using TurboTax?</p> <p>[... A.] I don't -- I think I understood that. I don't agree that consumers -- I'm sorry. Could you repeat the question. [...]</p> <p>Q. I think what you're saying is you don't agree with Intuit's position regarding consumer takeaway on the free, free, free ads; is that correct?</p> <p>A. Yes, I think that's correct.</p> <p>Q. And so that's another area of dispute between Intuit and complaint counsel, the consumer takeaway from the so-called free, free, free ads; is that right?</p>	

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p><b>A. Yes, I believe complaint counsel and Intuit likely do not agree on the consumer takeaway from these ads. BCP Depo. 252:16-256:18.</b></p>	
<p>Of equal significance, despite arguing to the Commission that the challenged ads made the express and implied claim that "TurboTax is free," under questioning, the Bureau conceded that no ad challenged actually made such a claim. <i>Id.</i> at 209:3-210:4 (acknowledging that Intuit's "Auctioneer" ad, for example, does not convey that TurboTax is free). Surreply, at 4.</p>	<p>Q. Sure. You say the ads speak for themselves. What is the first line of the auctioneer ad, which says: "And free and free and free and free and free," say?                  [... A.] The first line of the auctioneer ad presented here states and free and free and free and free. [...]  <b>Q. Makes no mention of TurboTax, correct?</b>  <b>A. This line does not mention TurboTax.</b>  <b>Q. And it does not convey that TurboTax is free, correct?</b>  <b>A. This ad -- well, this ad. This particular sentence within this ad simply states "and free" over and over.</b>  <b>Q. And my question is: Does the sentence: "And free and free and free and free and free" communicate that TurboTax is free?</b>  <b>A. Like I said, if the consumer, this hypothetical consumer who only sees the first sentence of the ad, is familiar with Intuit's free advertising campaign, then I could imagine that consumer believing that this ad was about Intuit and TurboTax. If this hypothetical consumer was not familiar with that advertising campaign, was not familiar with</b></p>	<p>Intuit's assertion that the Bureau's witness "acknowledge[ed] that Intuit's 'Auctioneer' ad, for example, does not convey that TurboTax is free" misrepresents the testimony. Counsel for Intuit asked the witness if one line of the script ("And free and free and free and free and free") represents that TurboTax is free. The witness acknowledged that a "hypothetical consumer [who] was not familiar with that advertising campaign, was not familiar with Intuit having a free campaign and just saw this one sentence at the beginning of the auctioneer ad, then I think it's unlikely the consumer would know what product was being advertised." The whole commercial, which includes mention of TurboTax at the end, is deceptive.</p> <p>The theoretical consumer who views the first lines of a commercial and then changes the channel is a somewhat tortured hypothetical, as an earlier exchange in the deposition made clear:                  Q. So if a reasonable consumer seeing the auctioneer ad, for example, for the very first time sees the portion of the ad that says: "And free and free and</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p><b>Intuit having a free campaign and just saw this one sentence at the beginning of the auctioneer ad, then I think it's unlikely the consumer would know what product was being advertised.</b></p> <p>Q. The first time in the auctioneer ad, discussed in Paragraph 5 of your complaint, mentions the word "TurboTax" is to say: "TurboTax Free Edition is free." Do I have that right?</p> <p>A. Yes –</p> <p>Q. Okay.</p> <p>A. -- the -- this auctioneer ad, the first time TurboTax is mentioned in this transcript is when it says: "That's right. TurboTax Free Edition is free." BCP Depo. 208:15-210:15.</p>	<p>free and free and free" and then changes the channel, what is their takeaway from the advertisement? [... A.] I suspect they would take away that whatever they were seeing was free. [...]</p> <p>Q. But they would not take away TurboTax is free, correct?</p> <p>A. It would depend whether they saw or heard anything in the advertisement that told them whose advertisement this was.</p> <p>Q. Right. And so my question is: Someone who just saw the part of the ad and they're seeing it for the first time, that says: "And free and free and free and free and free" and then they change the channel, that person would not take away the message from the advertisement discussed in Paragraph 5 TurboTax is free, correct?</p> <p>A. I mean, I -- I'm speculating about what a consumer would take away here, but if the consumer was familiar with Intuit's free advertising campaign generally and then saw the beginning of an ad that just kept using the word "free" that they might infer that that was TurboTax, but that -- I -- I'm not certain. It would depend on whether they were familiar with that advertising campaign or otherwise familiar with Intuit advertising free.</p> <p>Q. So someone who has never seen a Intuit or TurboTax ad before sees the part of the auctioneer ad that says: "And free and free and free and free</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
		<p>and free" and then changes the channel is that that person would not take away the message TurboTax is free, correct?                      [... A.] I mean, my analysis looking at this here, looking at the complaint would be if the consumer had nothing to go on as to what they were seeing, it would be difficult to determine who or what was free.                      BCP Depo. 202:15-204:19.</p>
<p>Likewise, in its Motion, Complaint Counsel relied extensively on consumer complaints, representing to the Commission that these complaints were dispositive reflections of consumer impressions. However, under oath, the Bureau acknowledged that it had failed to vet any of the consumer complaints it relied upon in its motion for summary decision. <i>Id.</i> at 353:14-354:13 (confirming that the Bureau did not perform any independent investigation of the validity of consumer complaints relied on by Complaint Counsel). Surreply, at 4-5.</p>	<p><b>Q. Okay. Yeah. Okay. Did the bureau undertake any independent investigation of the validity of those consumer complaints?</b>  <b>A. I believe staff within the bureau spoke with some of those consumers. I – I don't believe it was all of them. I'm not sure if they reached out to all of them or not. Some consumers in some cases don't respond when we reach out to them. I – I believe that – that they spoke to – to many of them. That's my understanding at least.</b>  <b>Q. Other than speaking to the consumer – of which you – and of course it's hard to get people on the phone – do you know of any independent investigation done of the validity of the consumer complaints being relied on in this case?</b>  <b>A. Other than speaking to them and reviewing any documents that any of them may have given us, I'm not aware of separate investigations of</b></p>	<p>The sole mention of consumer complaints in the Motion for Summary Decision is: "The Commission also received numerous complaints about Intuit, including its 'free' claims. SF 132." Mot. at 20. Similarly, Fact 132 is the only mention of consumer complaints in the Statement of Material Facts. In those filings, Complaint Counsel made no representation "that these complaints were dispositive reflections of consumer impressions." Intuit's multiple mischaracterizations aside, courts routinely admit consumer complaint evidence. <i>See FTC v. Figgie Int'l, Inc.</i>, 994 F.2d 595, 608-09 (9th Cir. 1993) ("[R]easonable efforts would not produce more probative evidence. Conceivably, FTC could bring letter-writers into court to swear, under oath and subject to cross-examination, that the contents of their letters were true. But such efforts would not be reasonable. 'It should</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p><b>the consumers' experiences with Intuit.</b> BCP Depo. 353:14-354:13.</p>	<p>not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a \$500 damage claim arising from an accident with a postal truck.' Furthermore, testimony from the letter-writers is not likely to be any more reliable than the letters themselves." (cleaned up)); <i>see also</i>, e.g., <i>FTC v. Ewing</i>, No. 2:07-cv-479-PMP, 2014 WL 5489210, at *2-3 (D. Nev. Oct. 29, 2014); <i>FTC v. AMG Servs., Inc.</i>, No. 2:12-cv-536, 2014 WL 317781, at *15-16 (D. Nev. Jan. 28, 2014); <i>FTC v. Mag. Sols., LLC</i>, No. 07-cv-692, 2009 WL 690613, at *2-3 (W.D. Pa. Mar. 16, 2009); <i>FTC v. Direct Benefits Grp., LLC</i>, No. 6:11-cv-1186, 2012 WL 5508050, at *2 (M.D. Fla. Nov. 14, 2012); <i>FTC v. Zamani</i>, No. 09-cv-977, 2011 WL 2222065, at *1 (C.D. Cal. June 6, 2011), as amended (Sept. 28, 2011); <i>FTC v. Cyberspace.com, LLC</i>, No. 00-cv-1806, 2002 WL 32060289, at *3 n.5 (W.D. Wash. July 10, 2002).</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
<p>Next, although it had argued to the Commission in its Motion that the TurboTax website obscured or hid the qualifications for TurboTax Free Edition, the Bureau conceded that the Bureau itself had determined the qualifications for TurboTax Free Edition by going to the TurboTax website. <i>Id.</i> at 211:16-212:8 (noting the TurboTax website lists information about who qualifies to file their taxes for free using TurboTax); <i>id.</i> at 251:7-252:5 (confirming that the Bureau determined that TurboTax Free Edition is free for consumers with simple tax returns because Intuit lists the eligibility requirements on the TurboTax website). Surreply, at 5.</p>	<p><b>Q. Okay. And, in fact, there are details about who qualifies for TurboTax Free Edition available on TurboTax.com, correct?</b>  <b>A. My understanding is that TurboTax website within – within the website includes information about, among other things, whom would qualify for free or who would qualify to file their taxes with TurboTax for free.</b>  <b>Q. So you can see details about TurboTax Free Edition at TurboTax.com, correct?</b>  <b>A. Like I said, the TurboTax website, my understanding is, includes within the website somewhere information about who is able to file for – for free and other terms and conditions.</b>                      BCP Depo. 211:16-212:8.</p>	<p>That pertinent information is <i>available somewhere</i> on the TurboTax website is not disputed and does not remedy Intuit's deception. <i>See In re ECM Biofilms, Inc.</i>, 160 F.T.C. 652, 734 n.75 (2015) (“[Respondent] expressly, repeatedly, and prominently made the ... claims to potential customers over a long period of time. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.”); <i>see also Fleetcor</i>, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”).</p>
	<p><b>Q. Okay. And how is it that the bureau knows who qualifies to use TurboTax Free Edition?</b>  <b>A. I believe – there are multiple places. I assume that information might have been available. I’m not sure which ones complaint counsel might have used, and I don’t want to intrude on a work product privilege to the extent I discuss it. I can imagine that we could have looked at that information in – into a website, and it may have also been provided as part of CIDs that were issued to</b></p>	<p>The availability of additional information somewhere on the TurboTax website to consumers who, for example, scroll to the bottom of the page or click a hyperlink, also does not cure deceptive information on the website that is presented more prominently. <i>See Mot. for Summary Decision</i> at 30–33.</p>

Intuit's Premise	Evidence <sup>1</sup>	Response
	<p><b>Intuit as -- in the course of the investigation.</b></p> <p><b>Q. How is it that you could go to the TurboTax website and figure out that TurboTax Free Edition is available only to consumers with simple tax returns?</b></p> <p><b>A. I believe that, generally speaking, Intuit has included the requirements for filing using -- for free somewhere on its website.</b></p> <p>BCP Depo. 251:7-252:5.</p>	

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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In The Matter of: )  
 ) Docket No. 9408  
Intuit Inc., )  
 a corporation, )  
 )  
 Respondent. )  
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- C O N F I D E N T I A L -

Videotaped Deposition of William T. Maxson  
December 8, 2022  
9:23 a.m.

Reported by: Bonnie L. Russo  
Job No. 5570324

1 Videotaped Deposition of William T. Maxson held  
2 at:

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6 Wilmer Cutler Pickering Hale and Dorr, LLP

7 1875 Pennsylvania Avenue, N.W.

8 Washington, D.C.

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18 Pursuant to Notice, when were present on behalf

19 of the respective parties:

20

21

22

1 APPEARANCES:

2  
3 On behalf of the Federal Trade Commission:

4 ROBERTO ANGUIZOLA, ESQUIRE

JAMES EVANS, ESQUIRE

5 SARA TONNESEN, ESQUIRE

REBECCA PLETT, ESQUIRE

6 (Via Teleconference)

600 Pennsylvania Avenue, N.W.

7 Mail Drop CC-8528

Washington, D.C. 20580

8 roberto.anguizola@ftc.gov

james.evans@ftc.gov

9 sara.tonnesen@ftc.gov

rebecca.plett@ftc.gov

10  
11 On behalf of Intuit, Inc.:

DAVID GRINGER, ESQUIRE

12 ELEANOR DAVIS, ESQUIRE

WILMER CUTLER PICKERING HALE AND DORR, LLP

13 7 World Trade Center

250 Greenwich Street

14 New York, New York 10007

david.gringer@wilmerhale.com

15 eleanor.davis@wilmerhale.com

-and-

16 MOLLY DILLAWAY, ESQUIRE

WILMER CUTLER PICKERING HALE AND DOOR, LLP

17 1225 17th Street, Suite 1660

Denver, Colorado 80202

18 molly.dillaway@wilmerhale.com

-and-

19 JONATHAN PAIKIN, ESQUIRE

WILMER CUTLER PICKERING HALE AND DORR, LLP

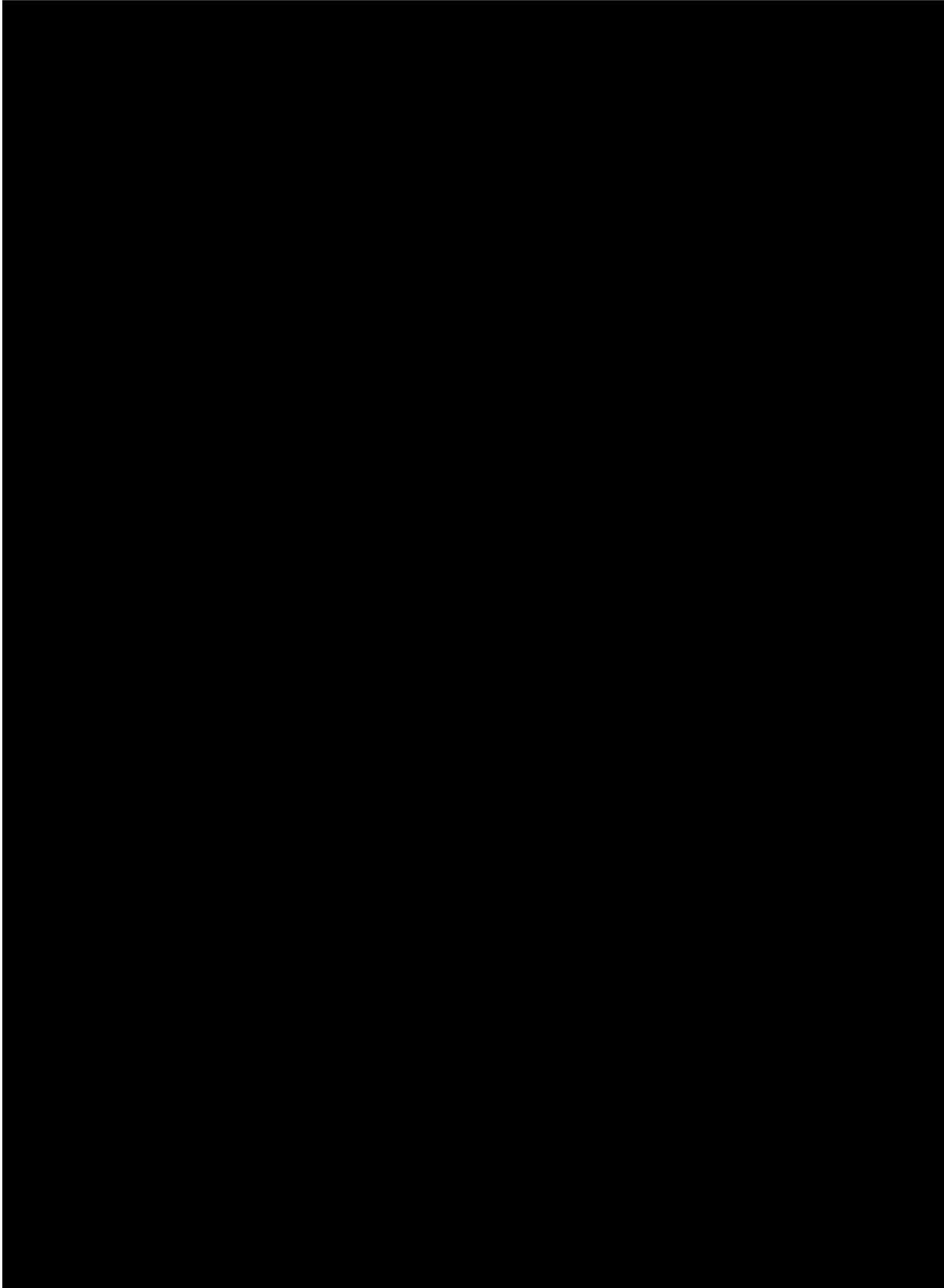
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Washington, D.C. 20006

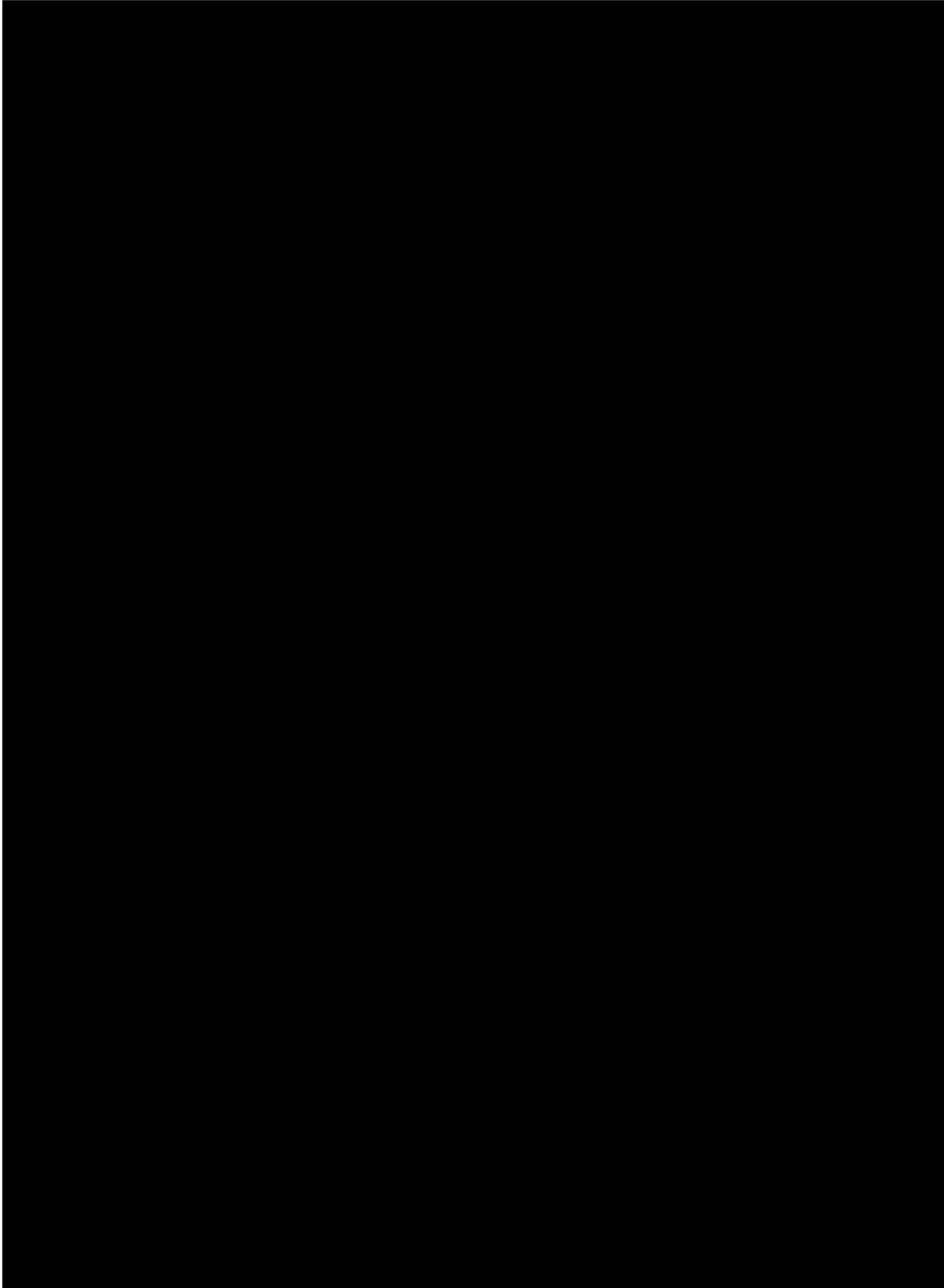
21 jonathan.paikin@wilmerhale.com

22 Also Present:

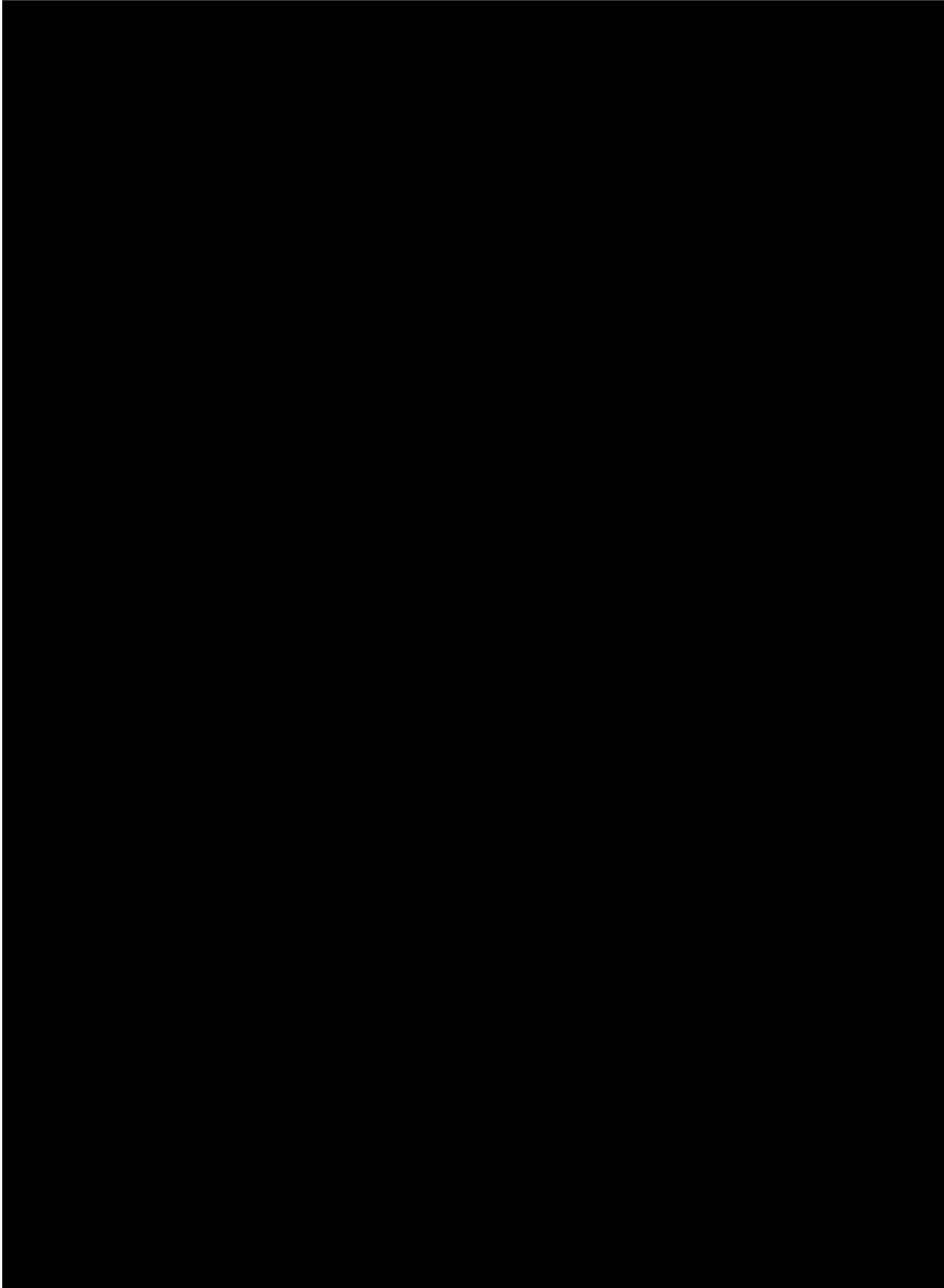
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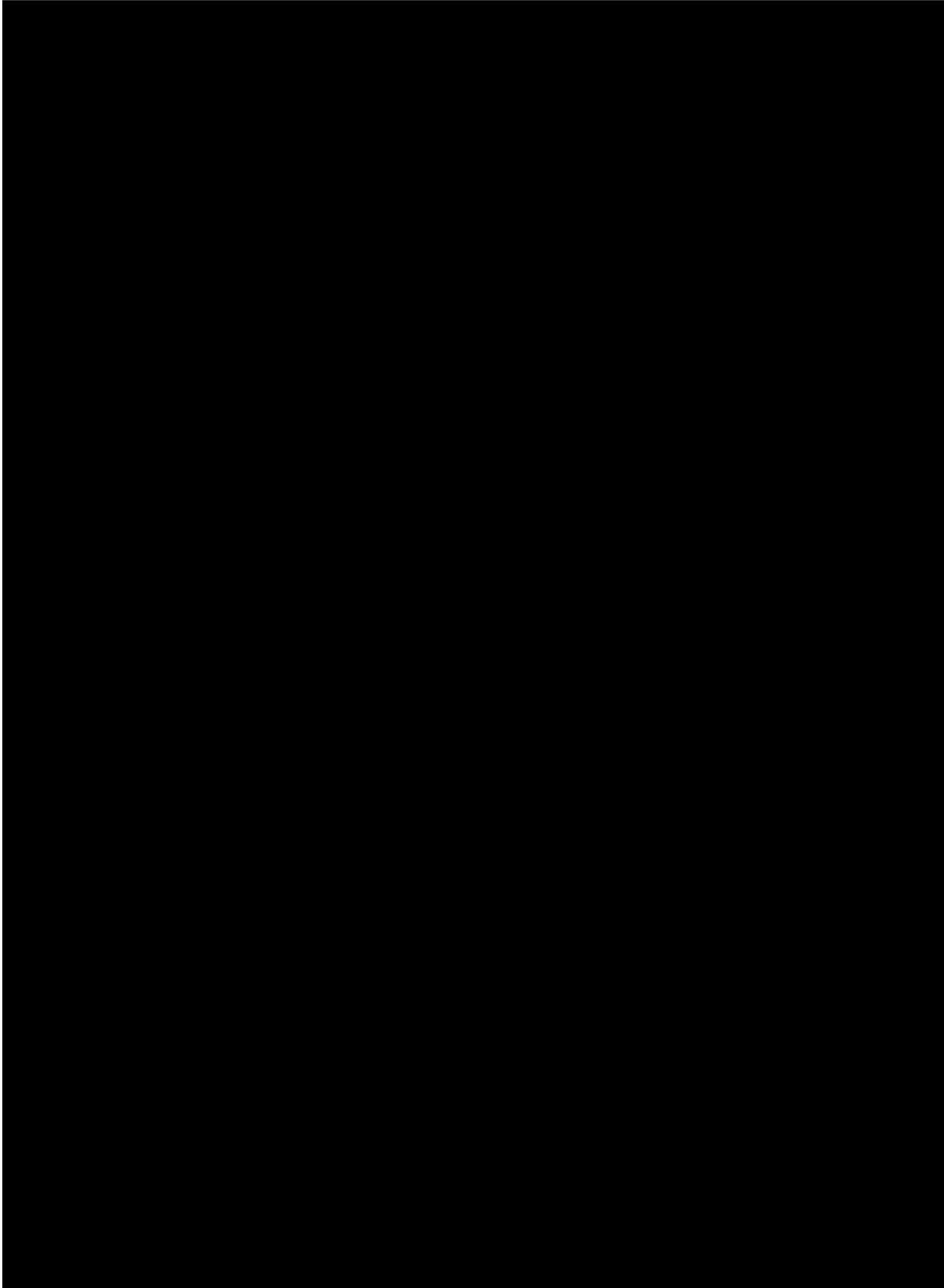
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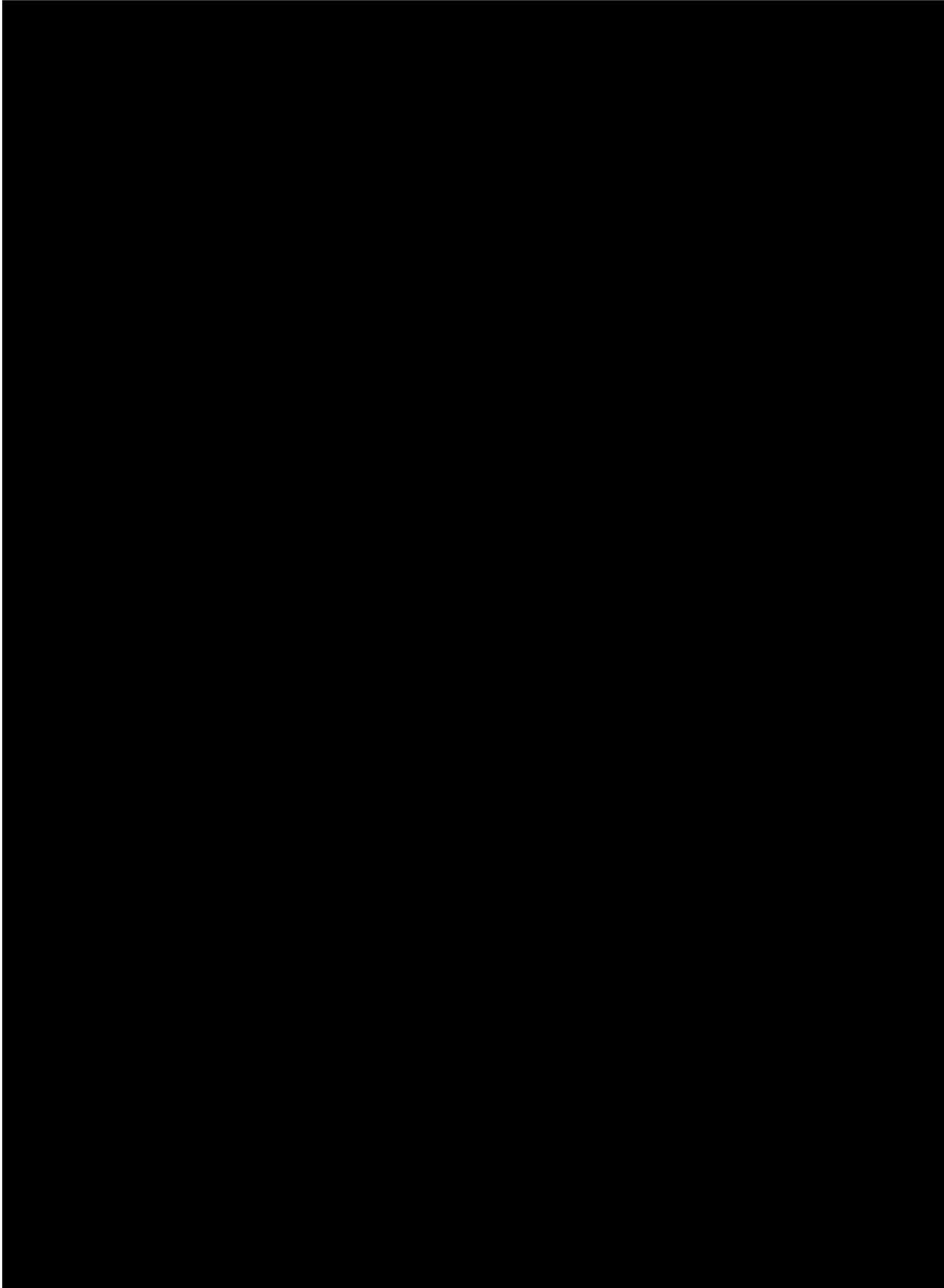
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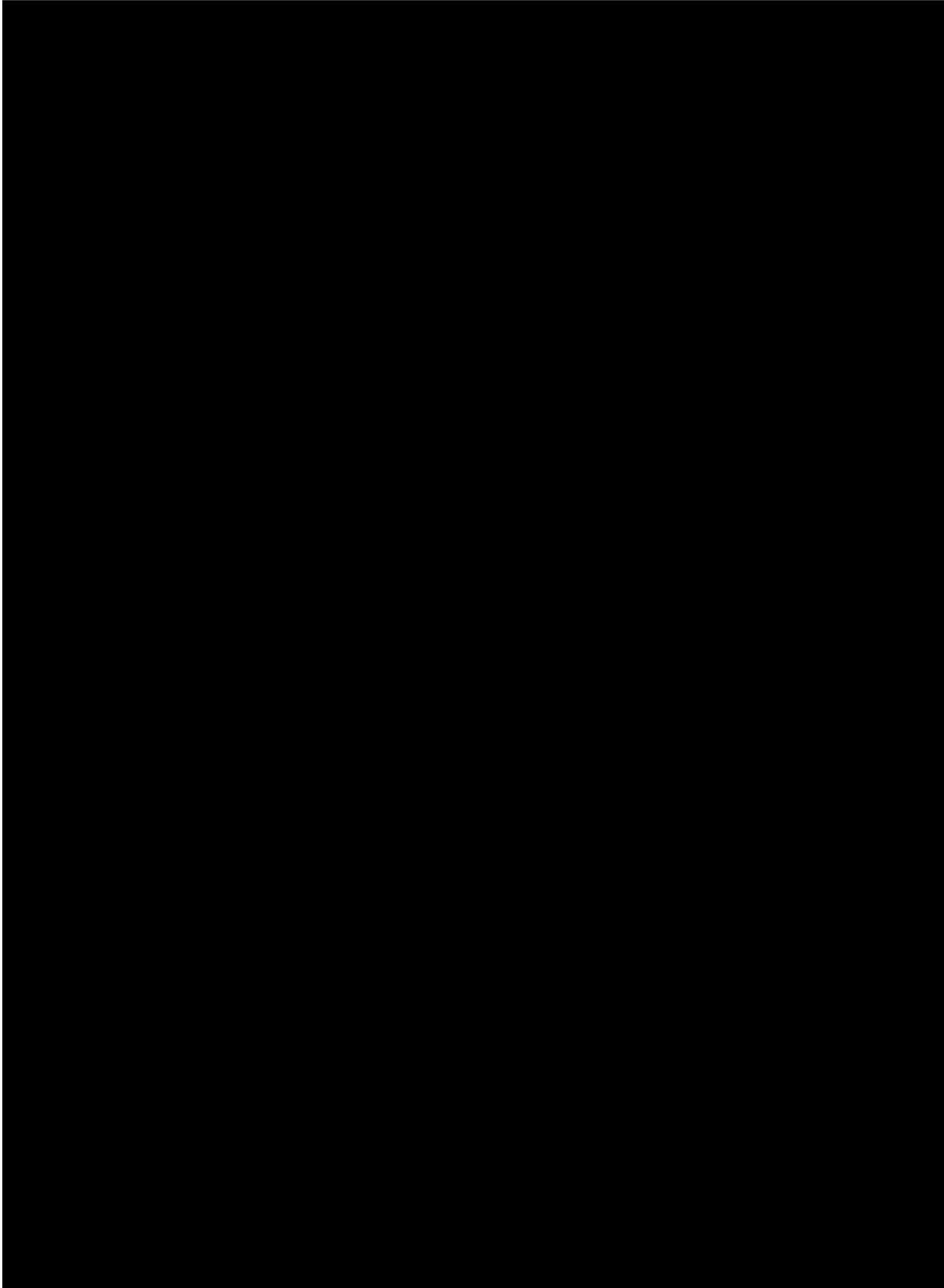
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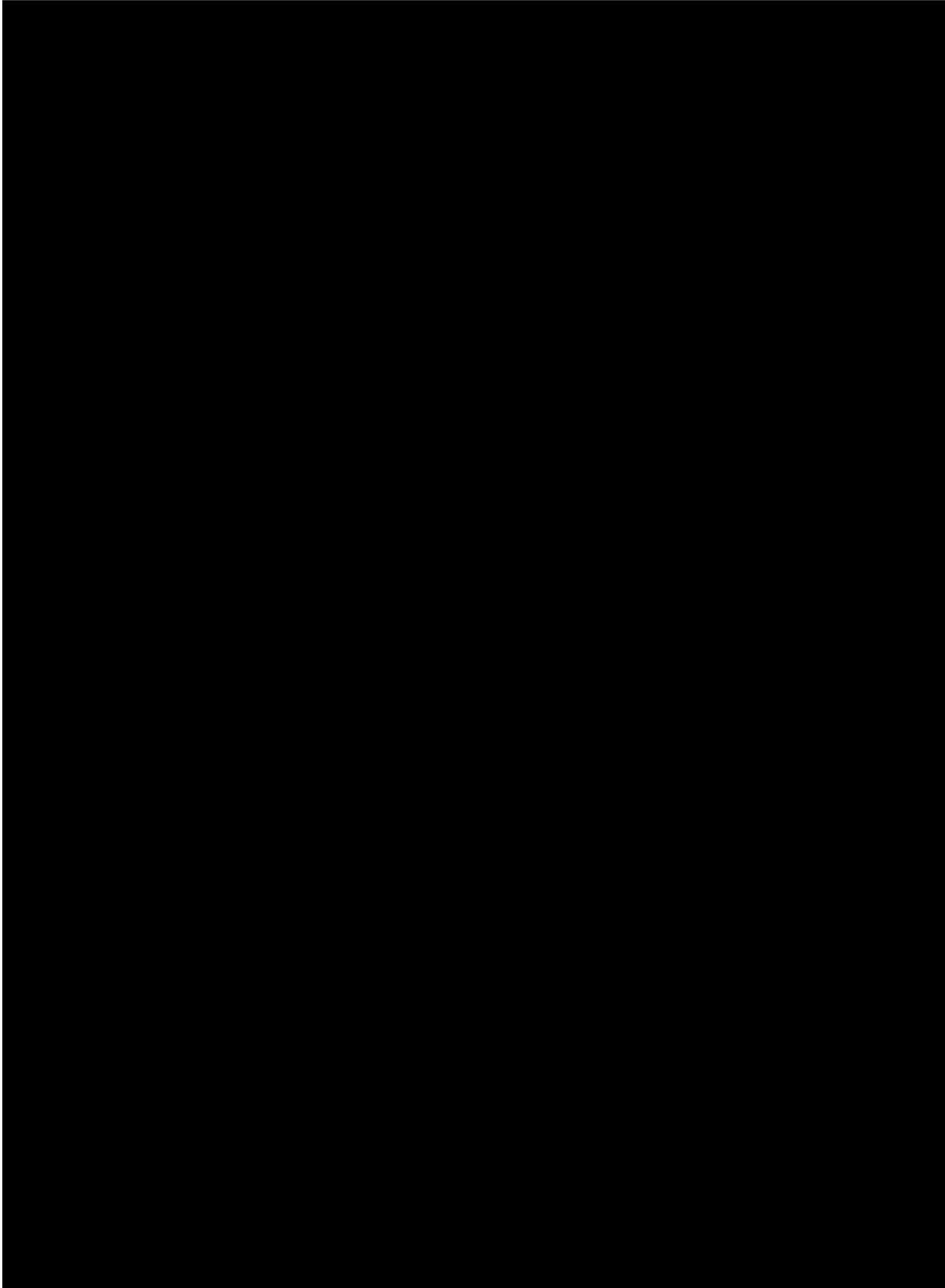
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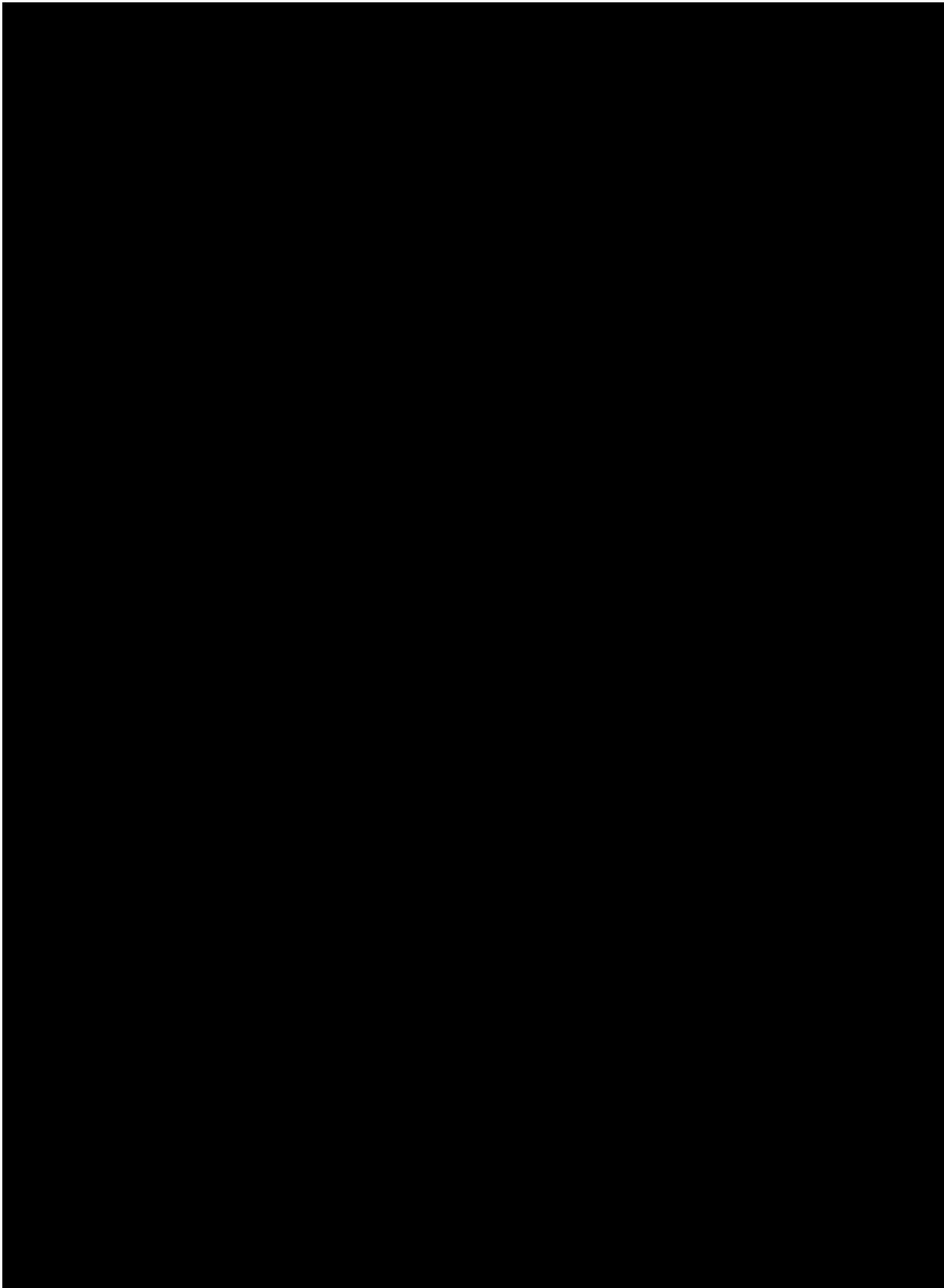
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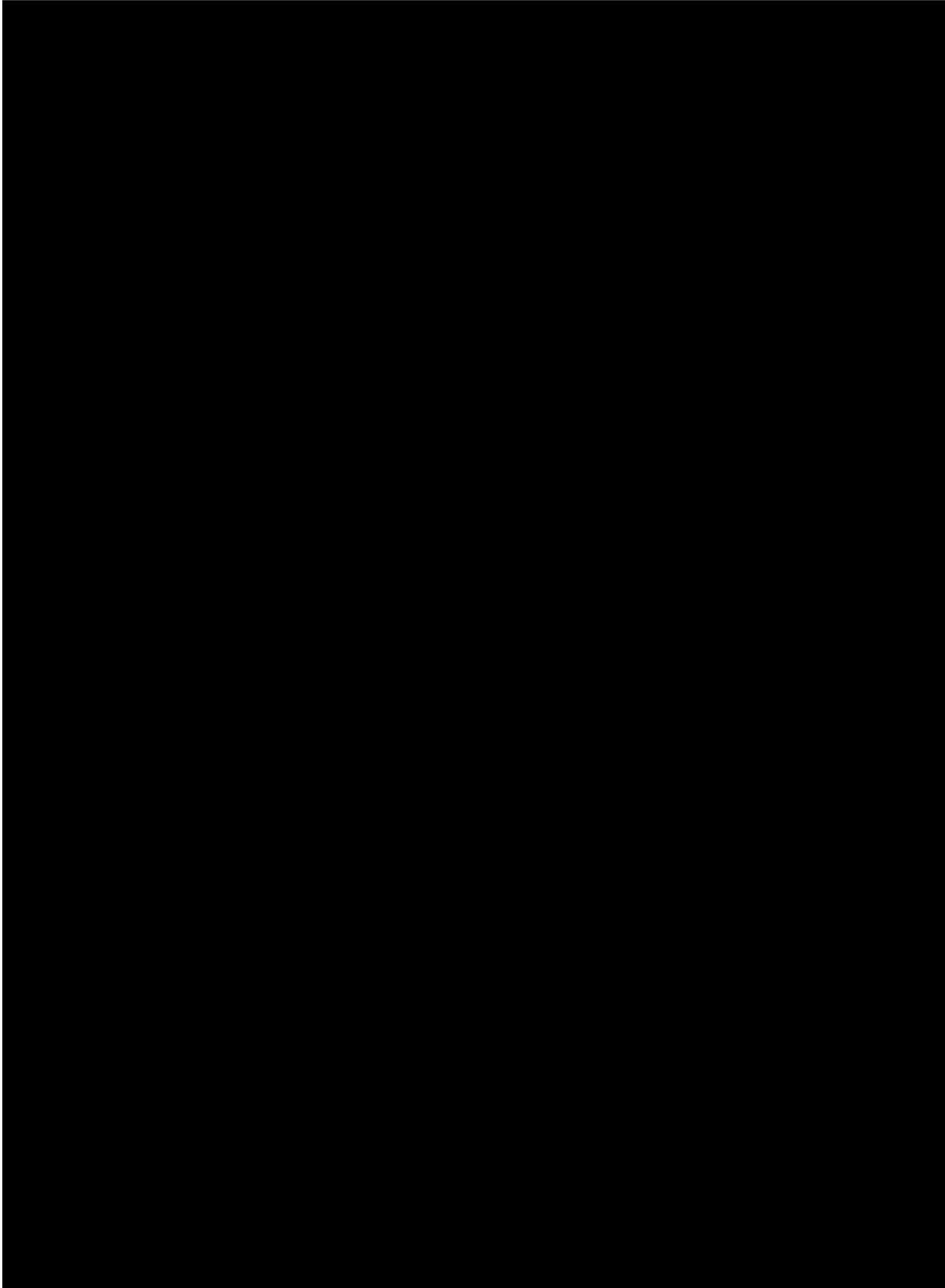
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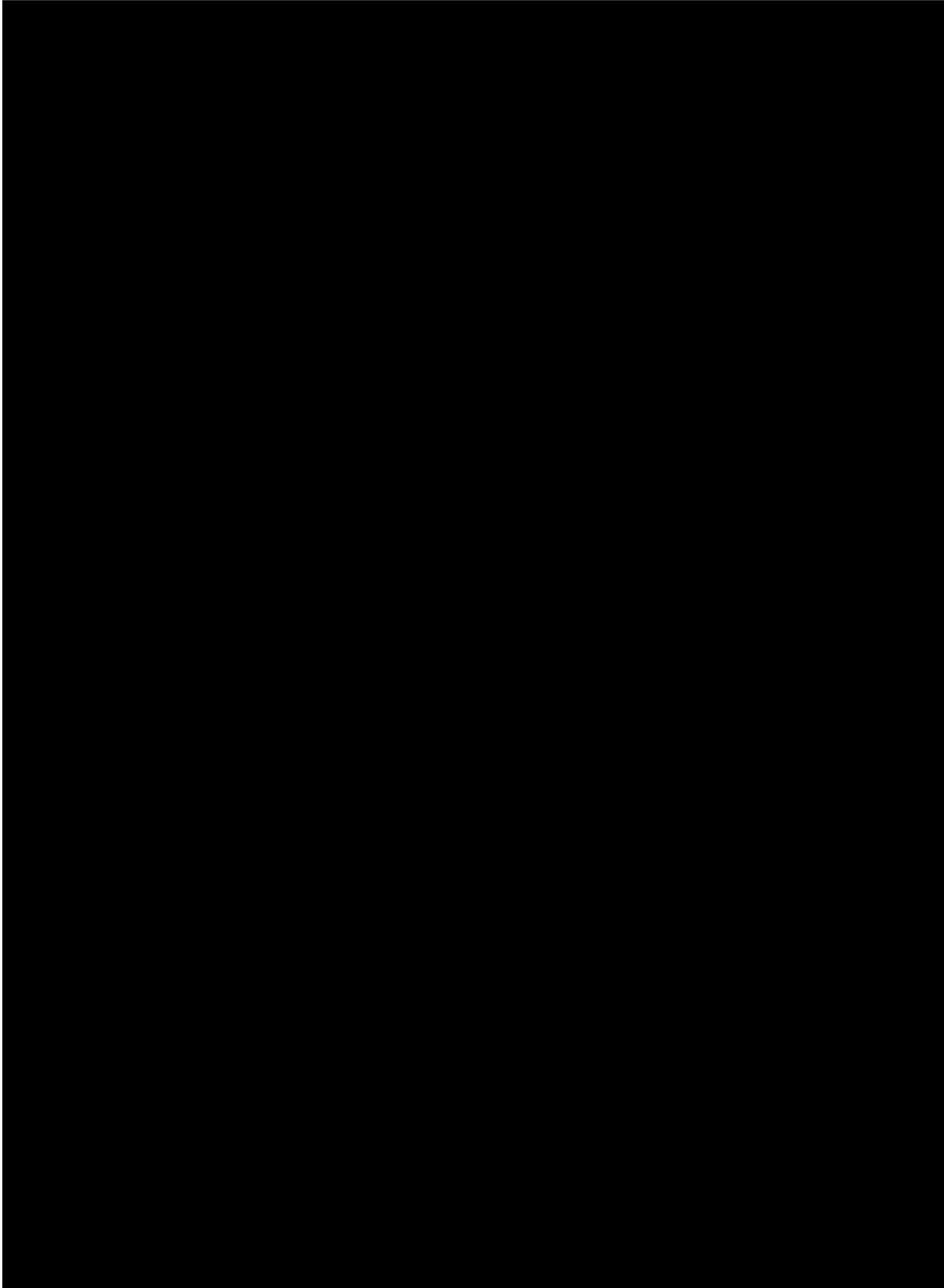
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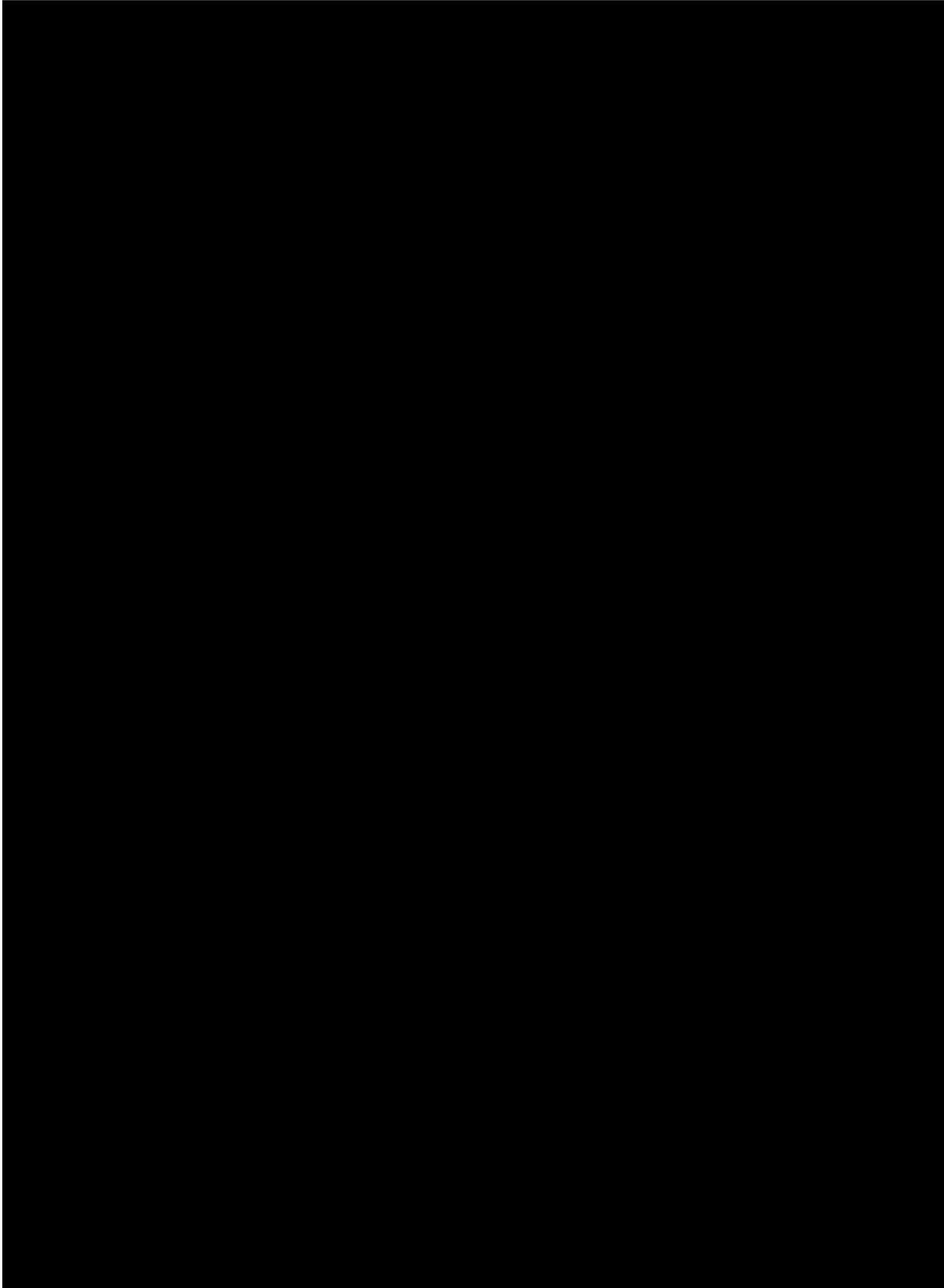
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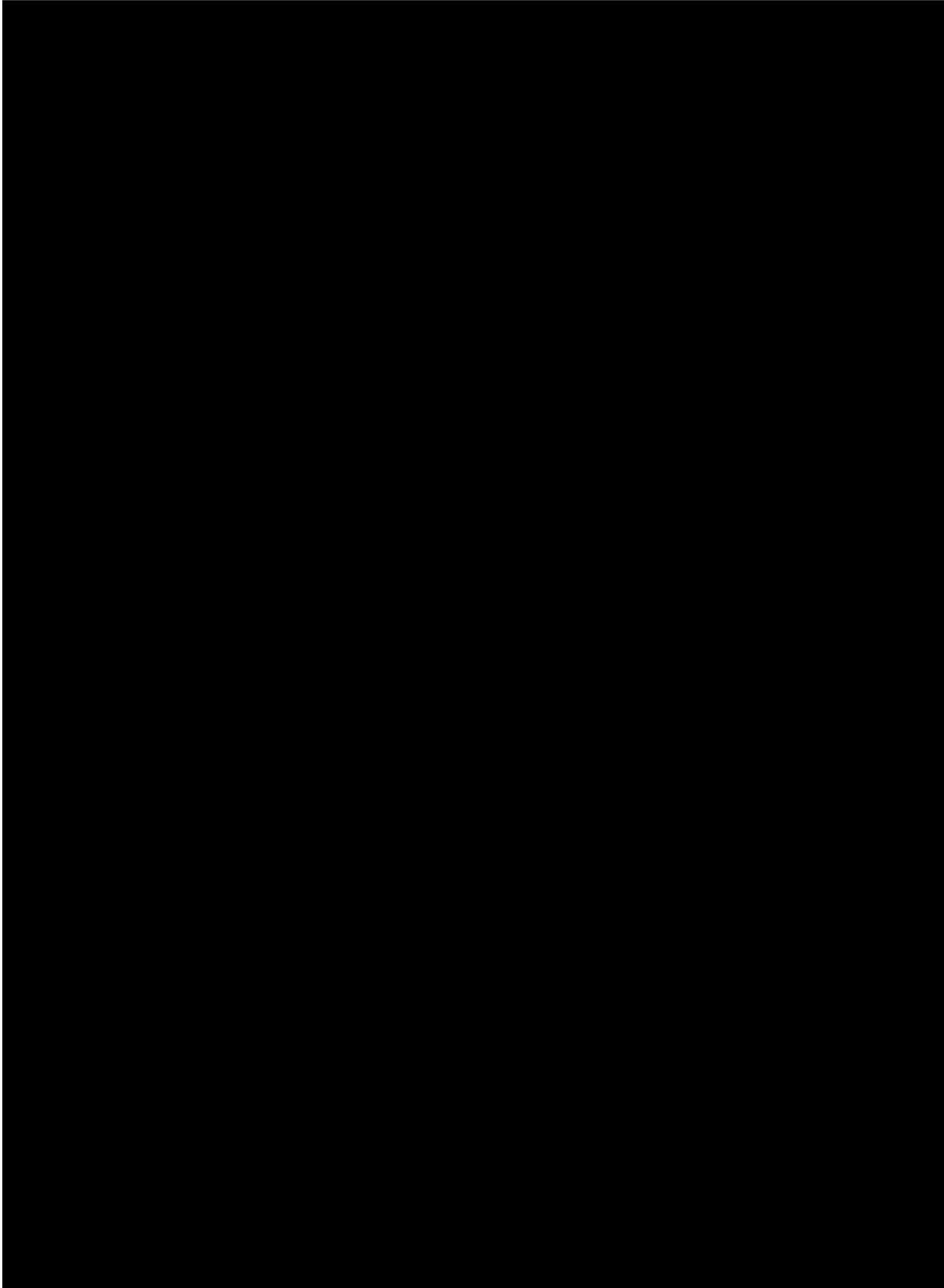
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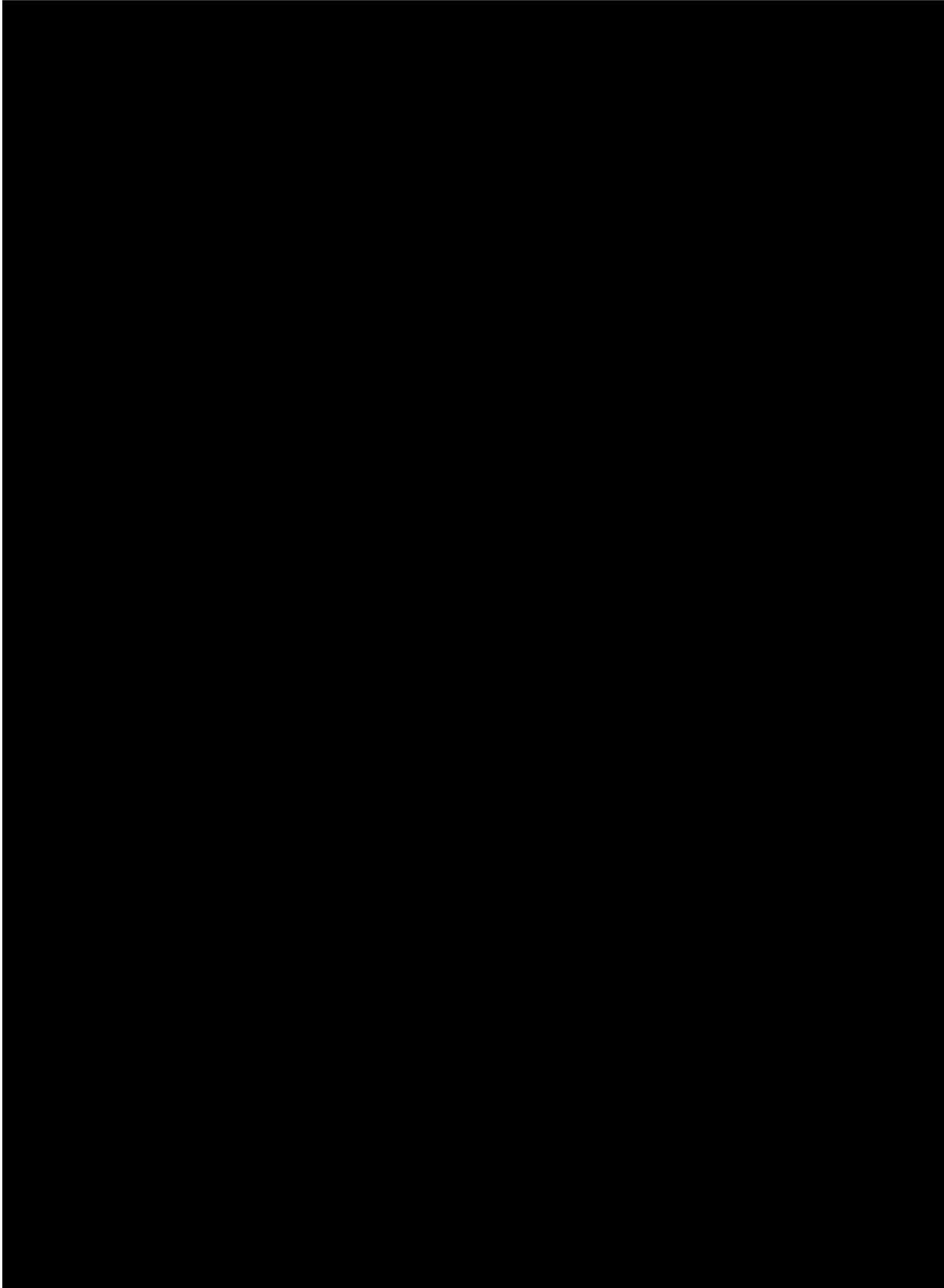
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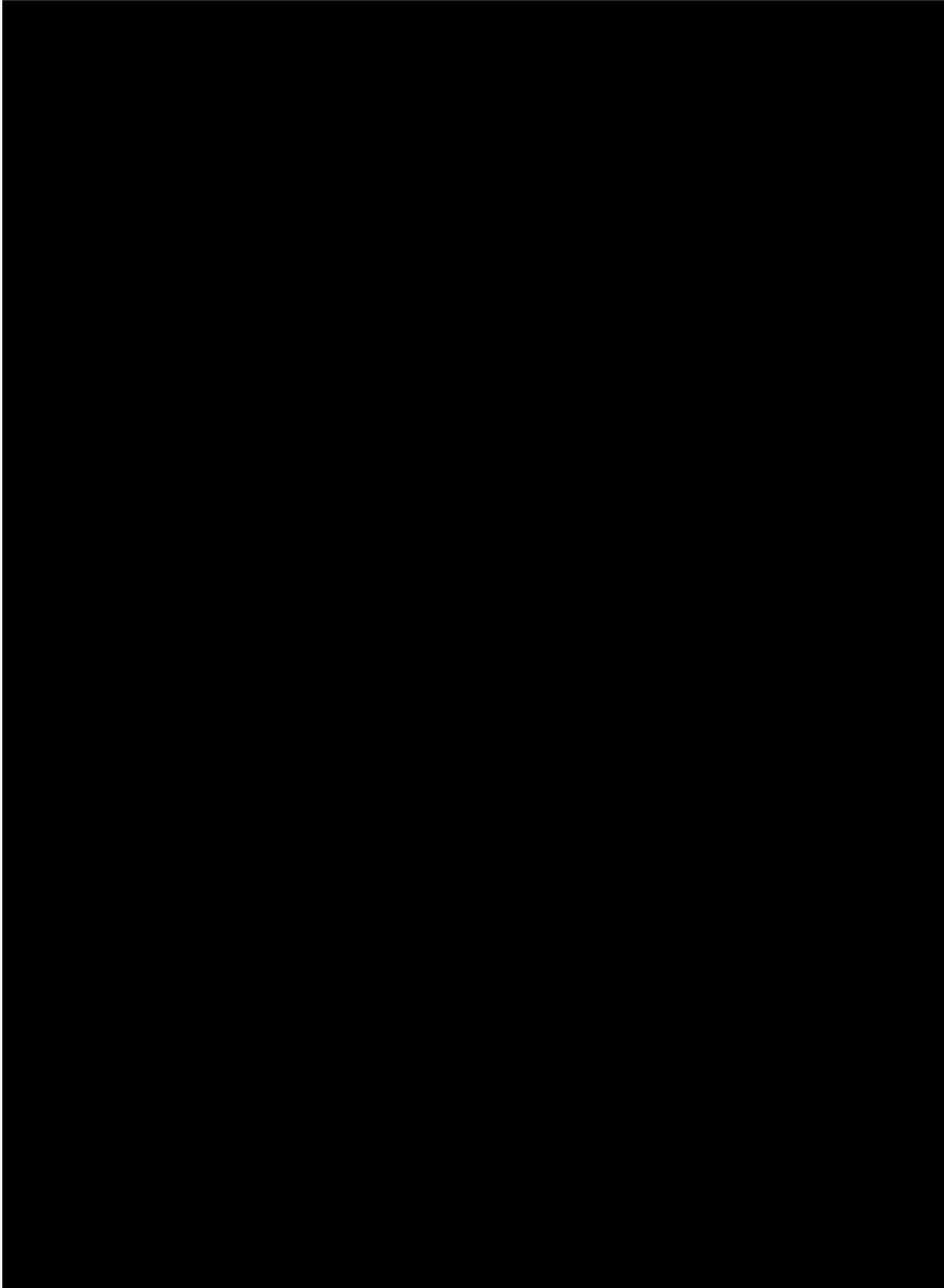
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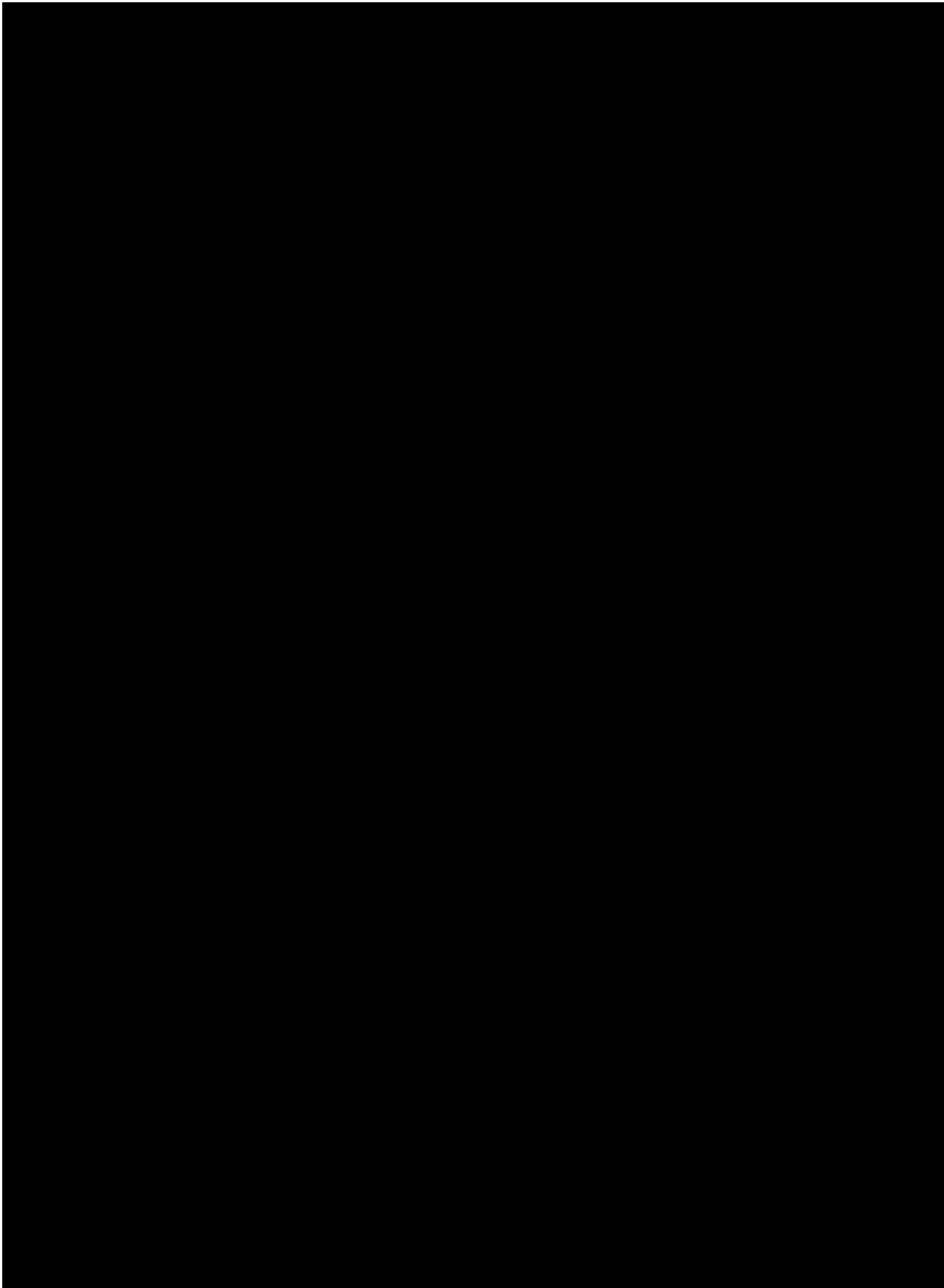
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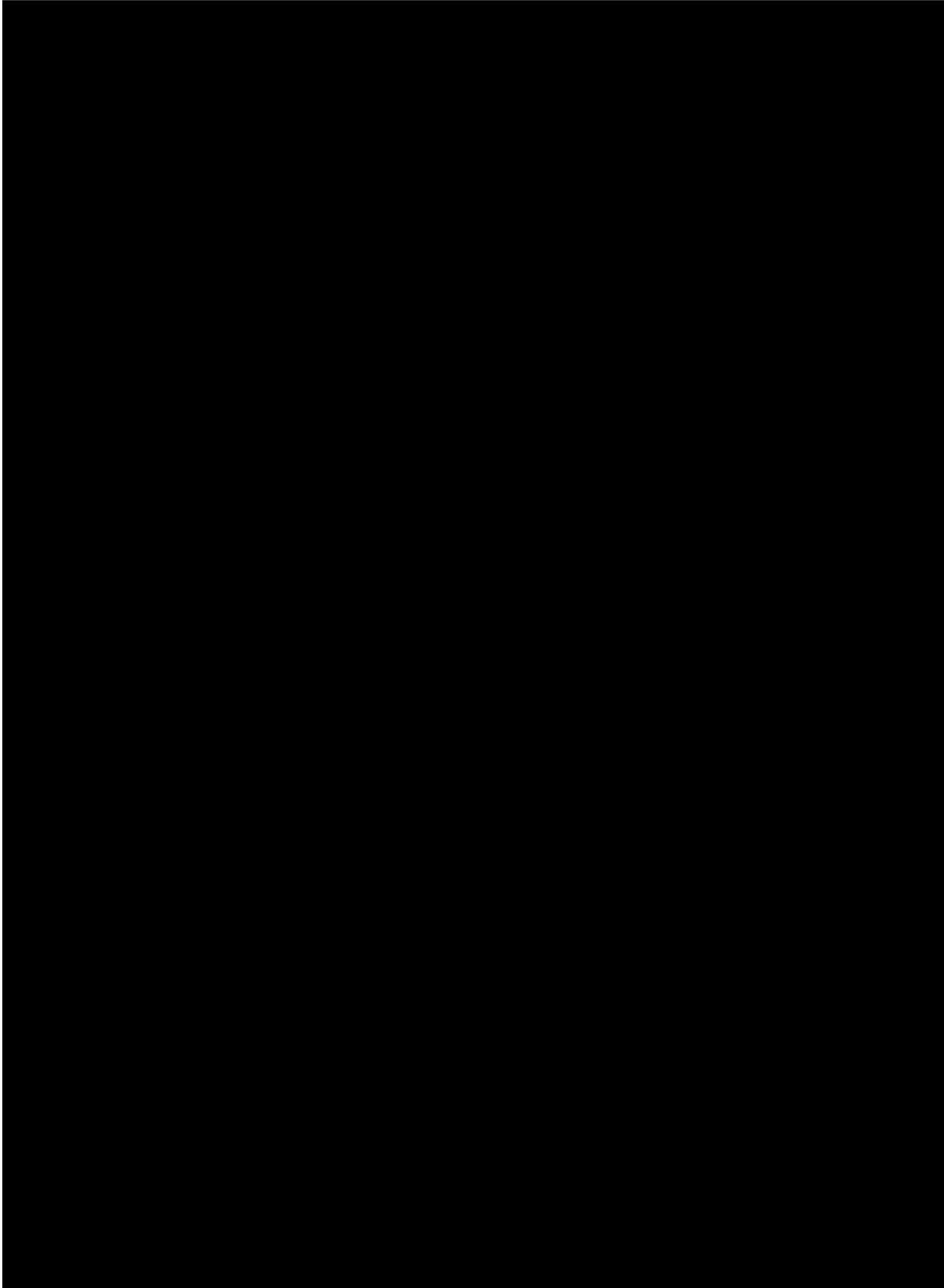
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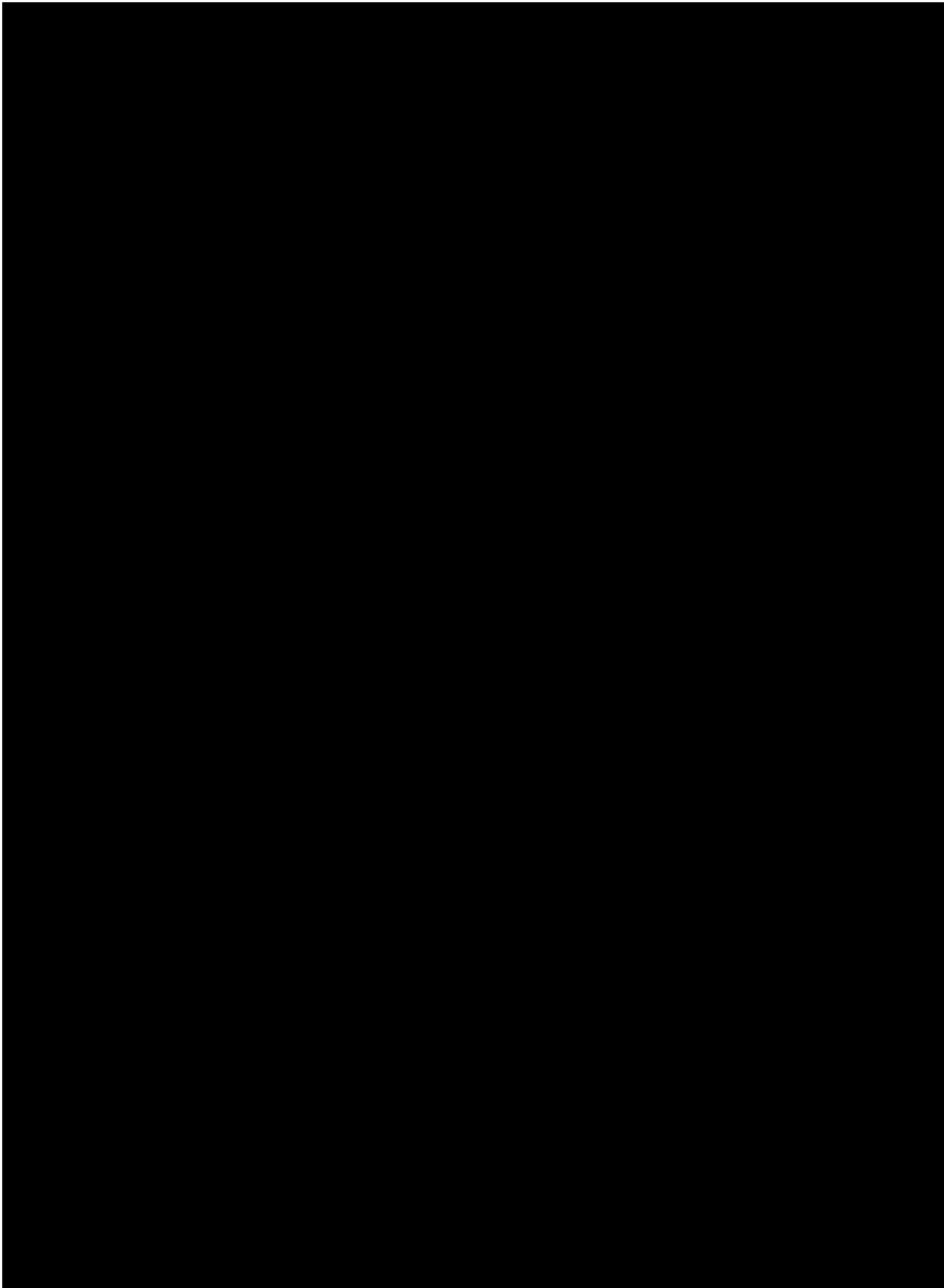
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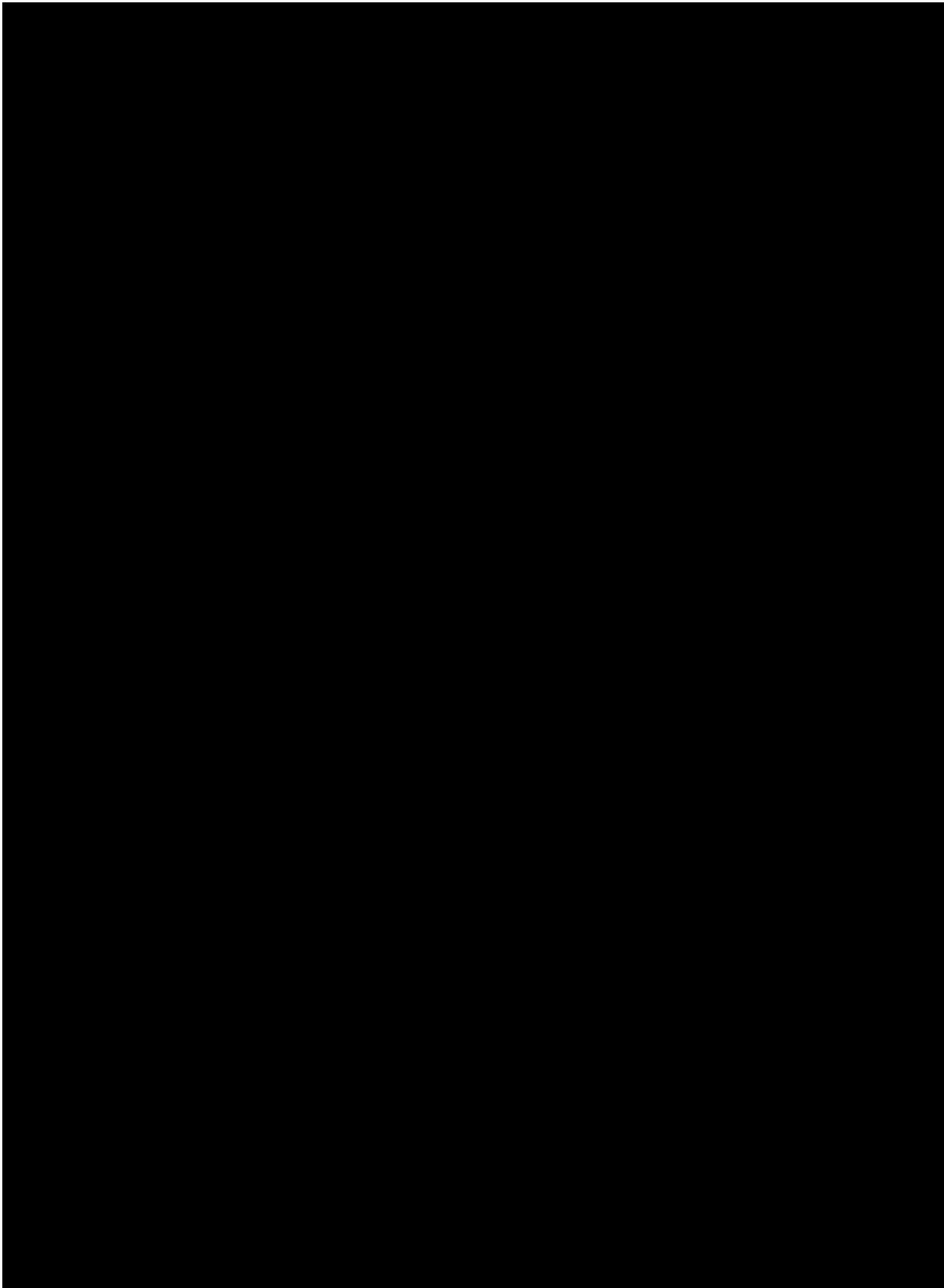
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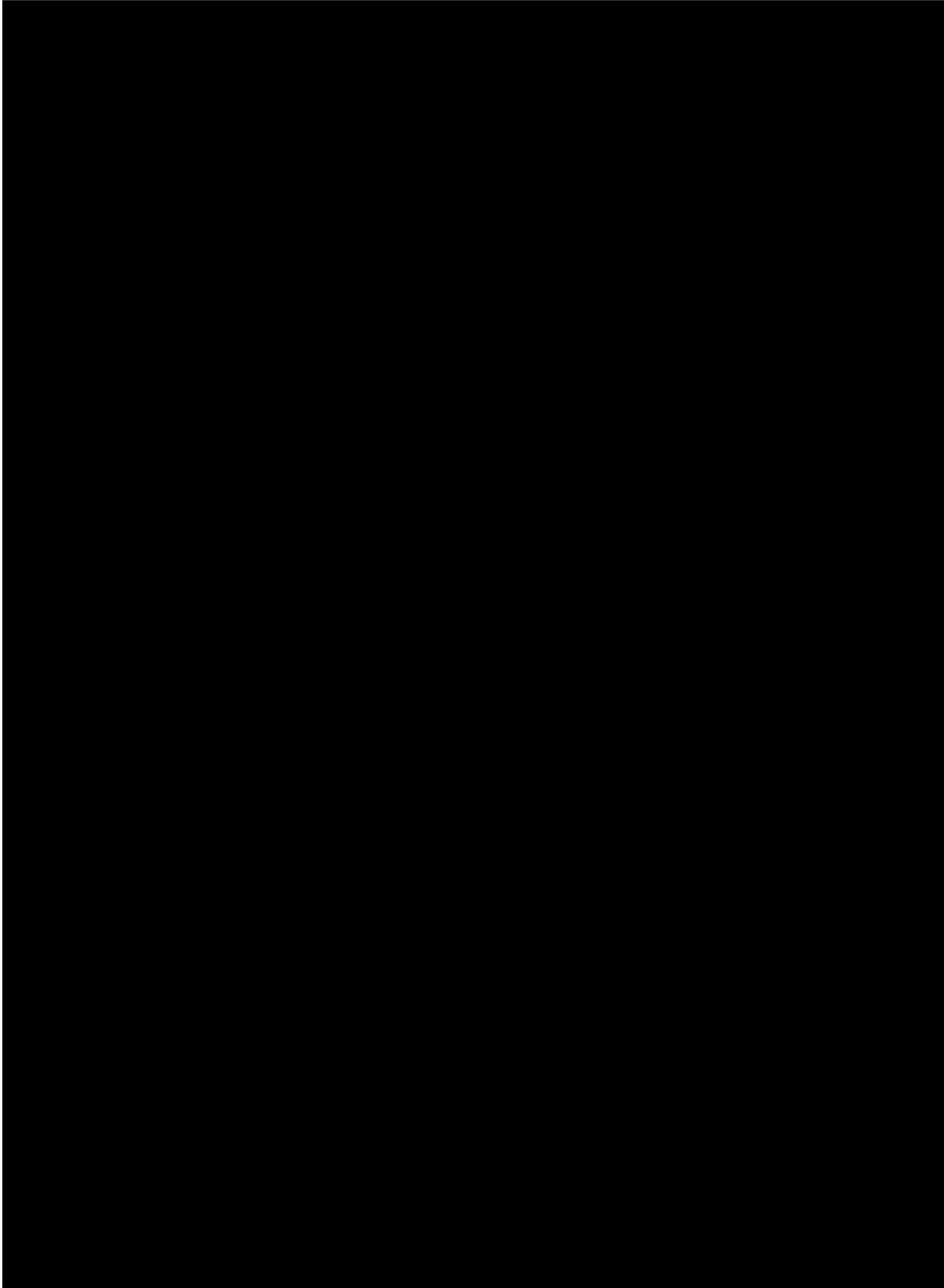
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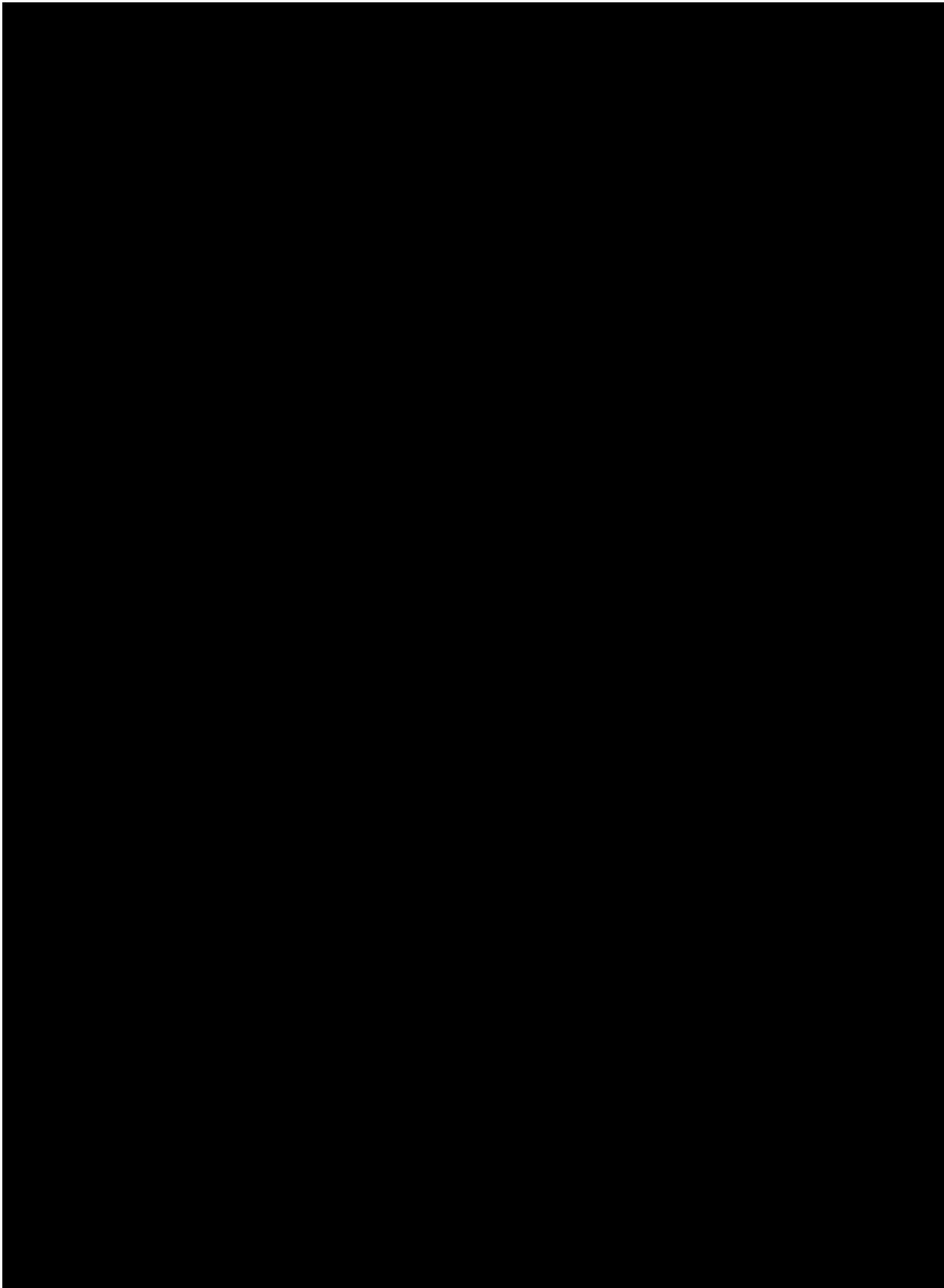
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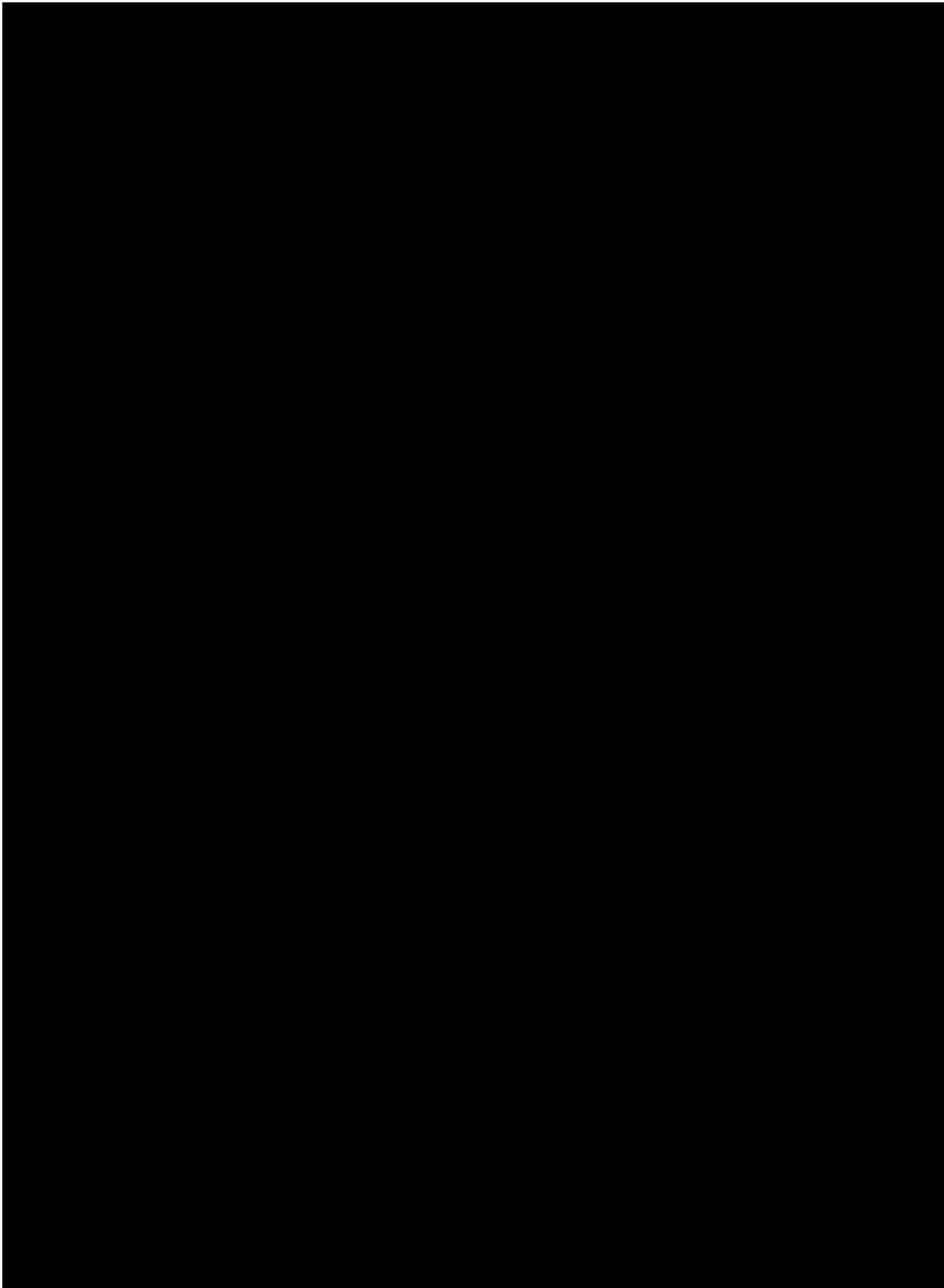
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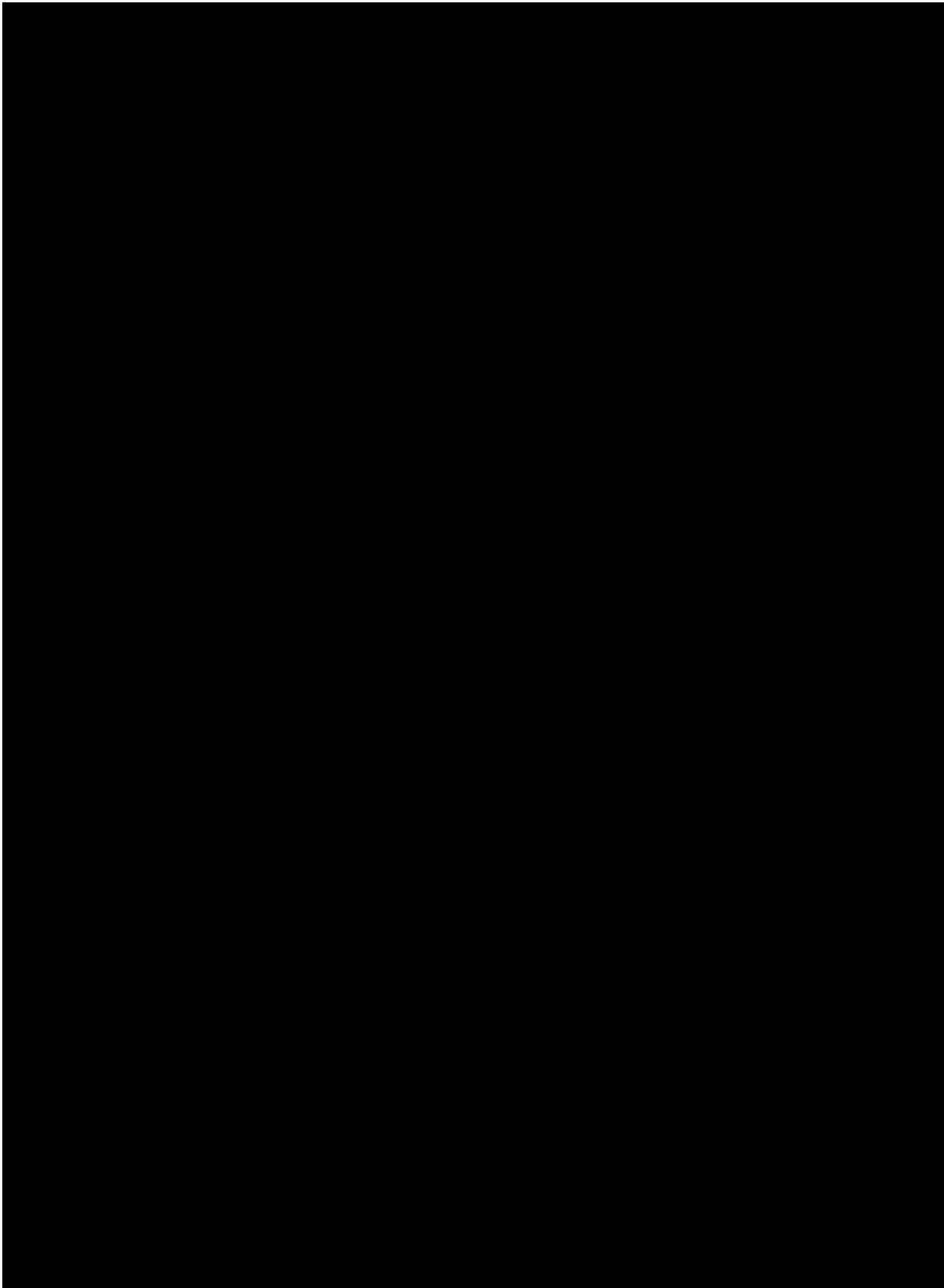
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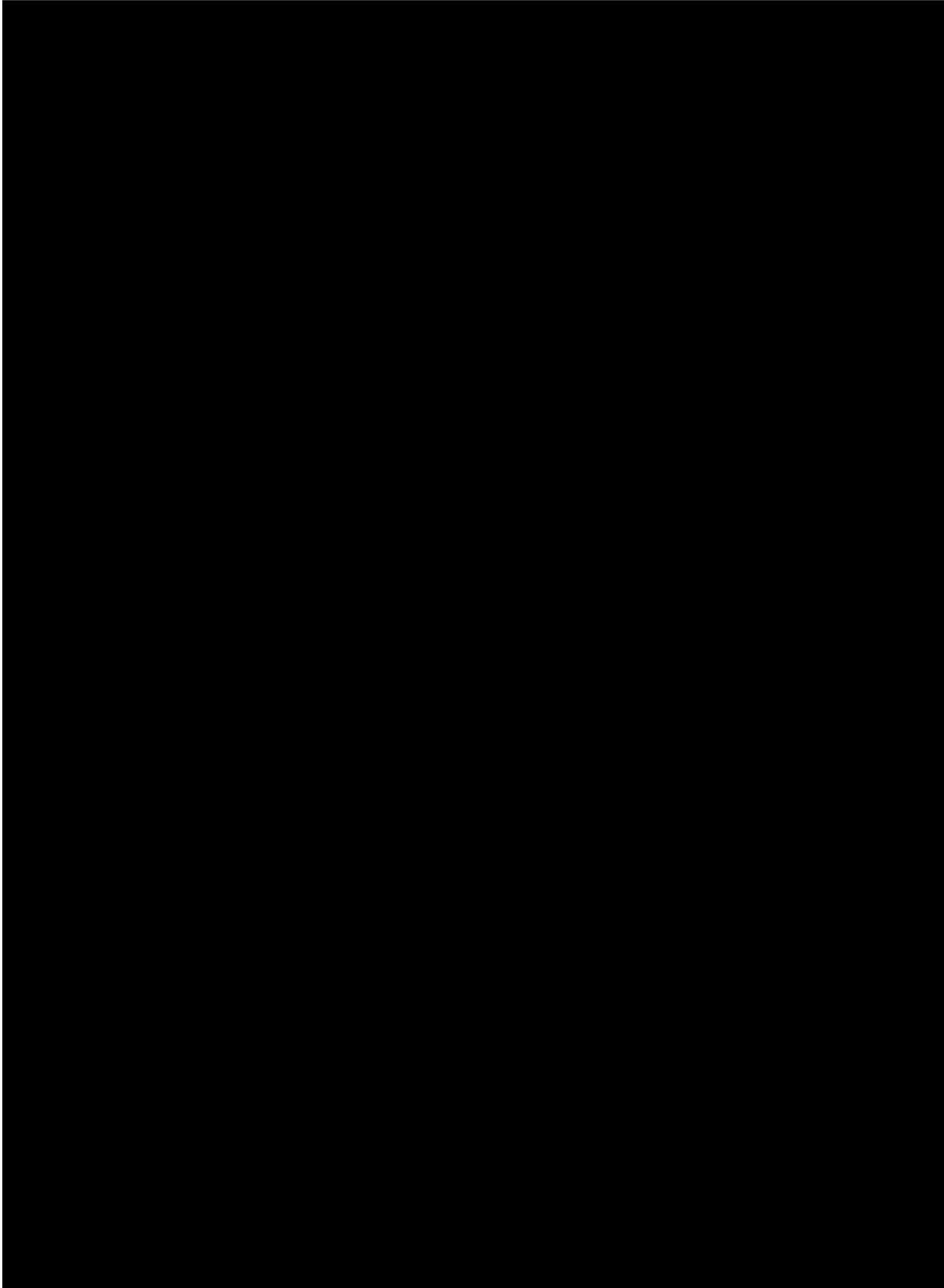
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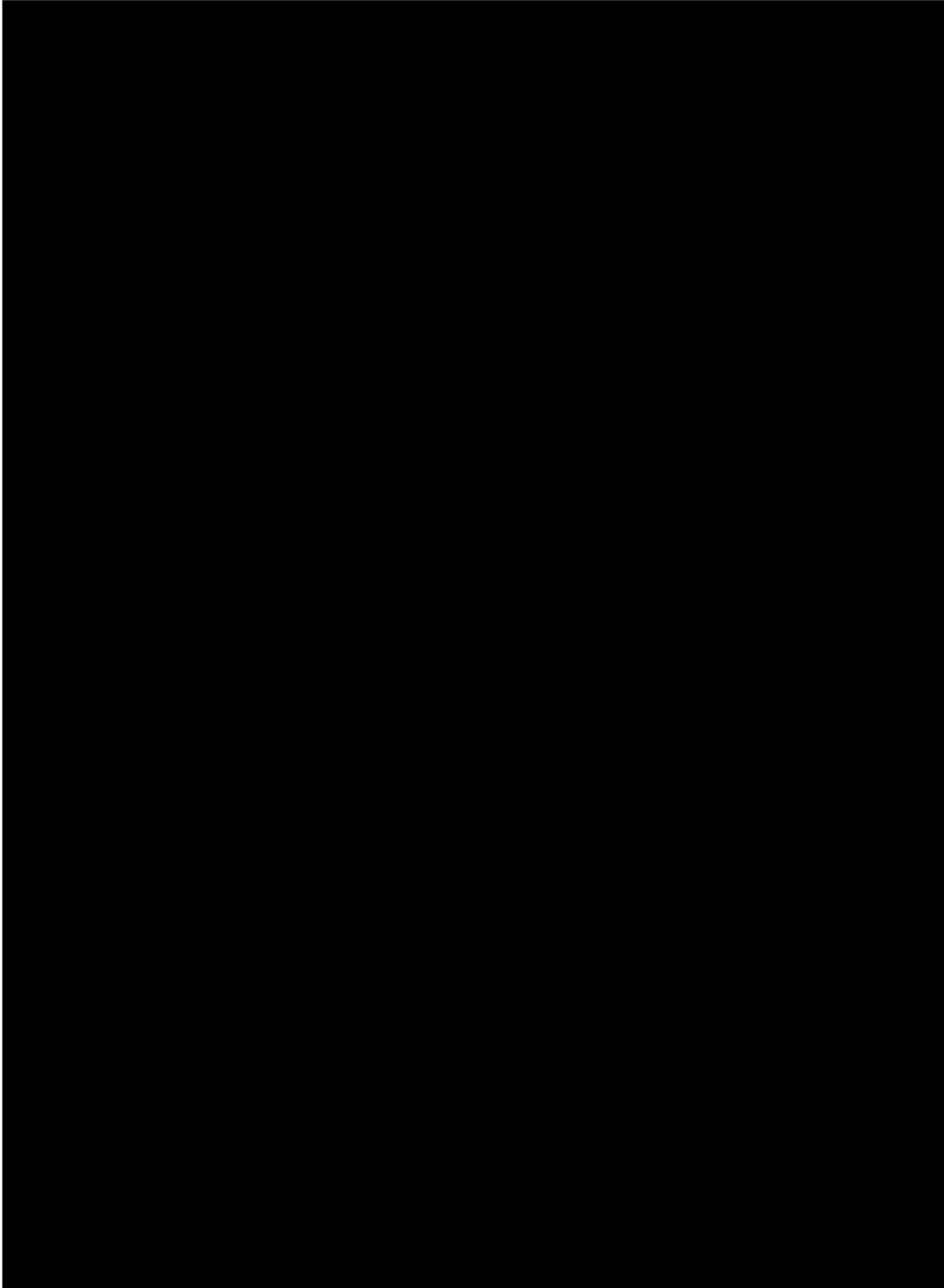
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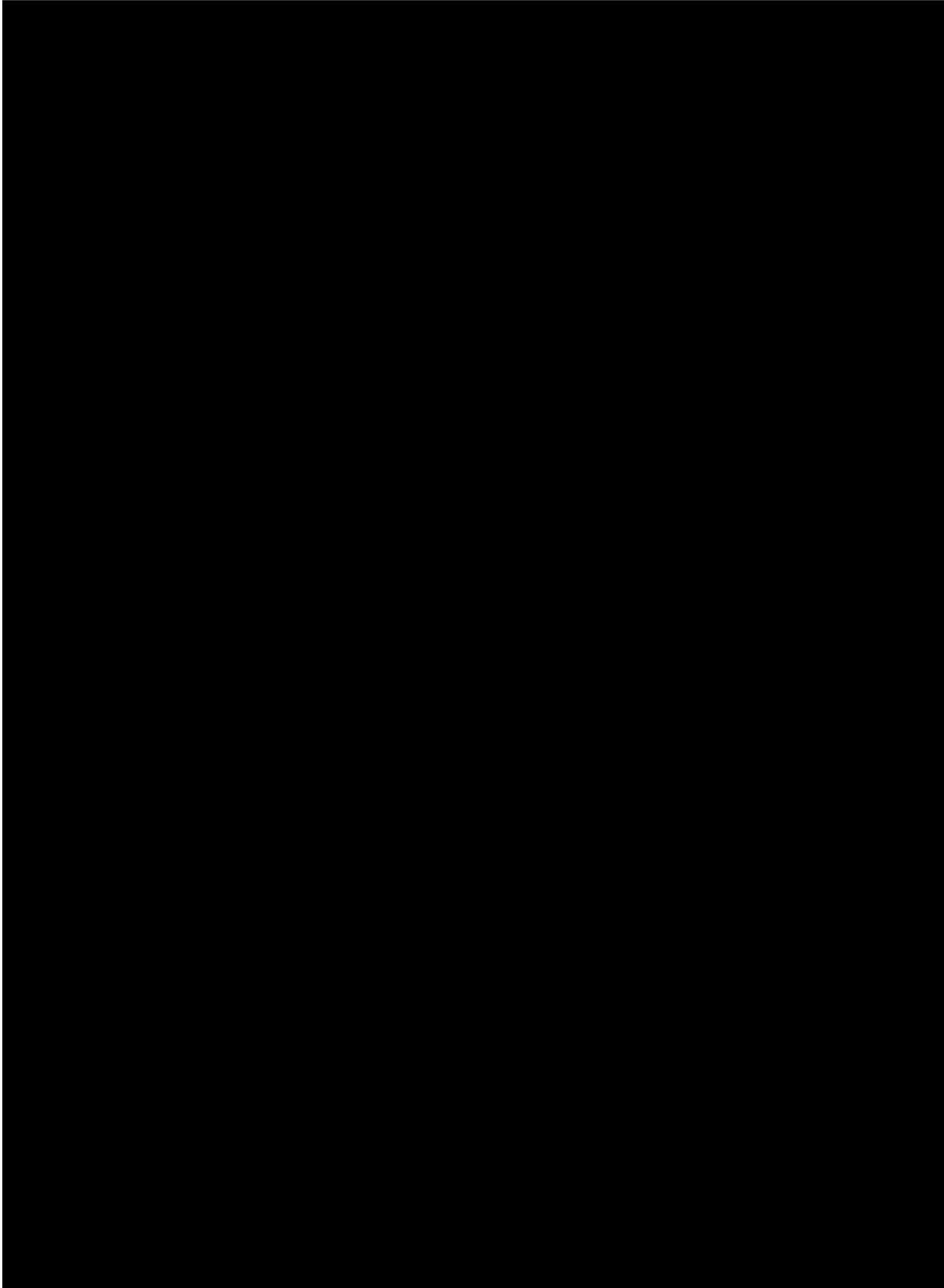
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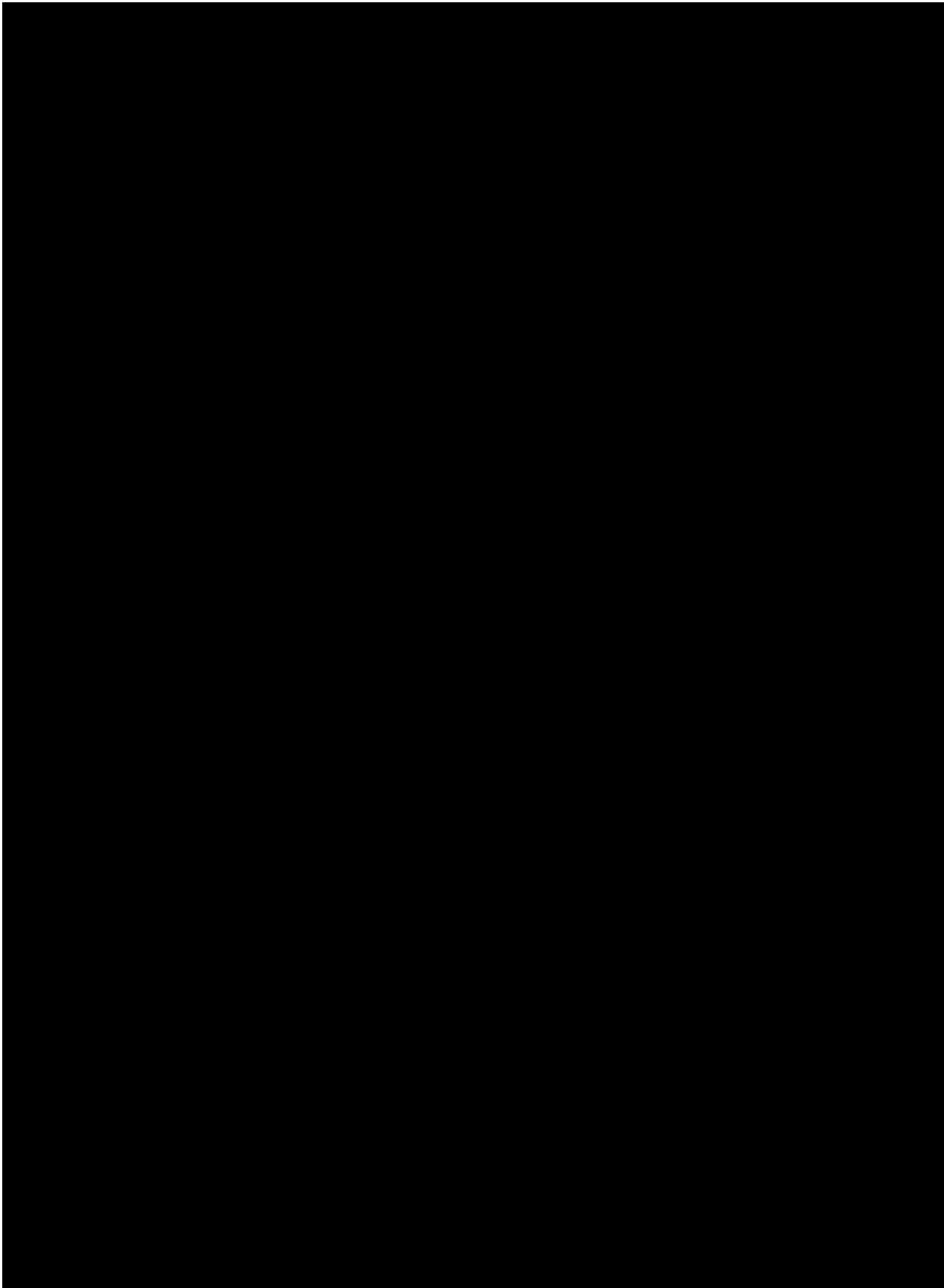
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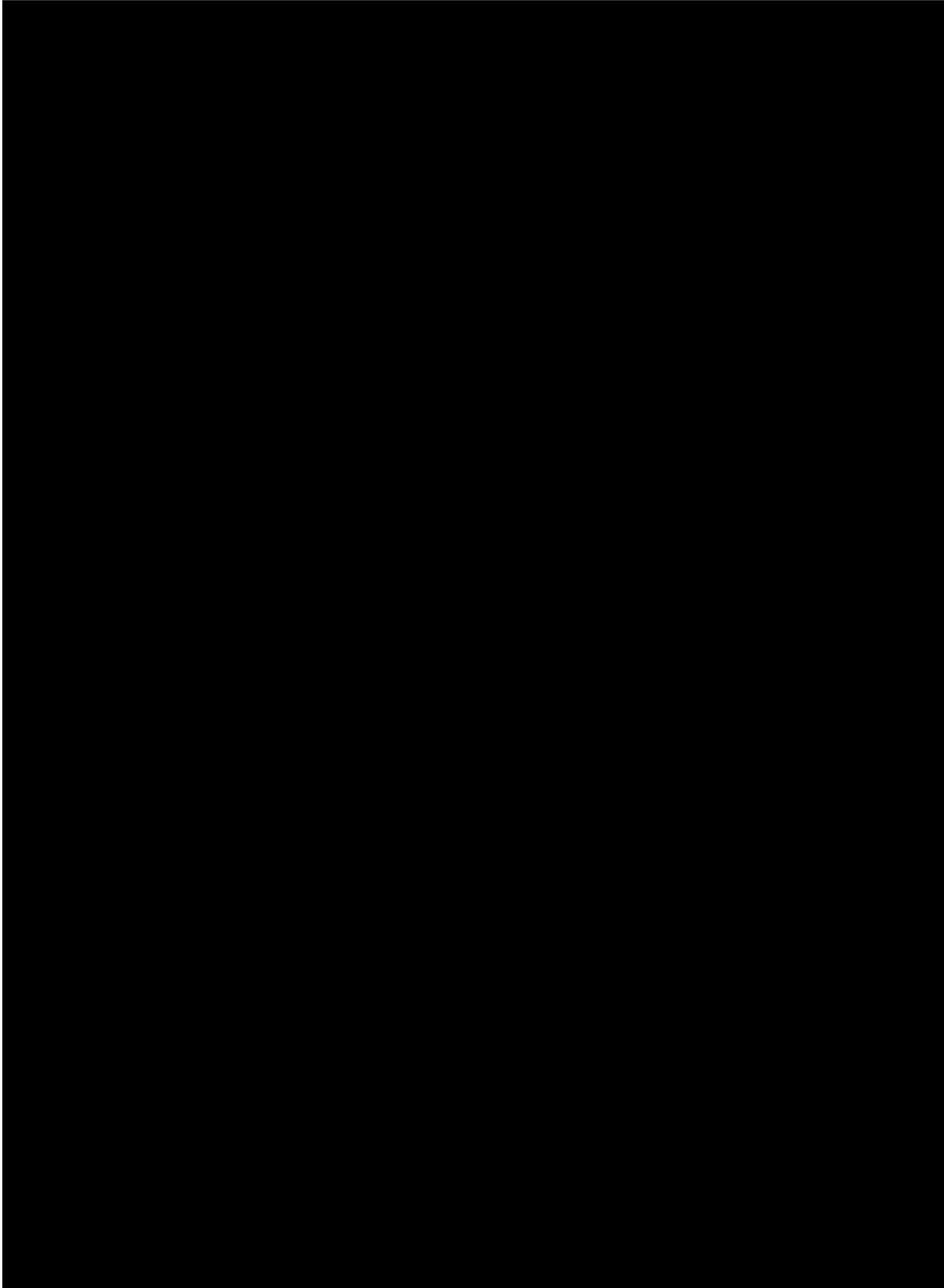
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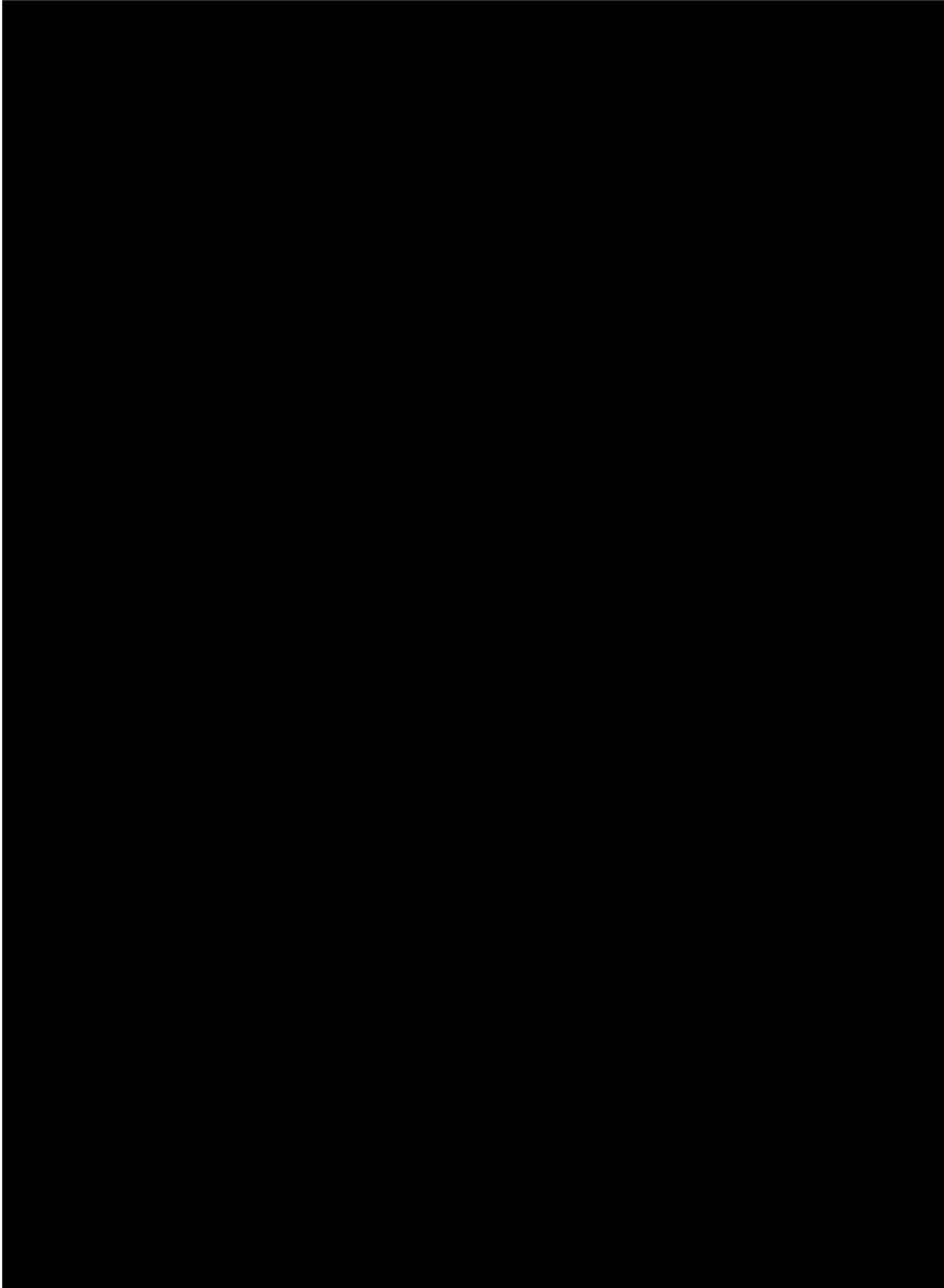
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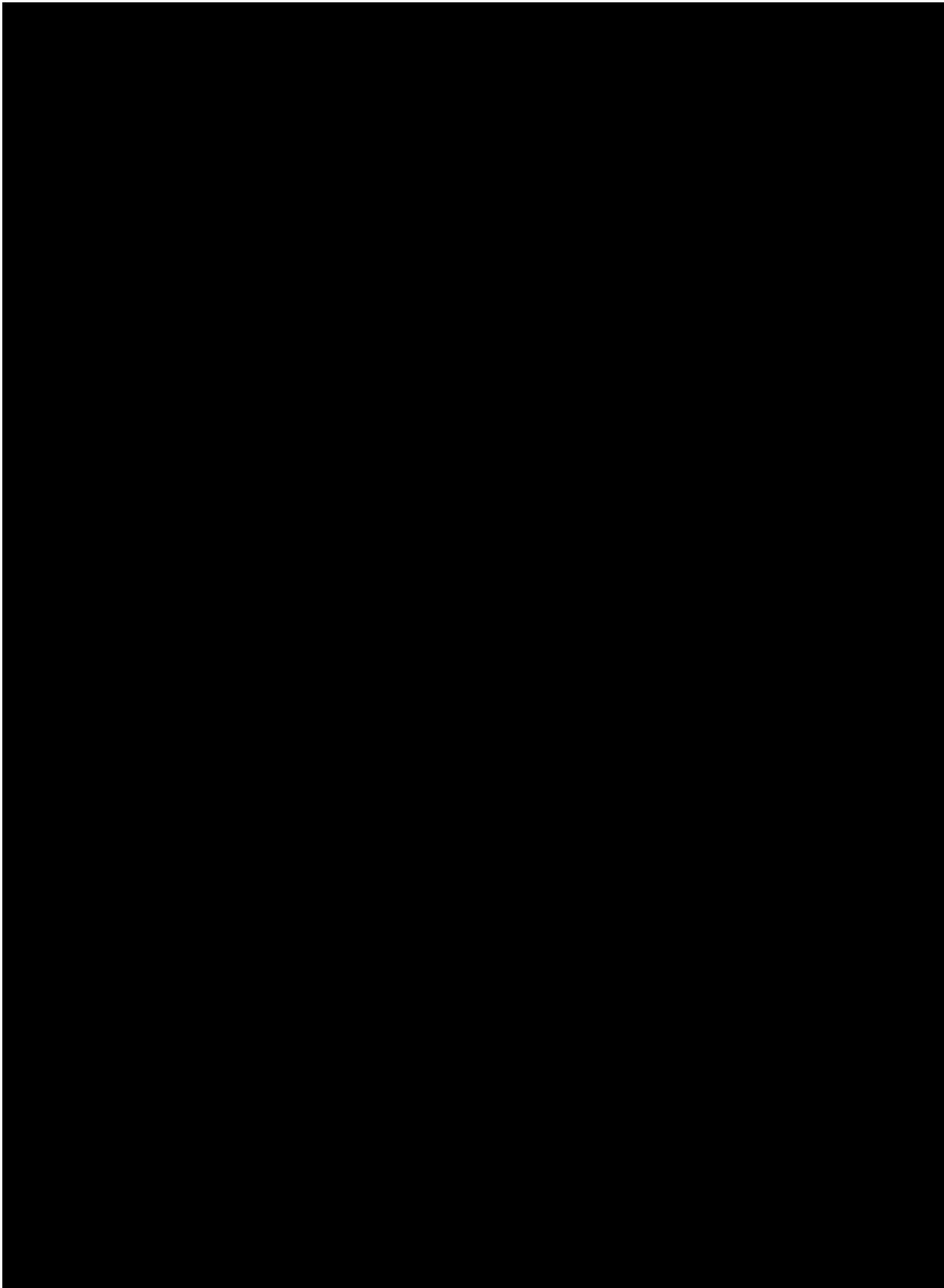
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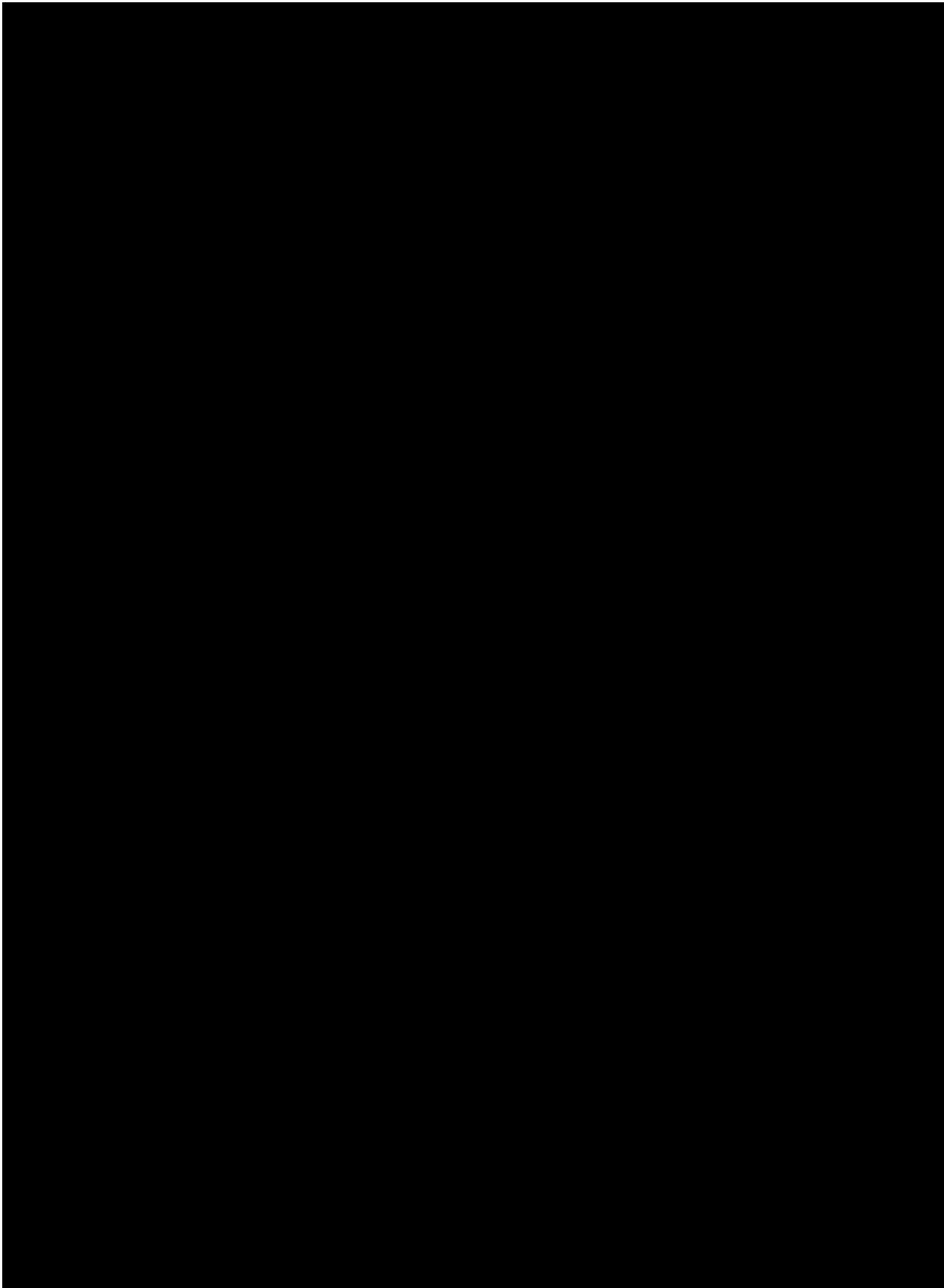
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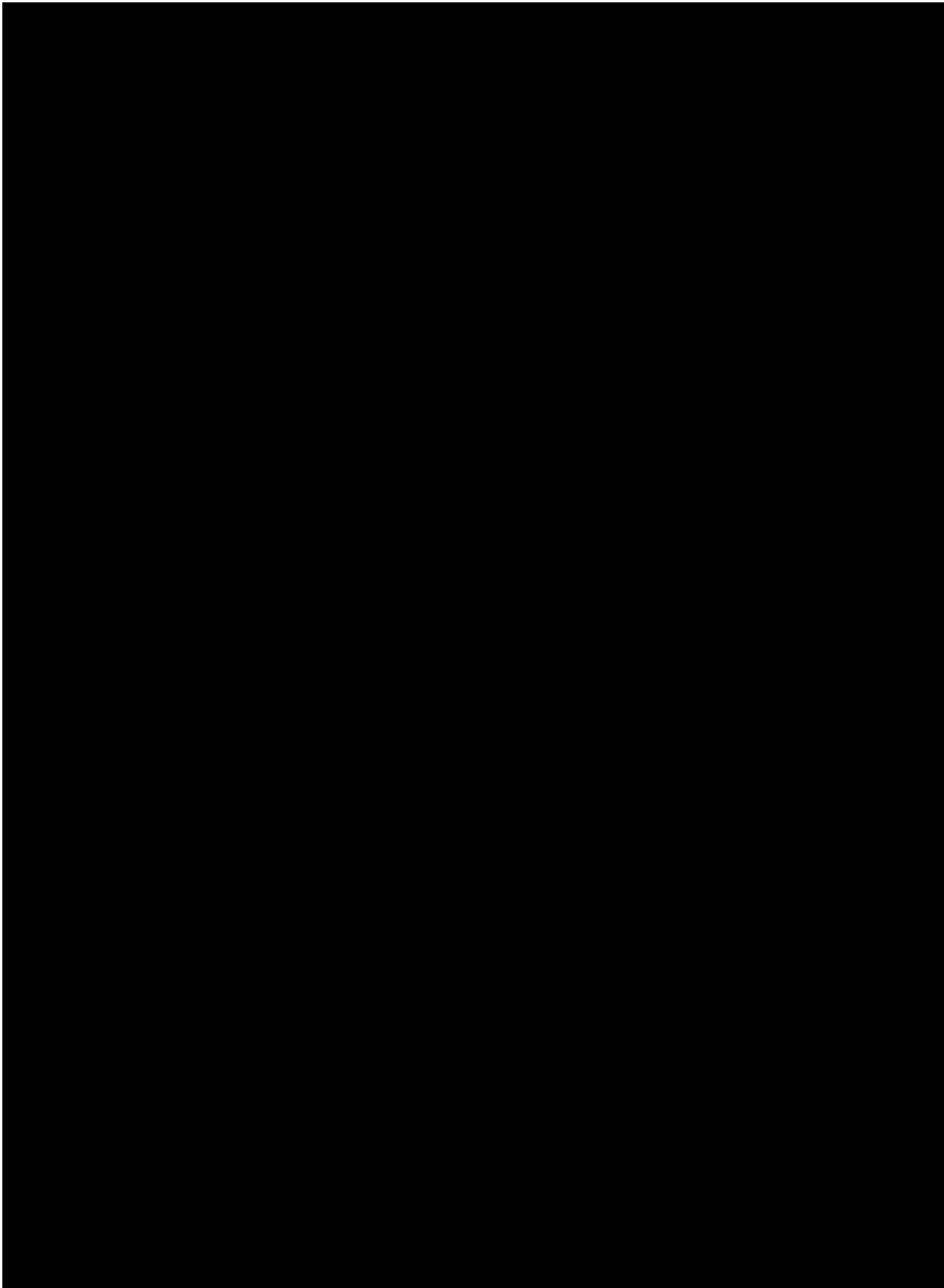
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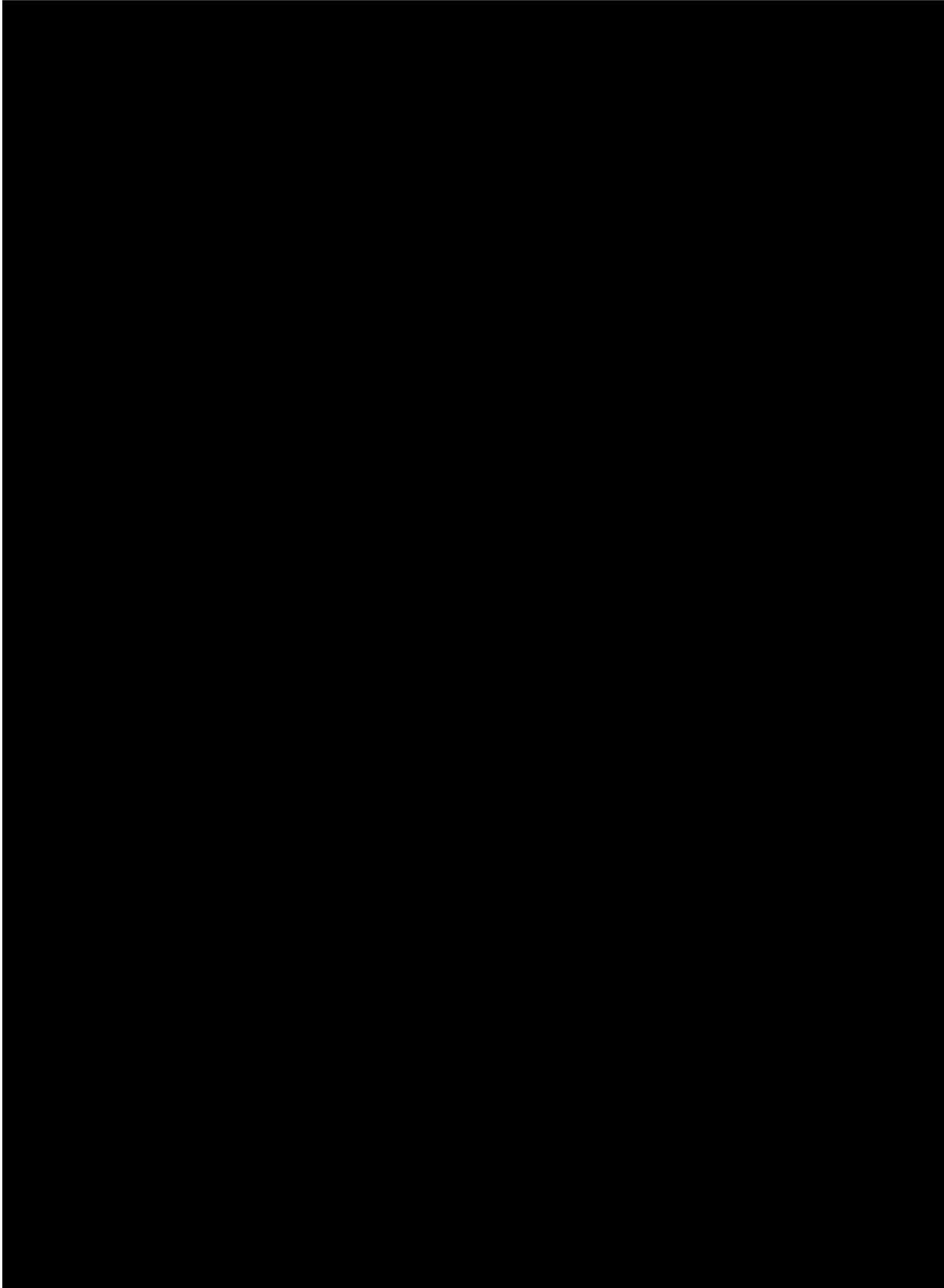
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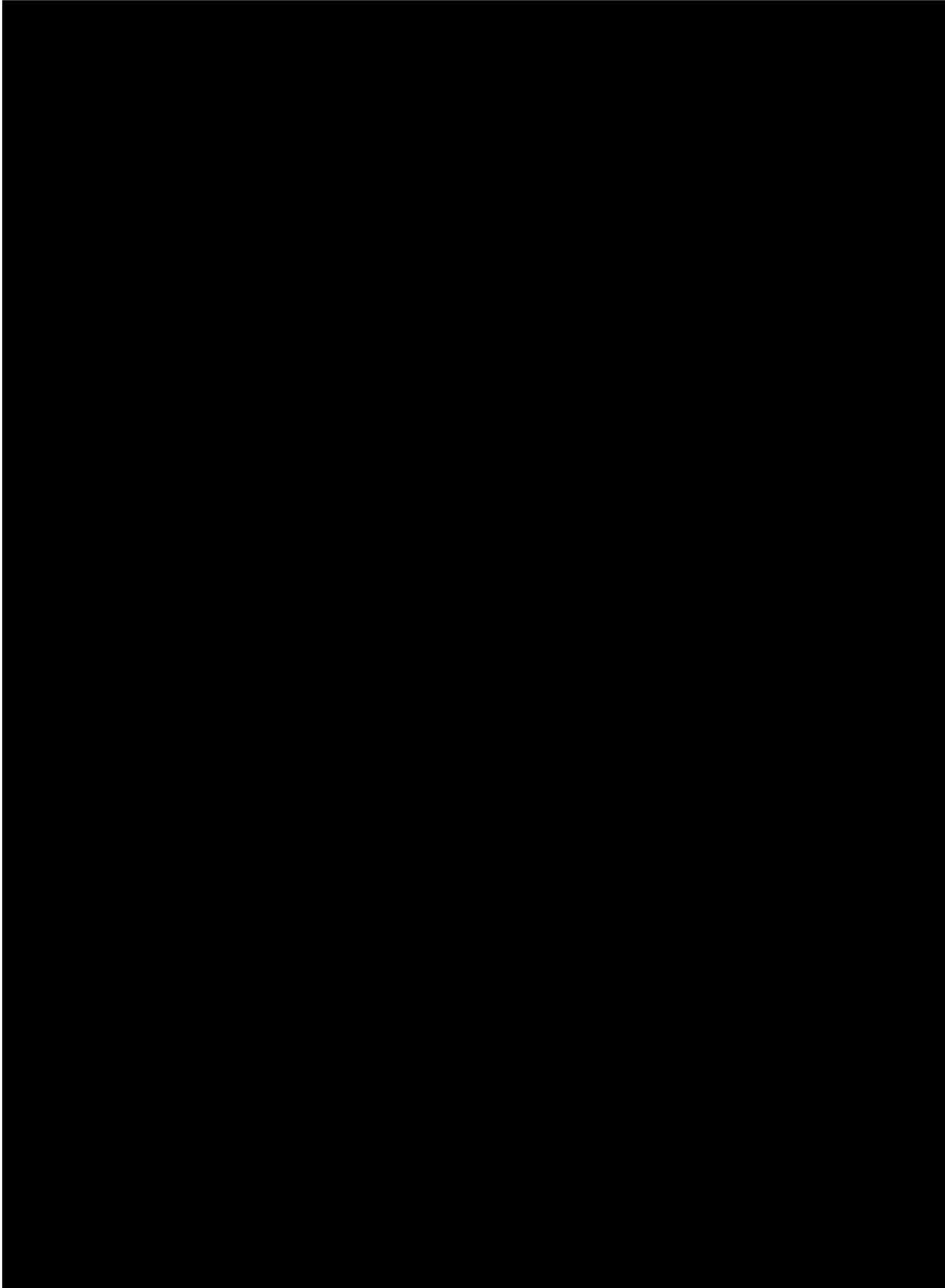
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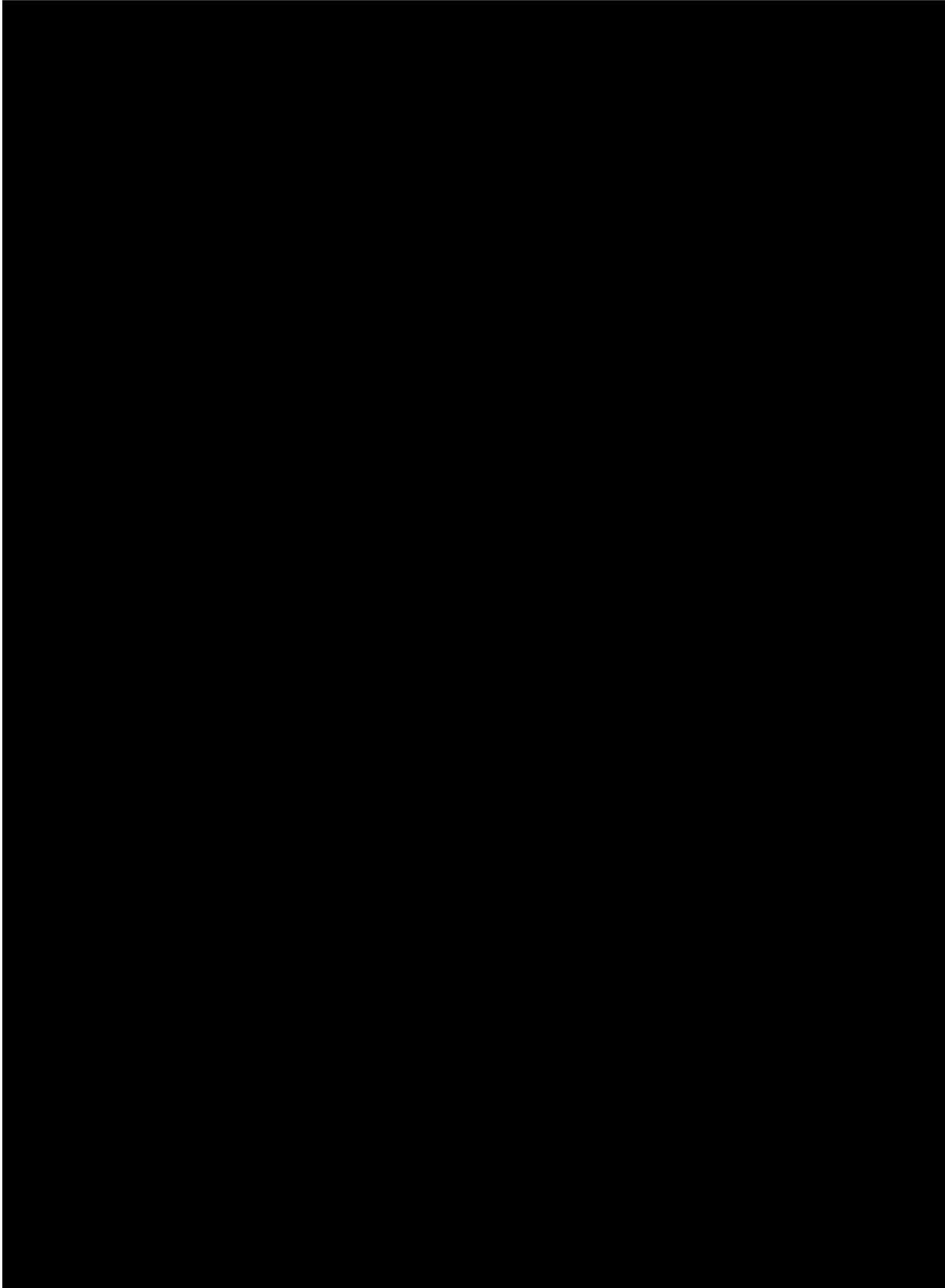
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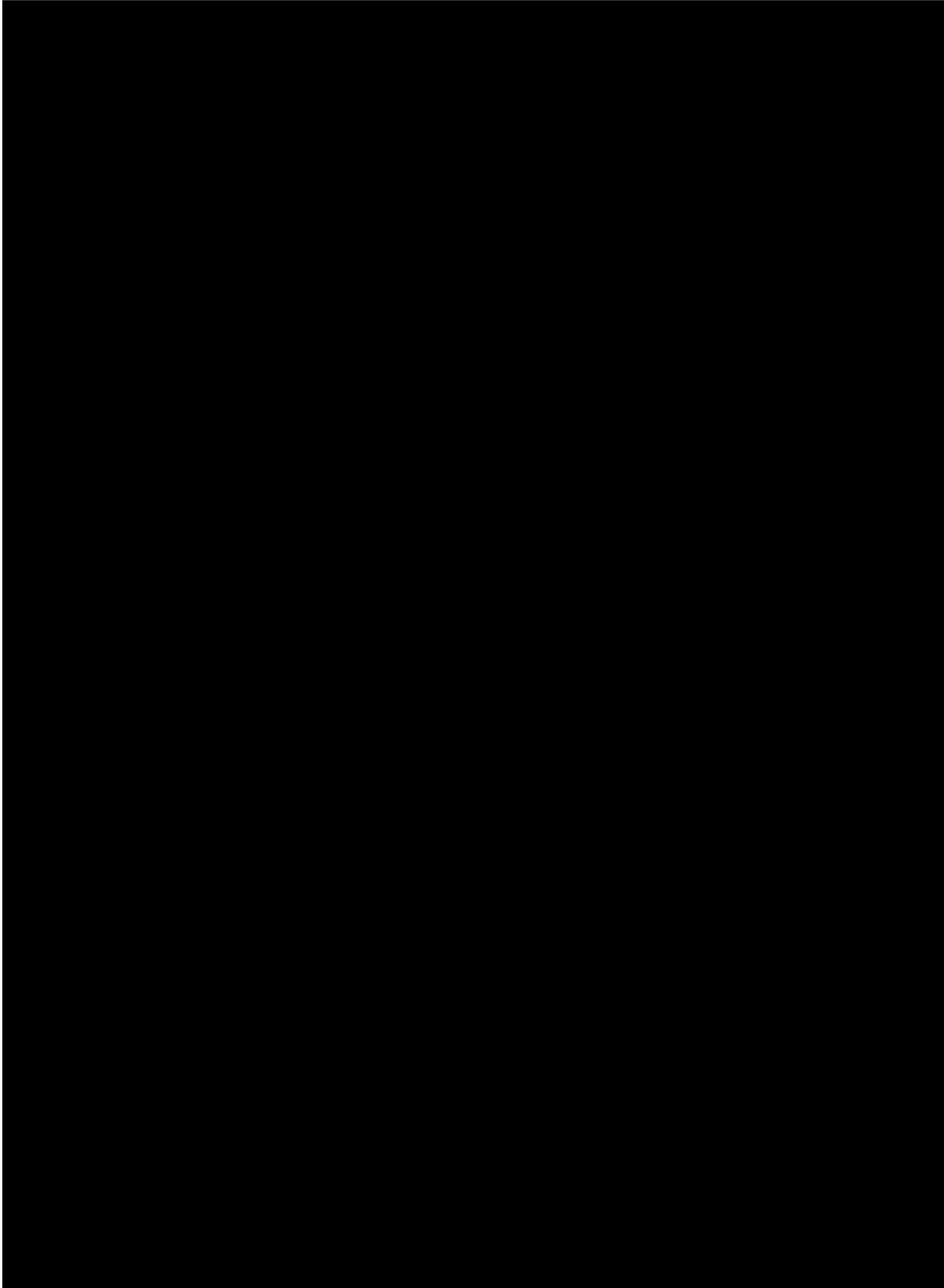
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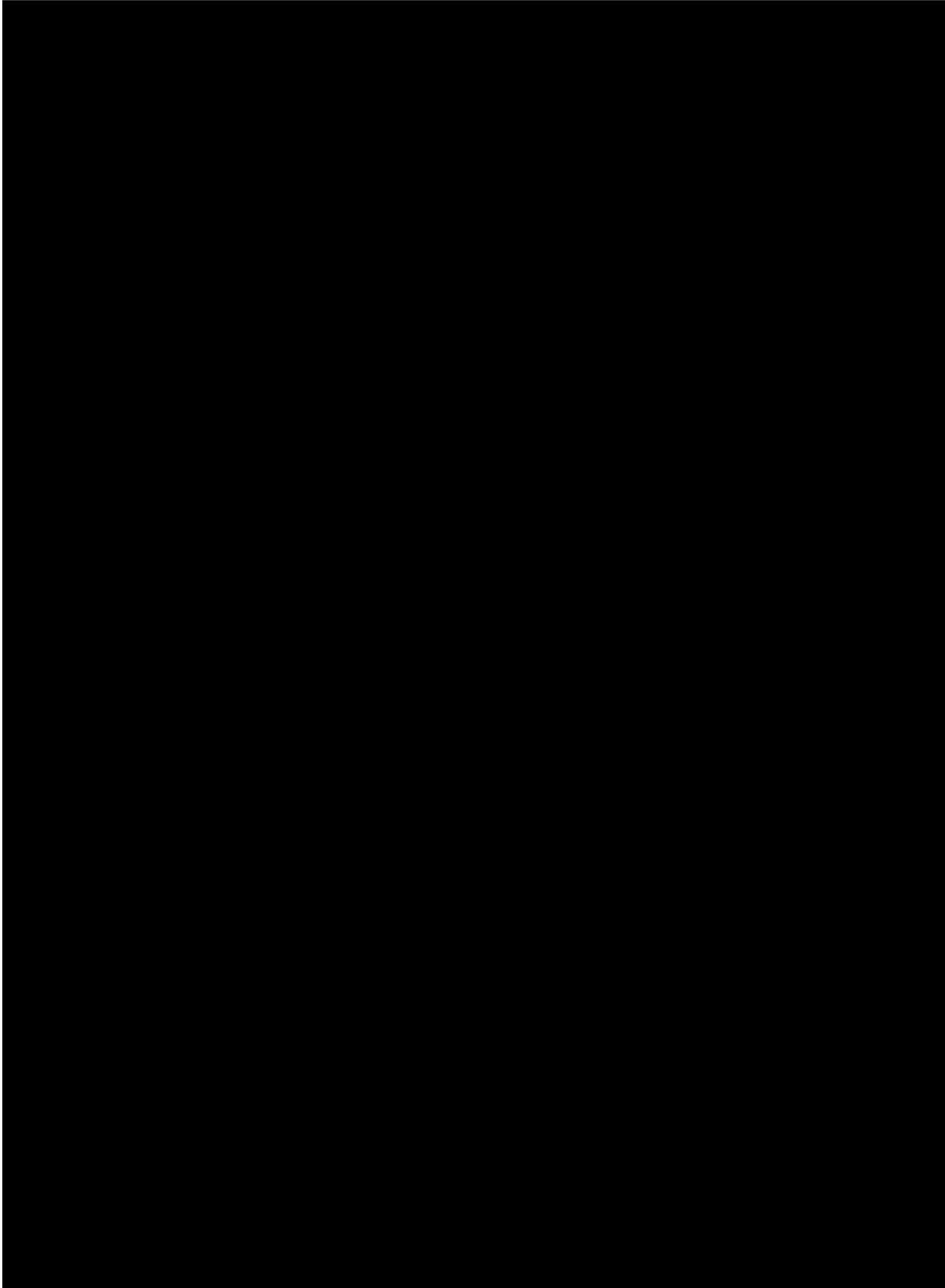
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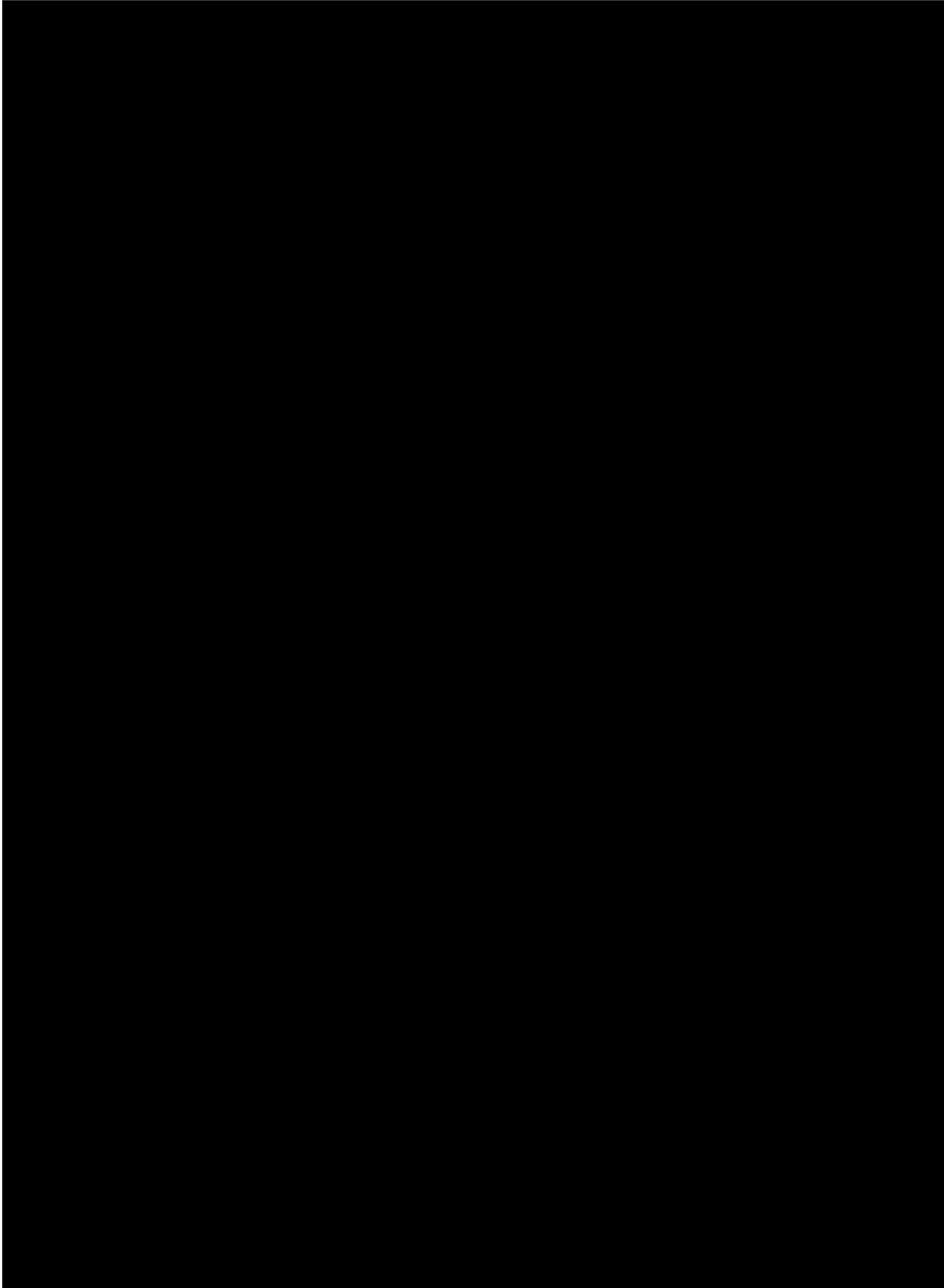
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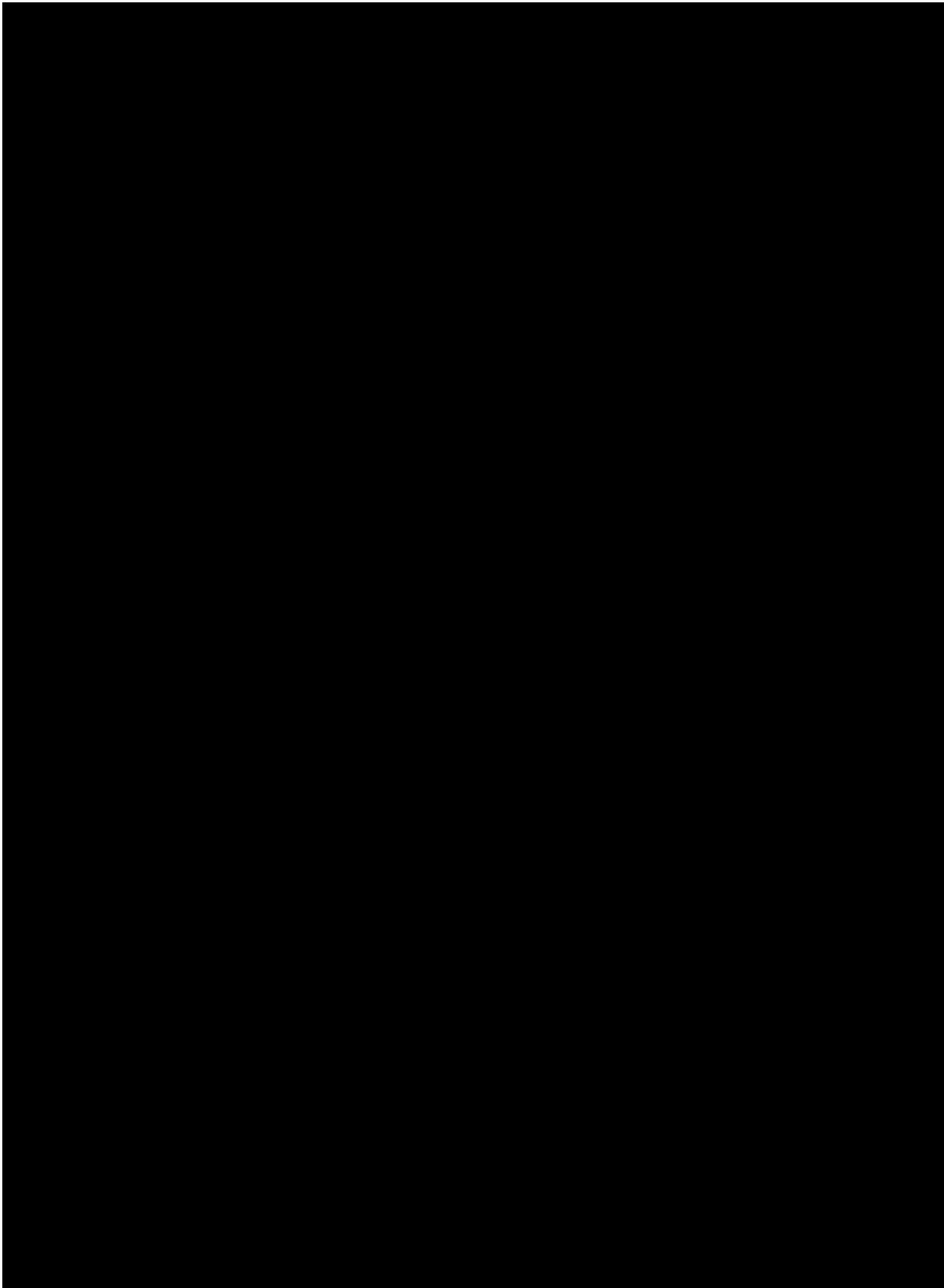
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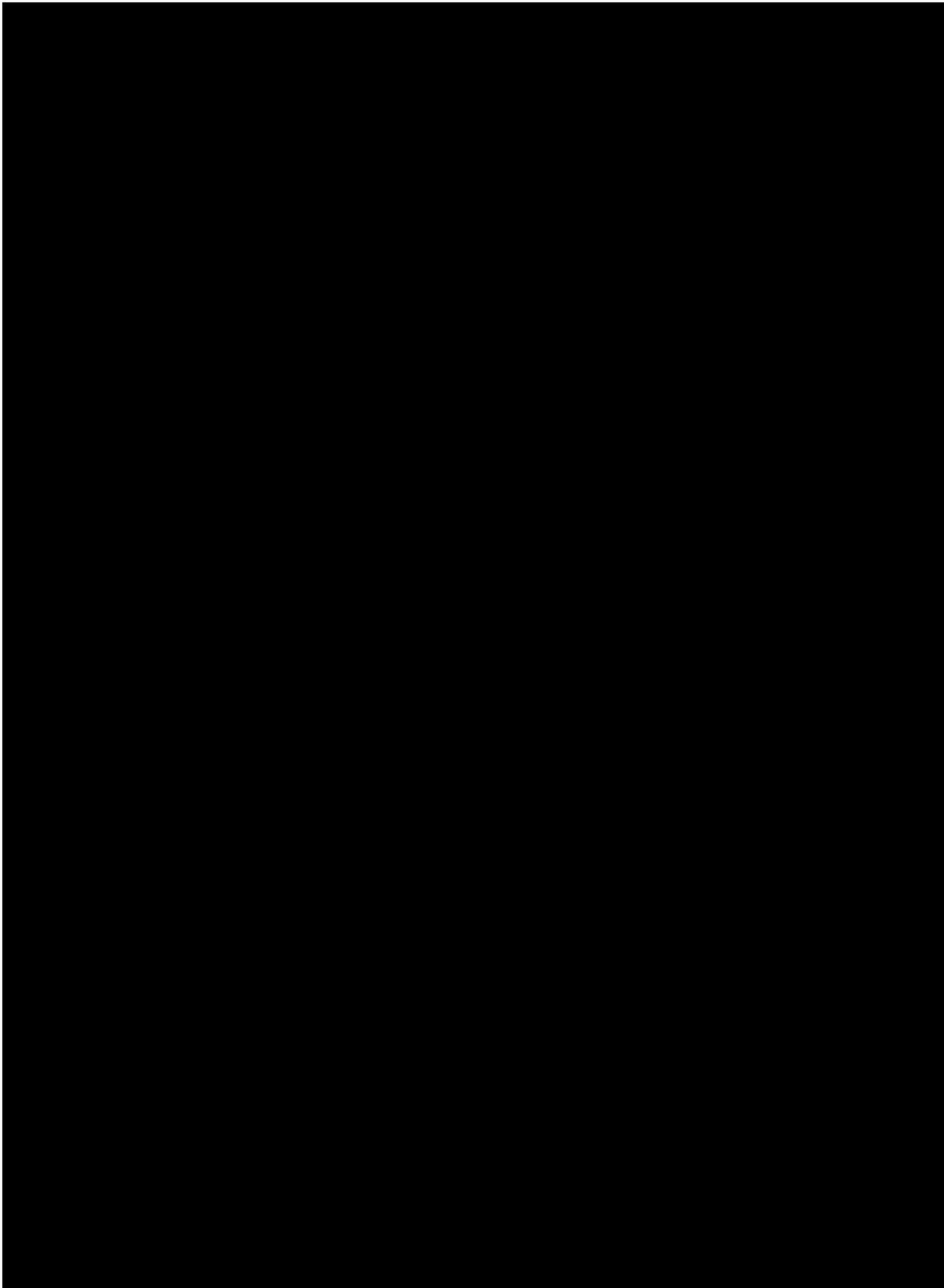
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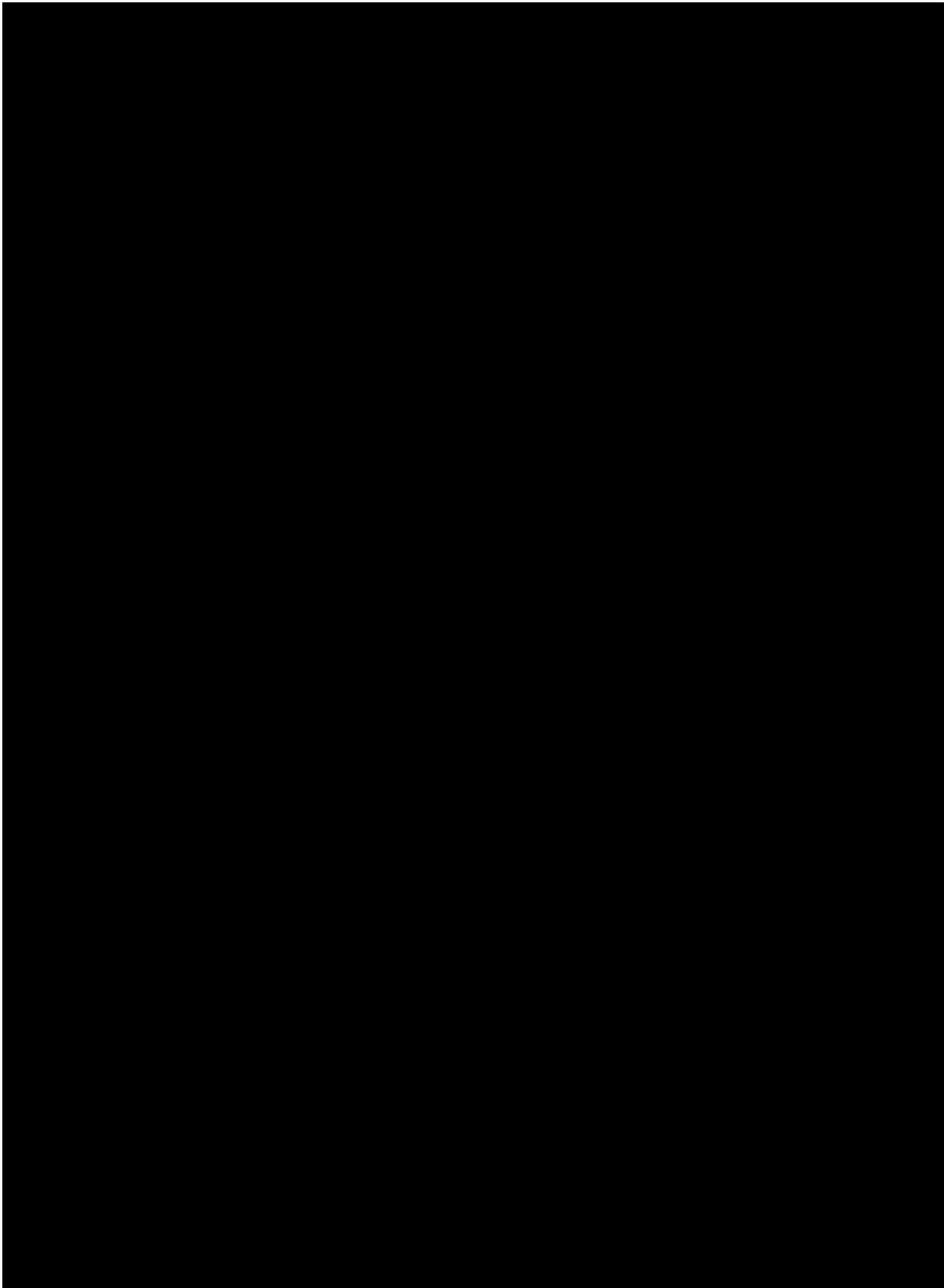
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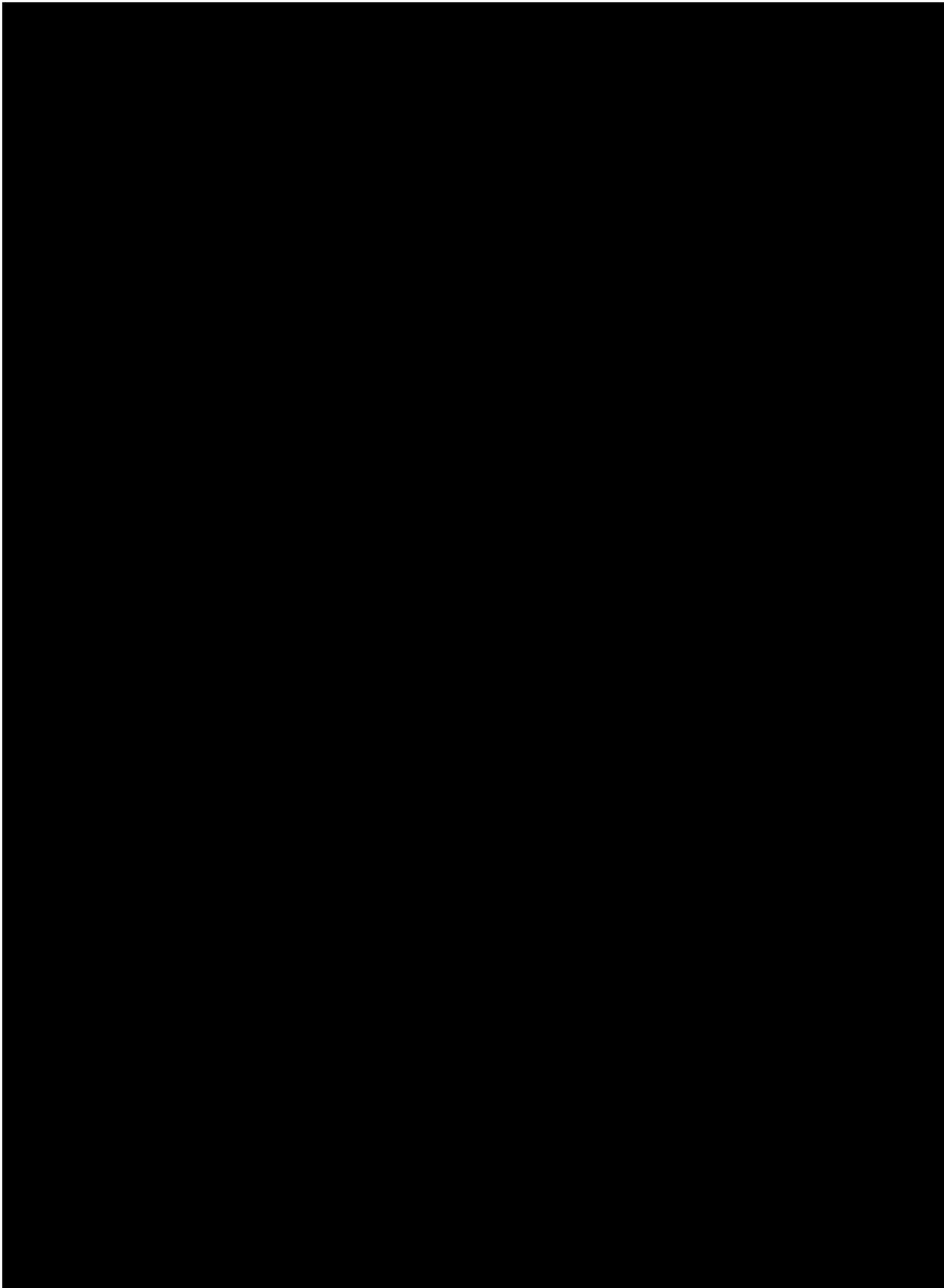
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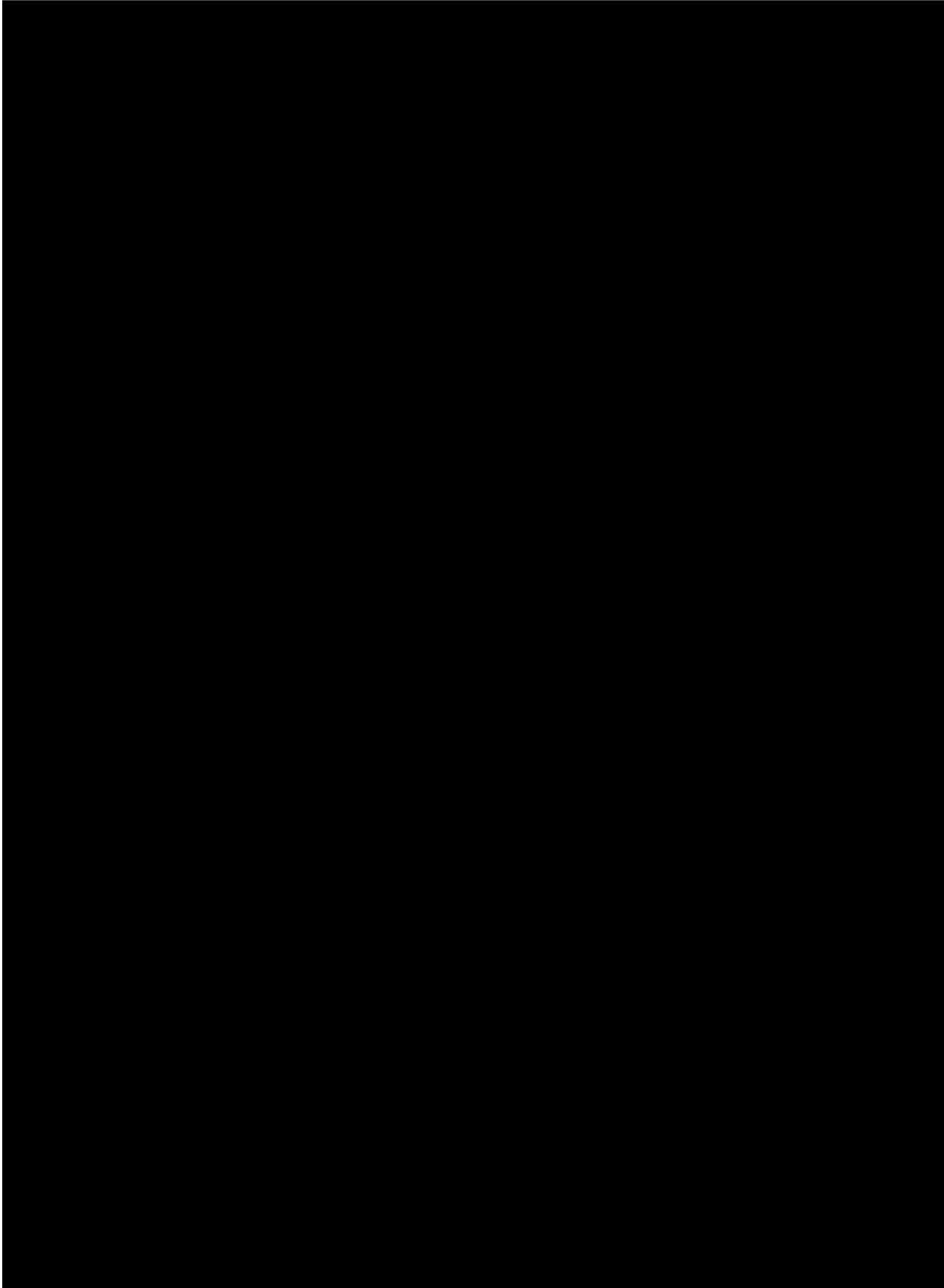
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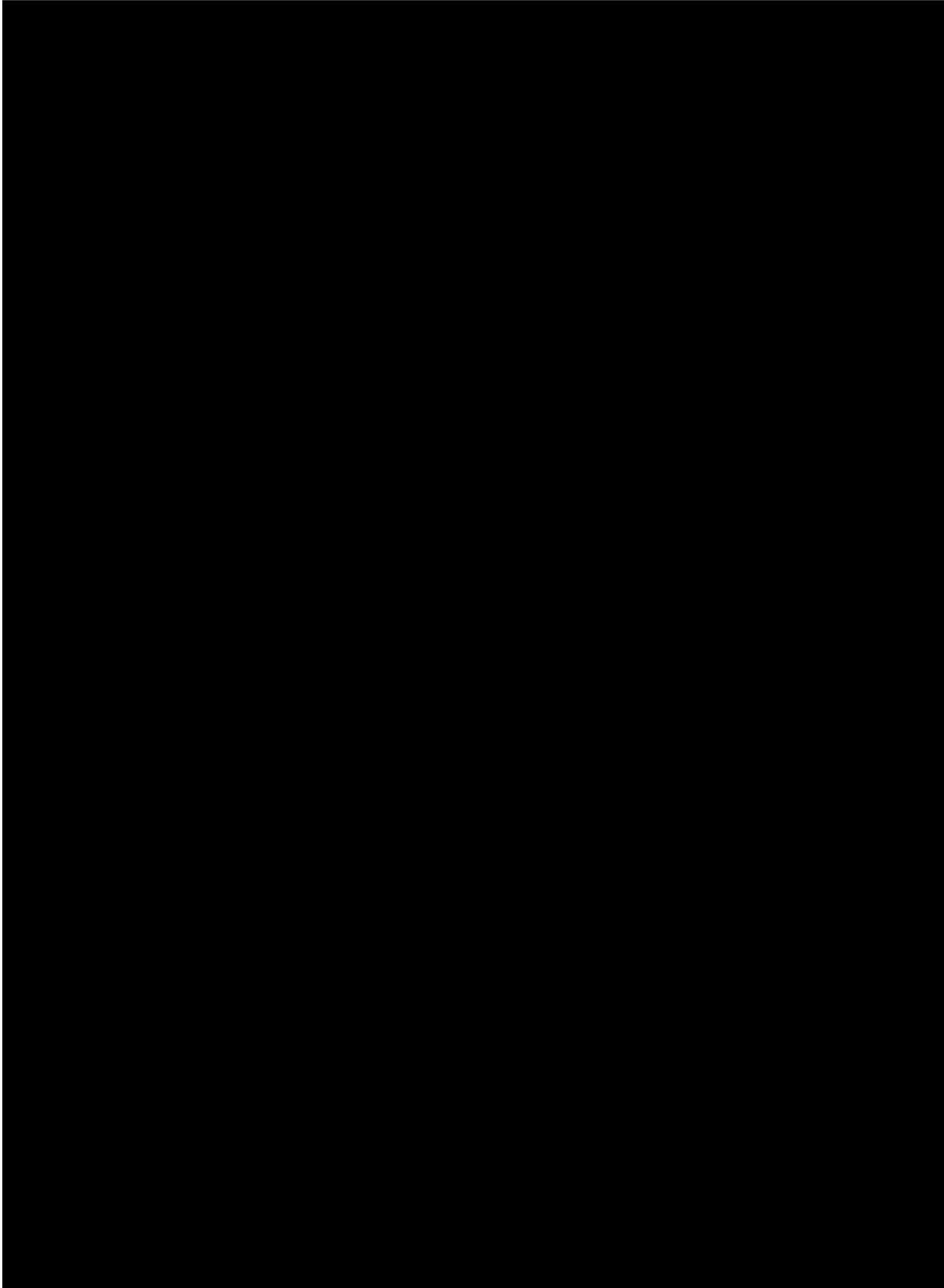
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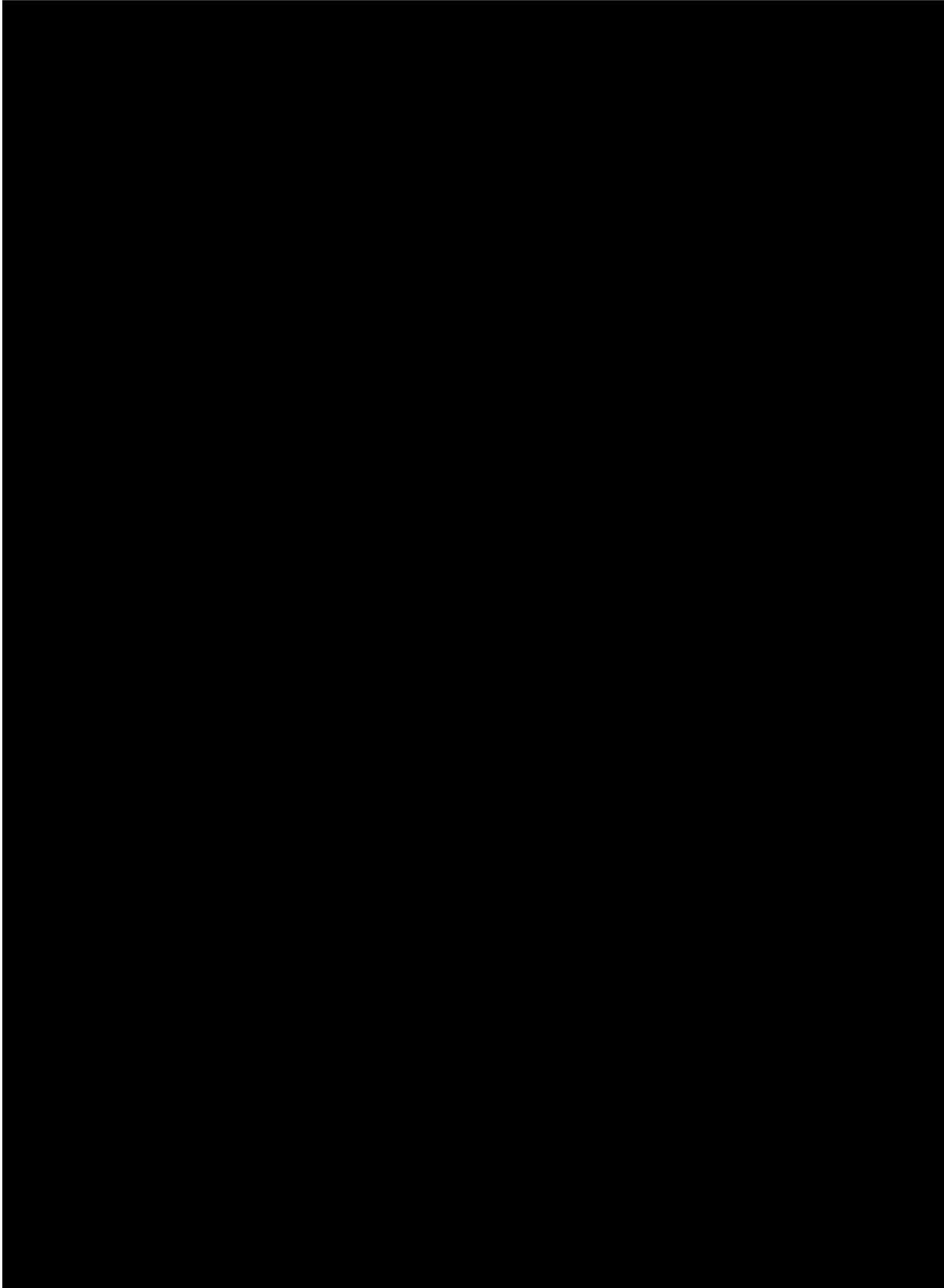
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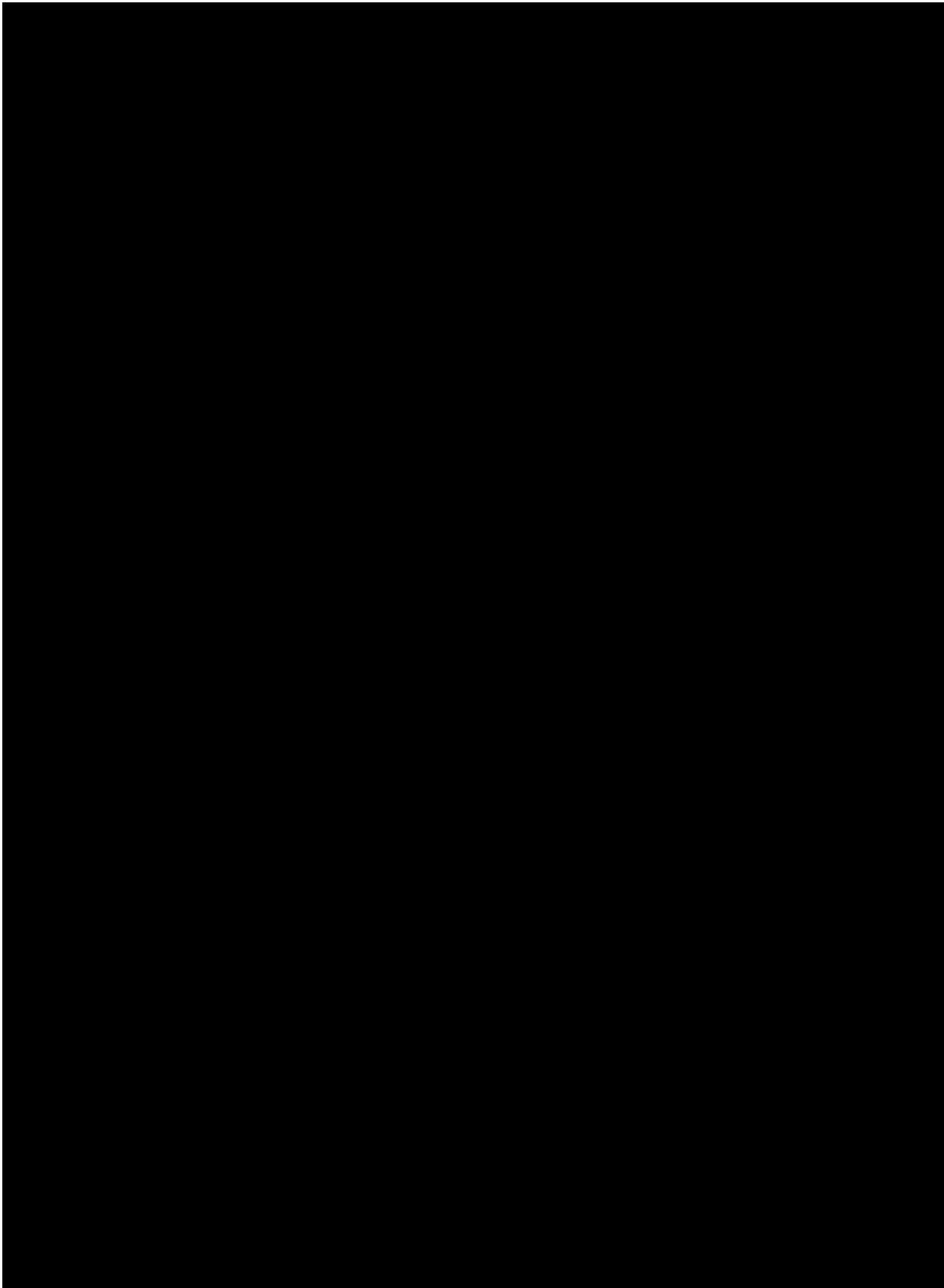
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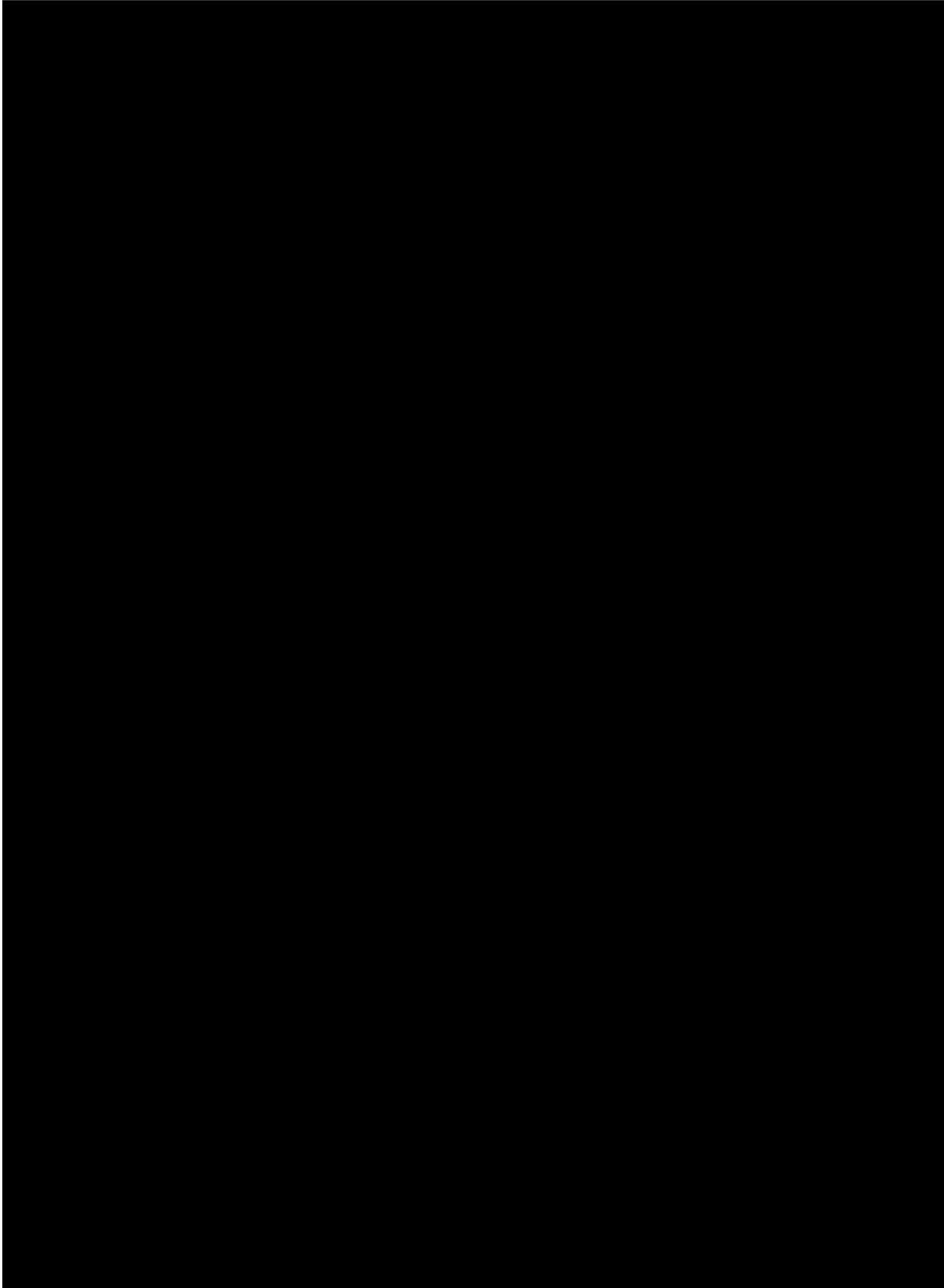
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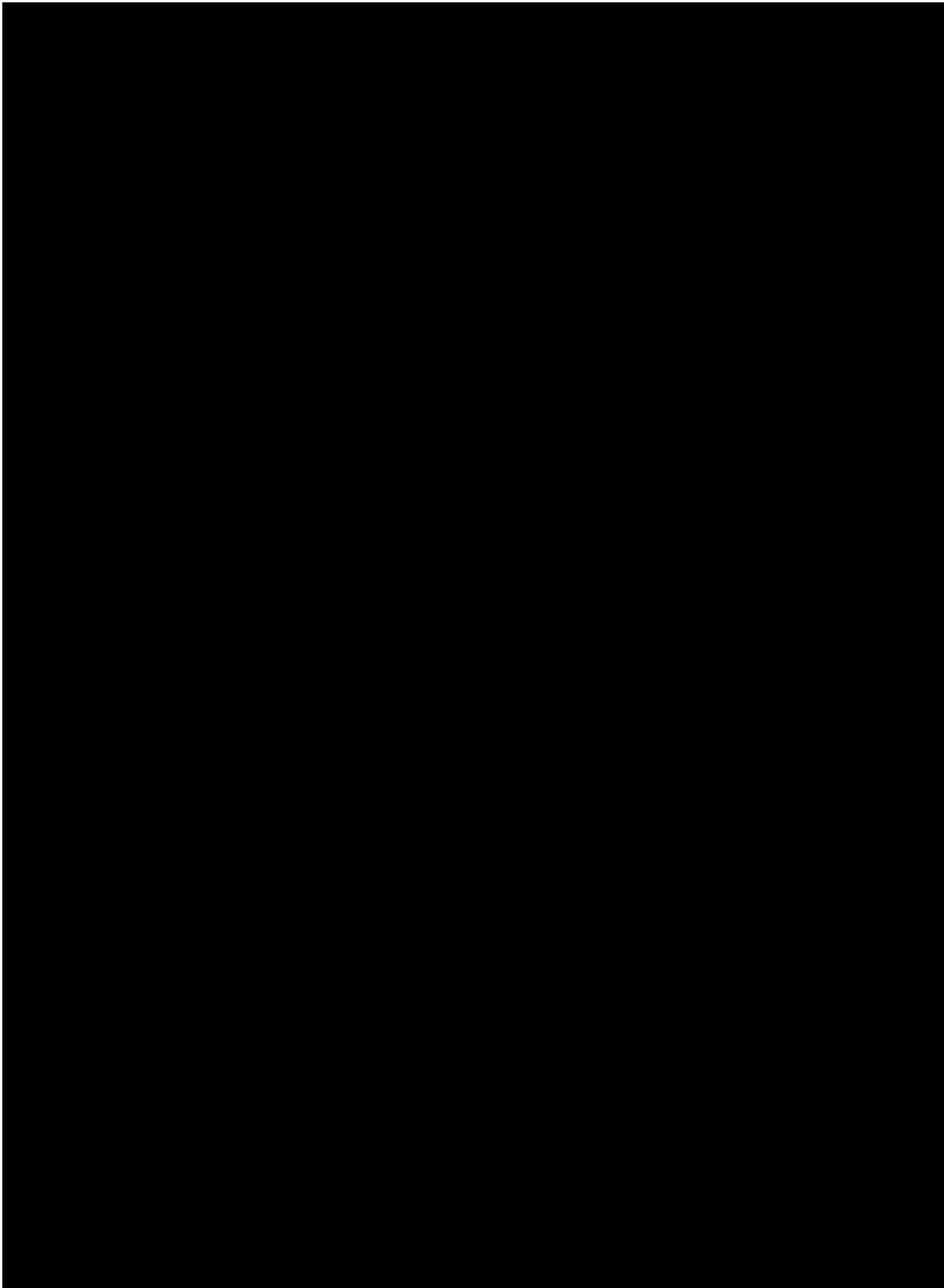
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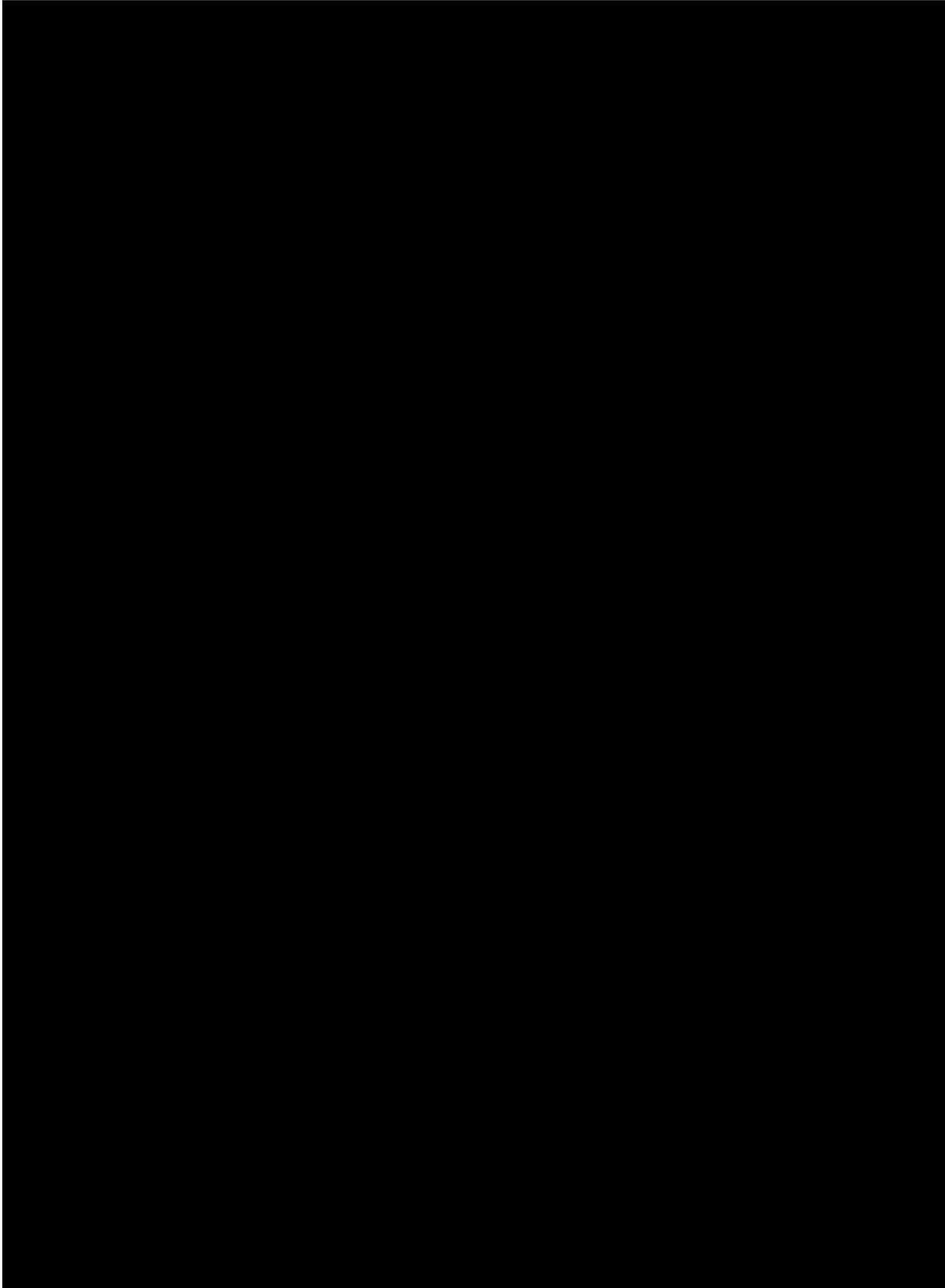
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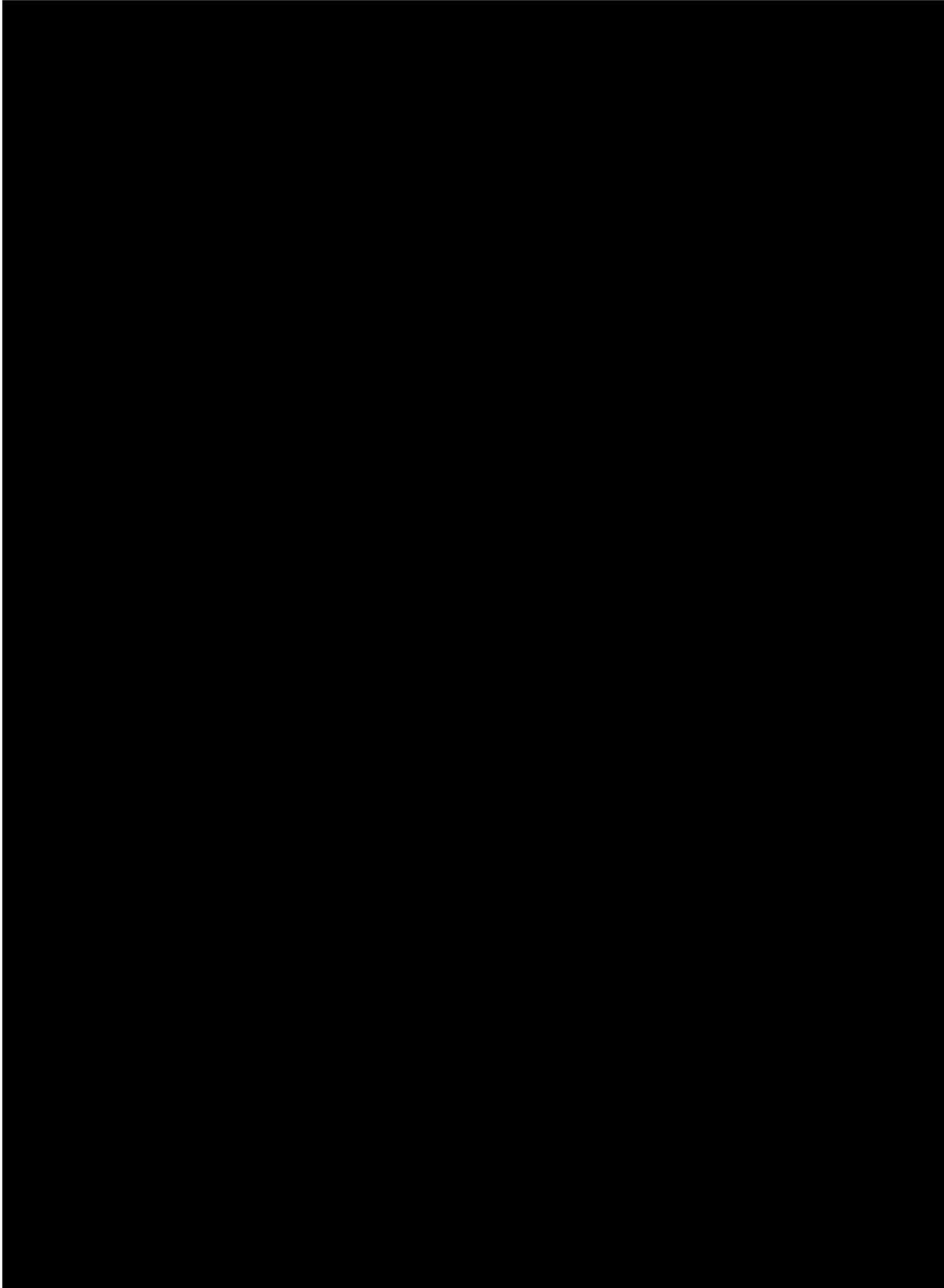
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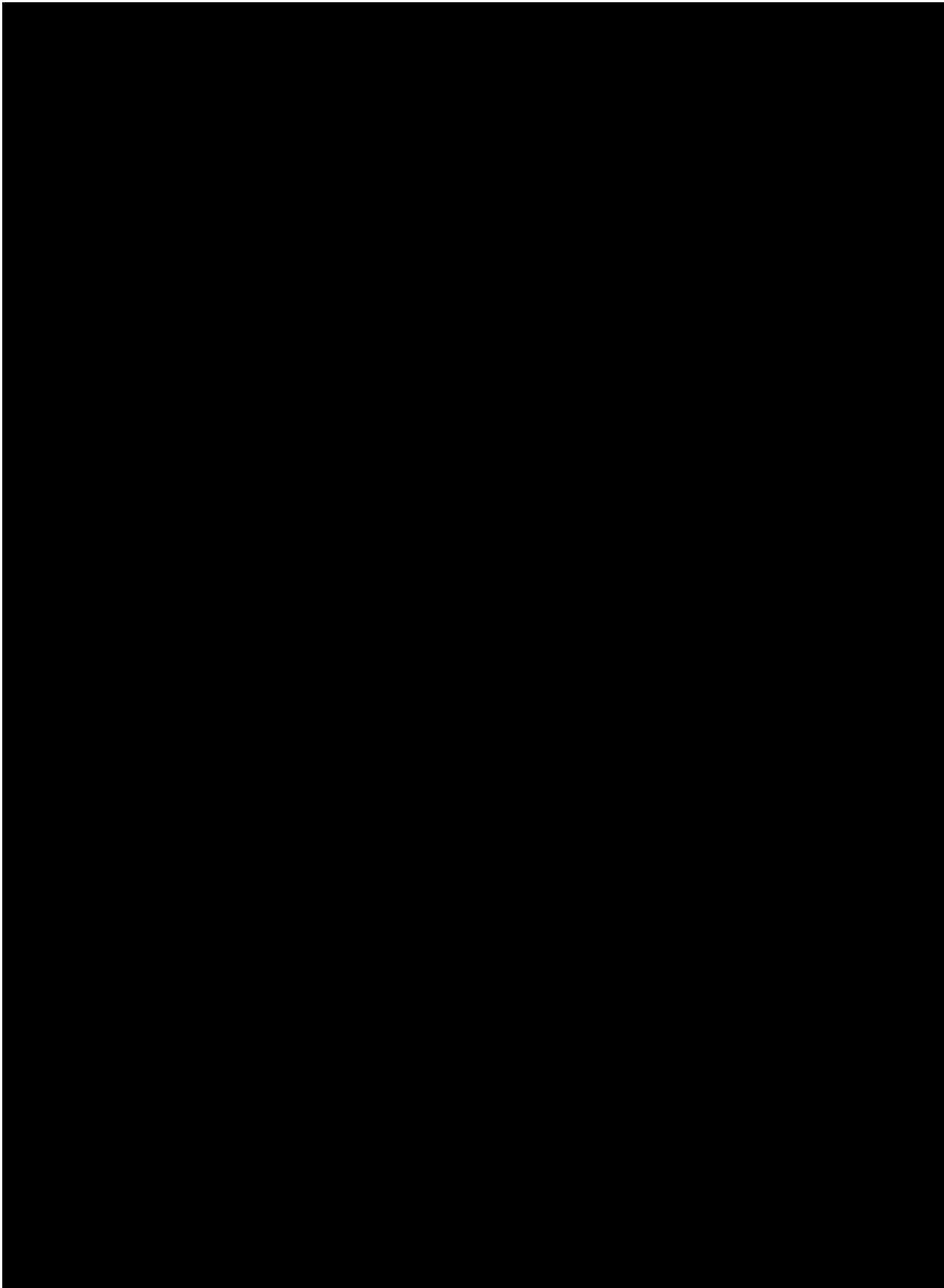
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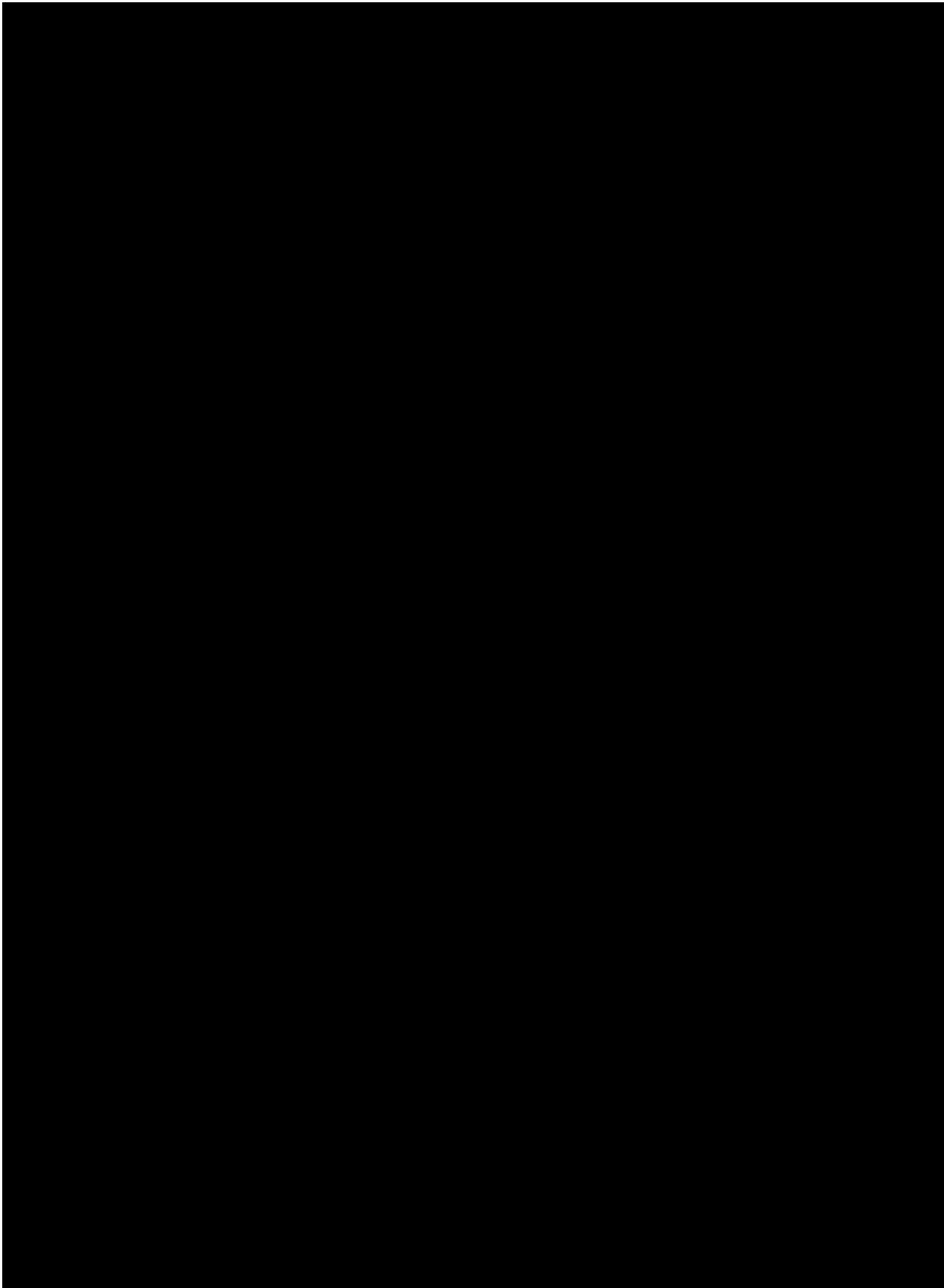
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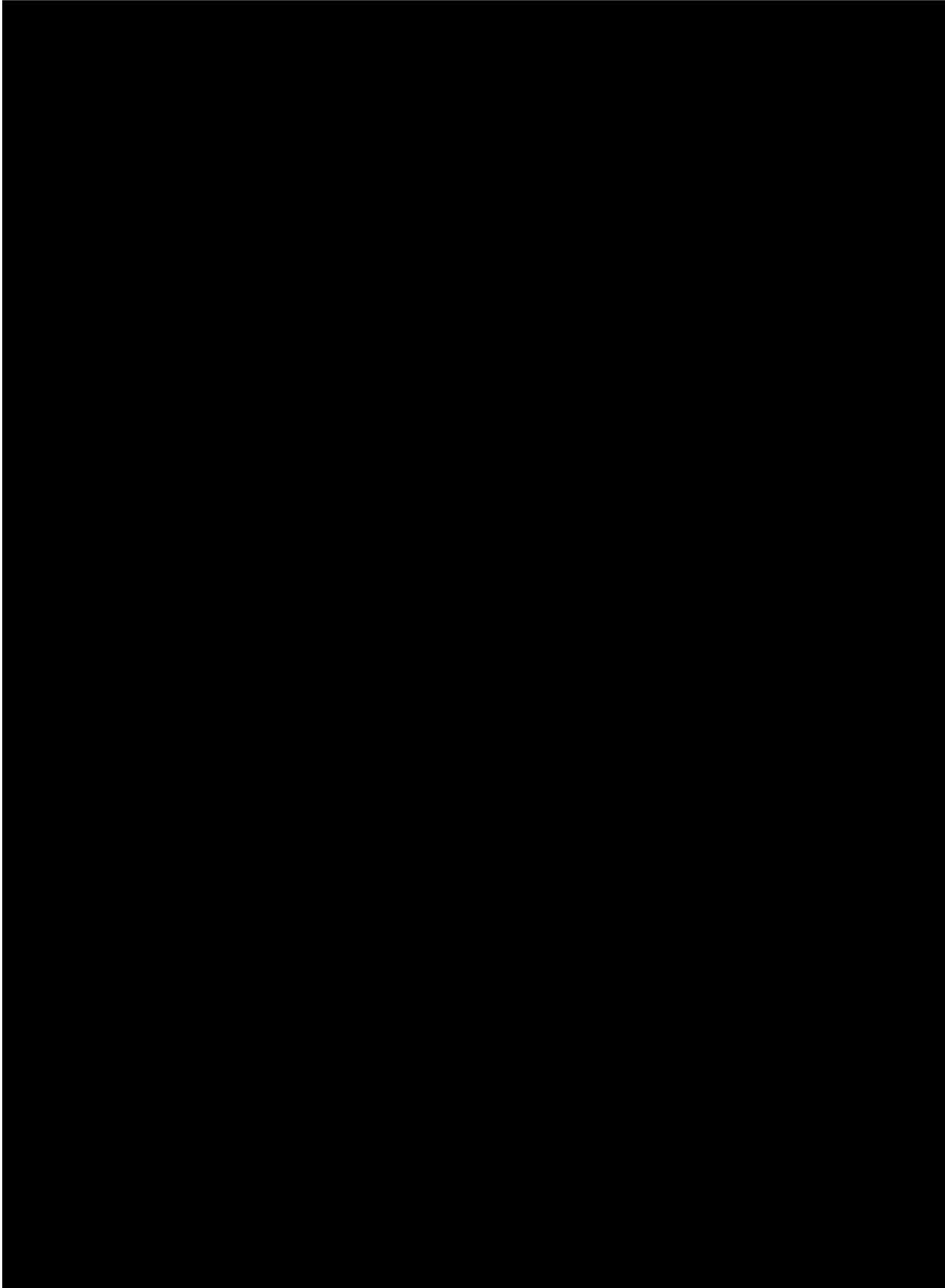
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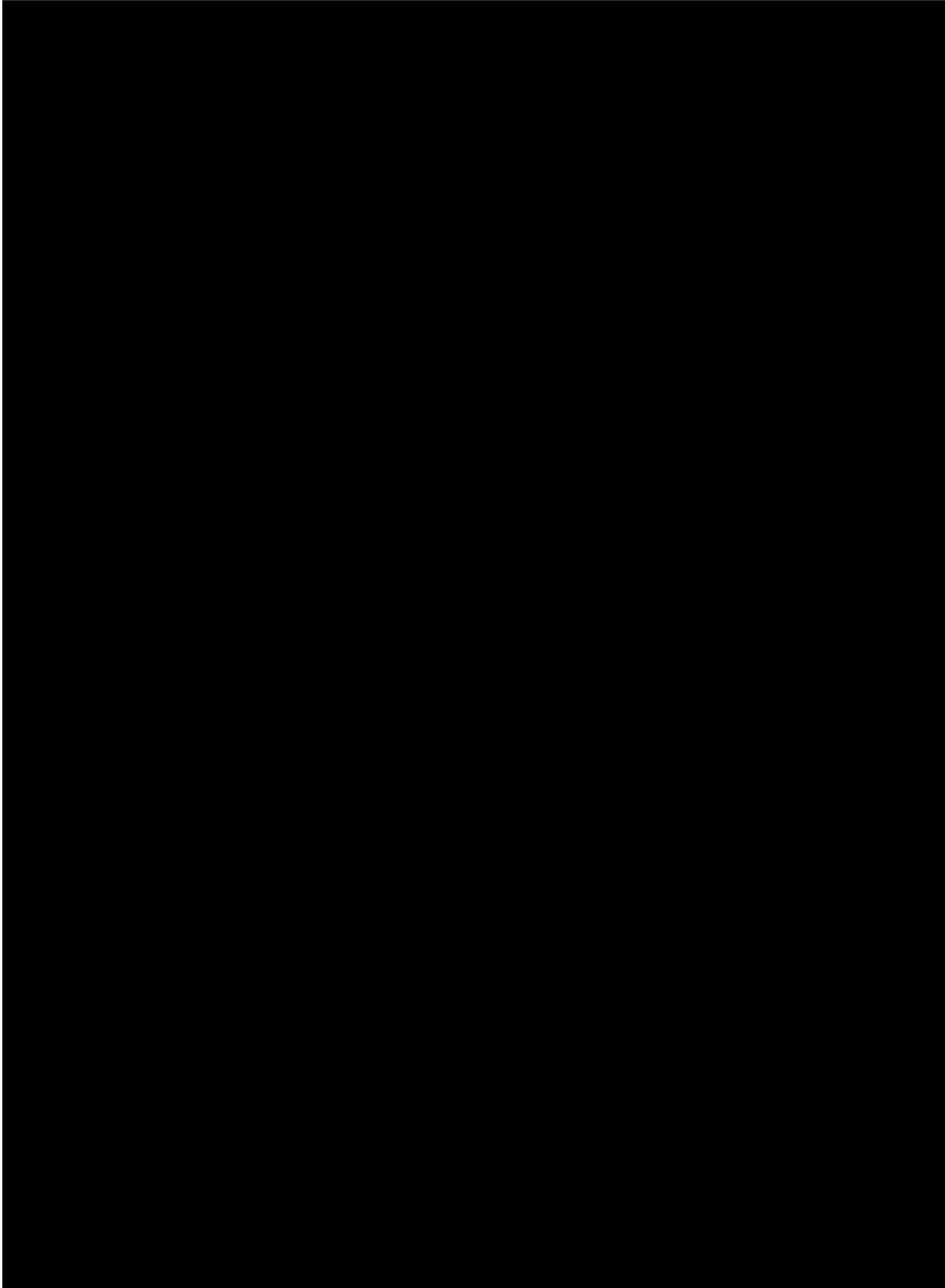
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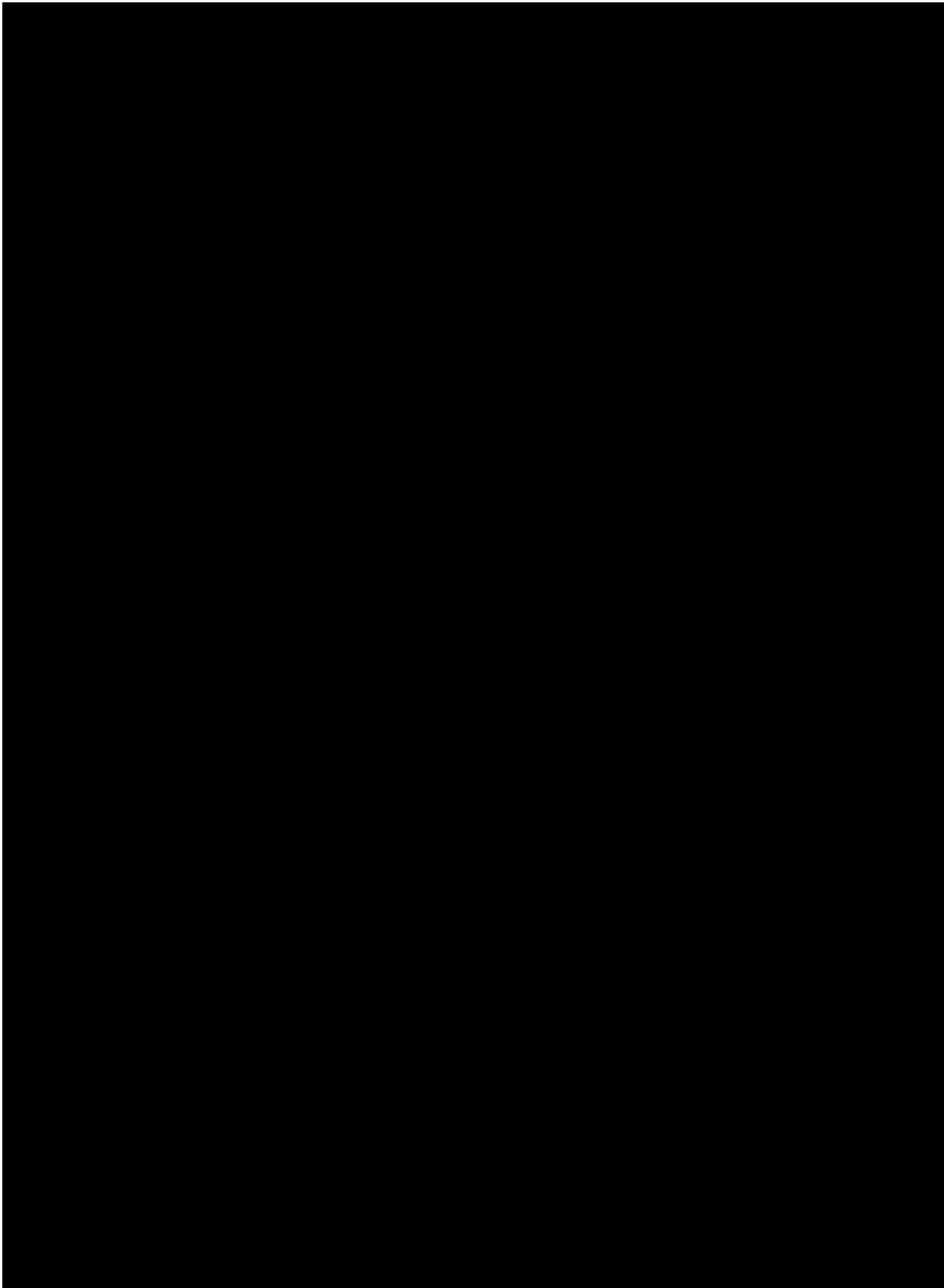
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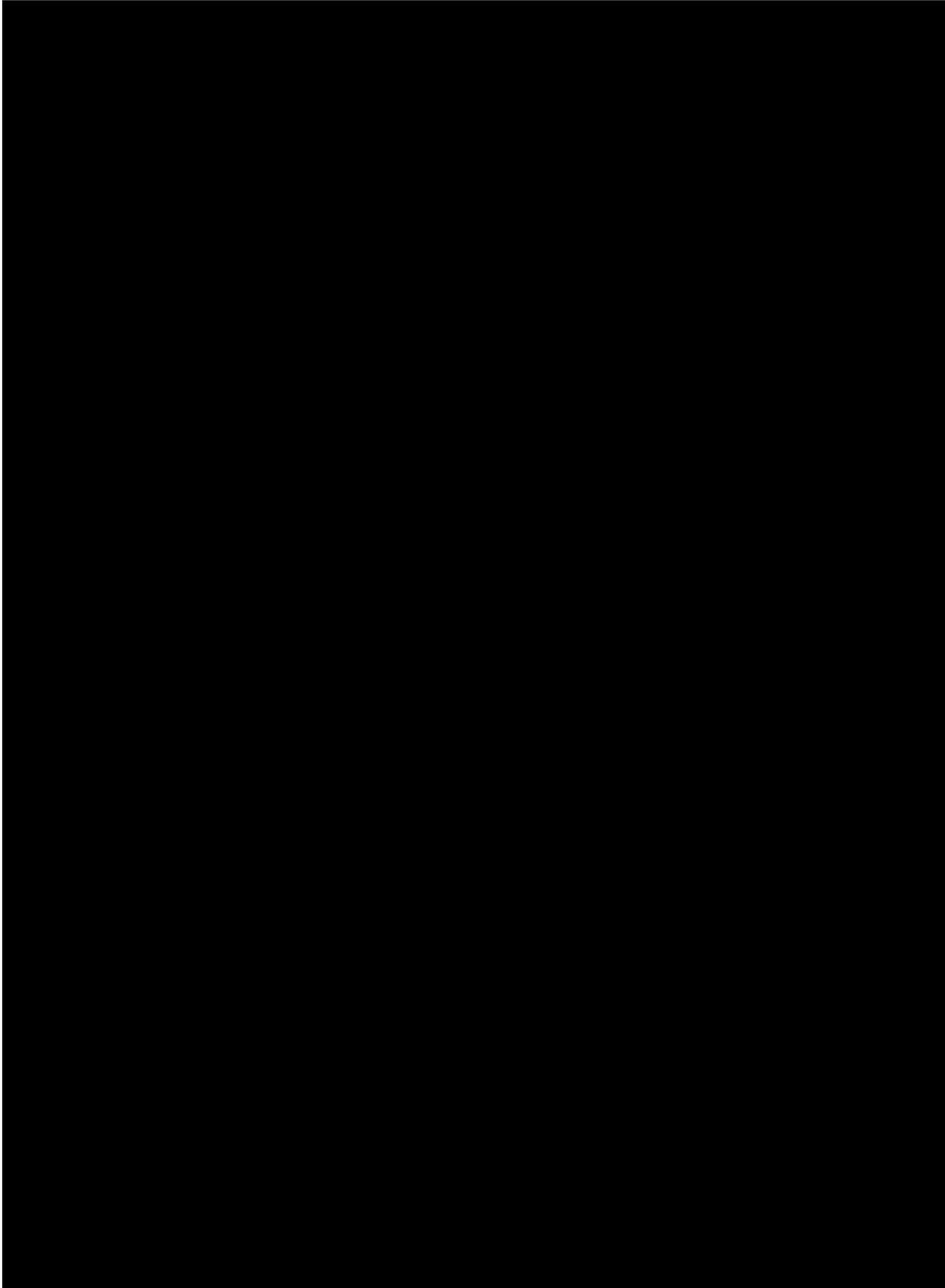
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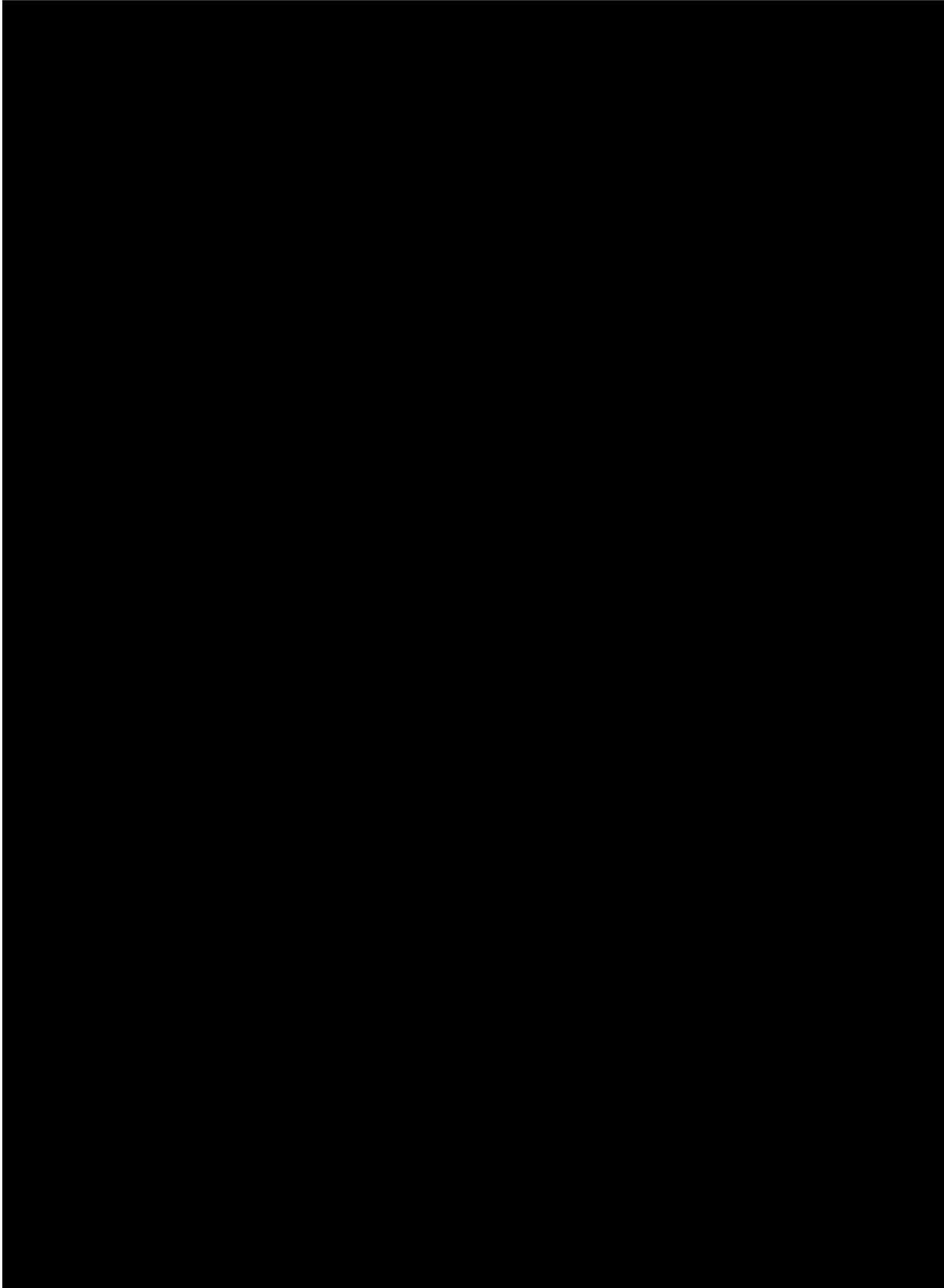
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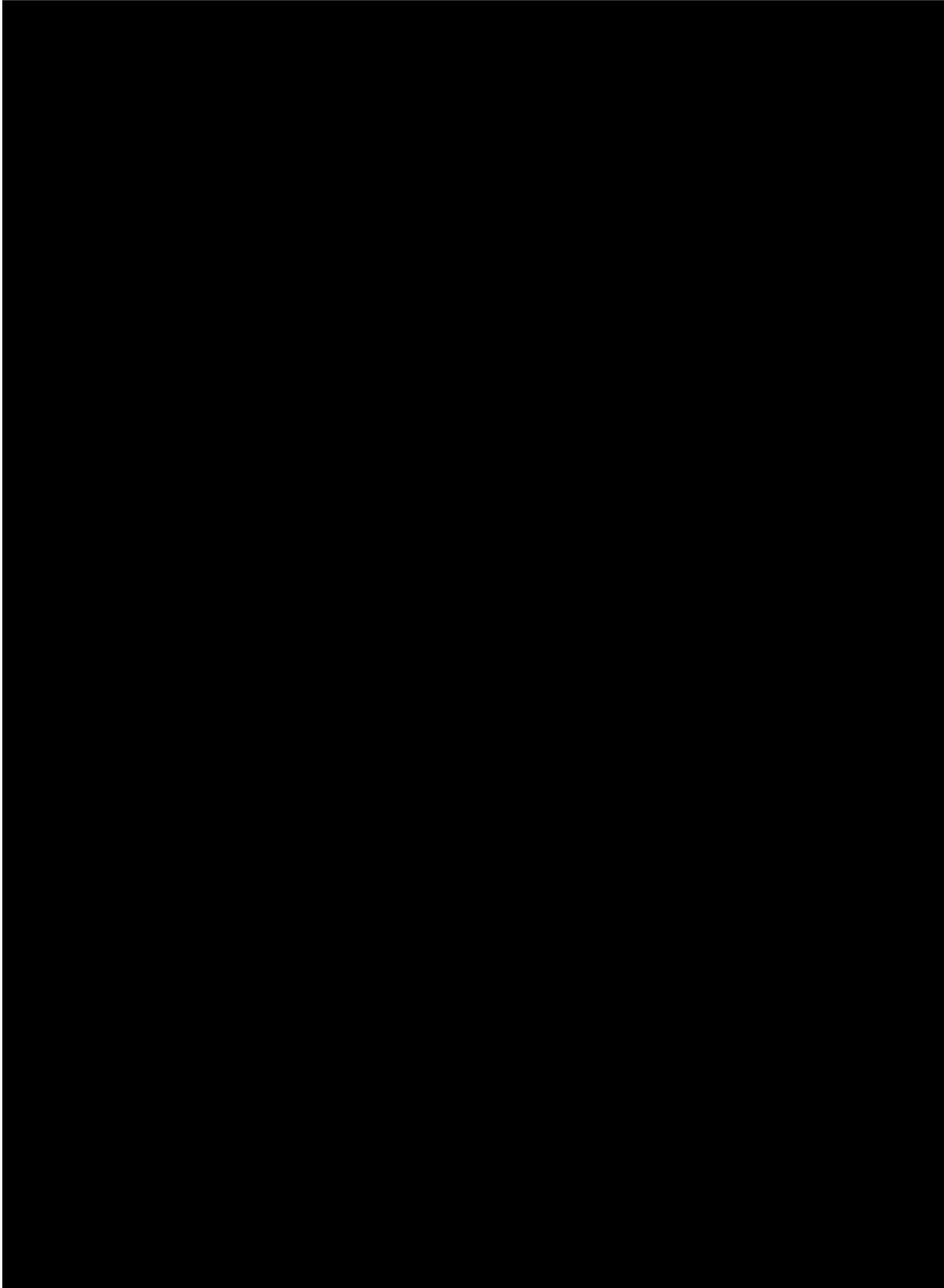
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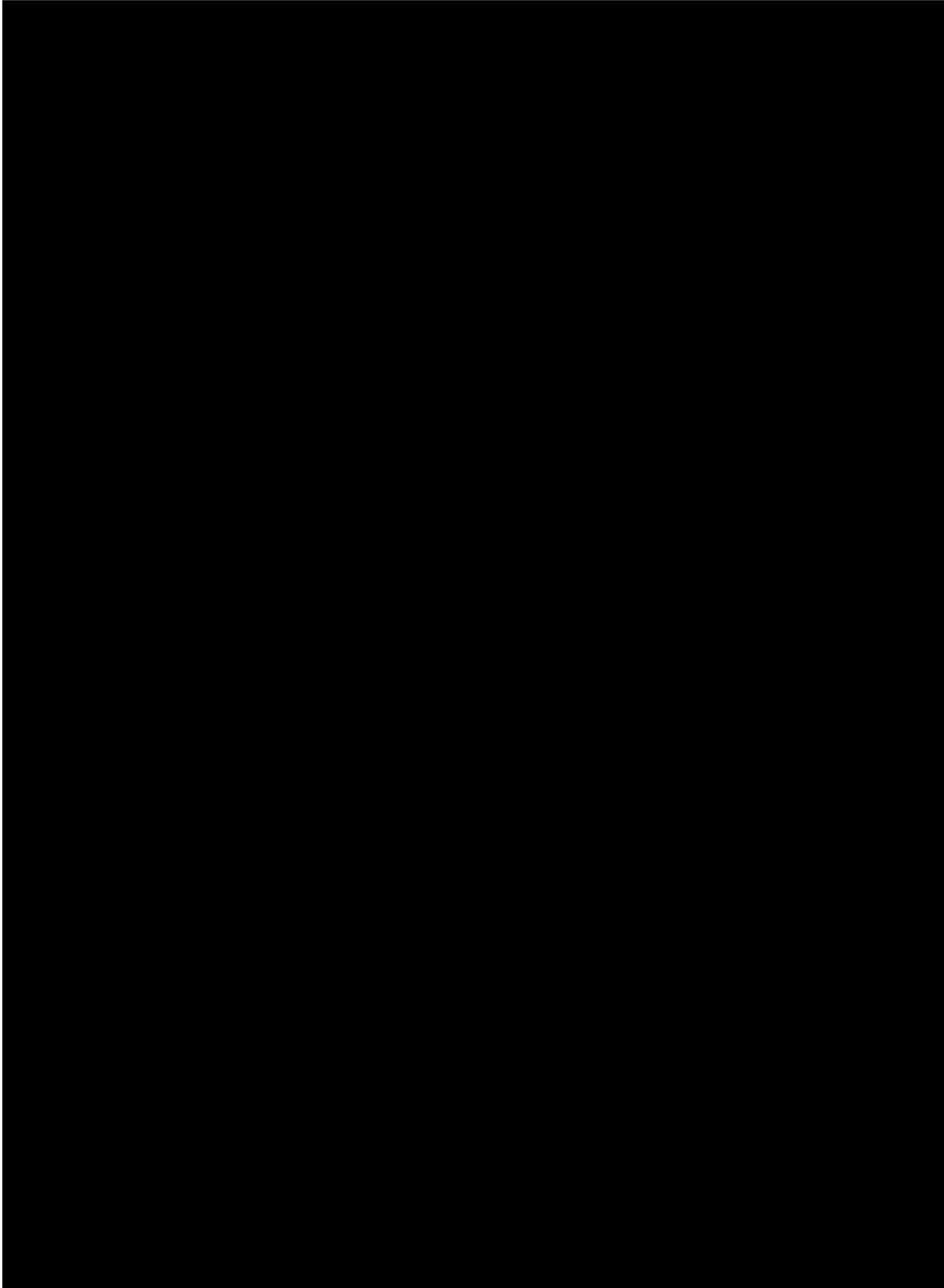
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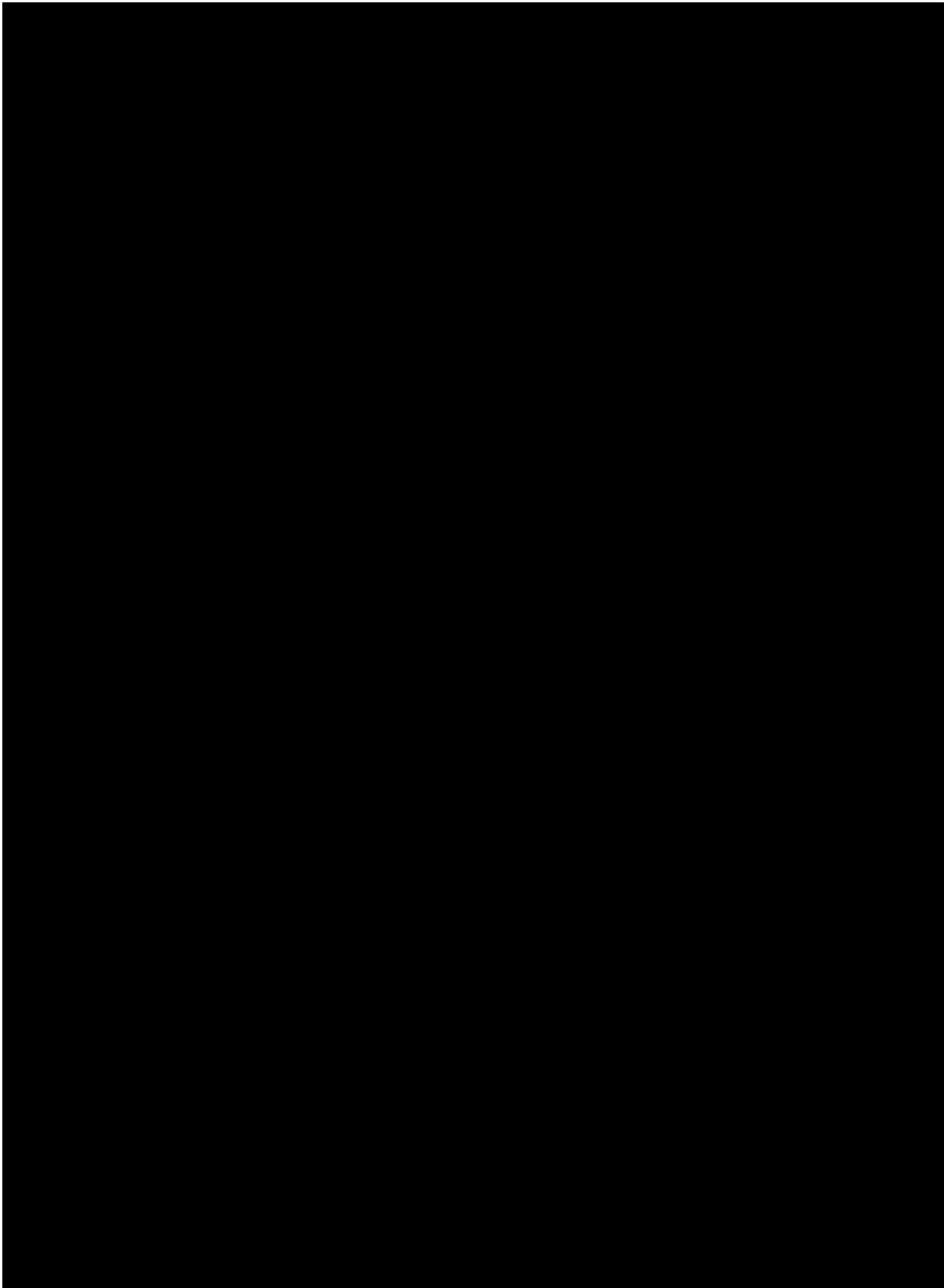
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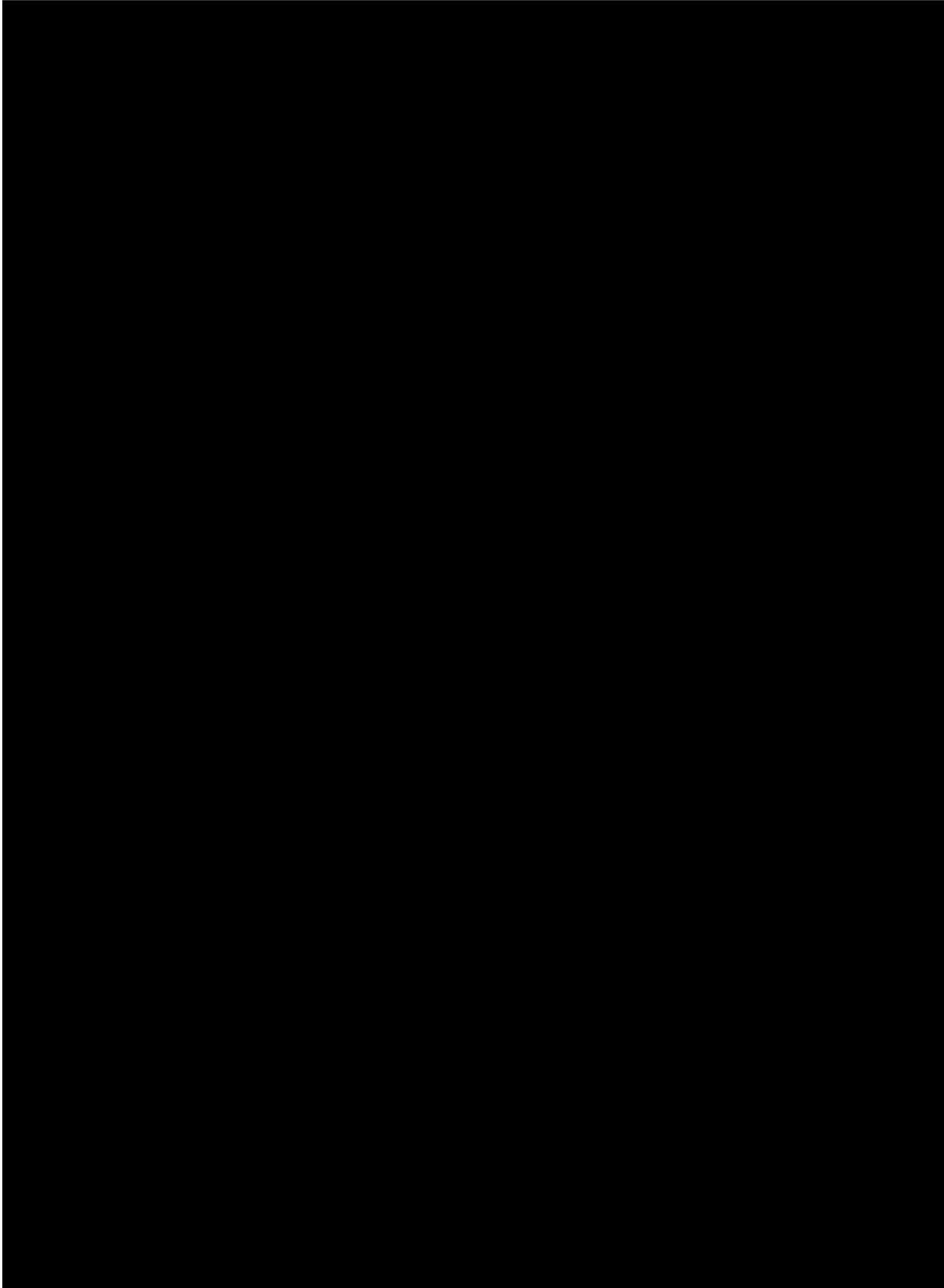
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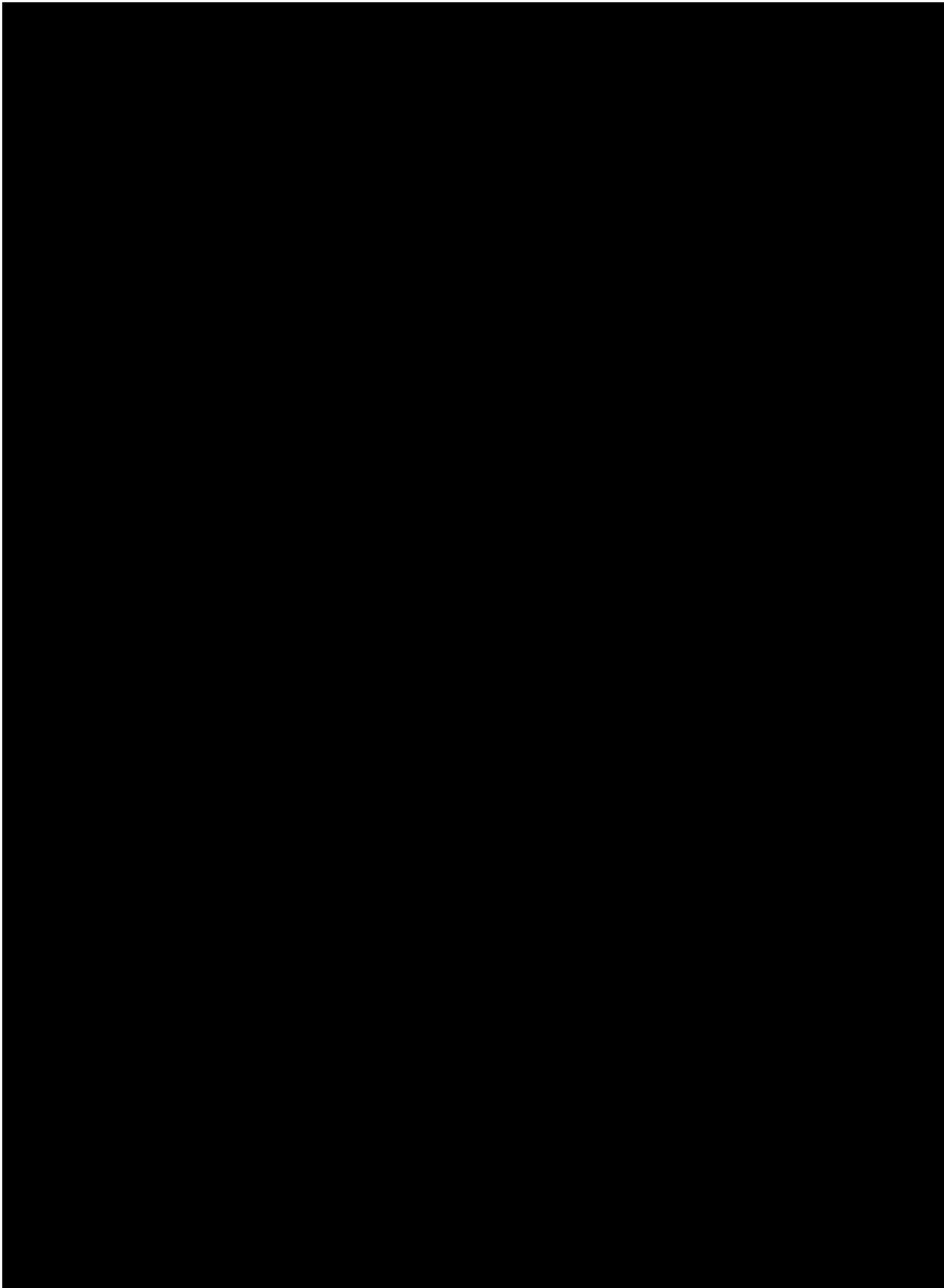
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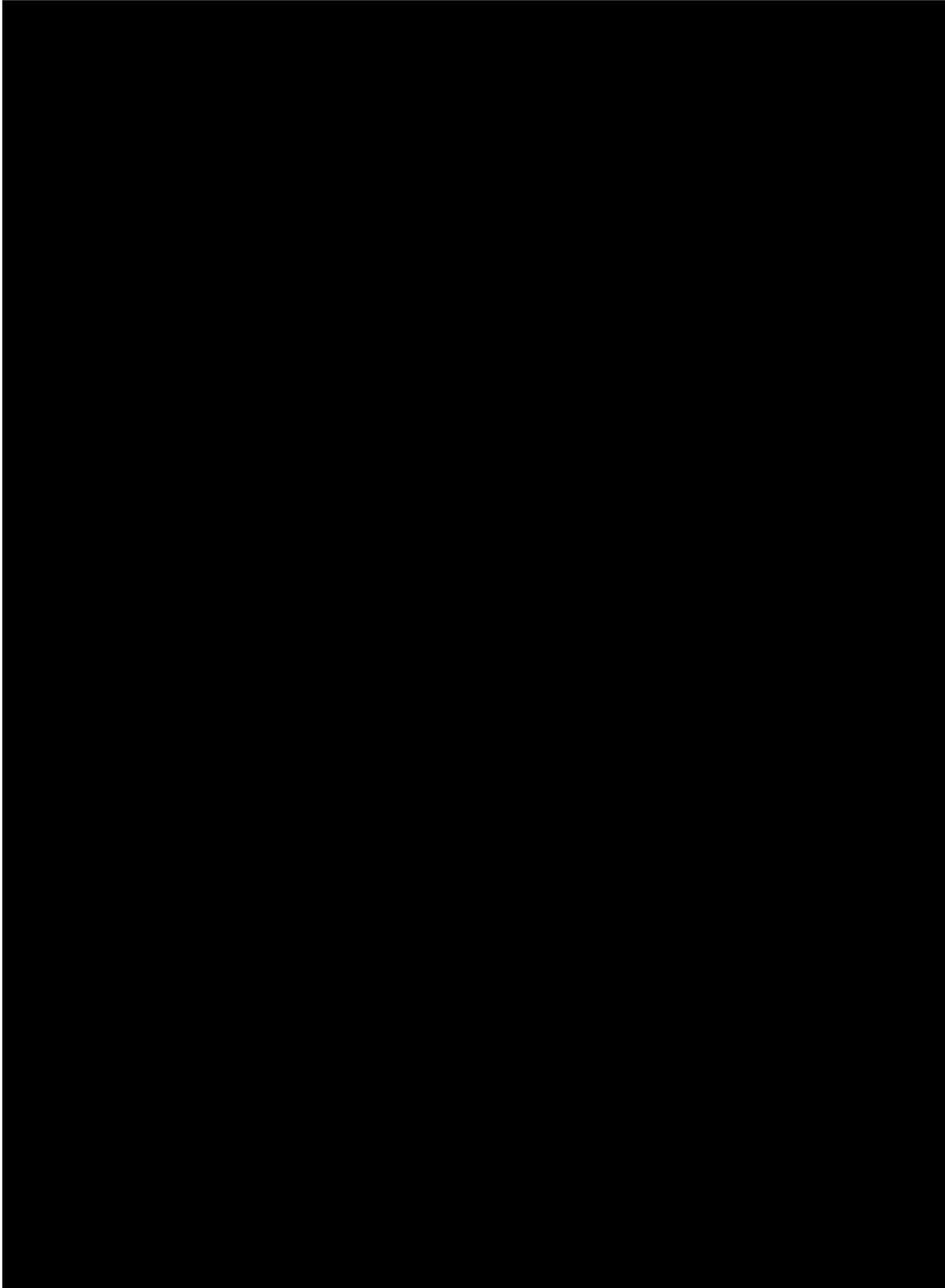
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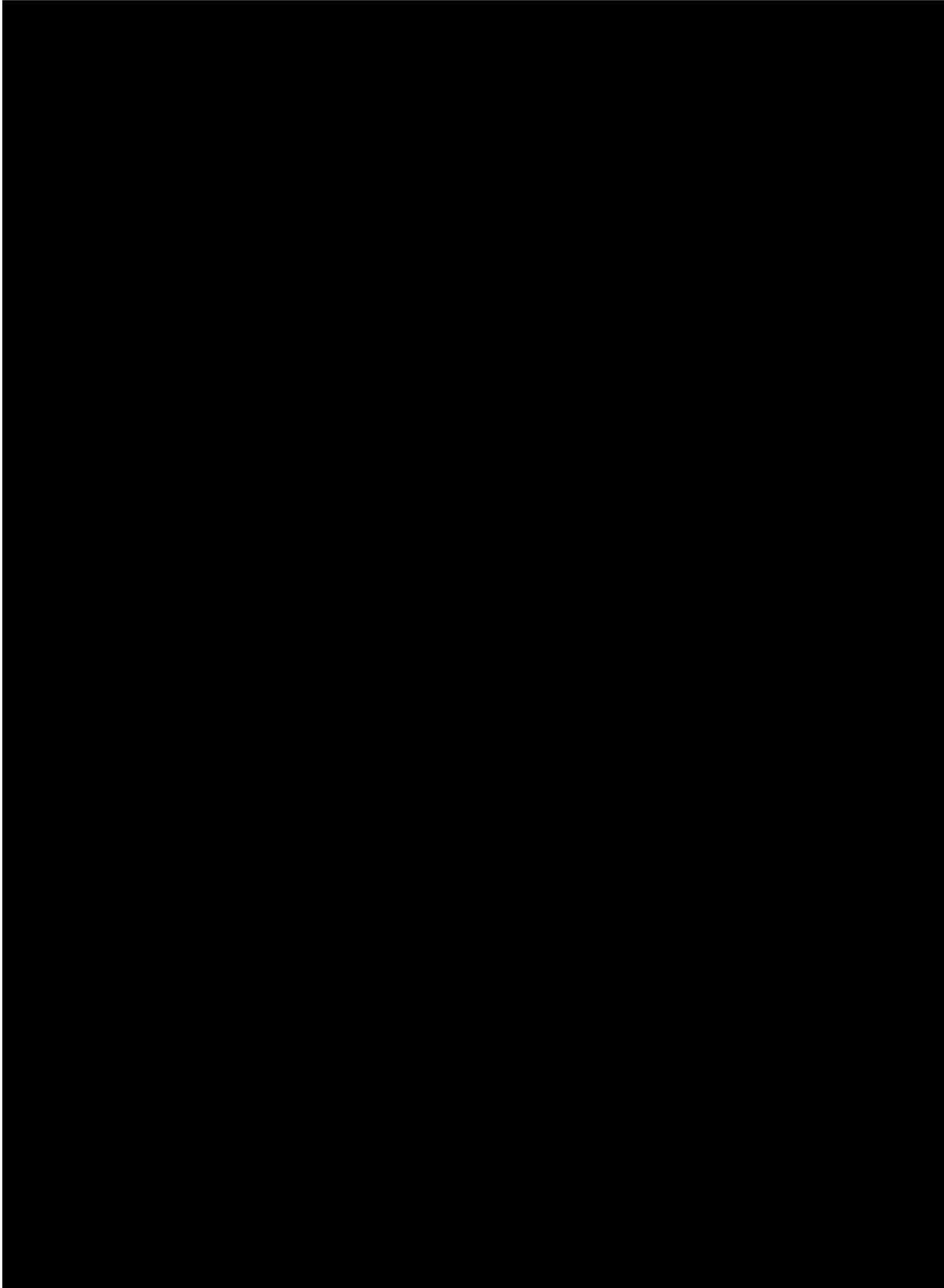
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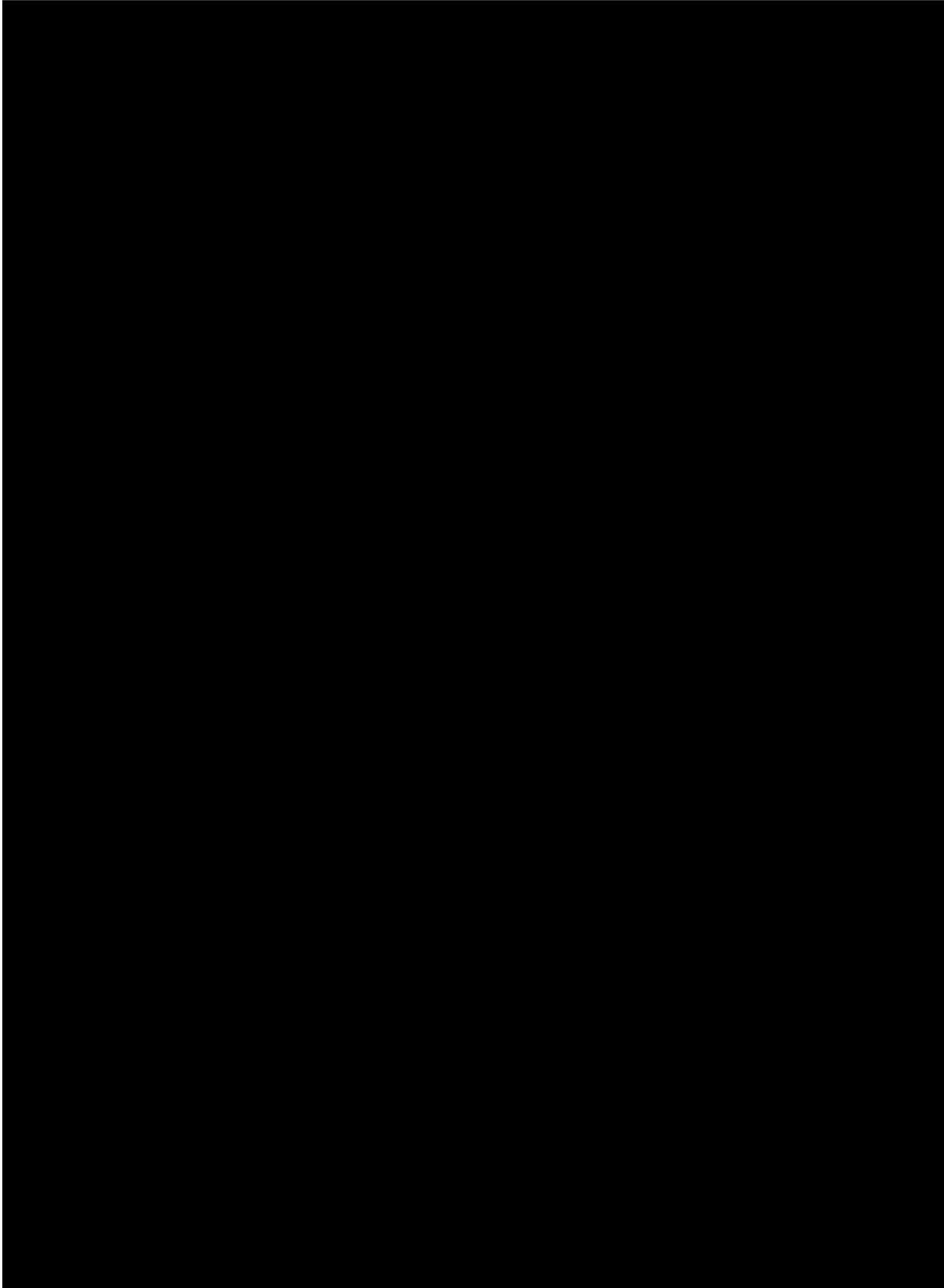
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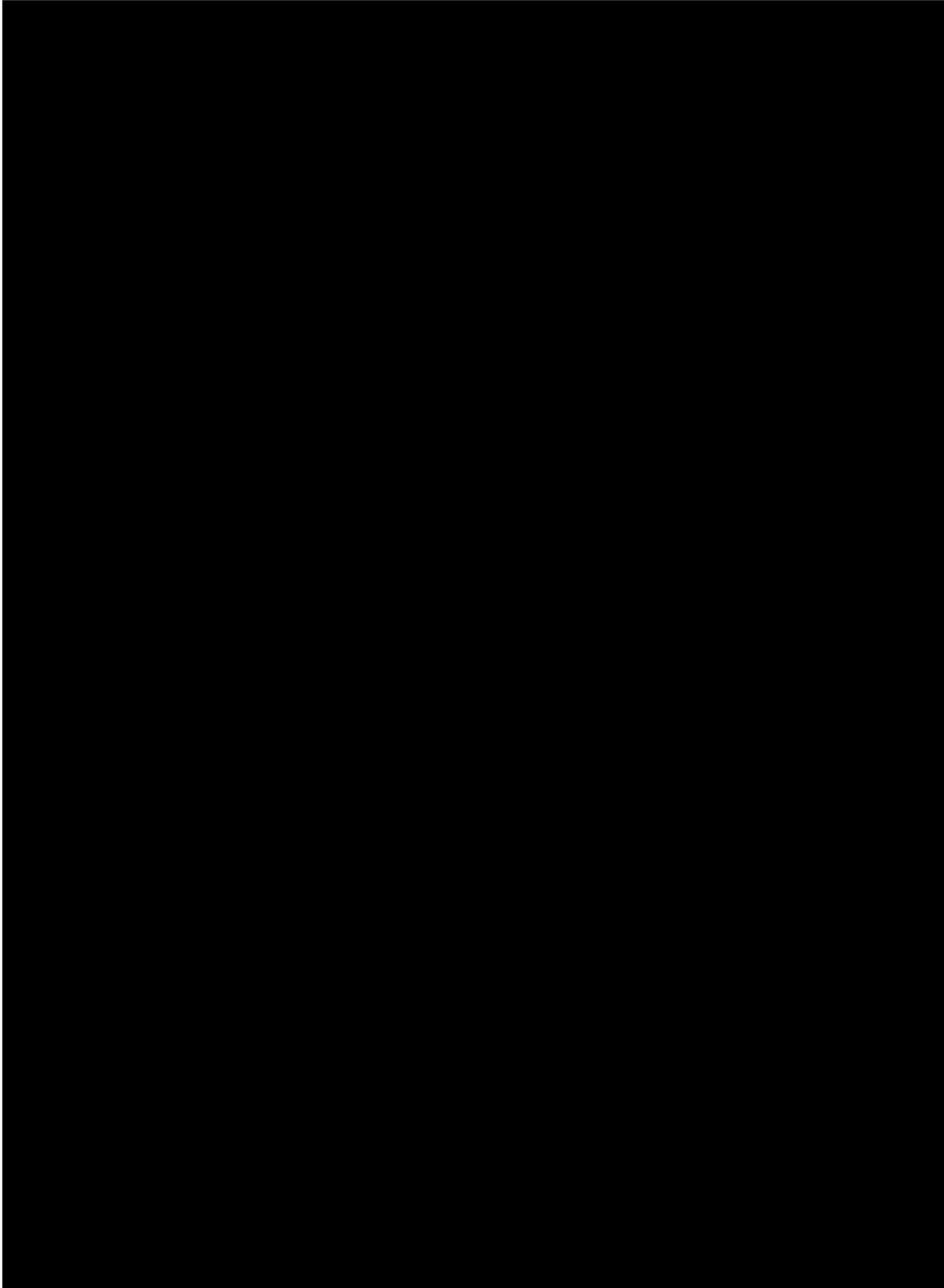
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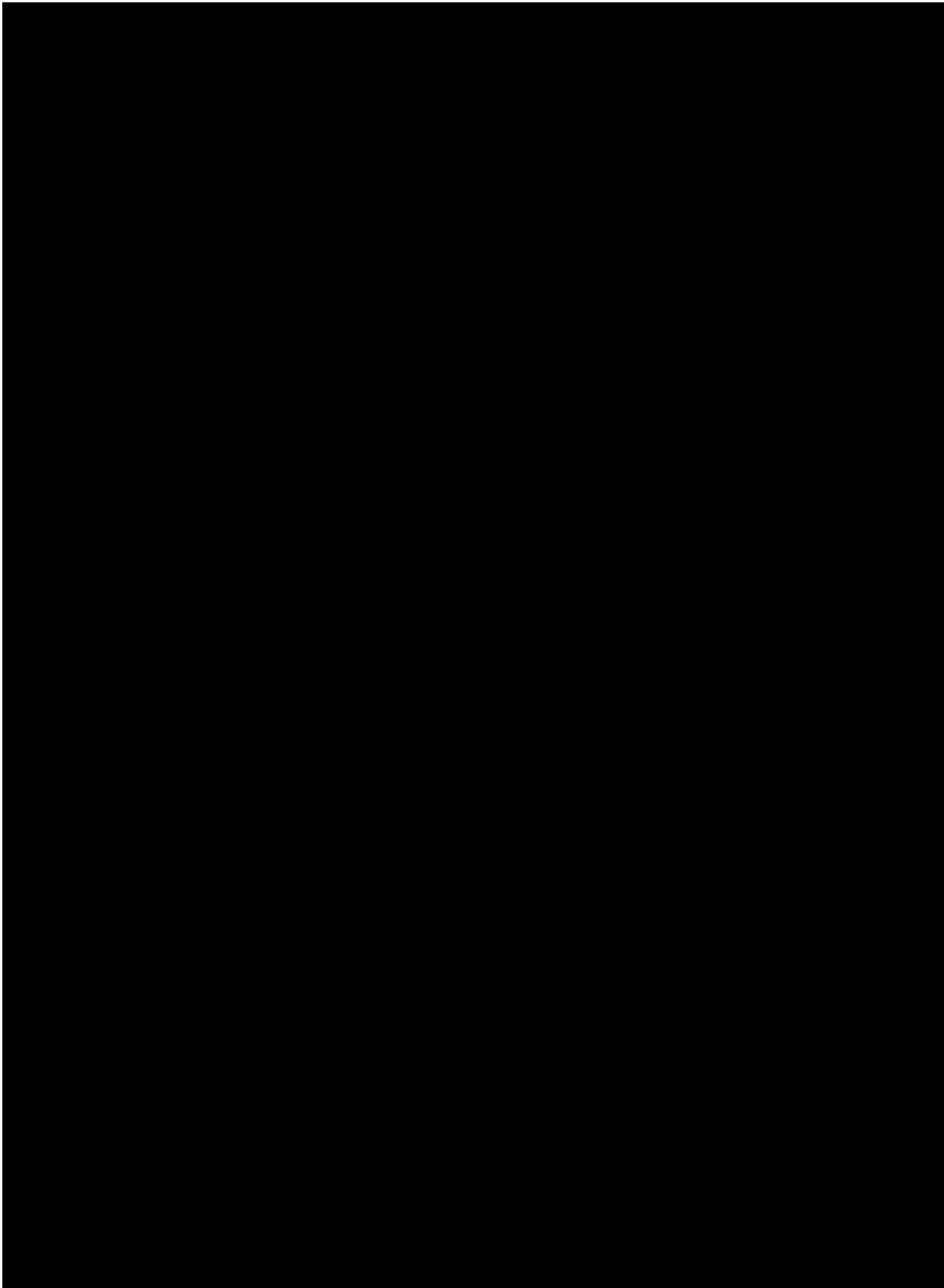
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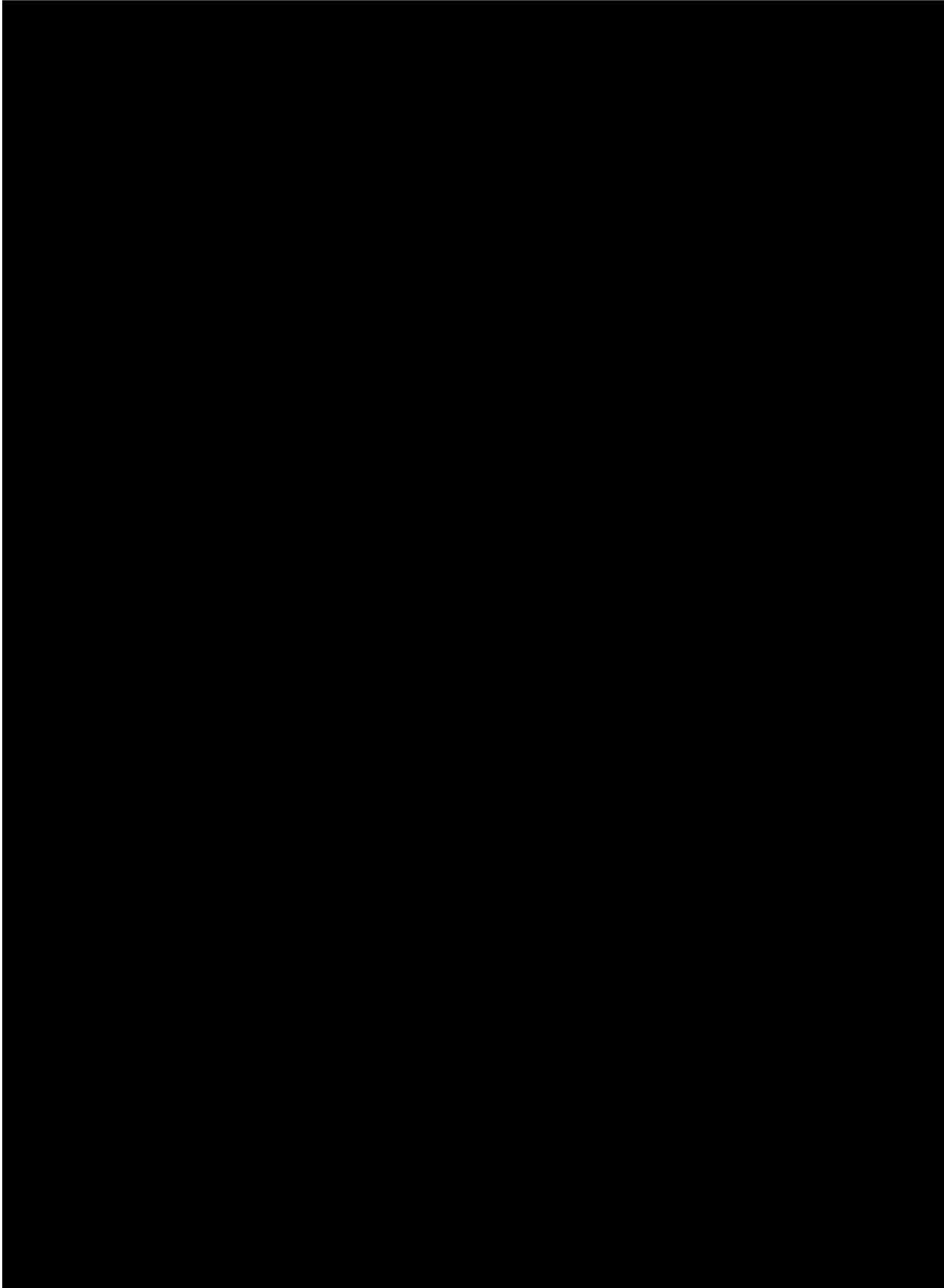
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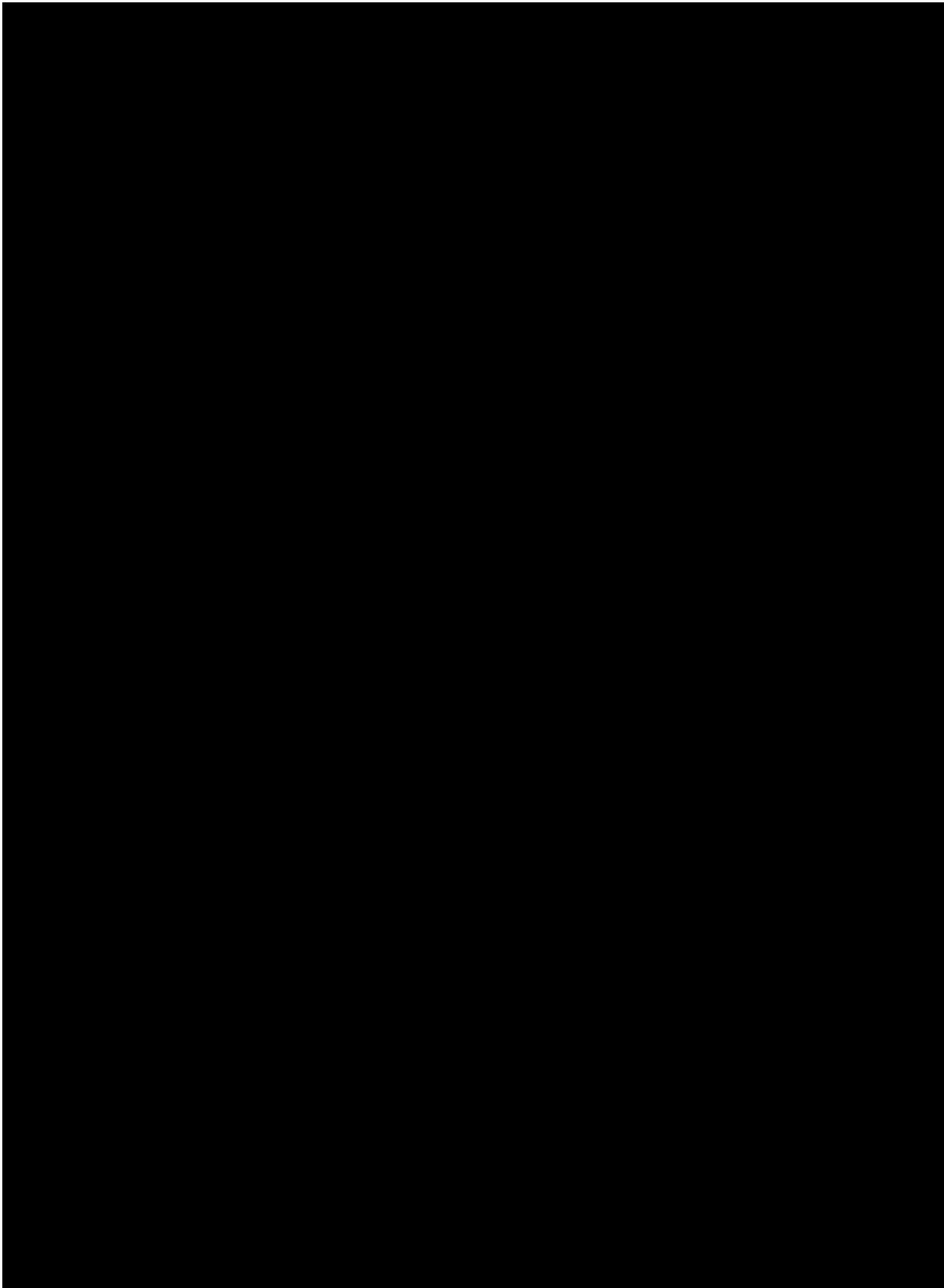
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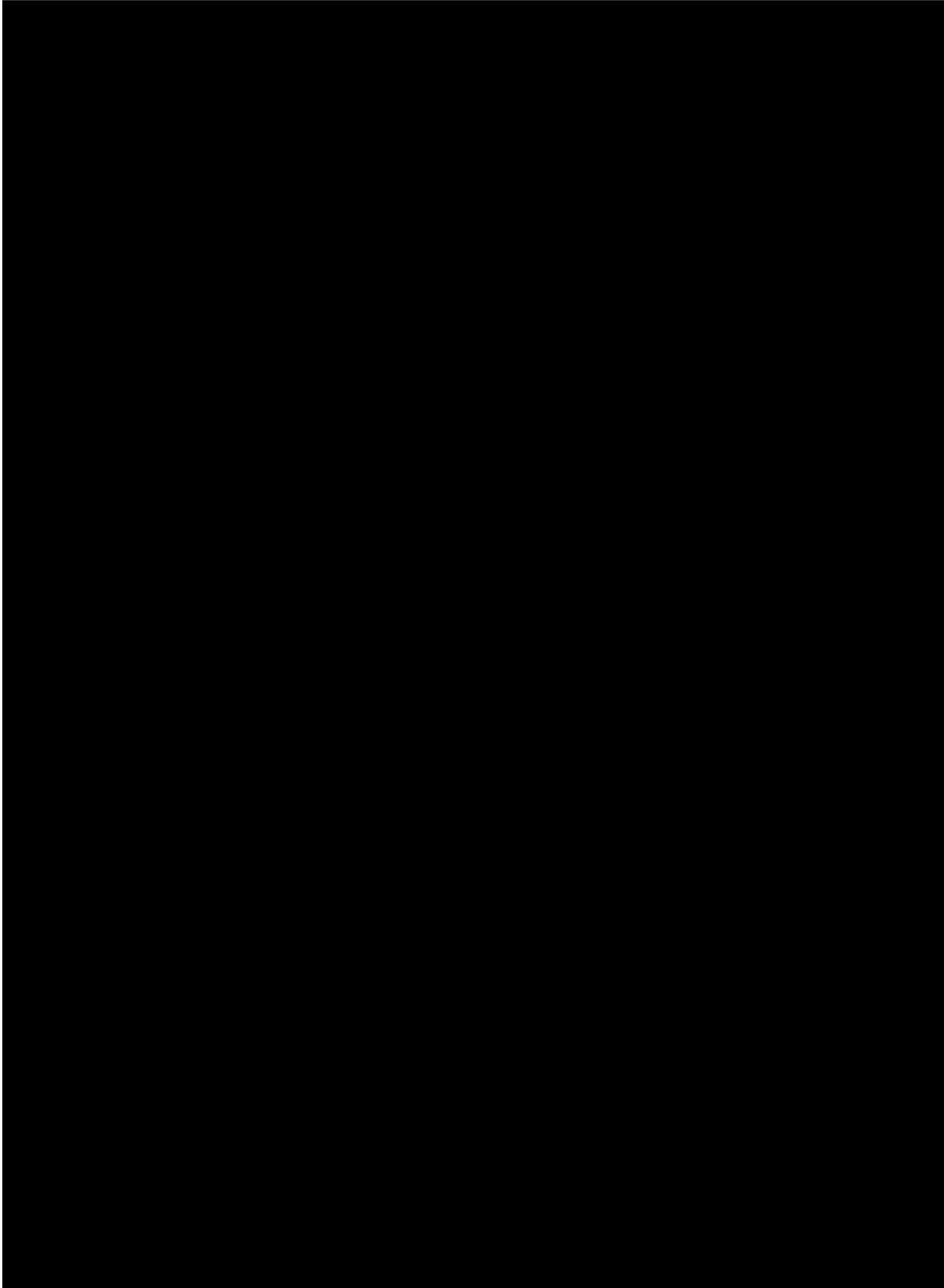
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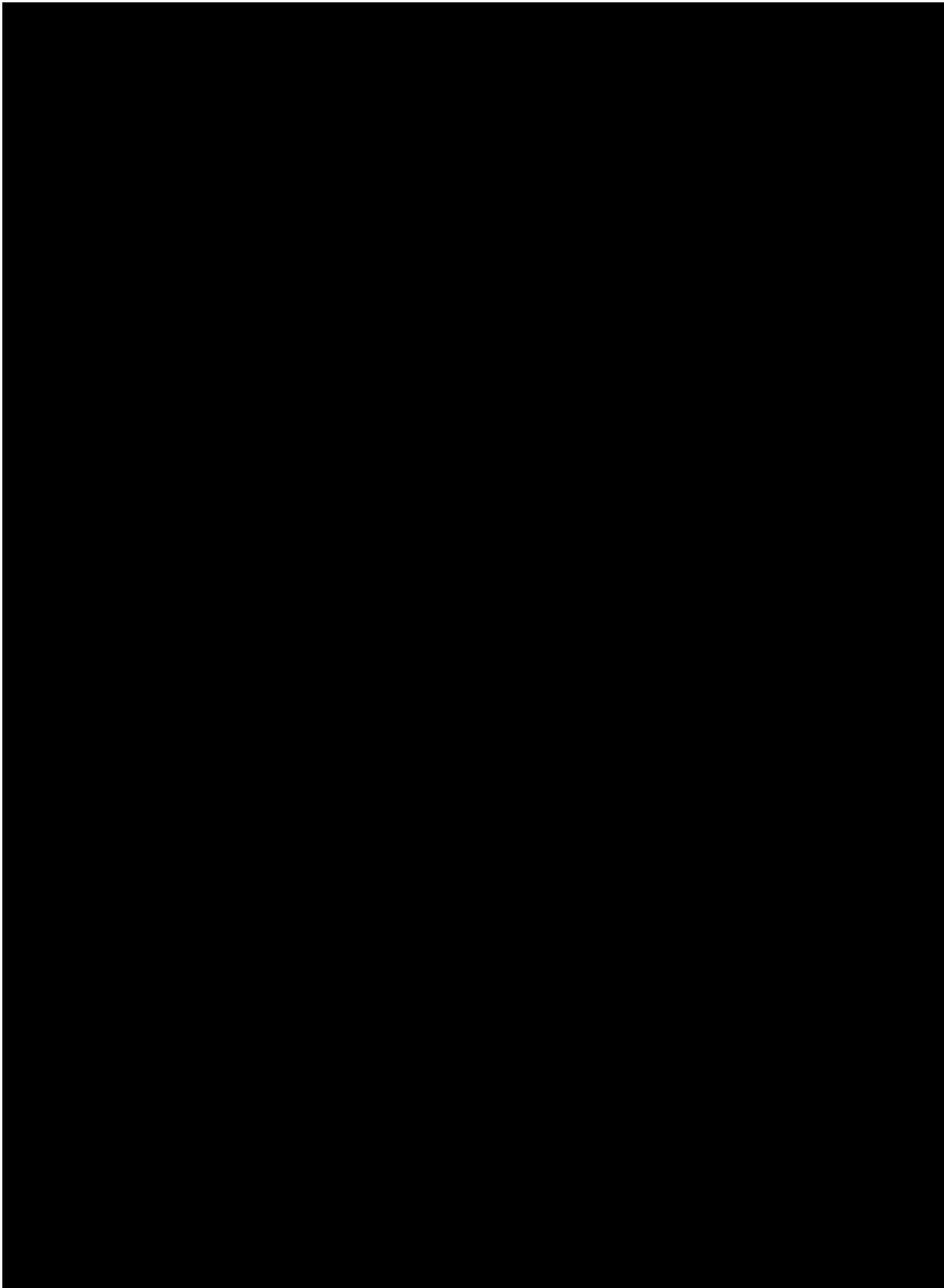
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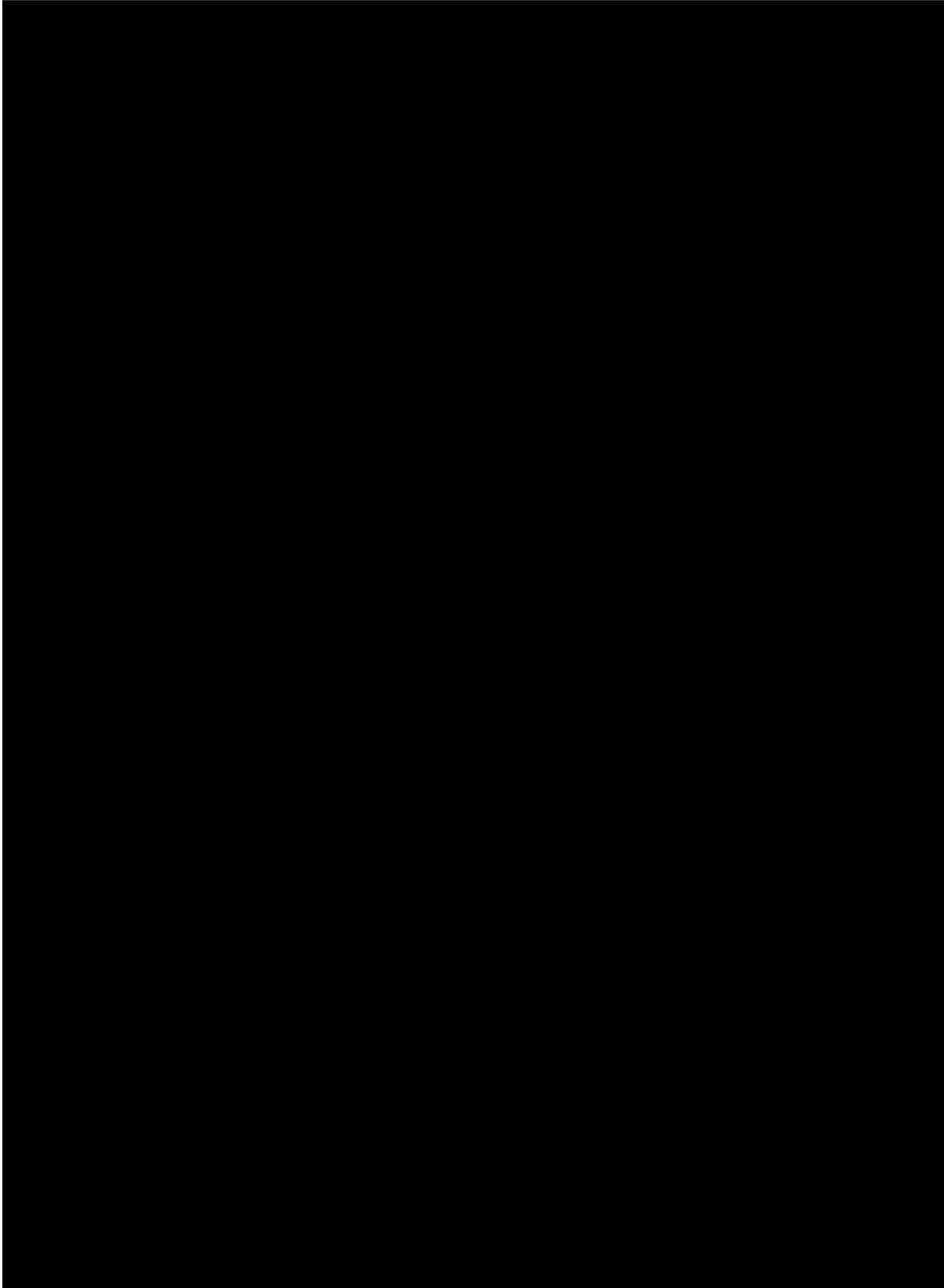
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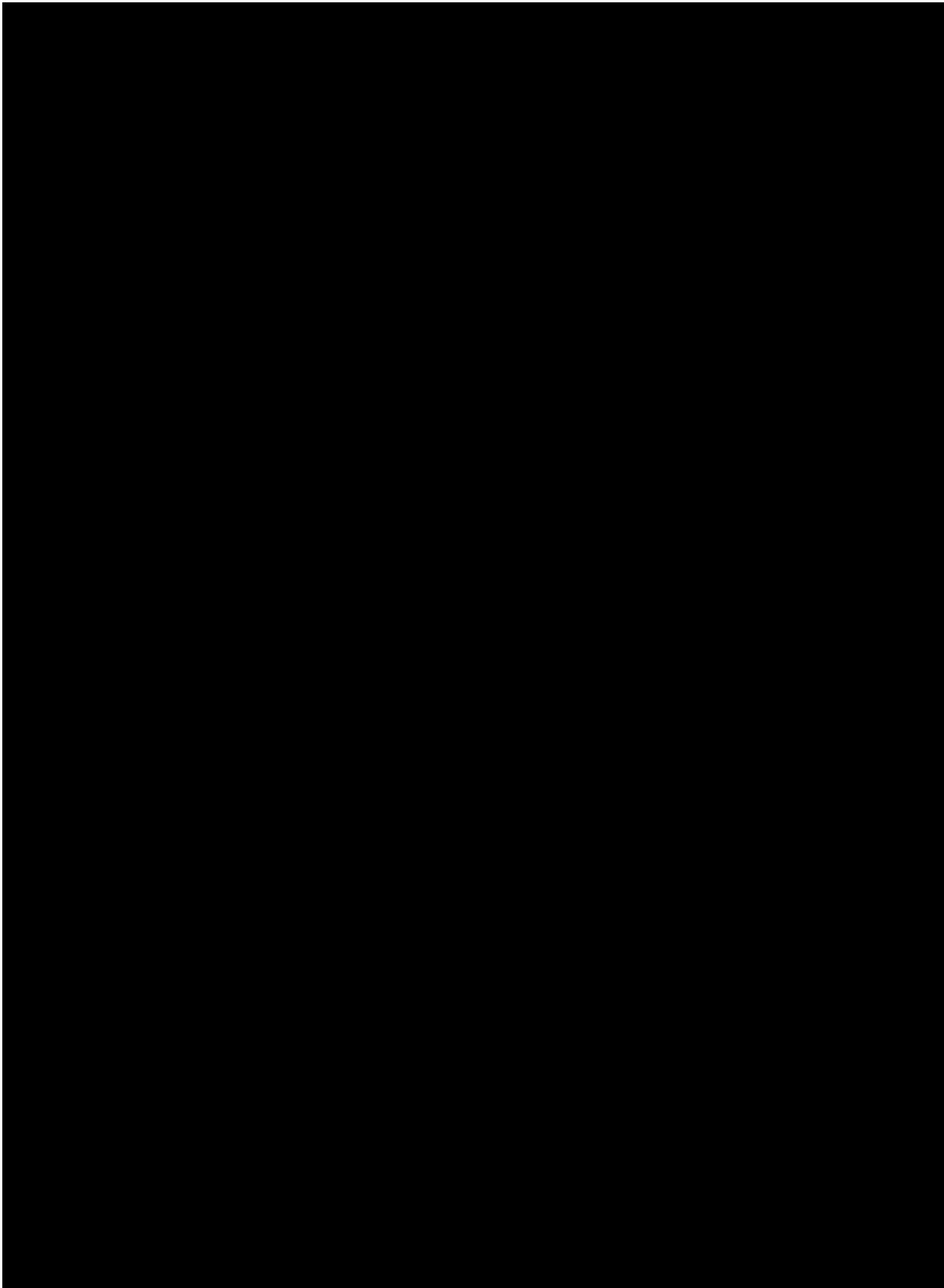
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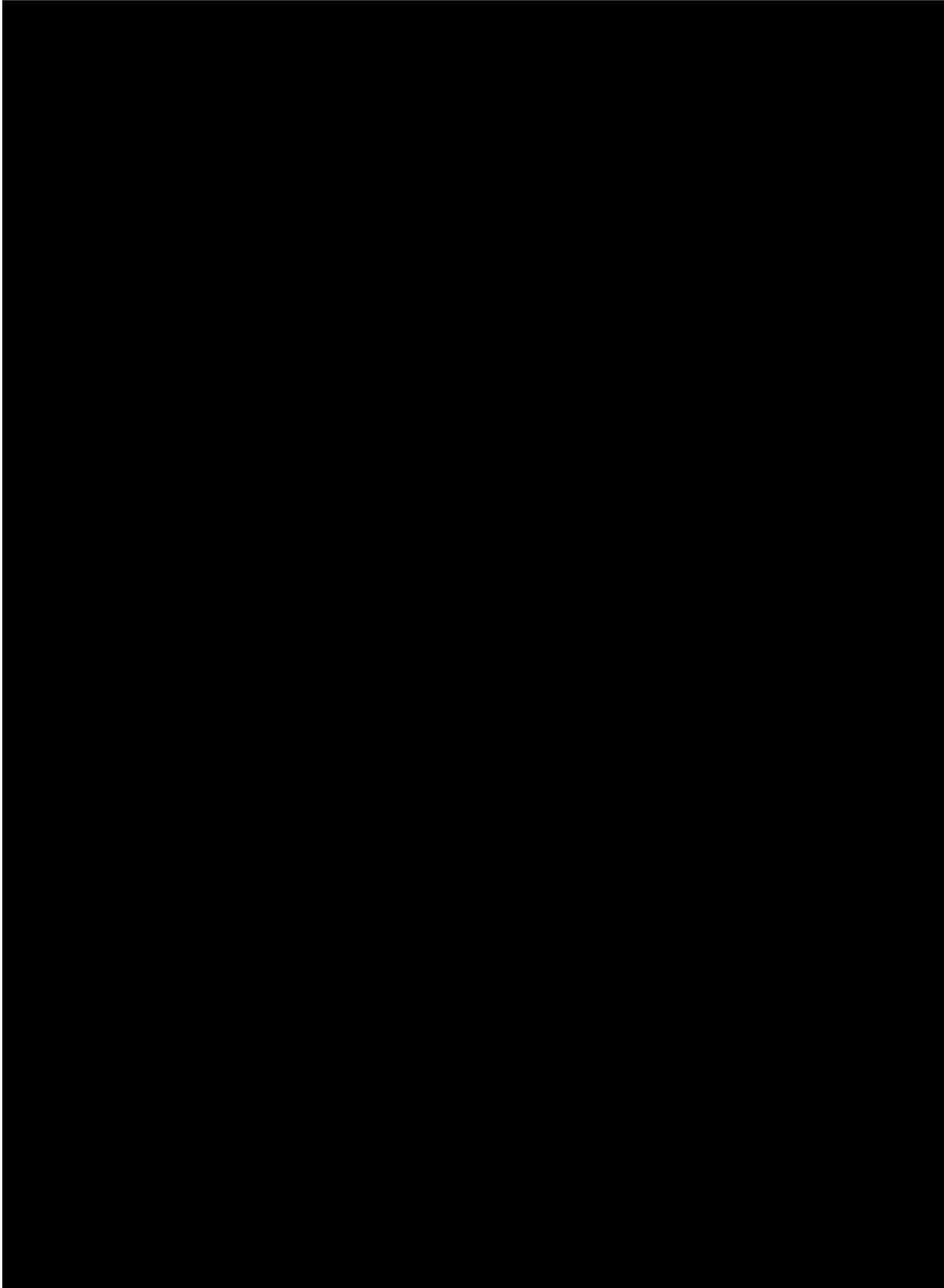
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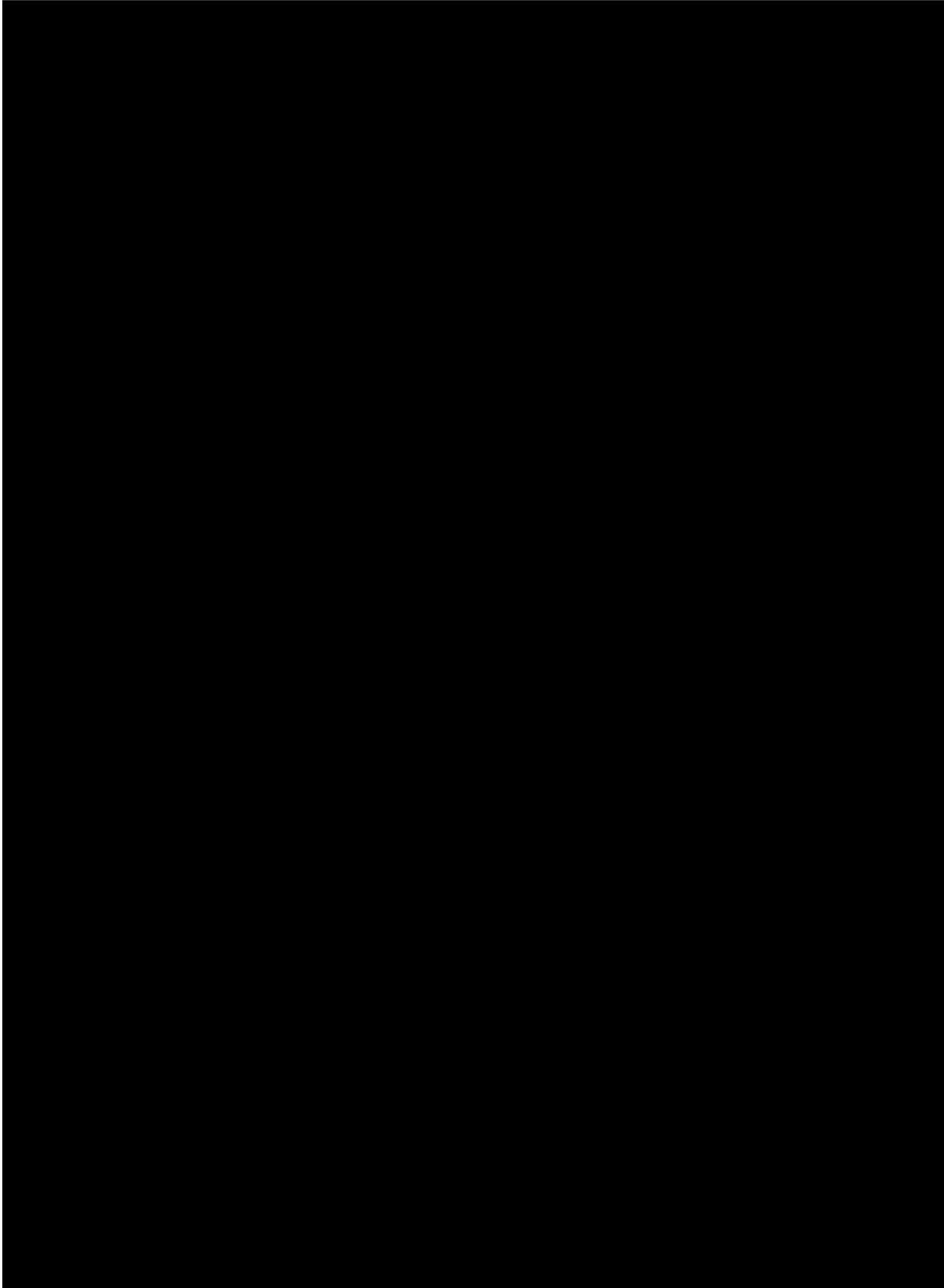
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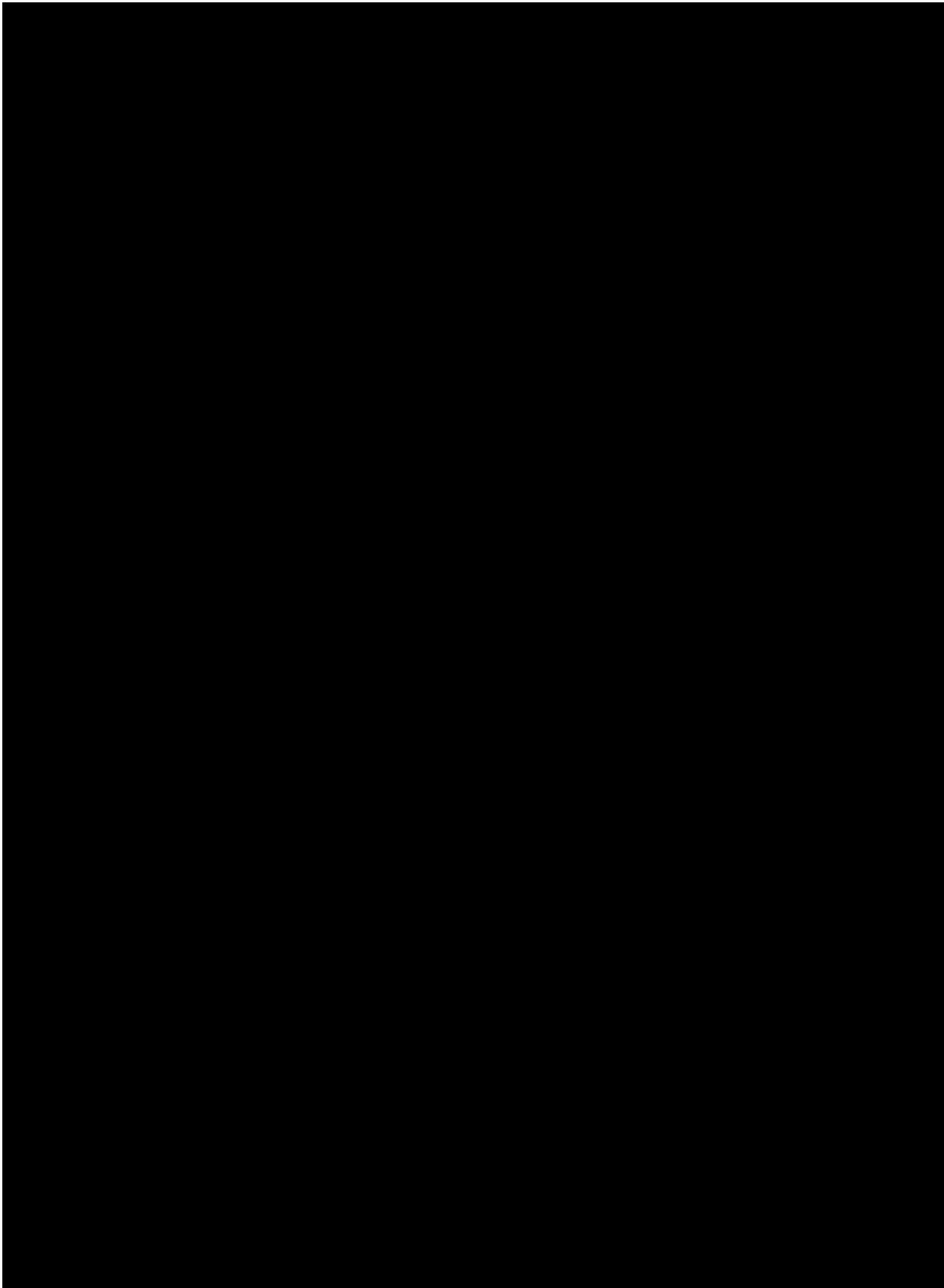
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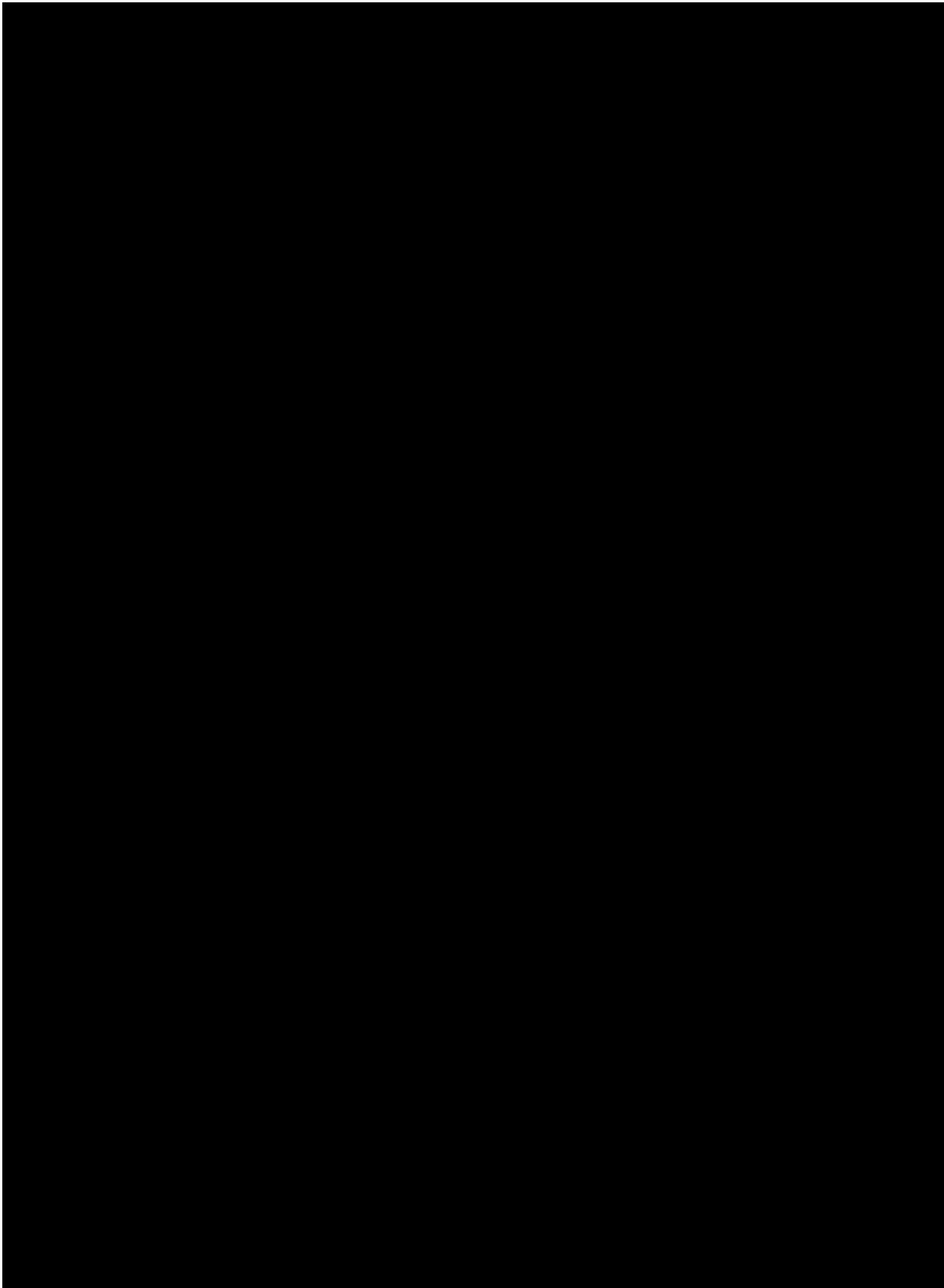
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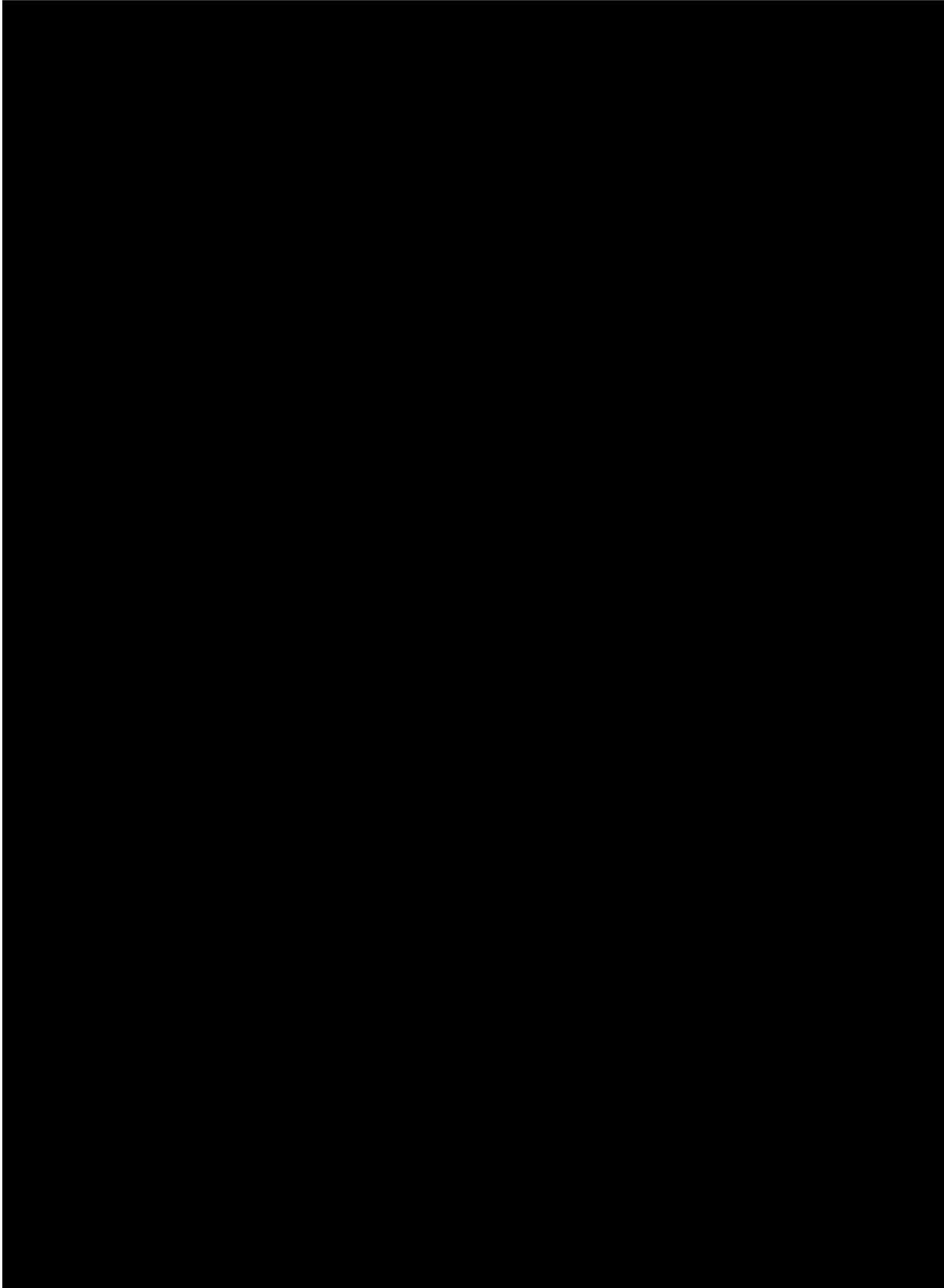
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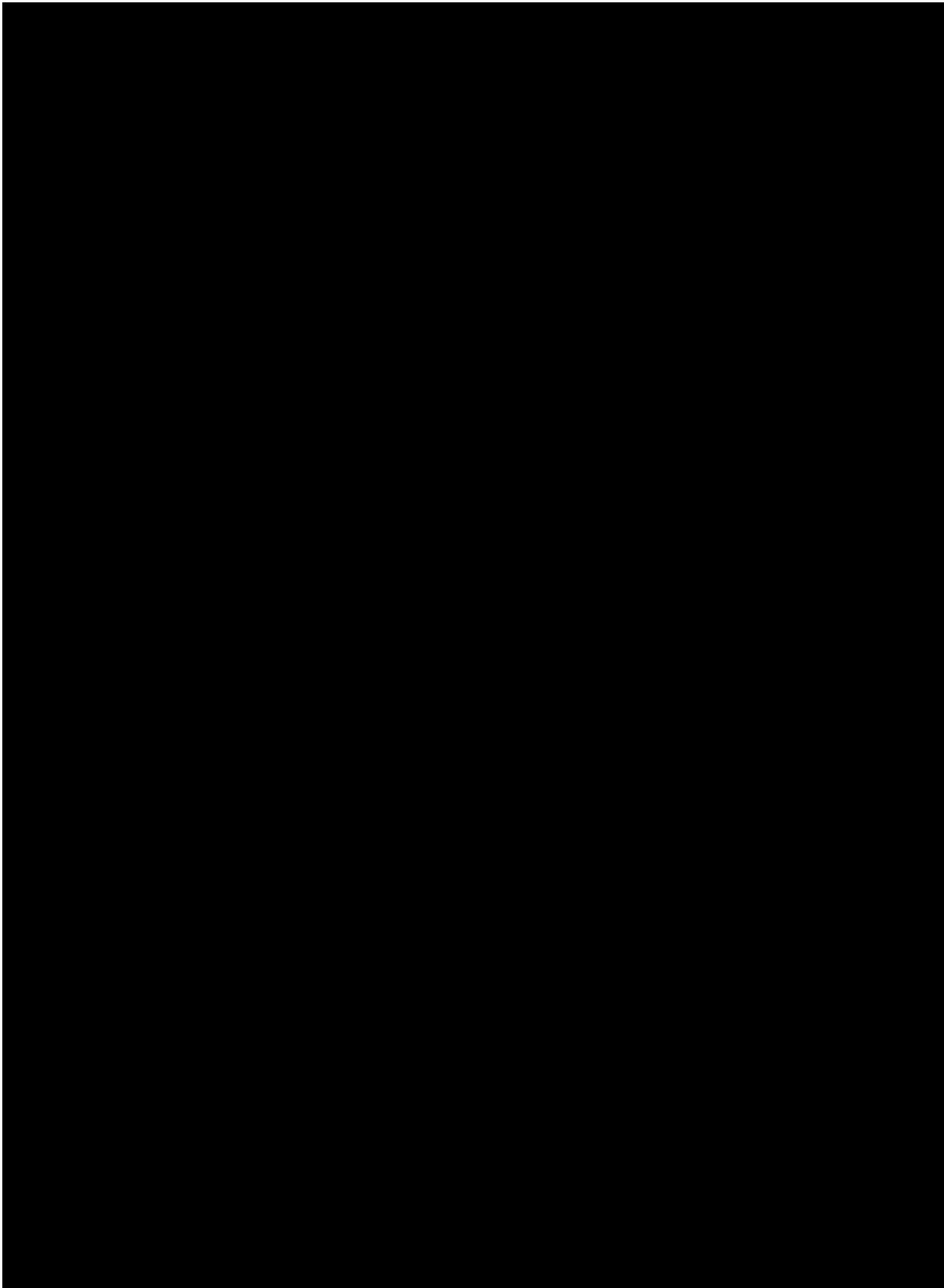
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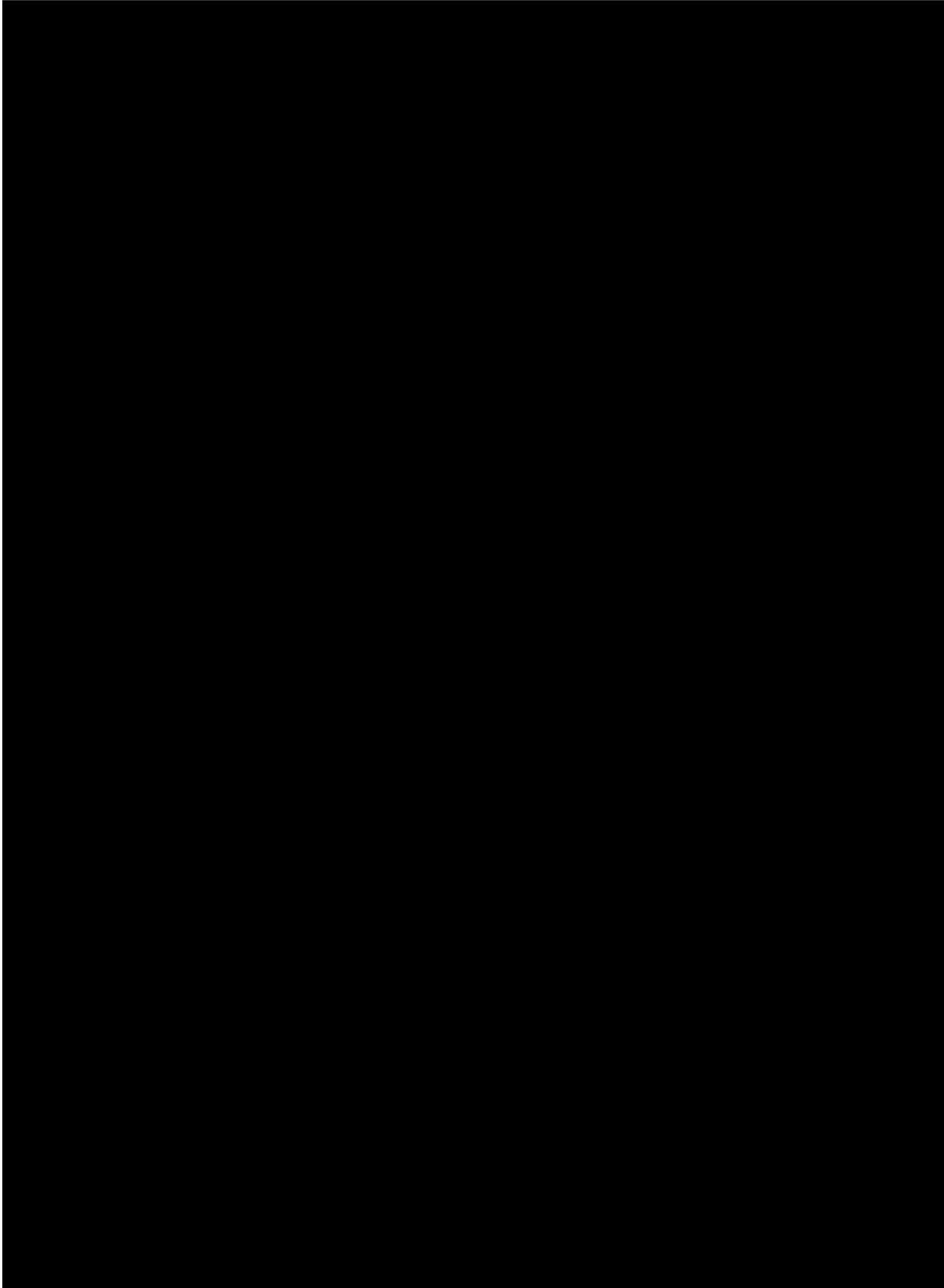
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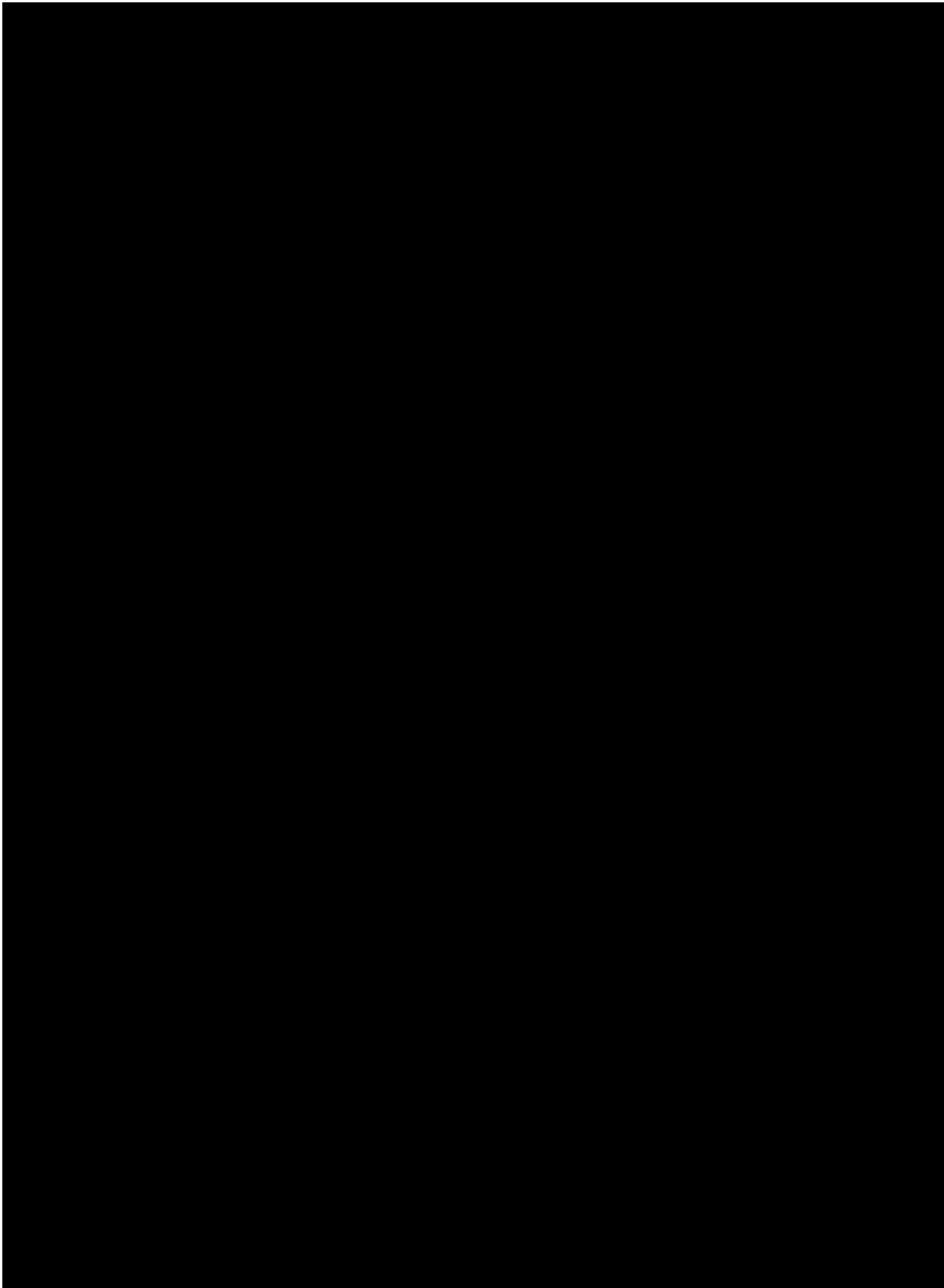
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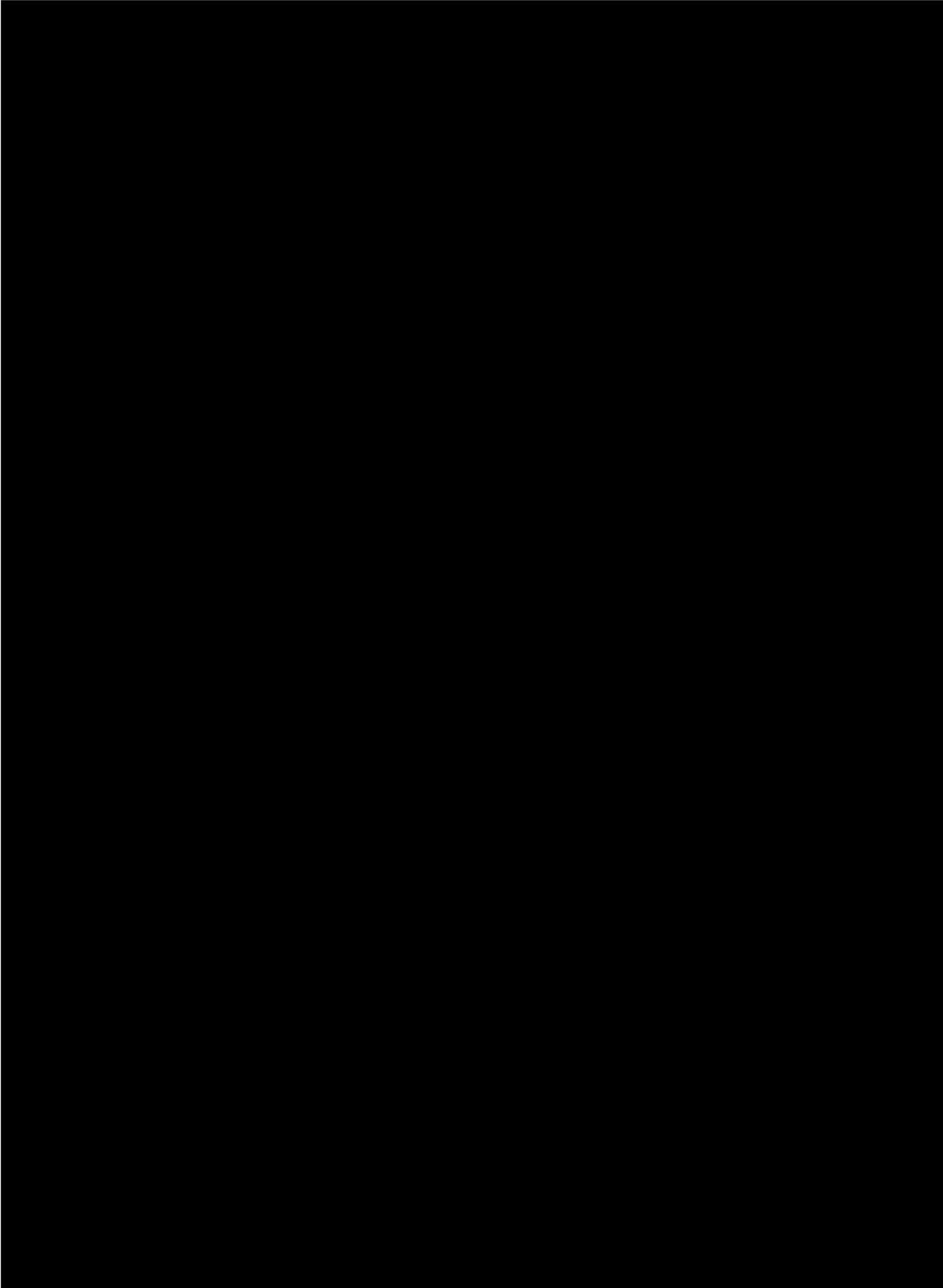
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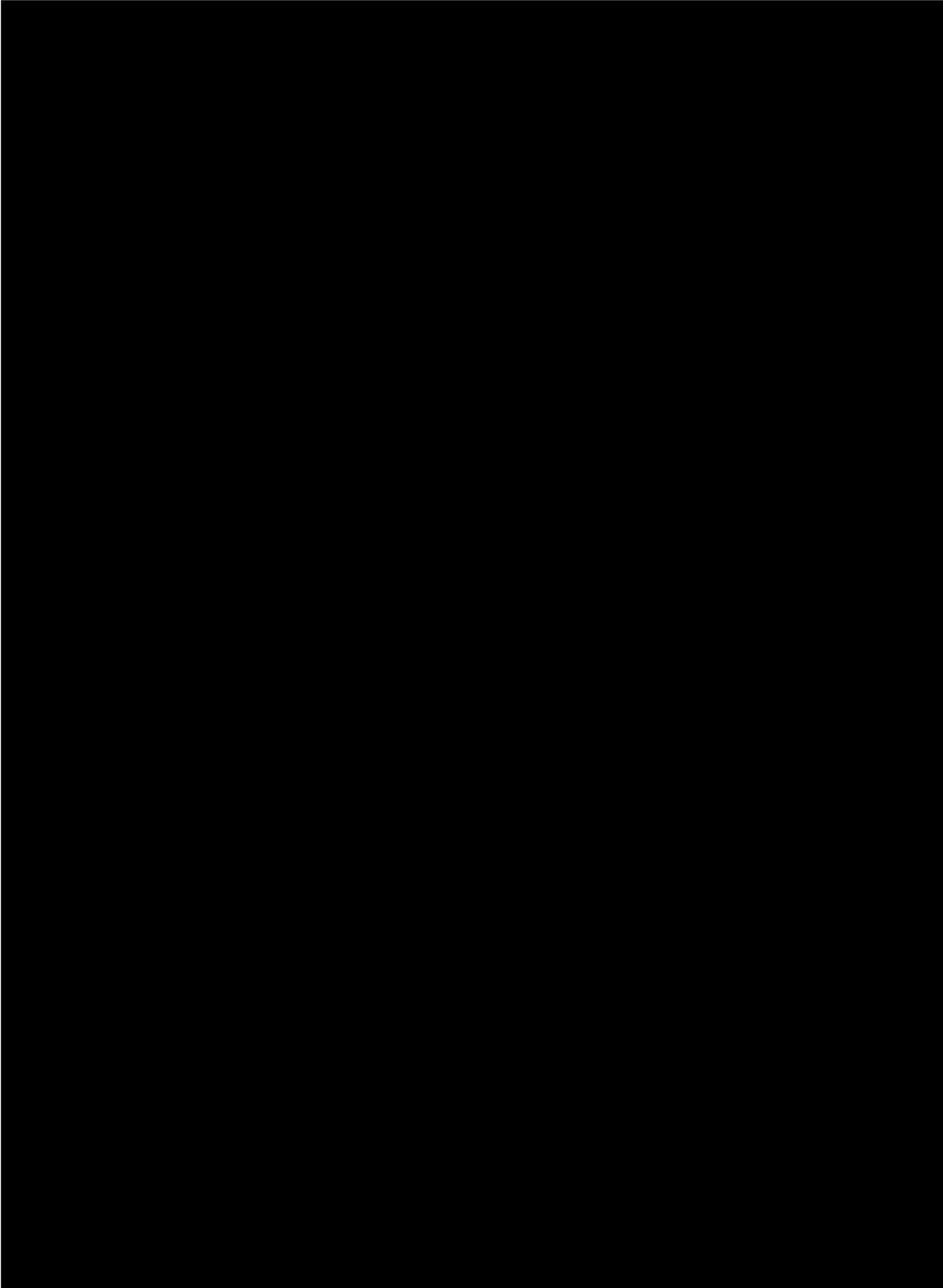
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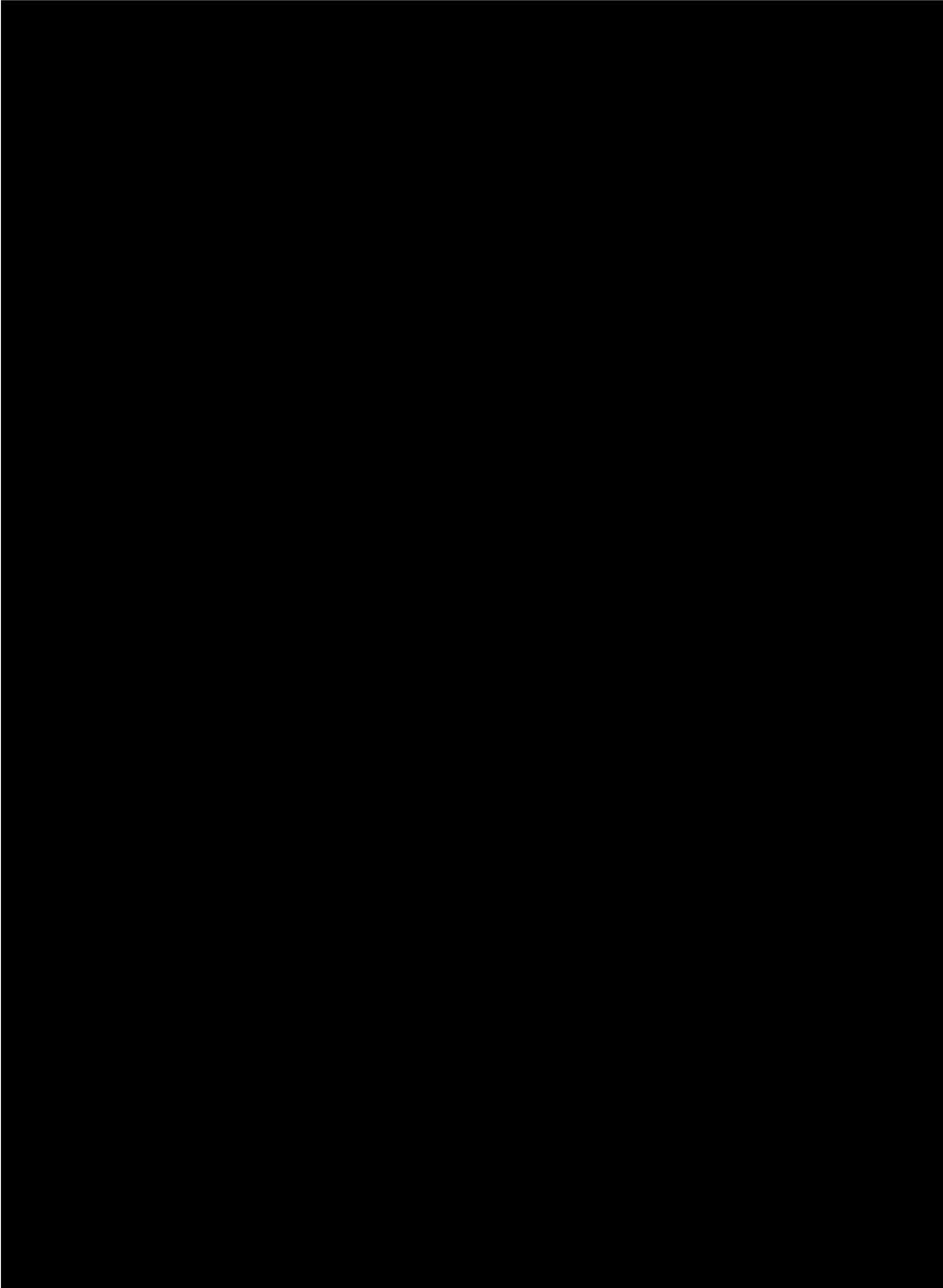
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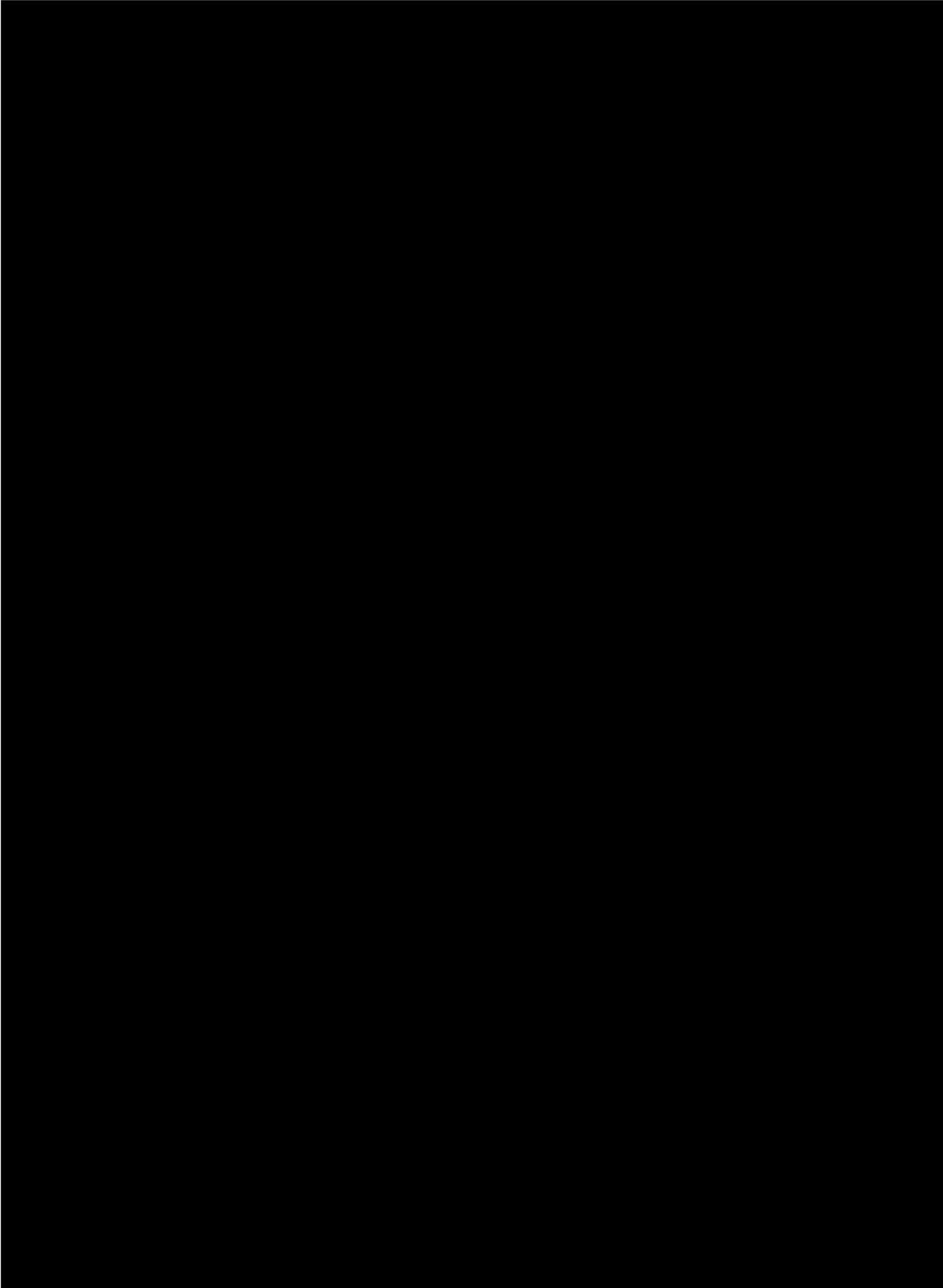
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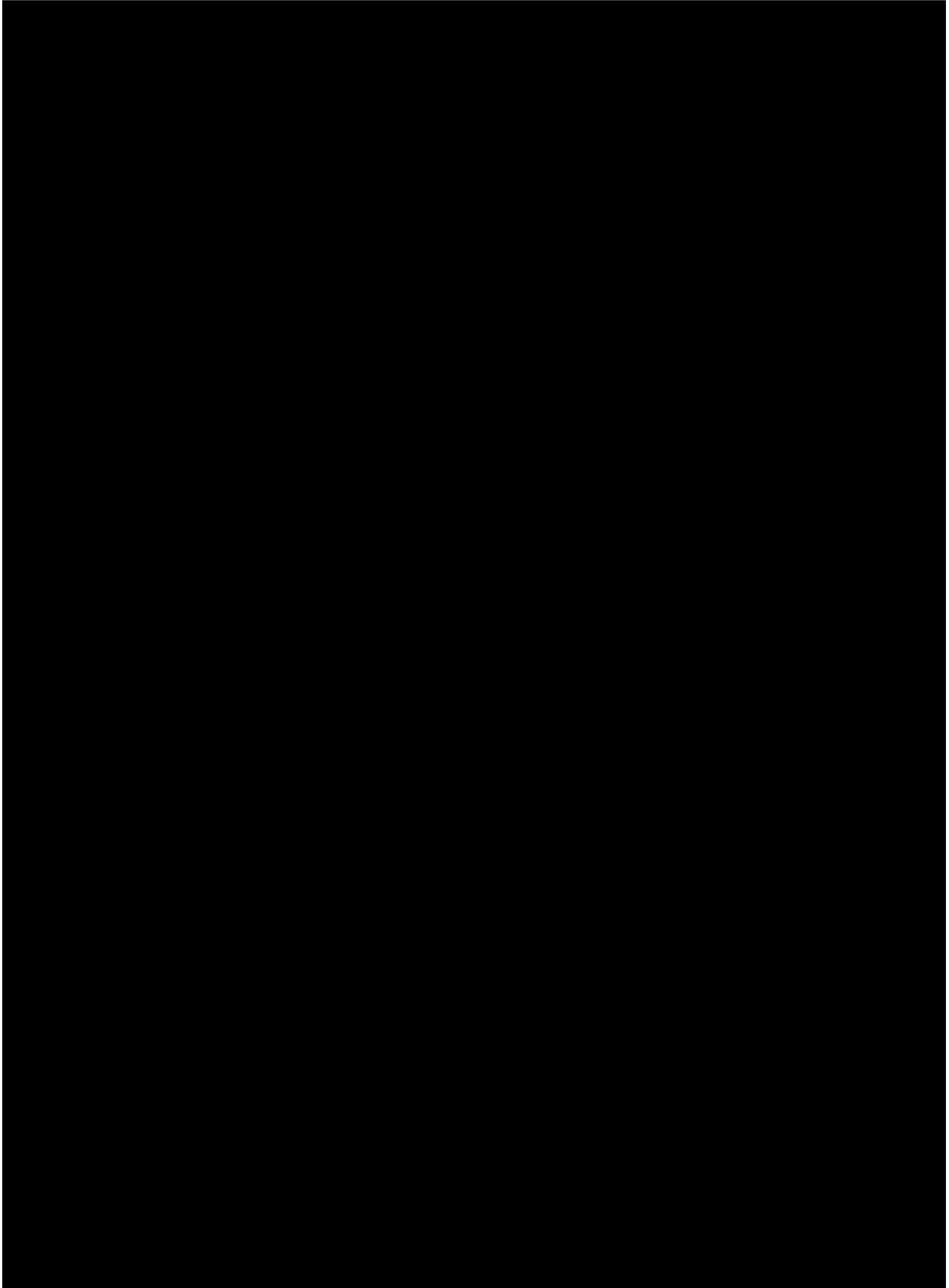
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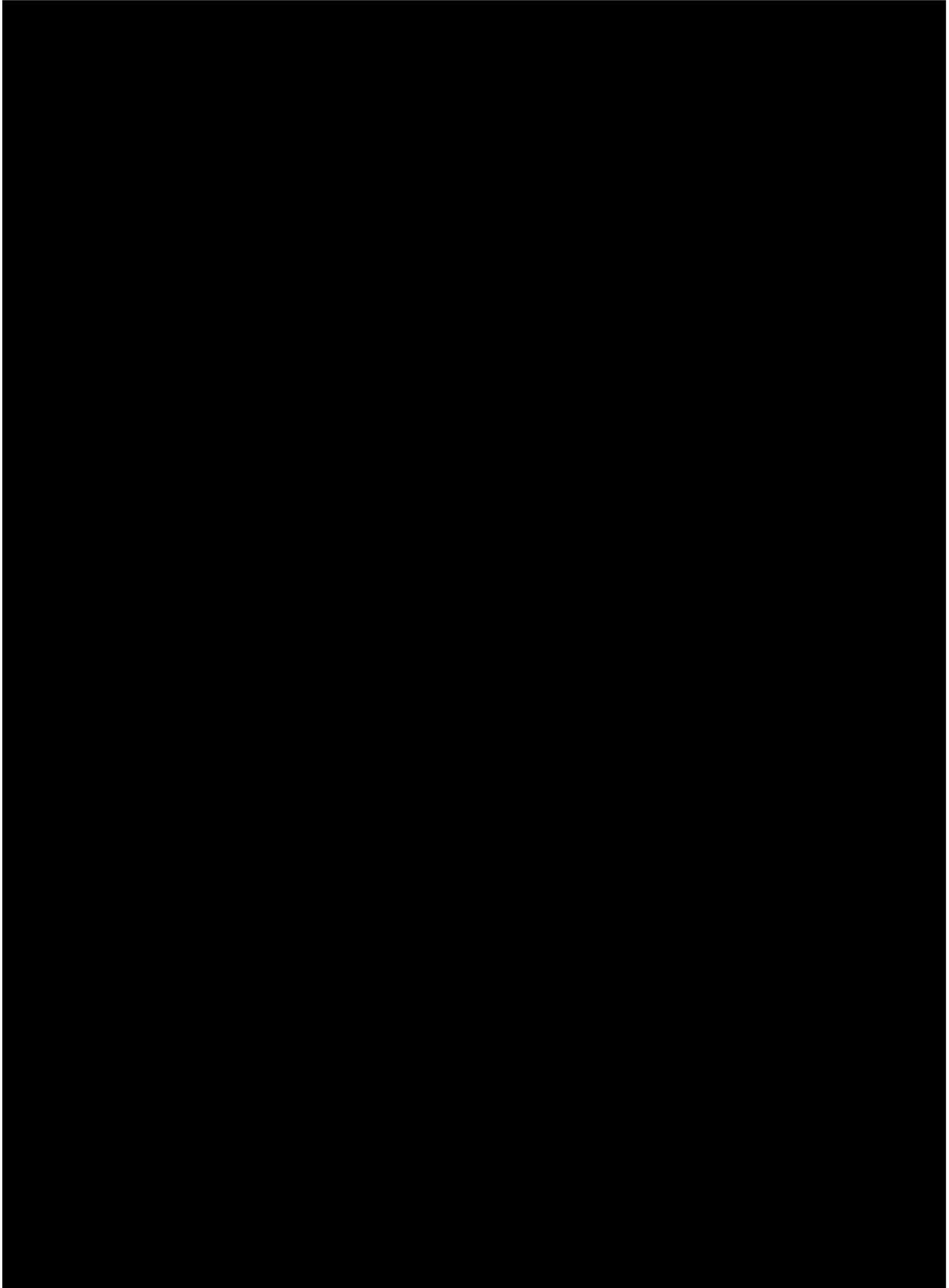
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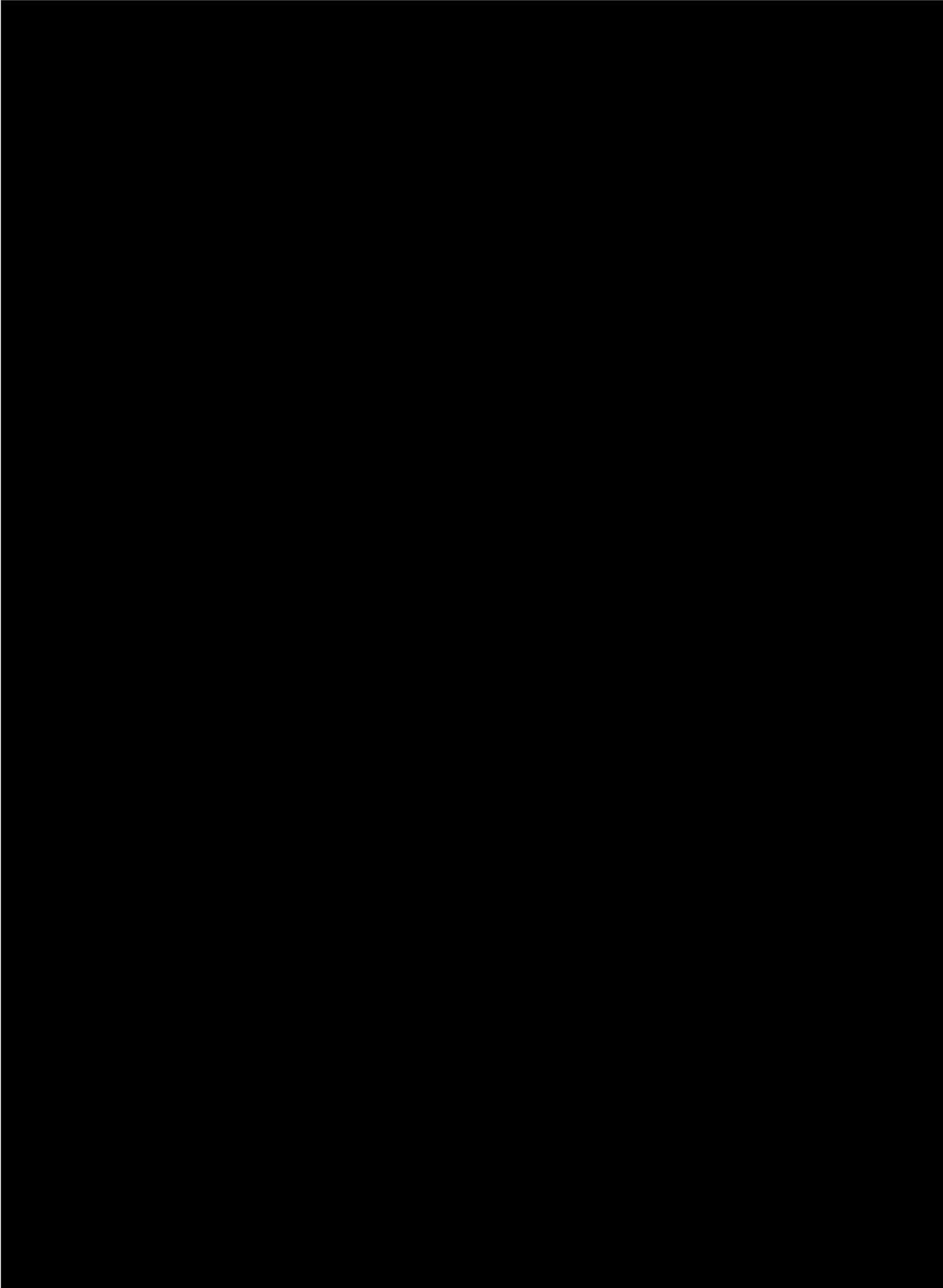
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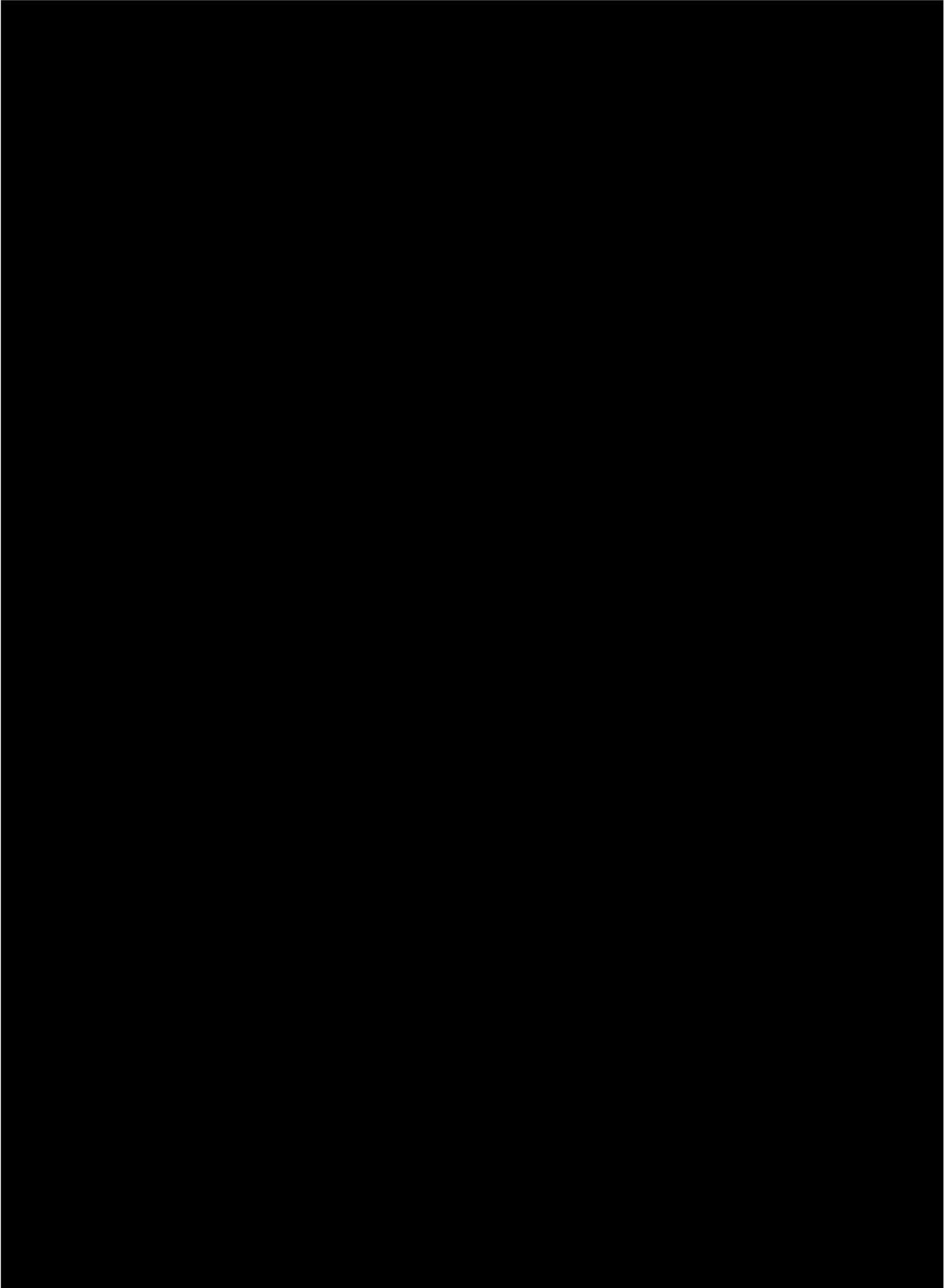
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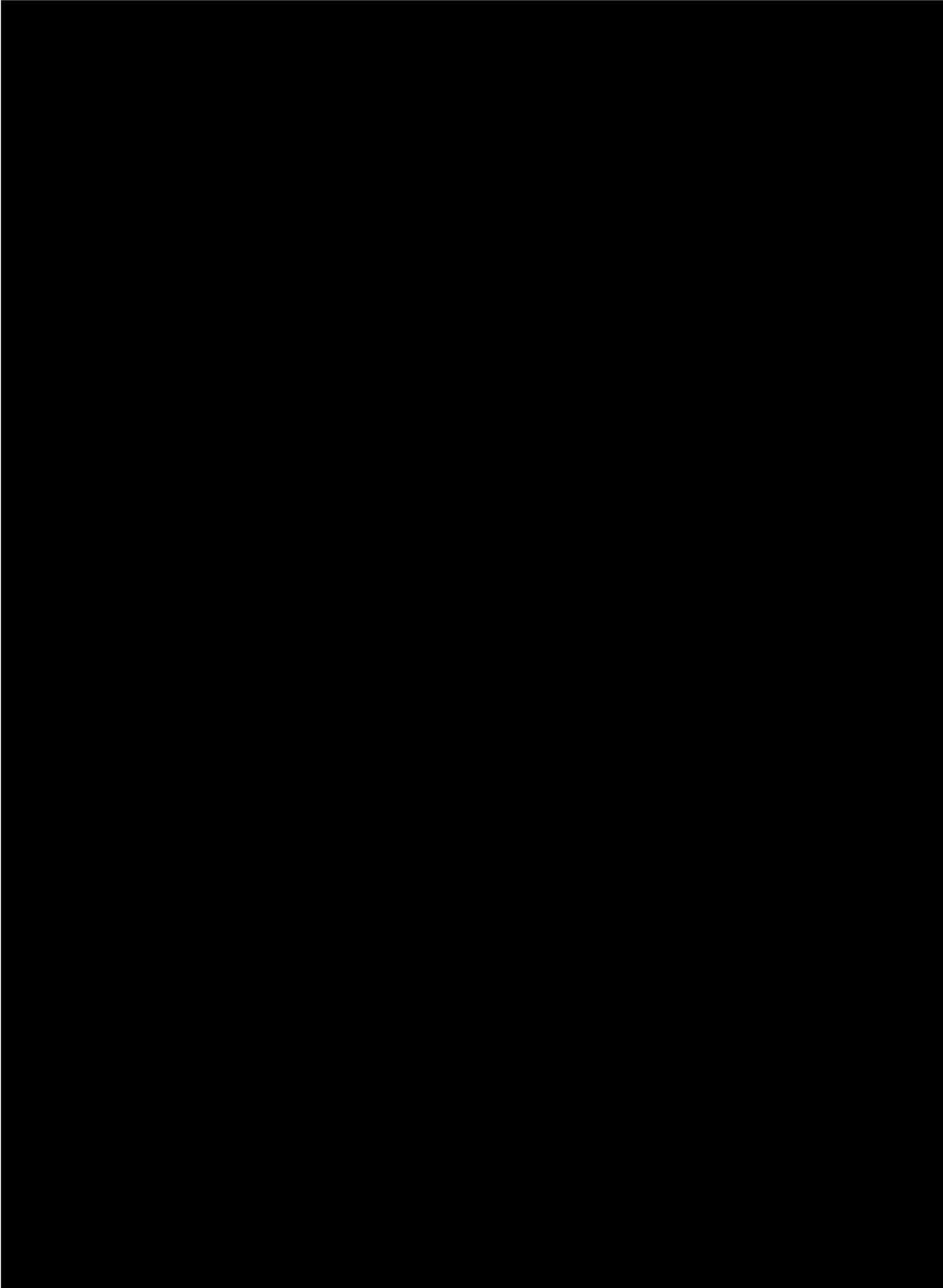
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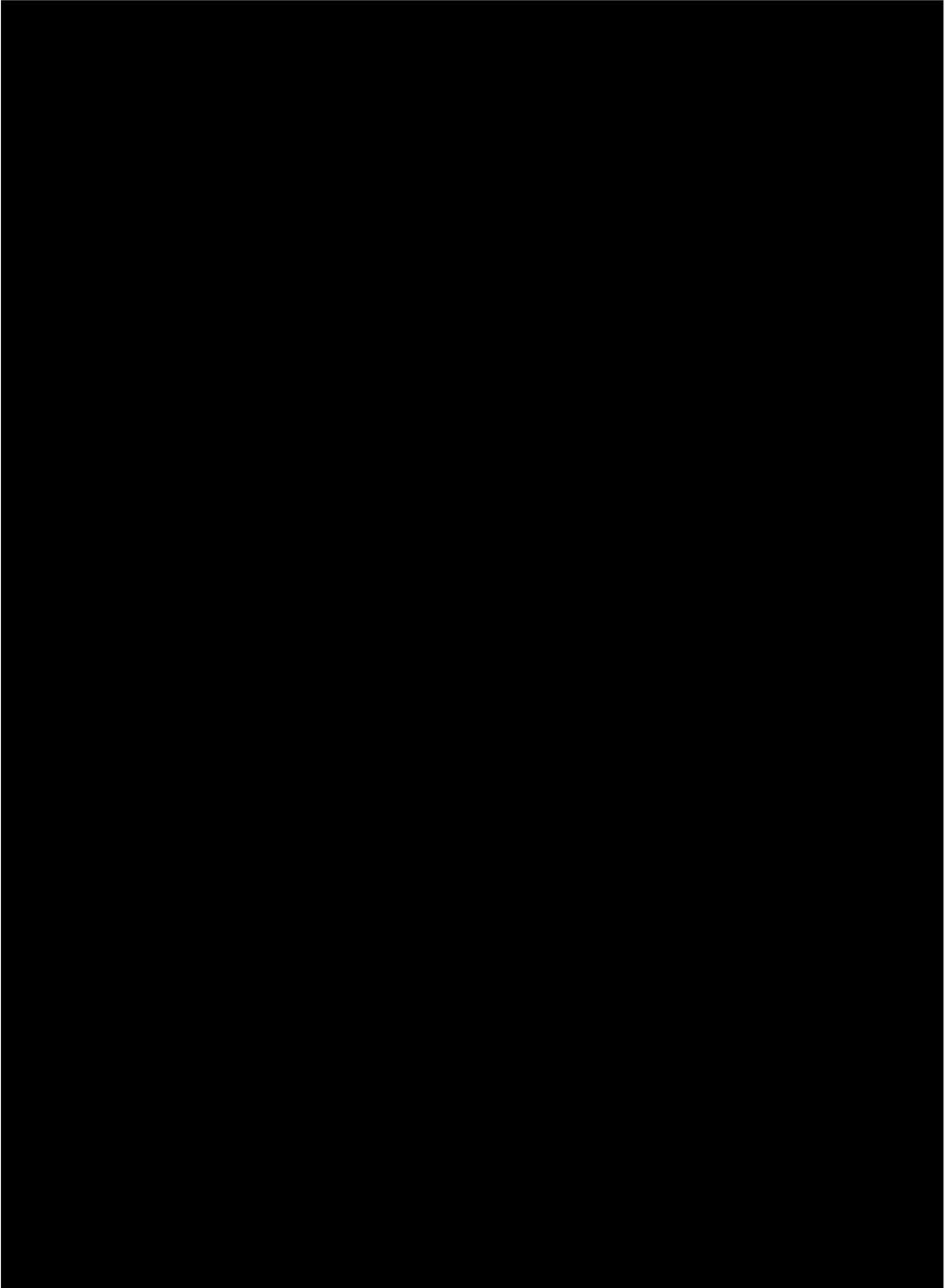
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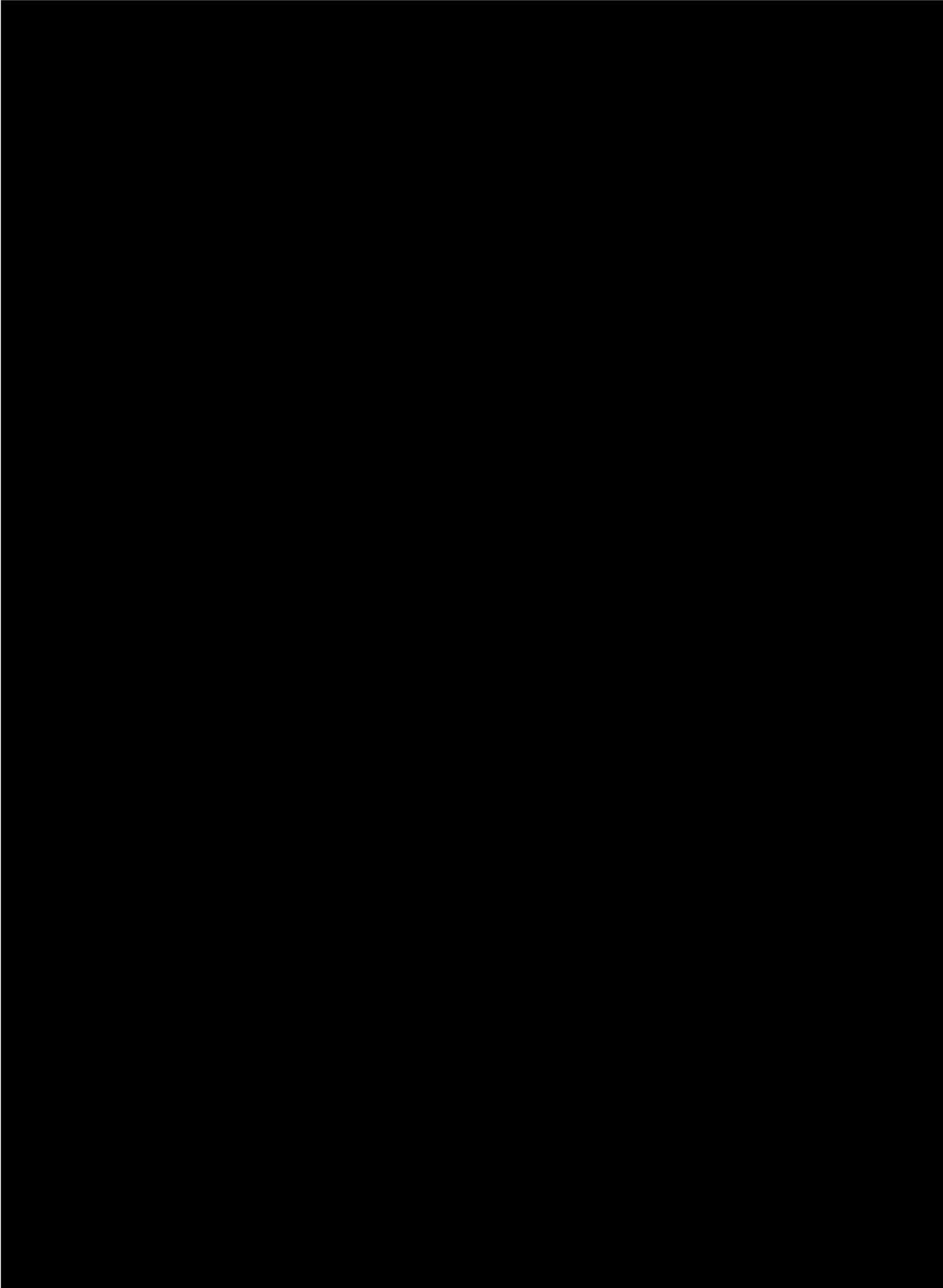
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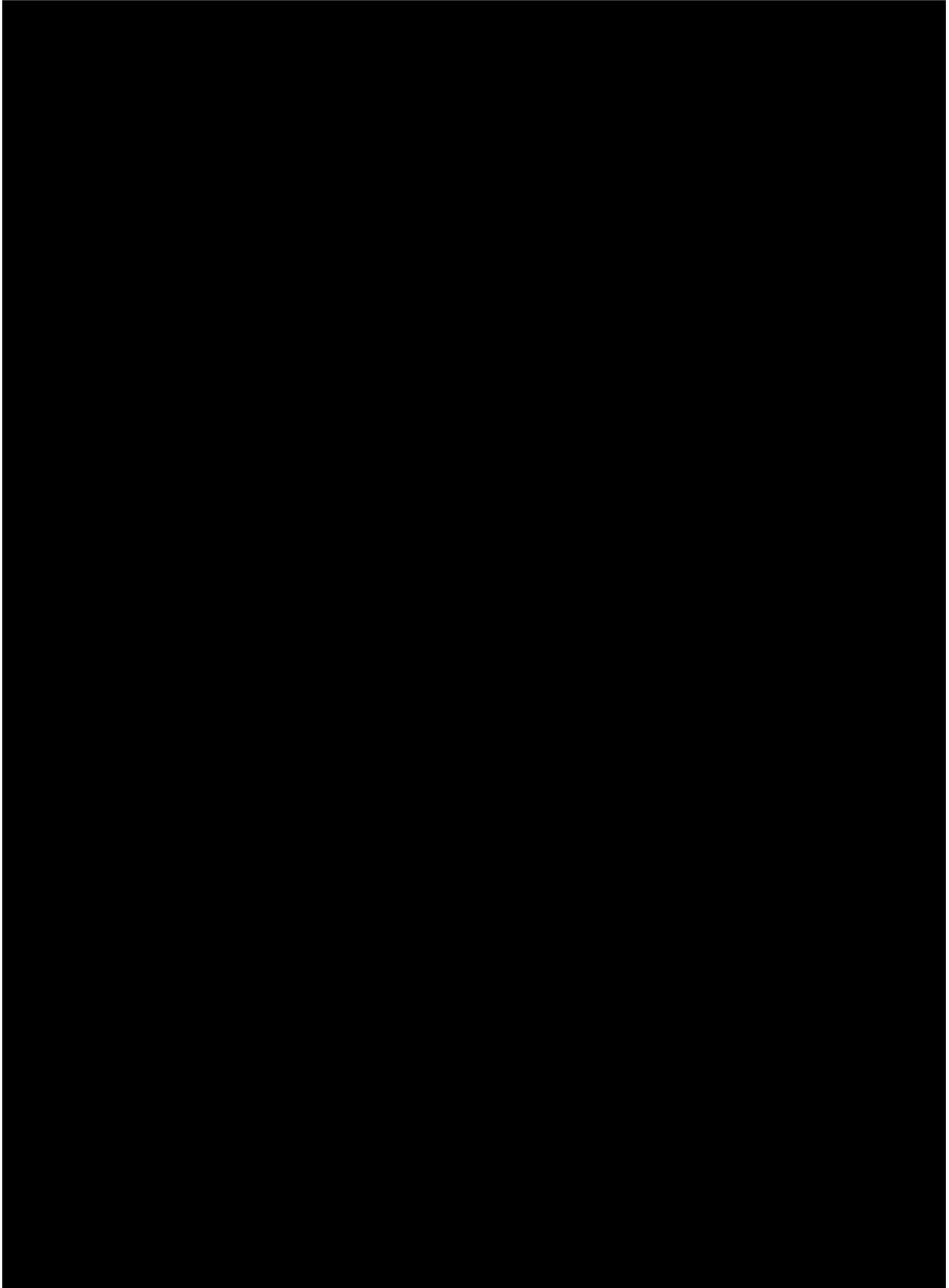
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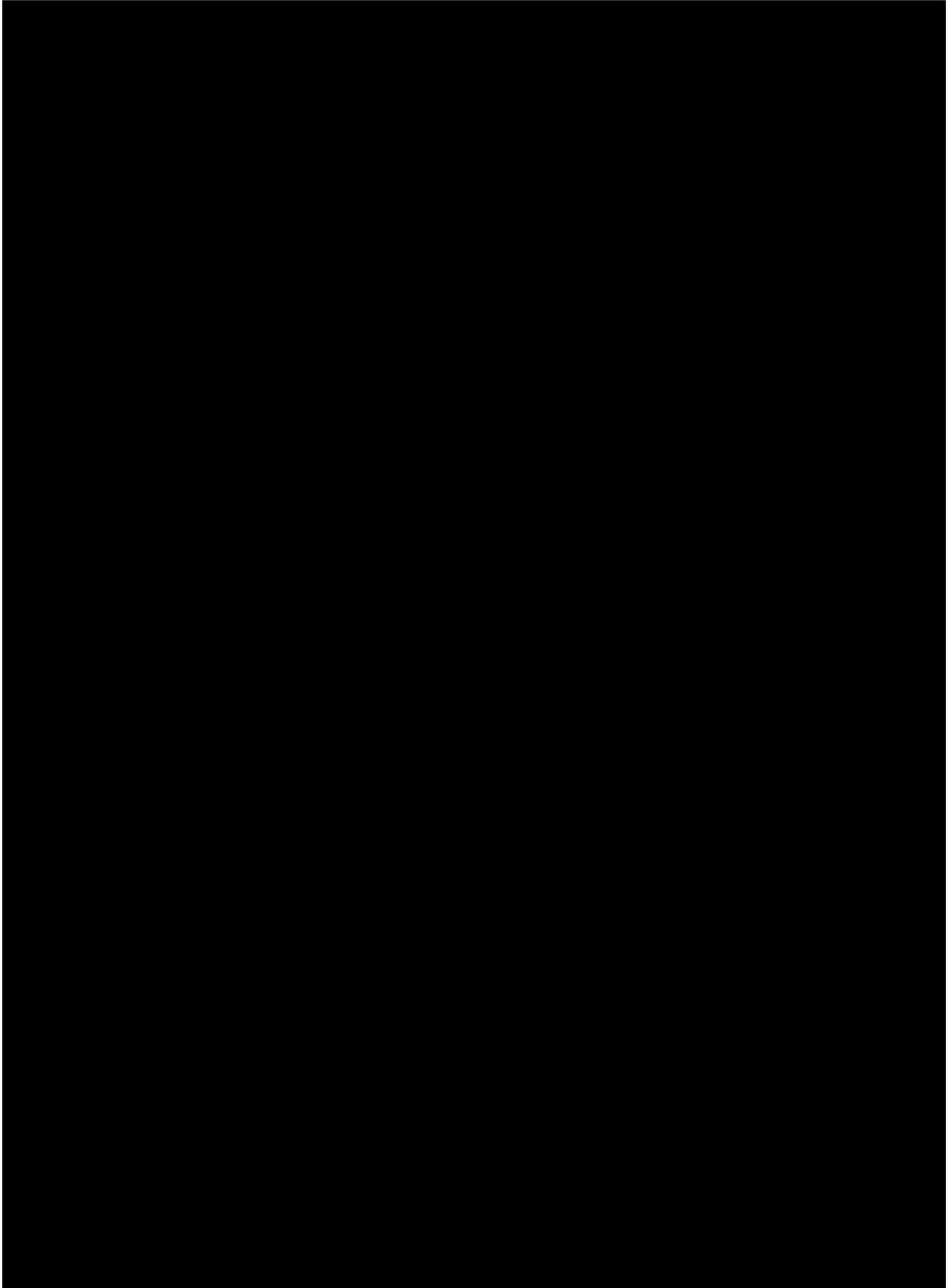
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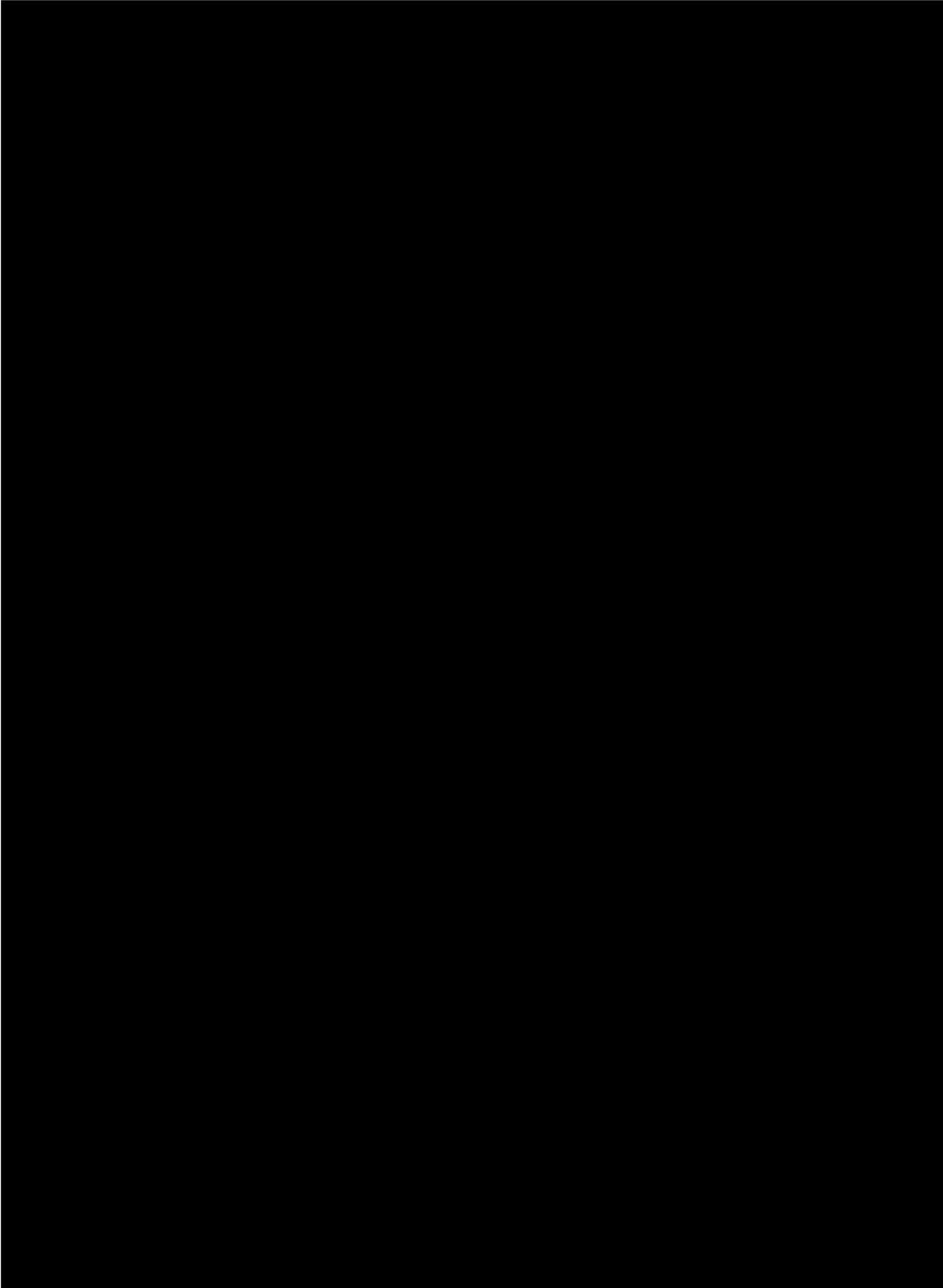
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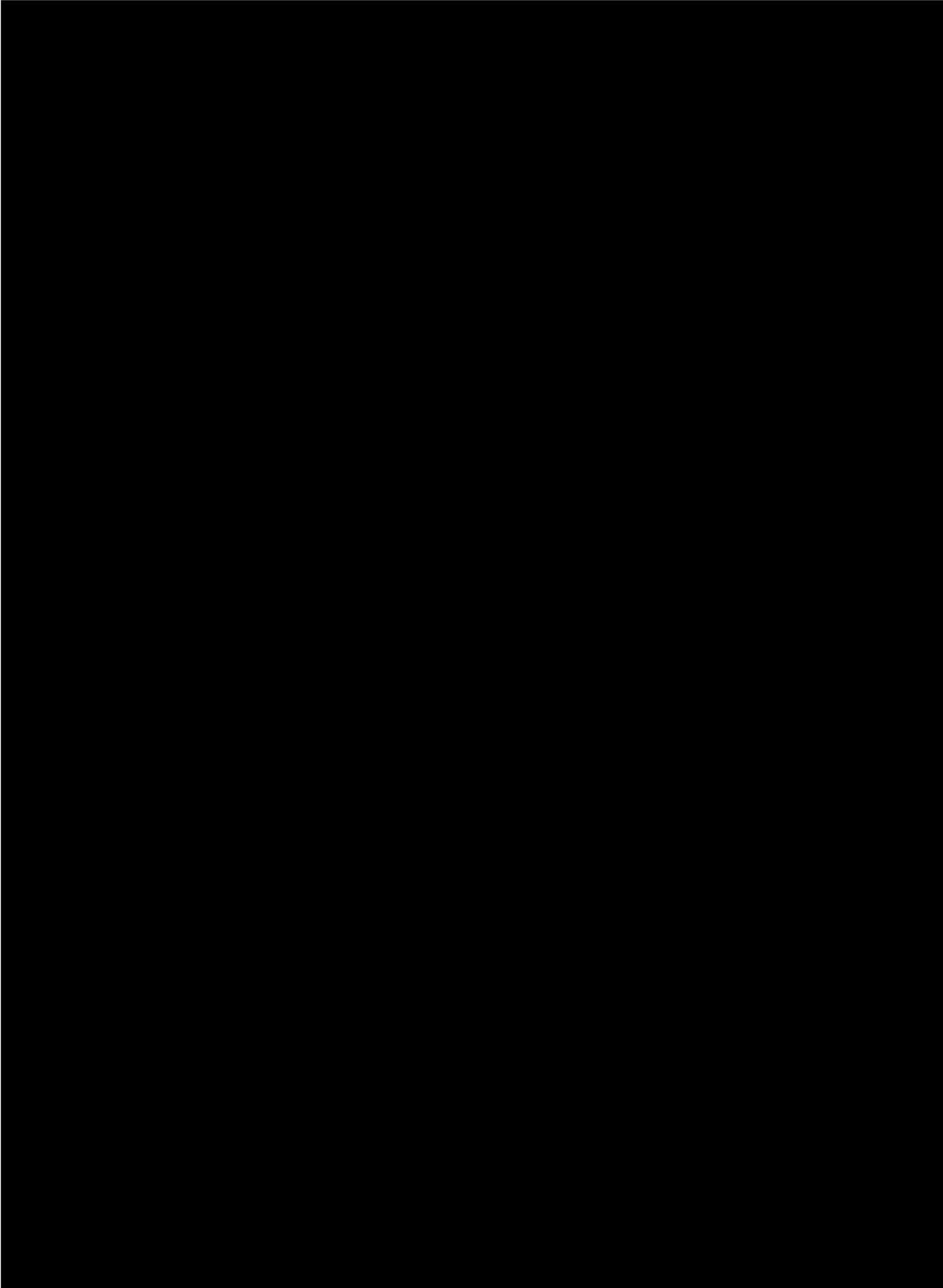
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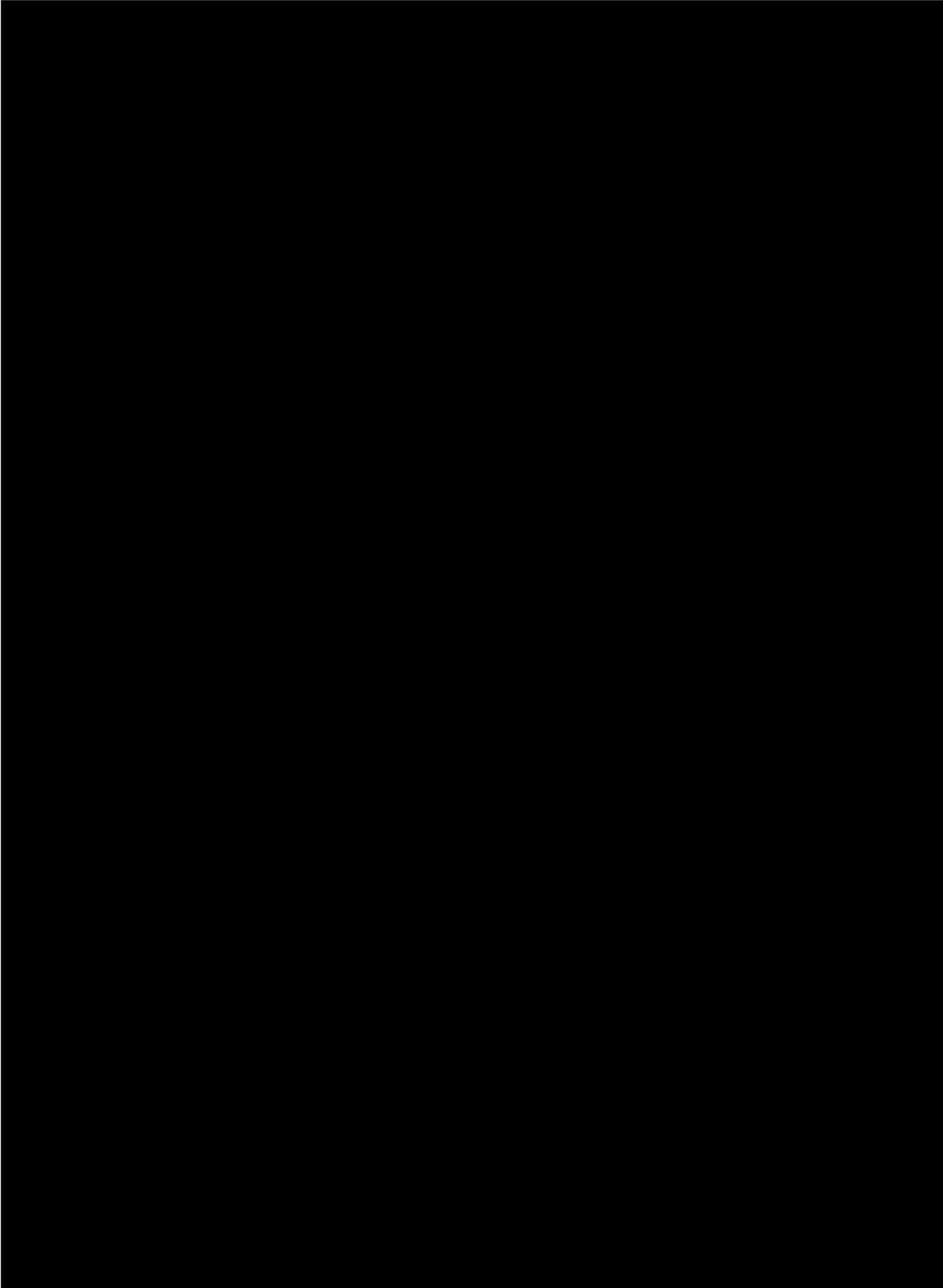
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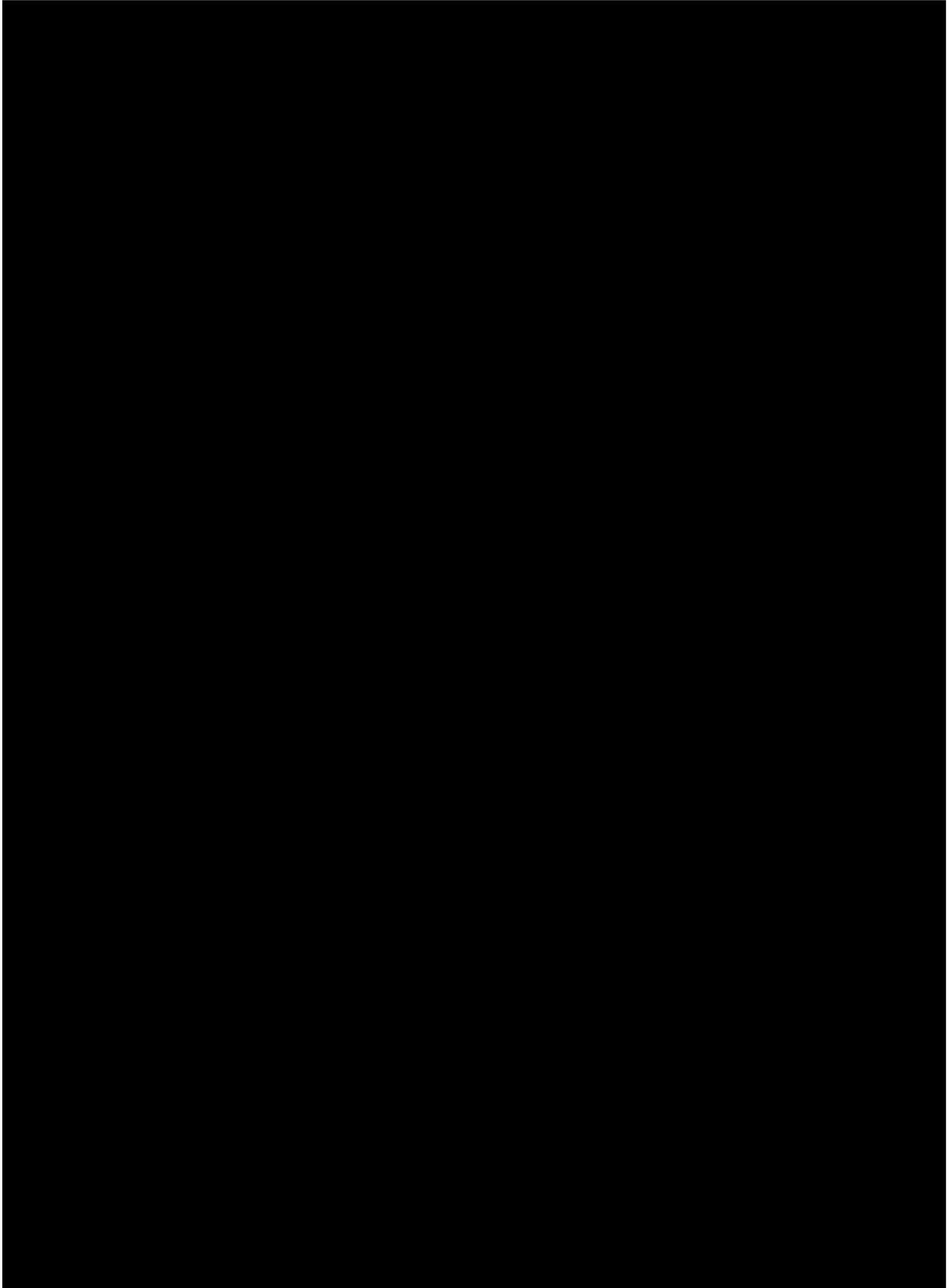
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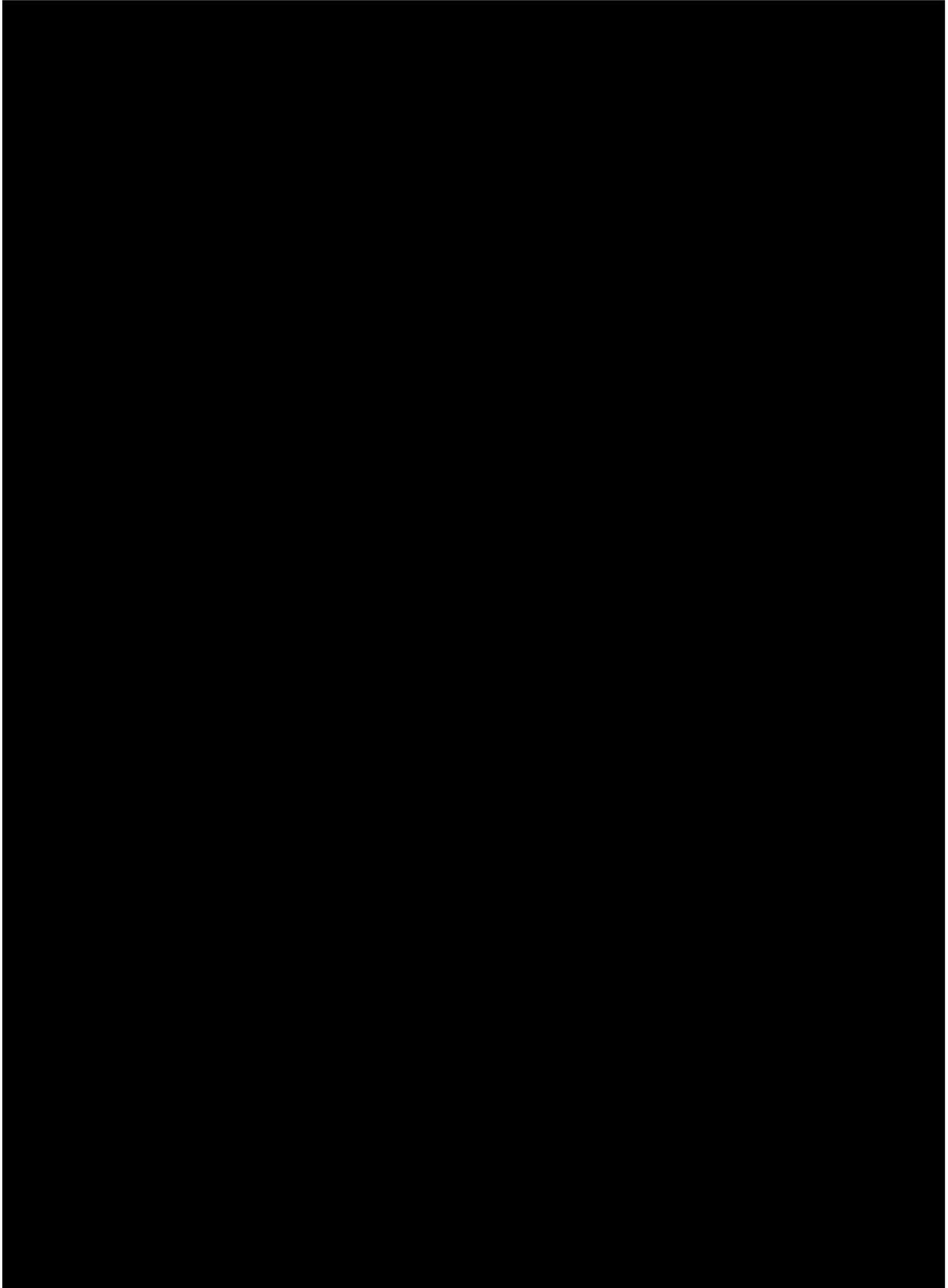
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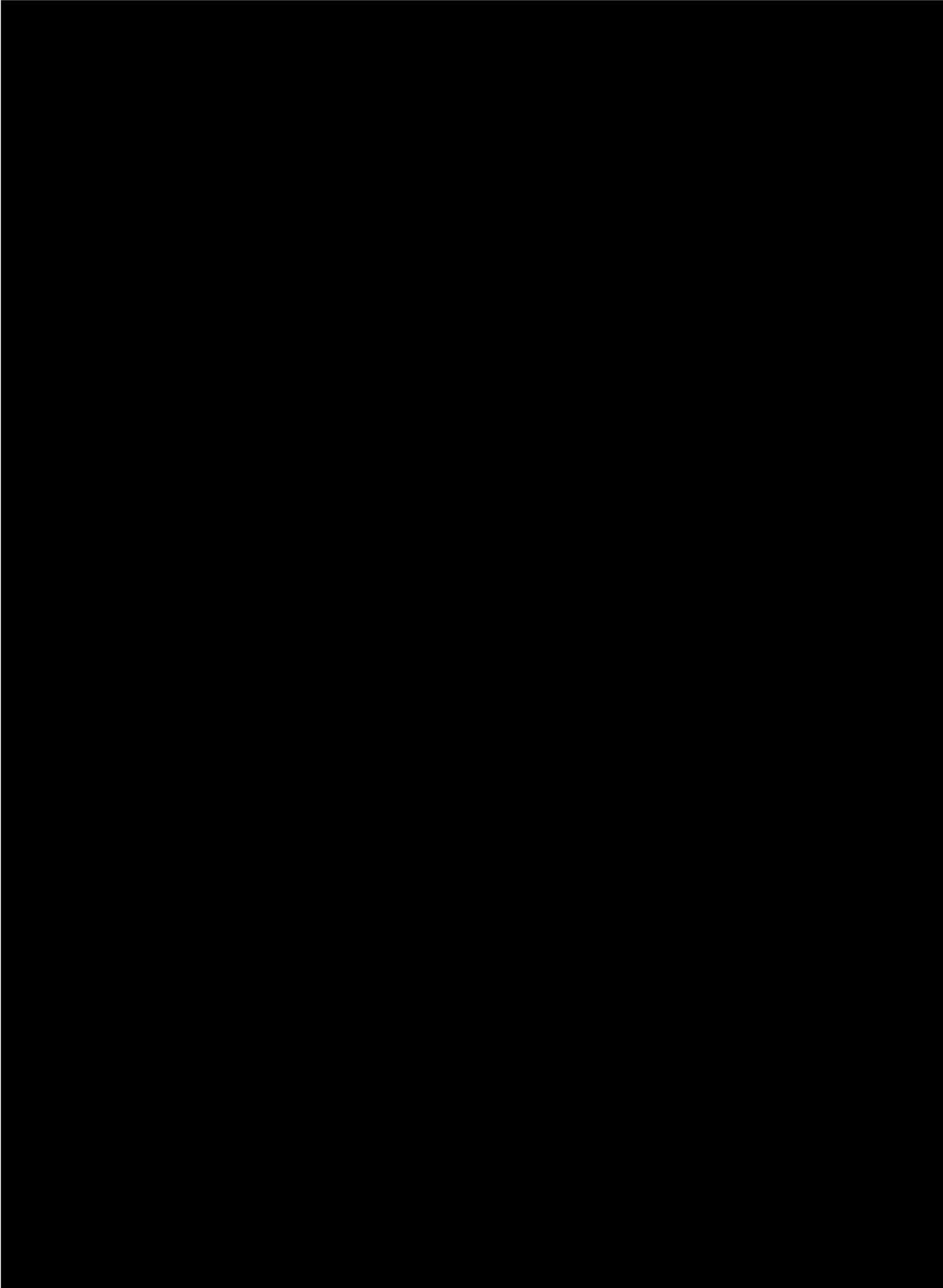
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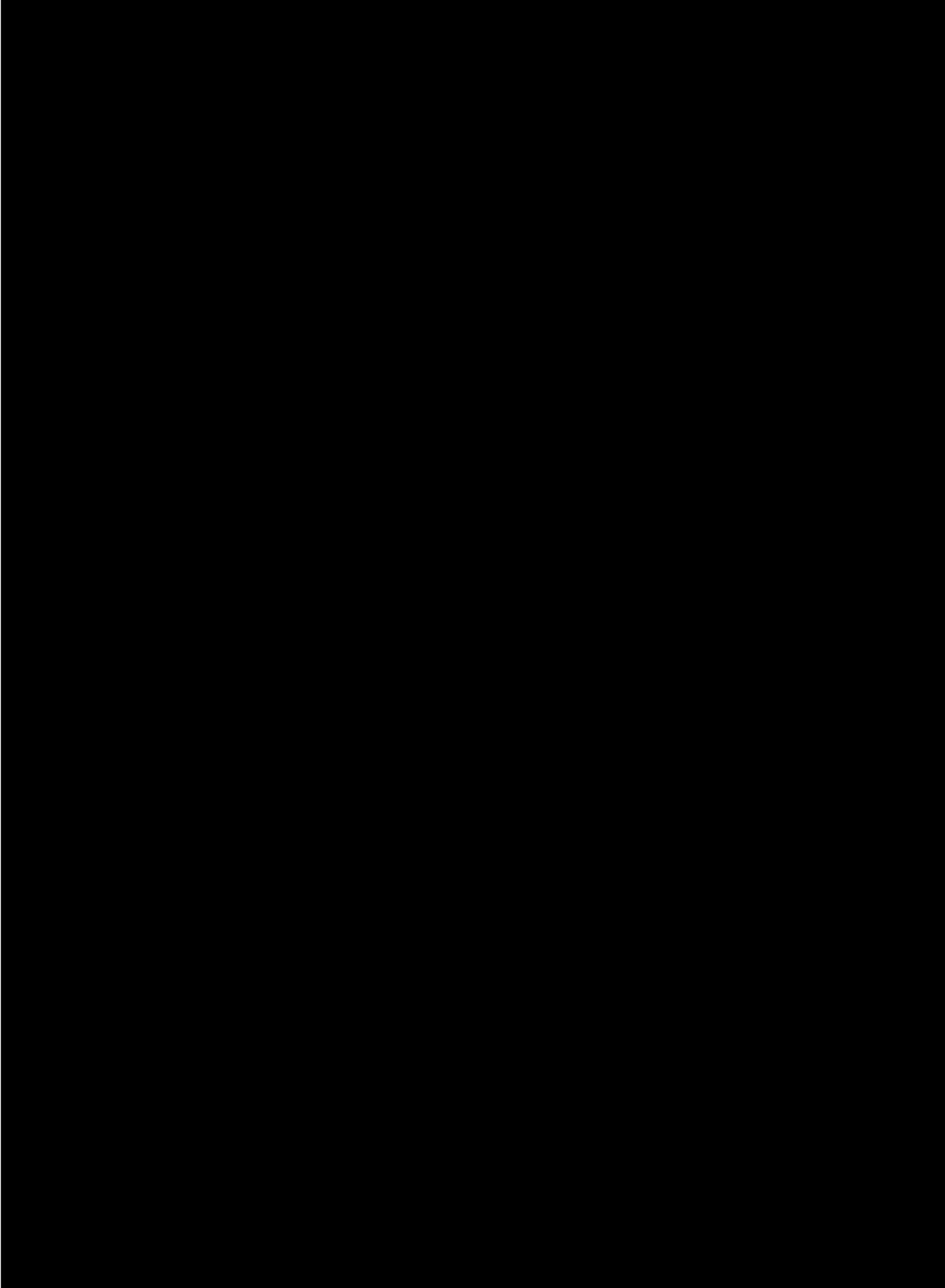
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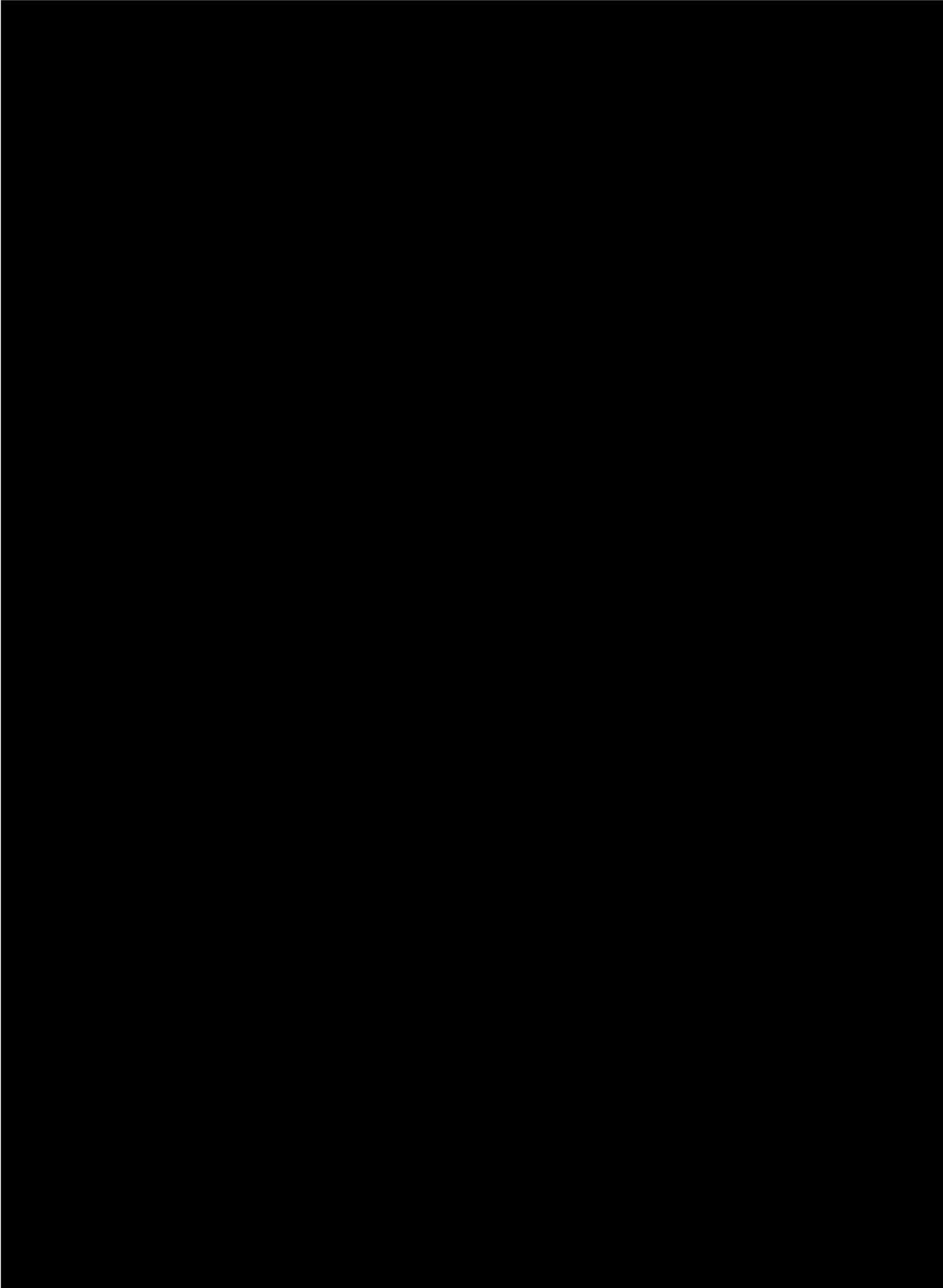
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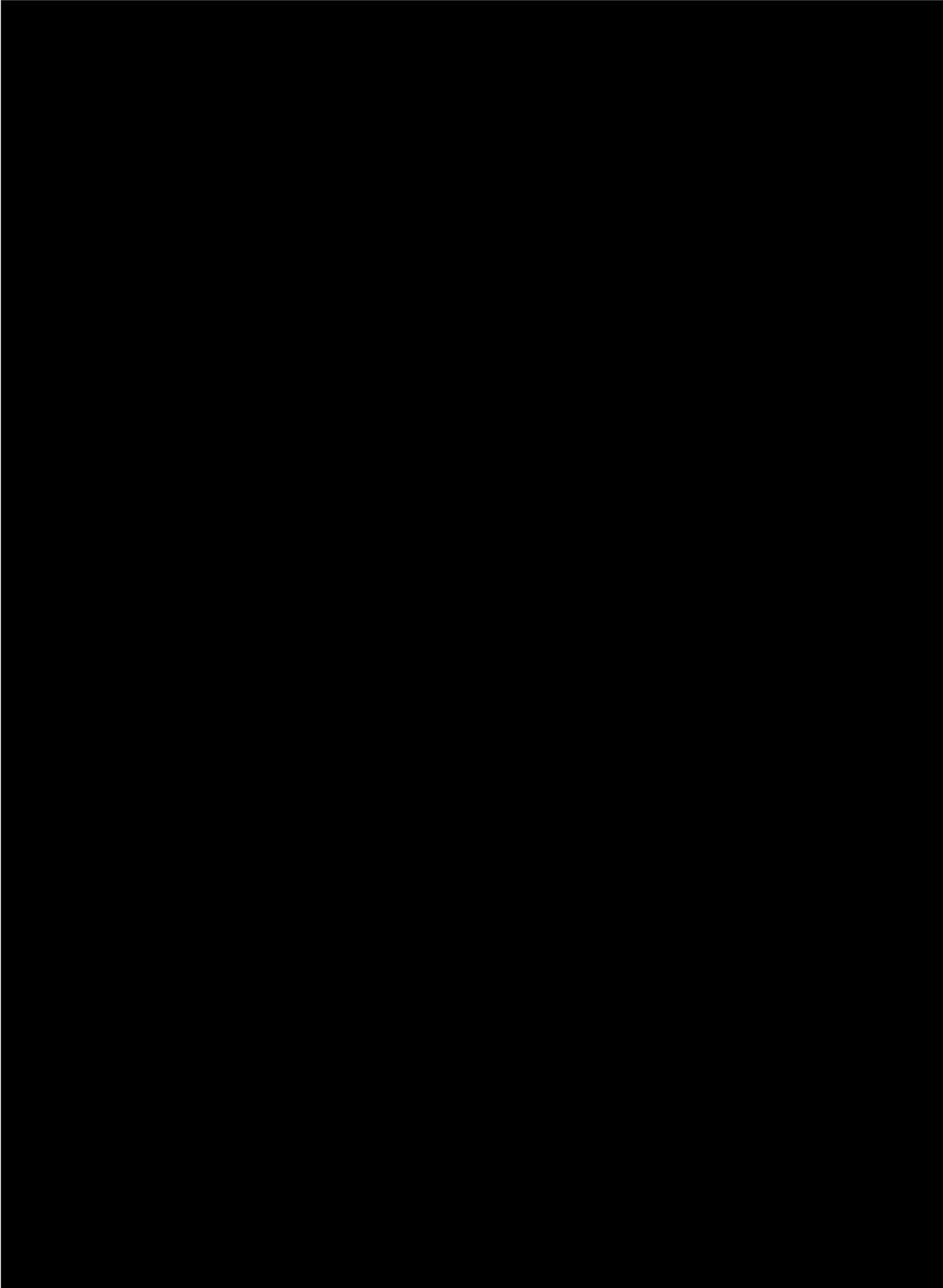
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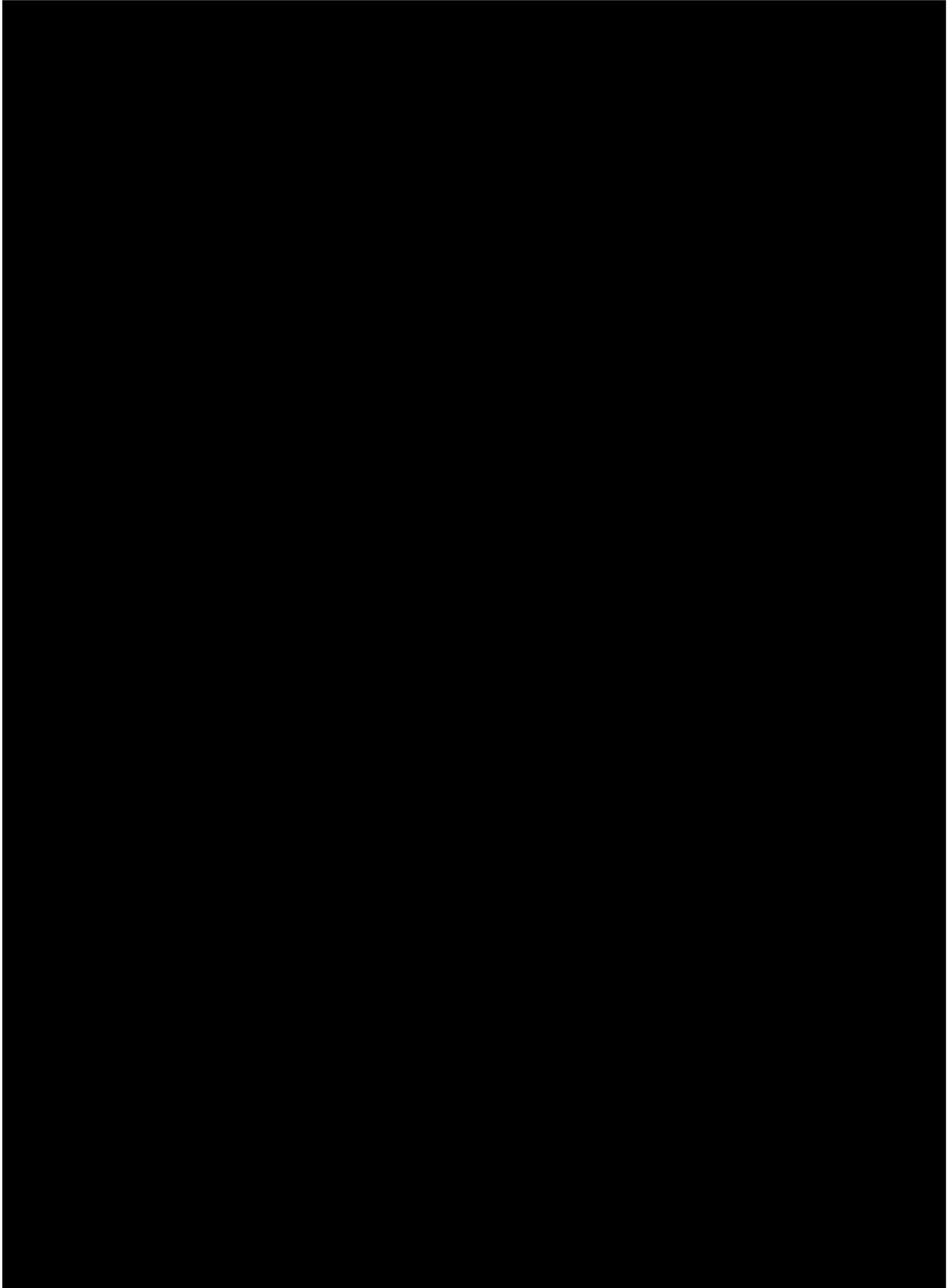
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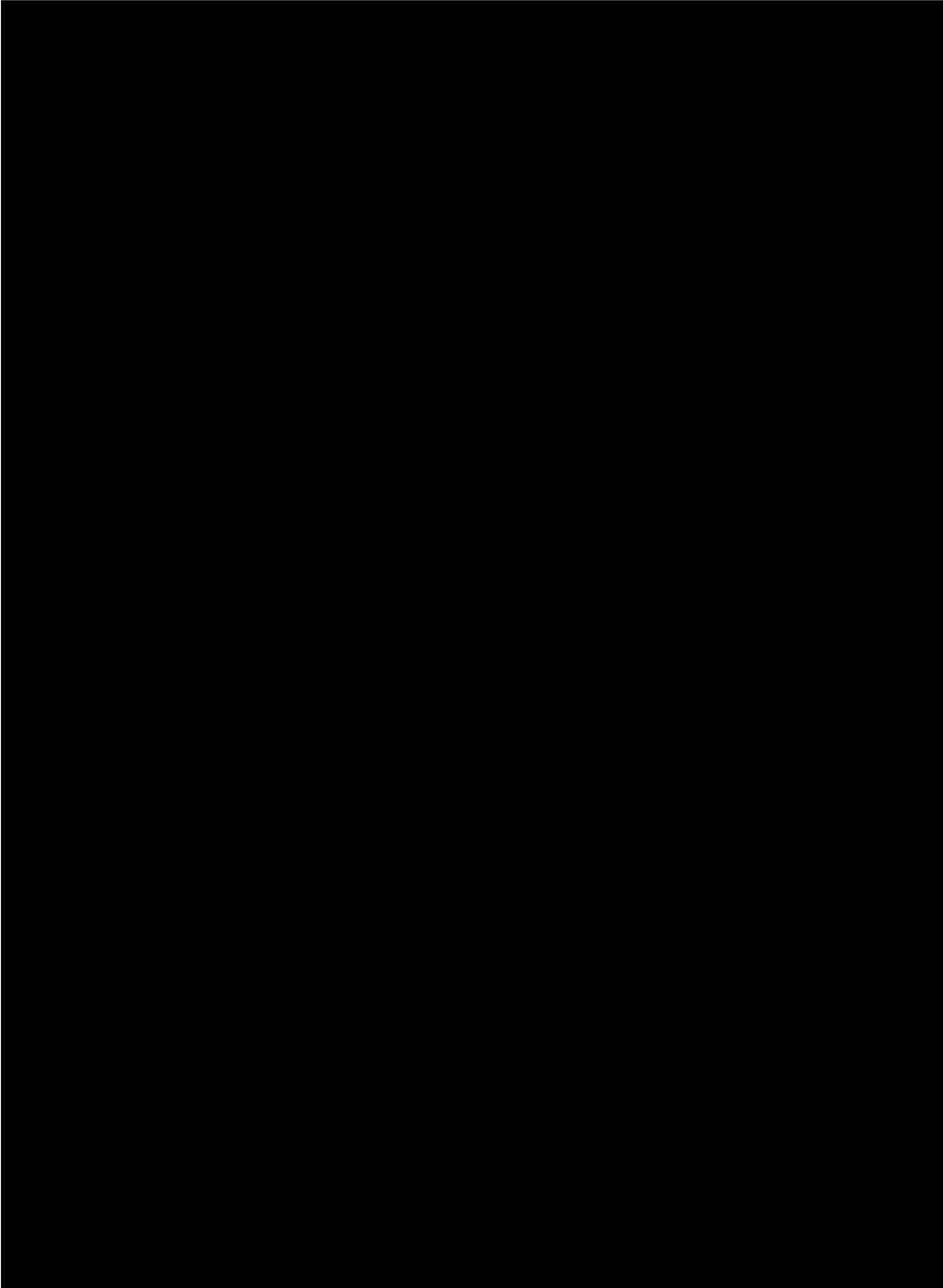
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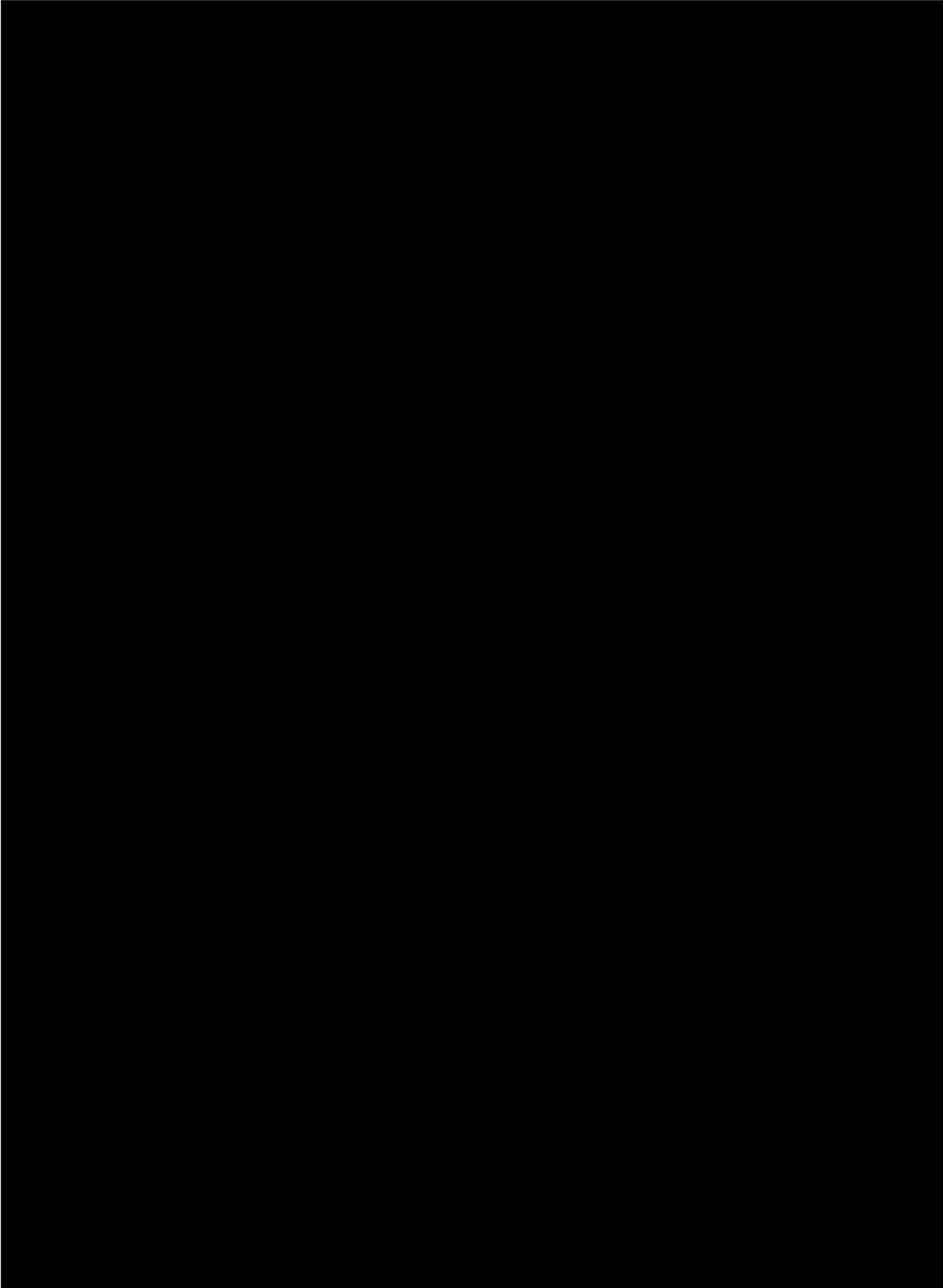
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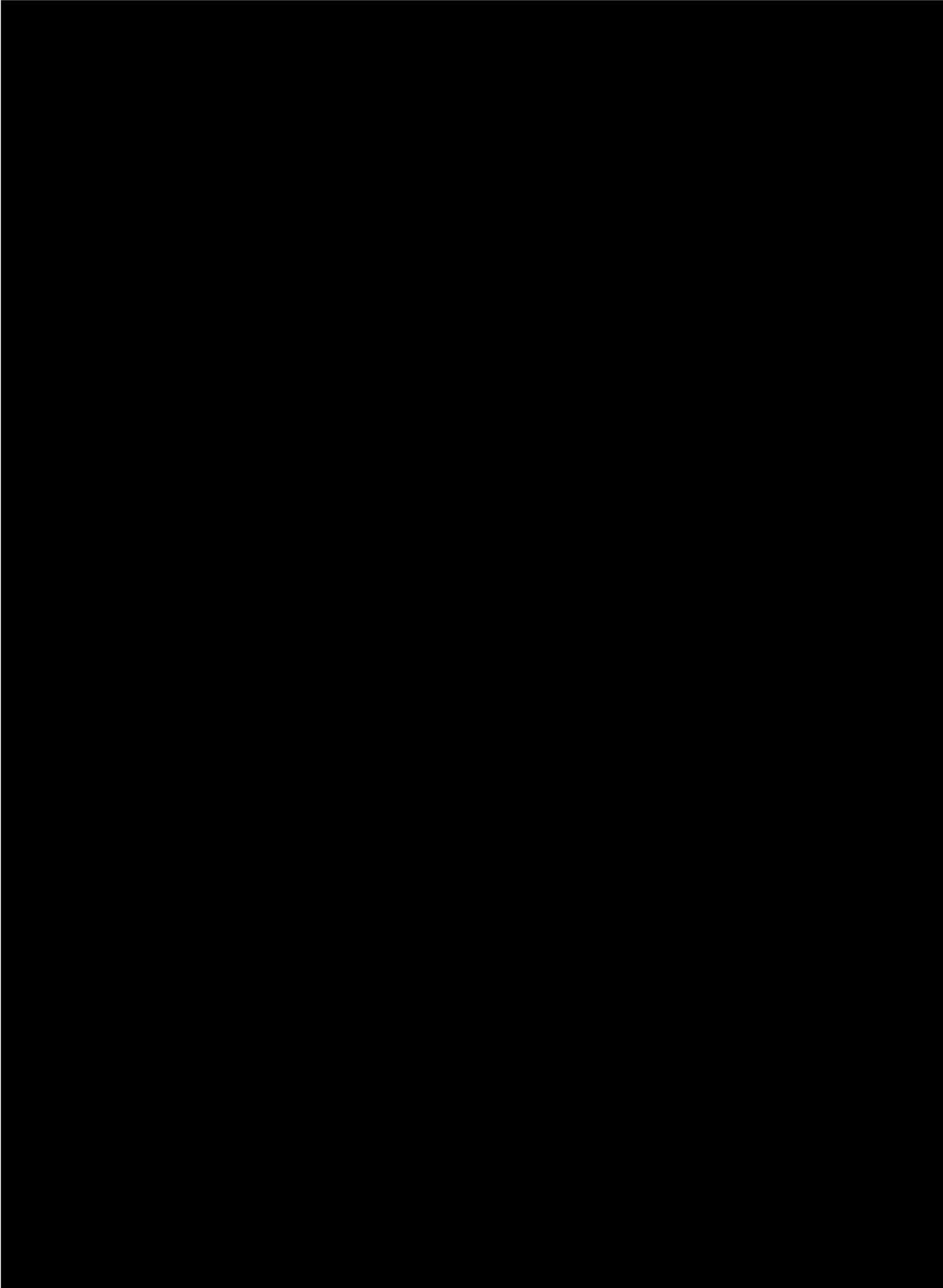
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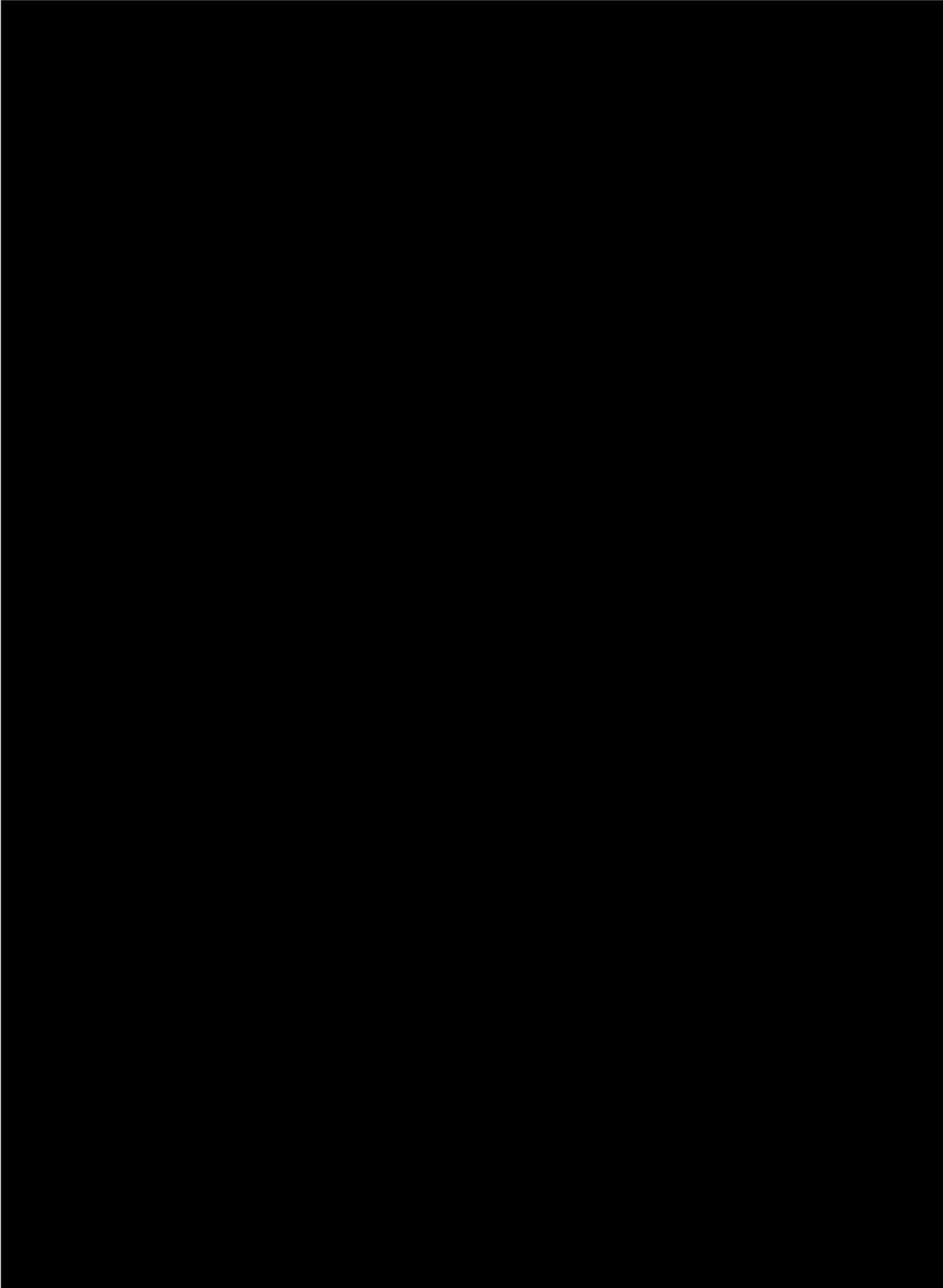
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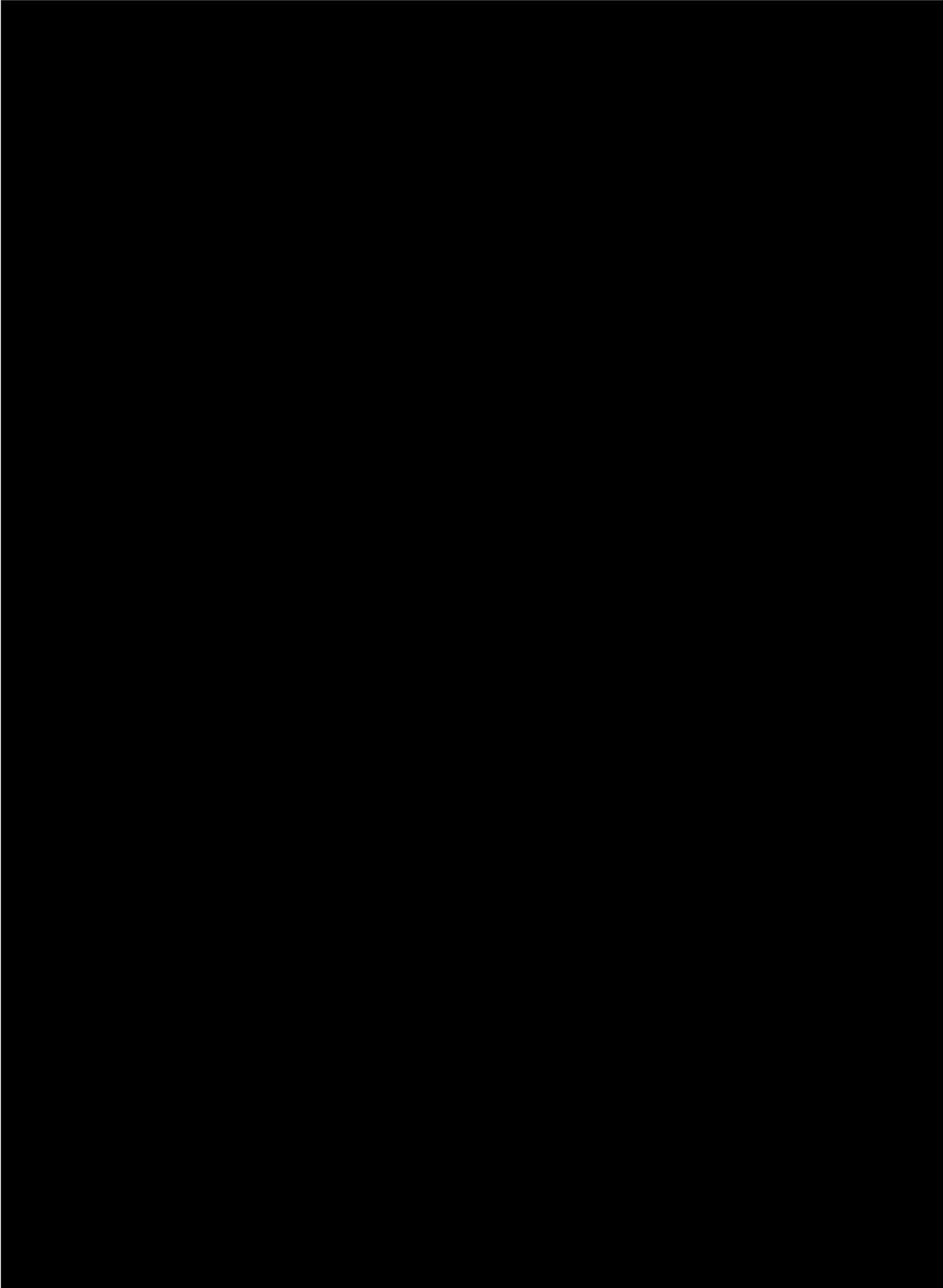
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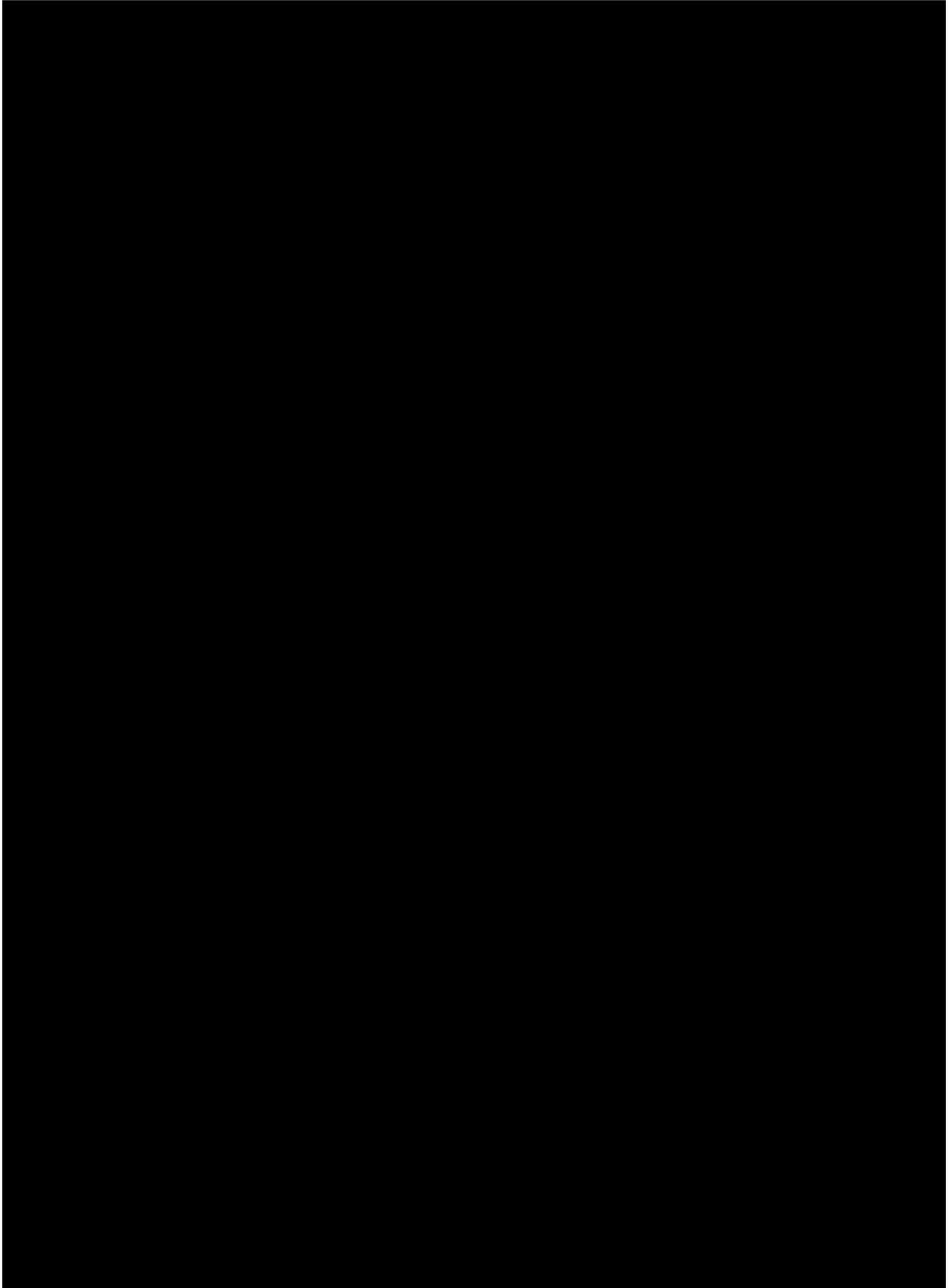
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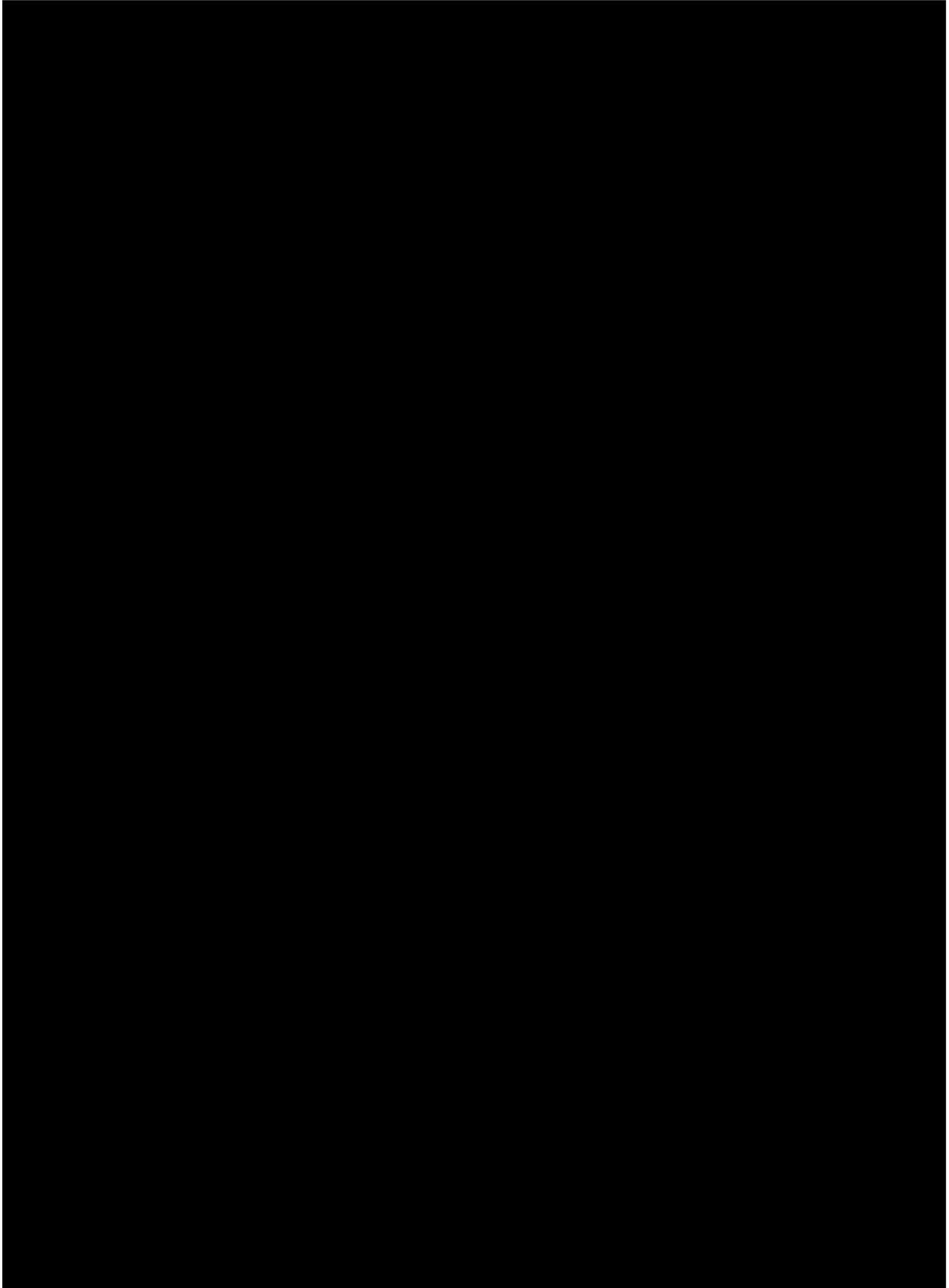
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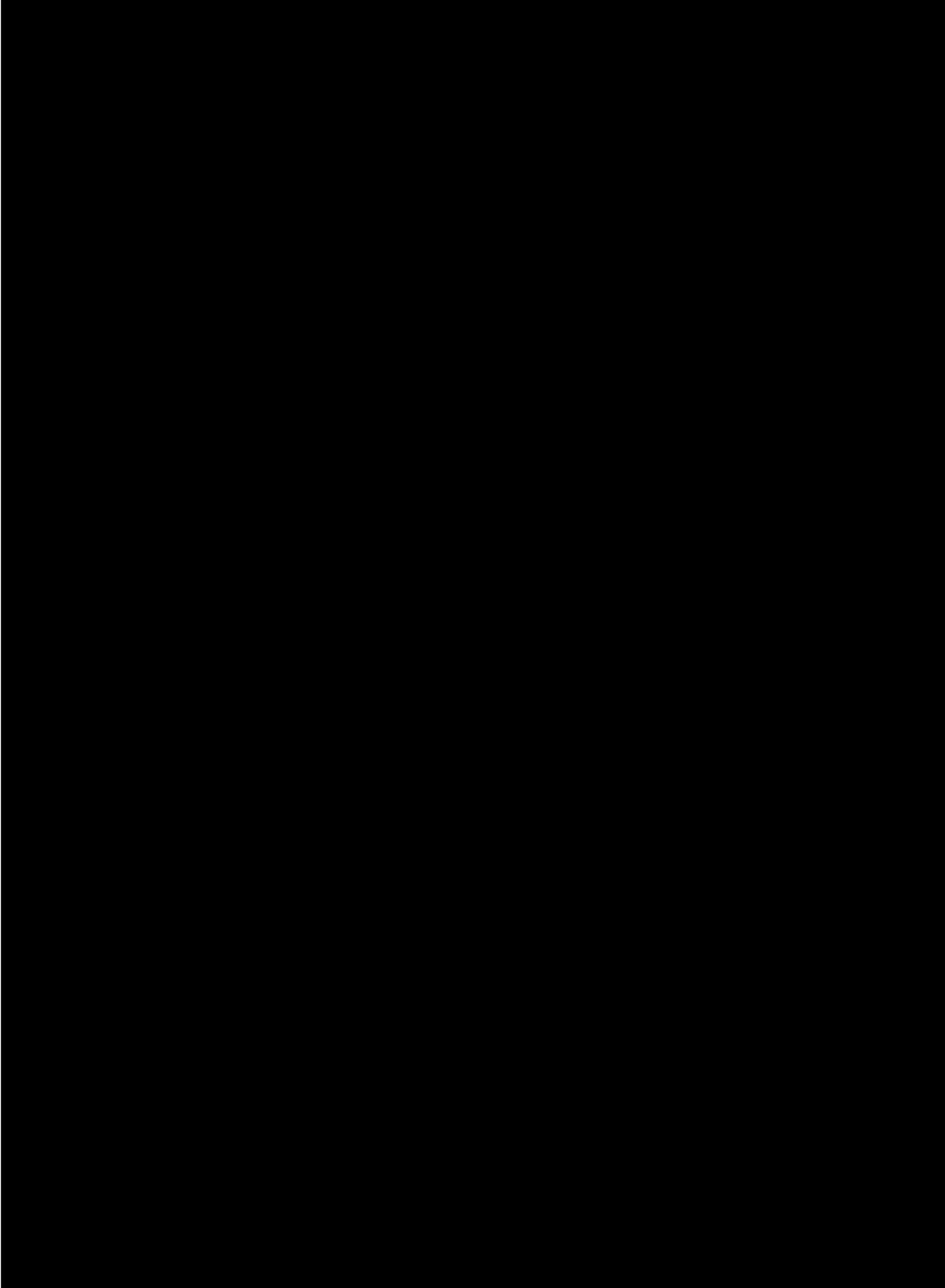
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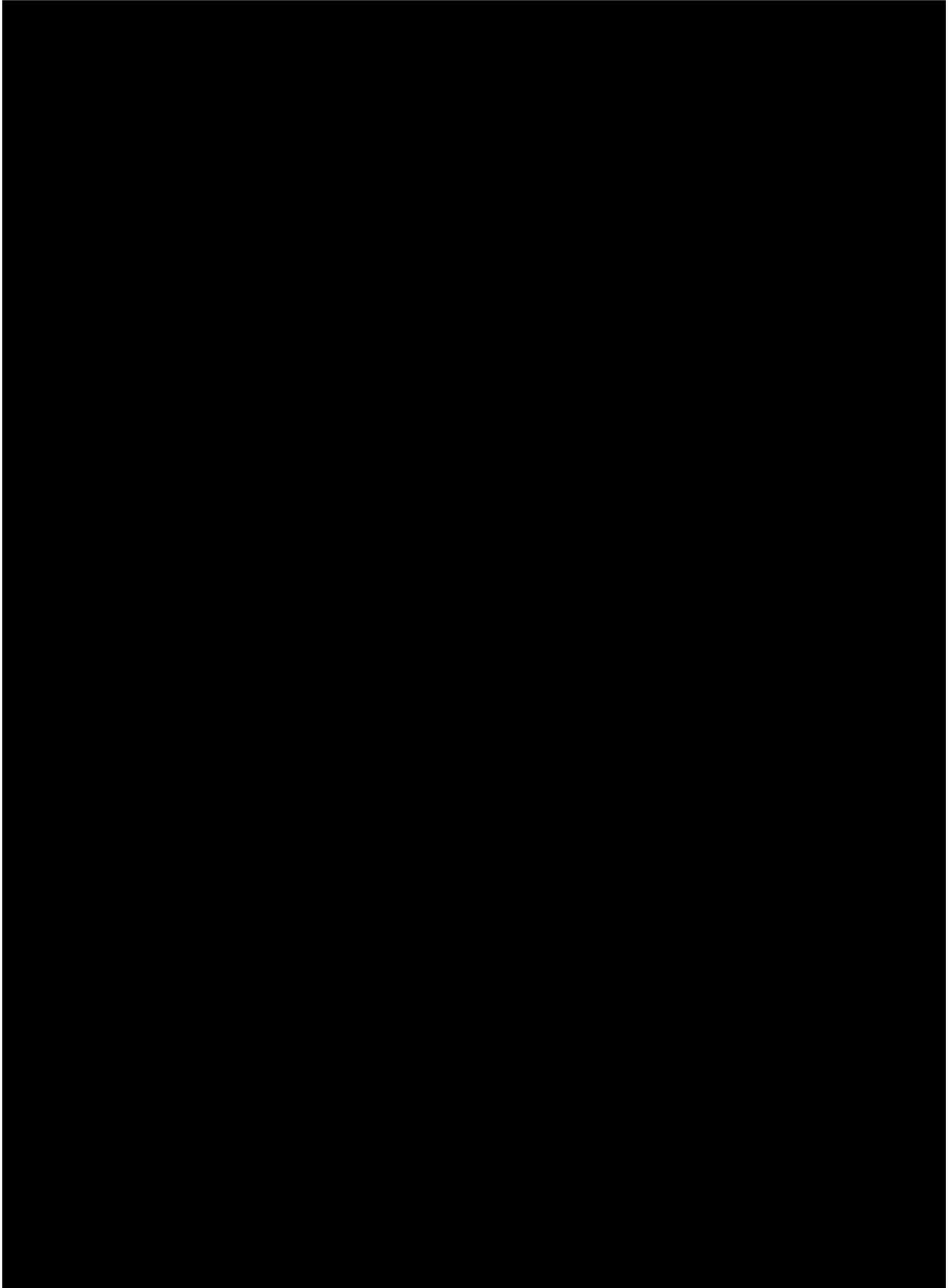
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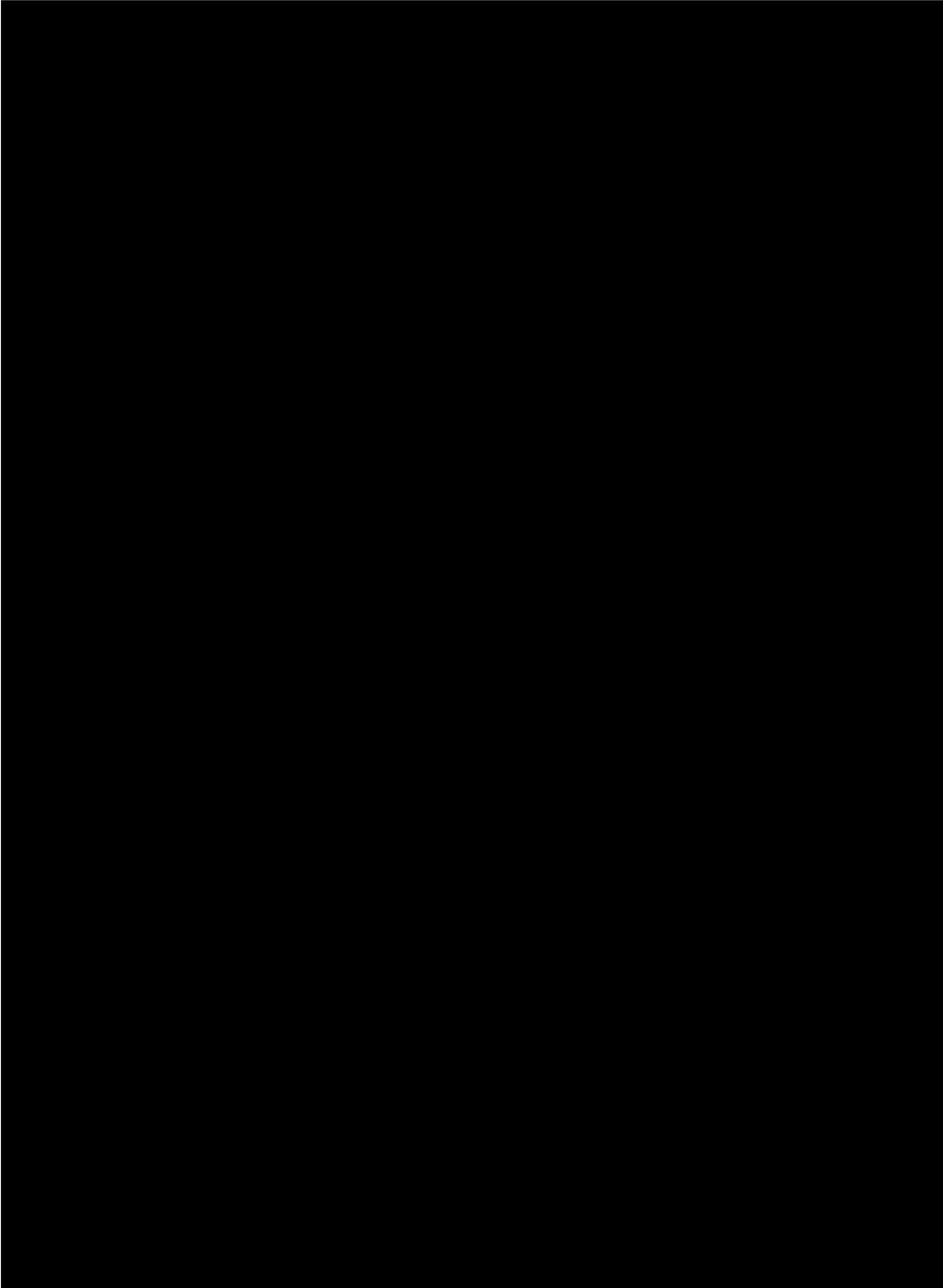
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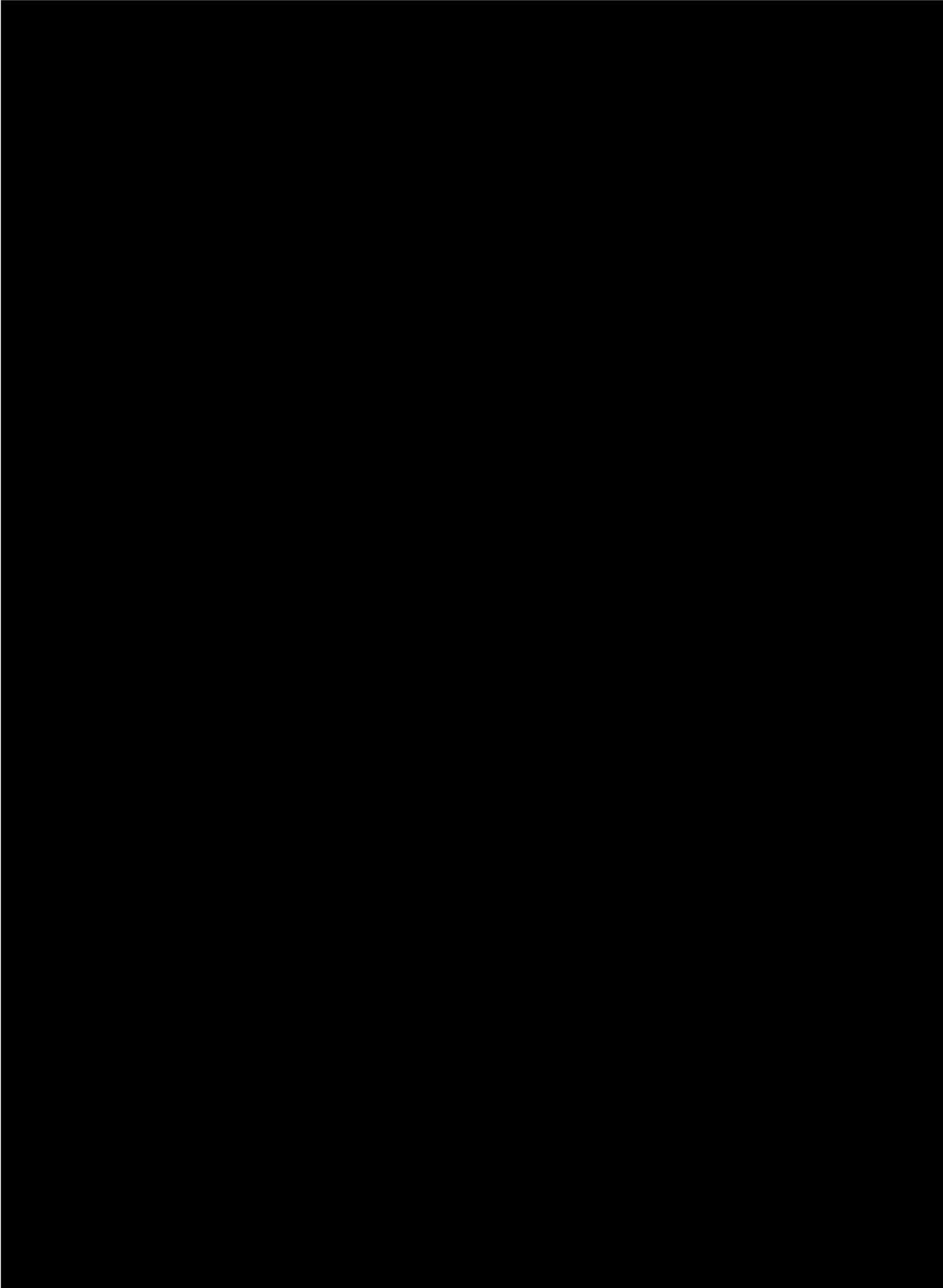
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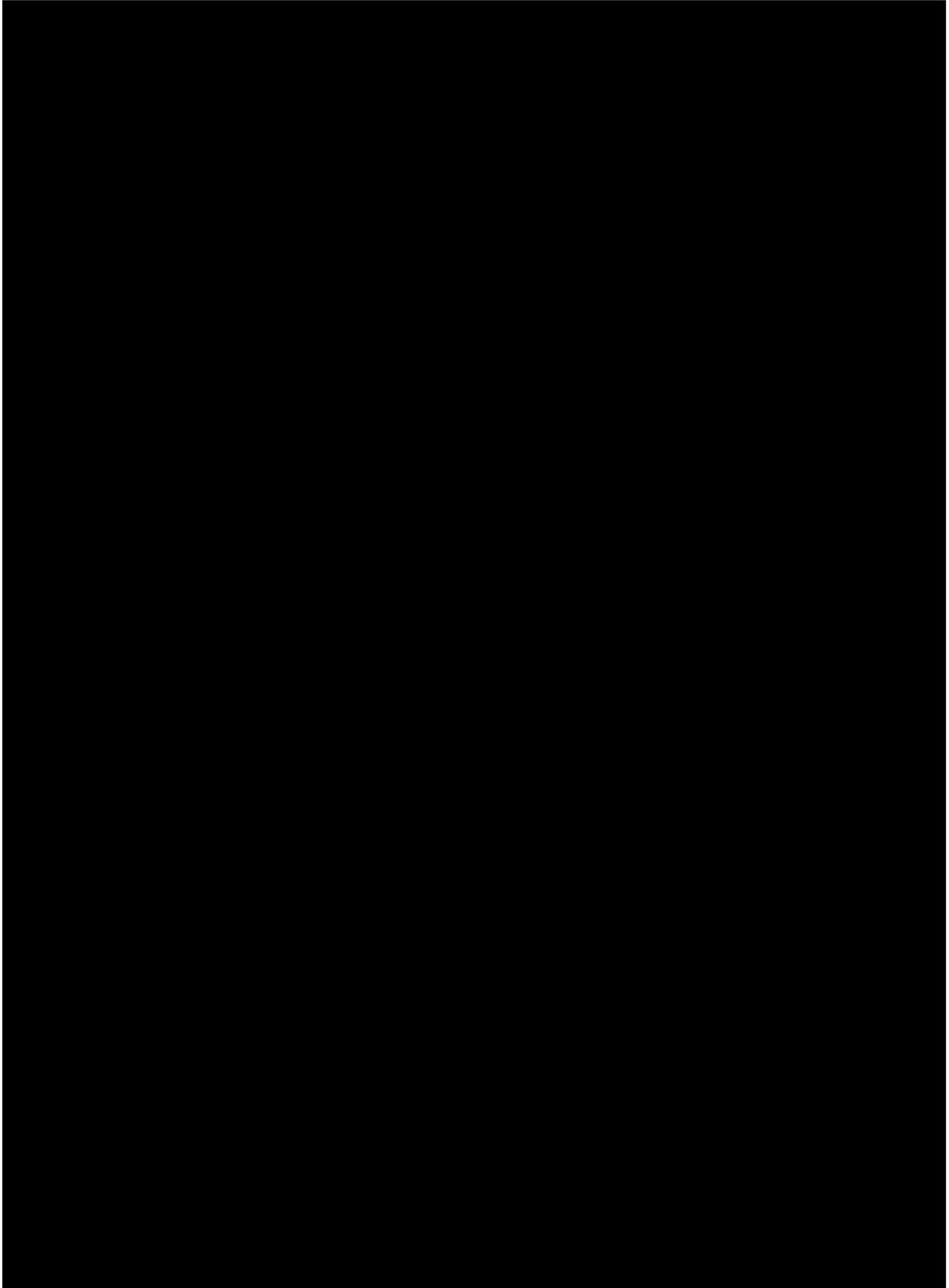
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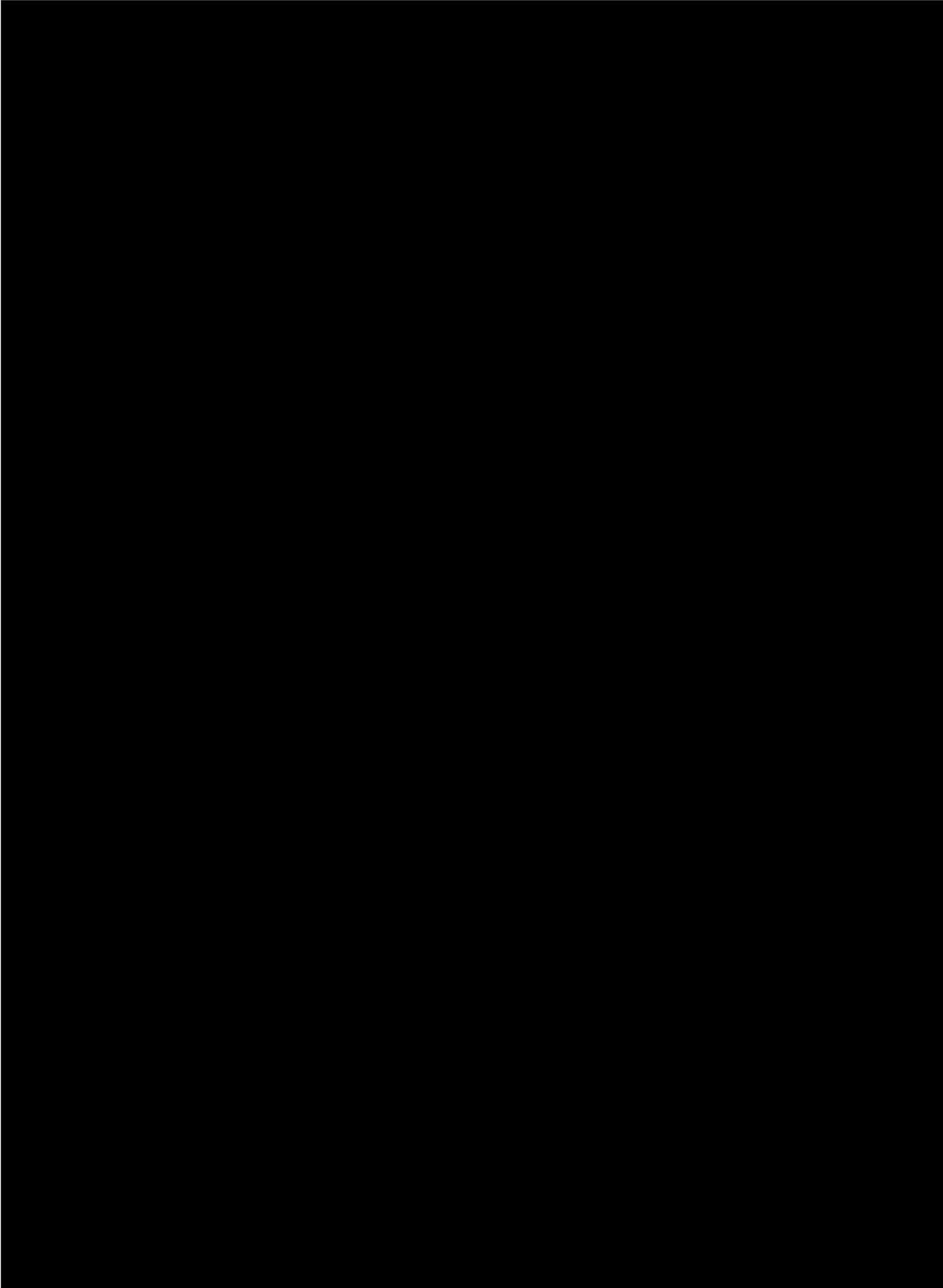
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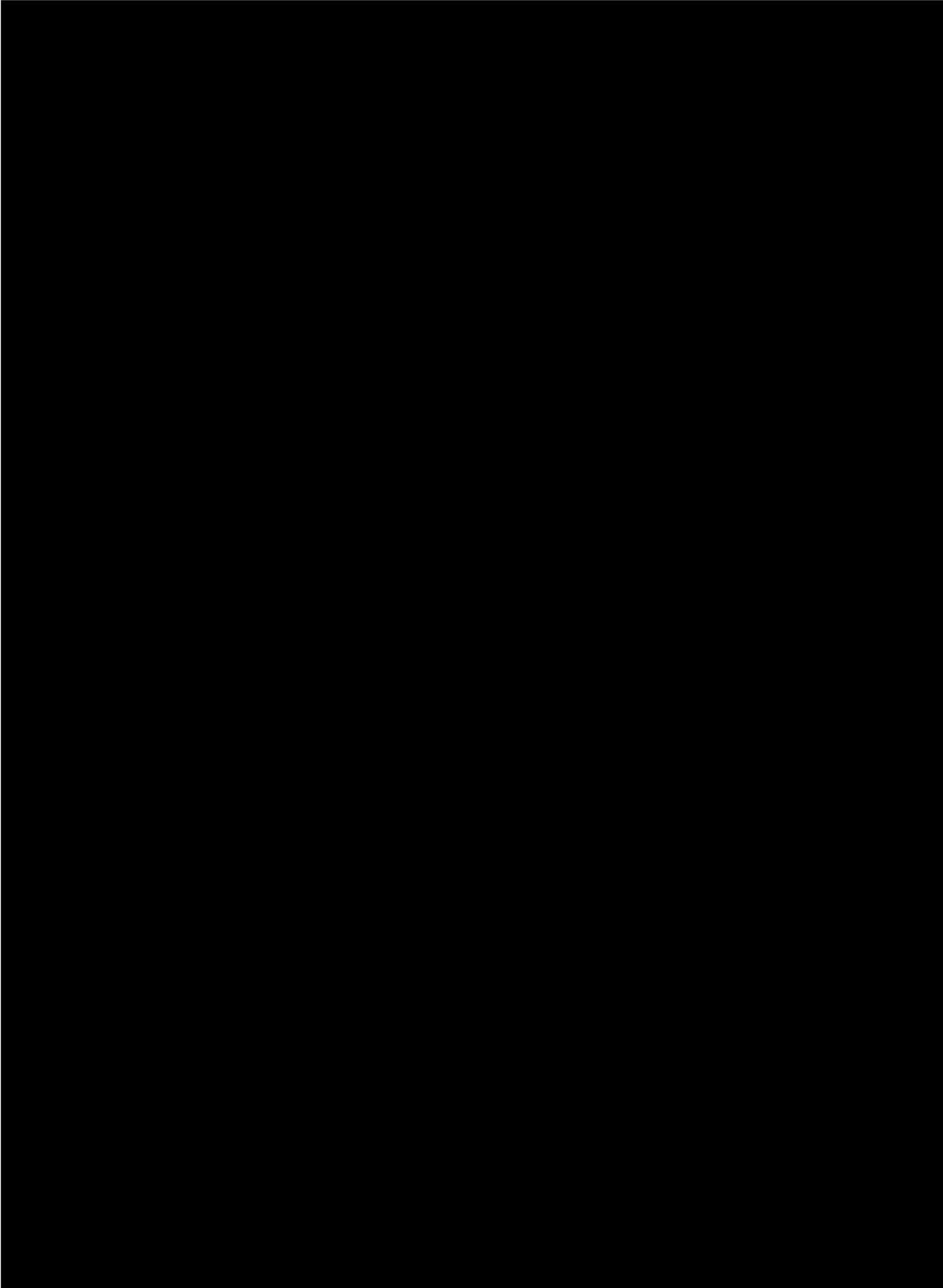
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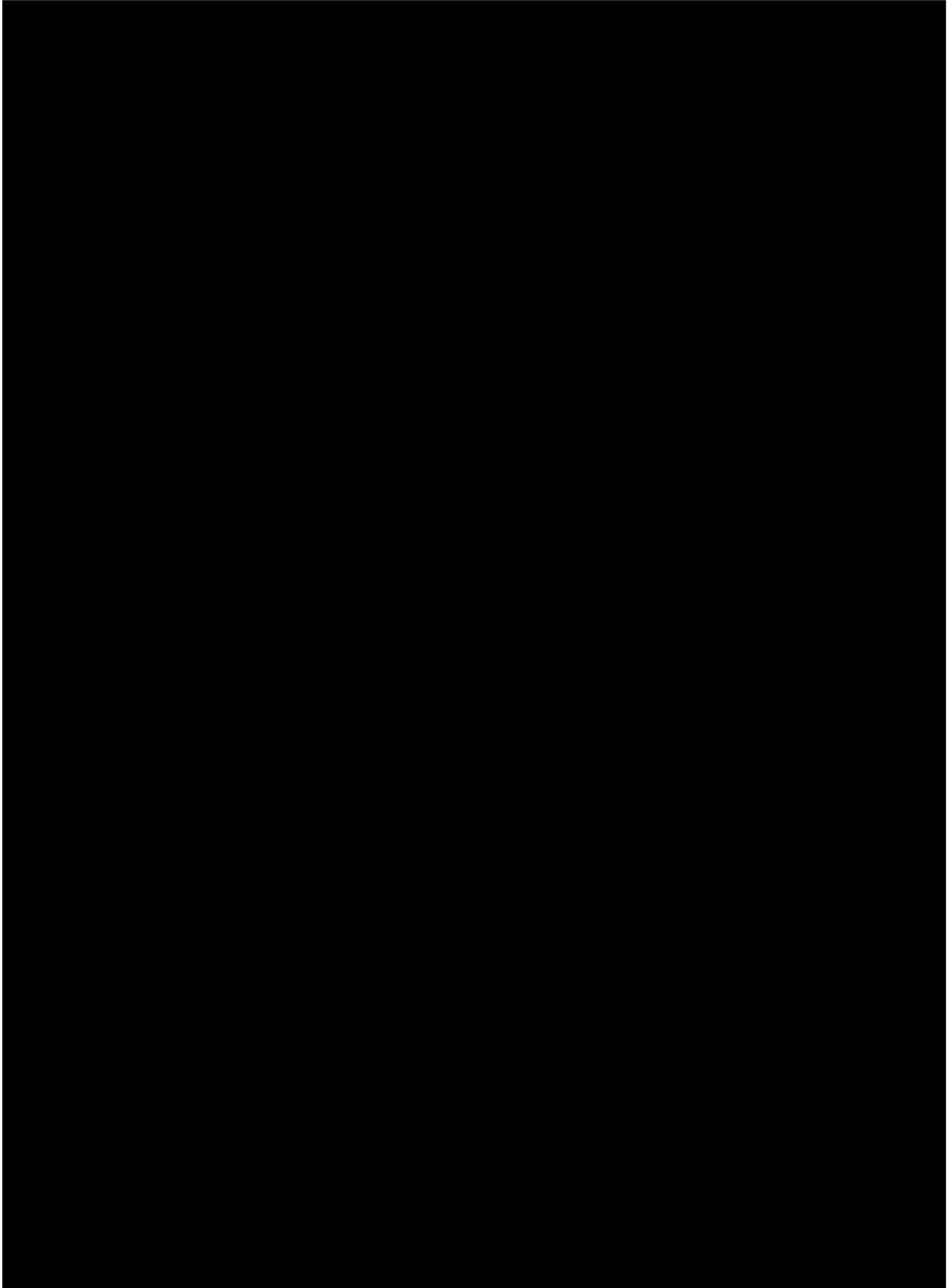
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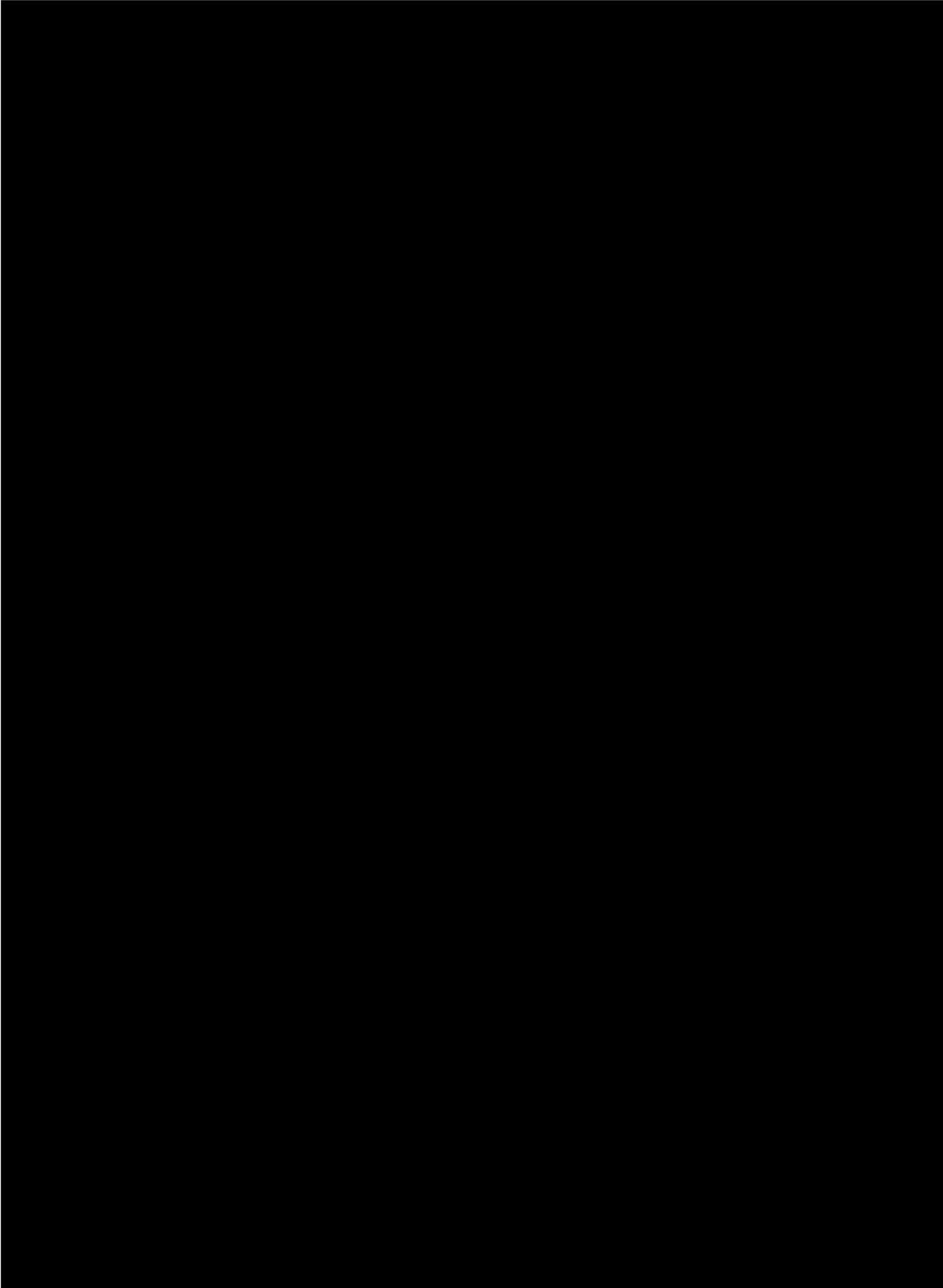
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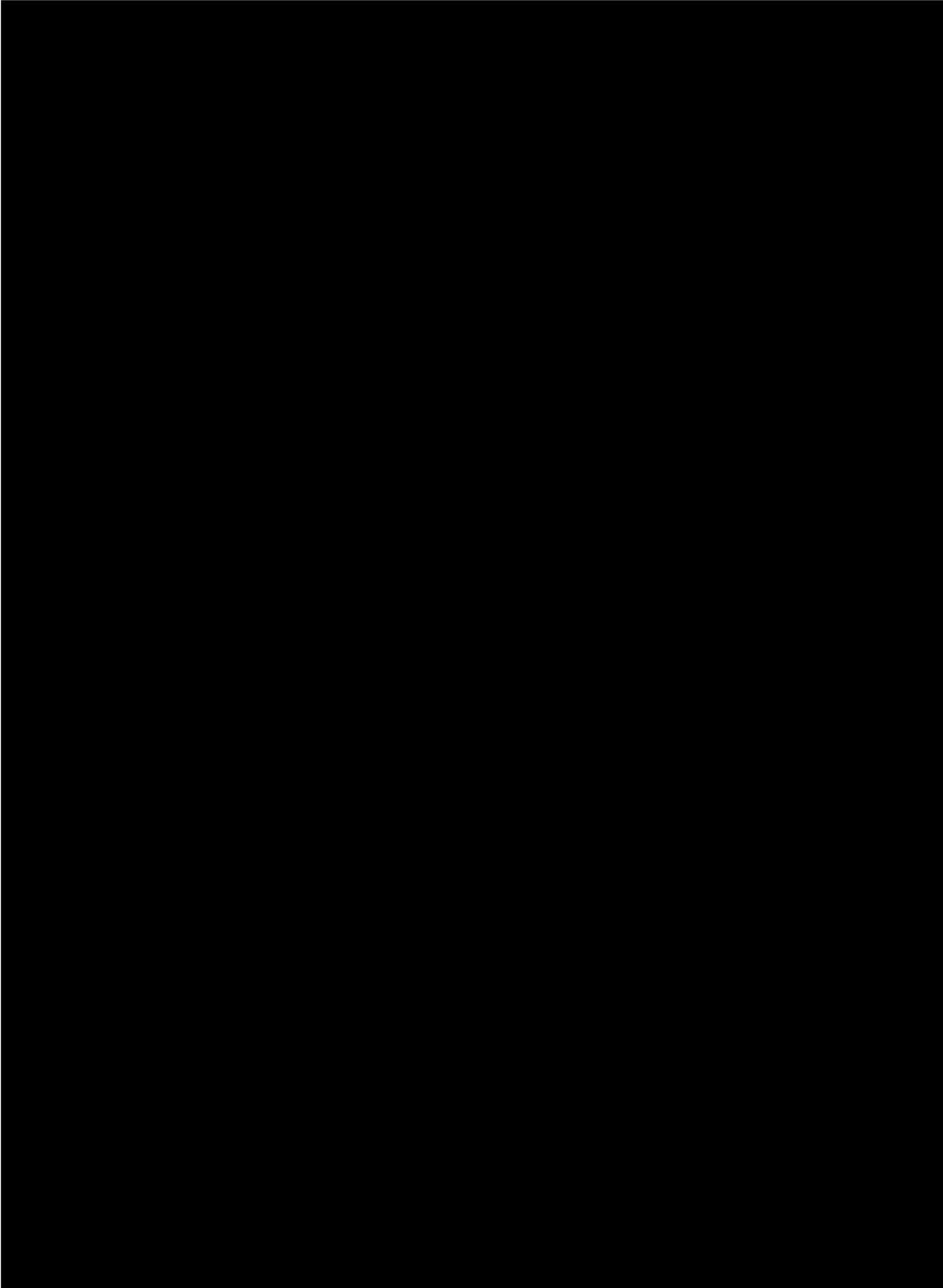
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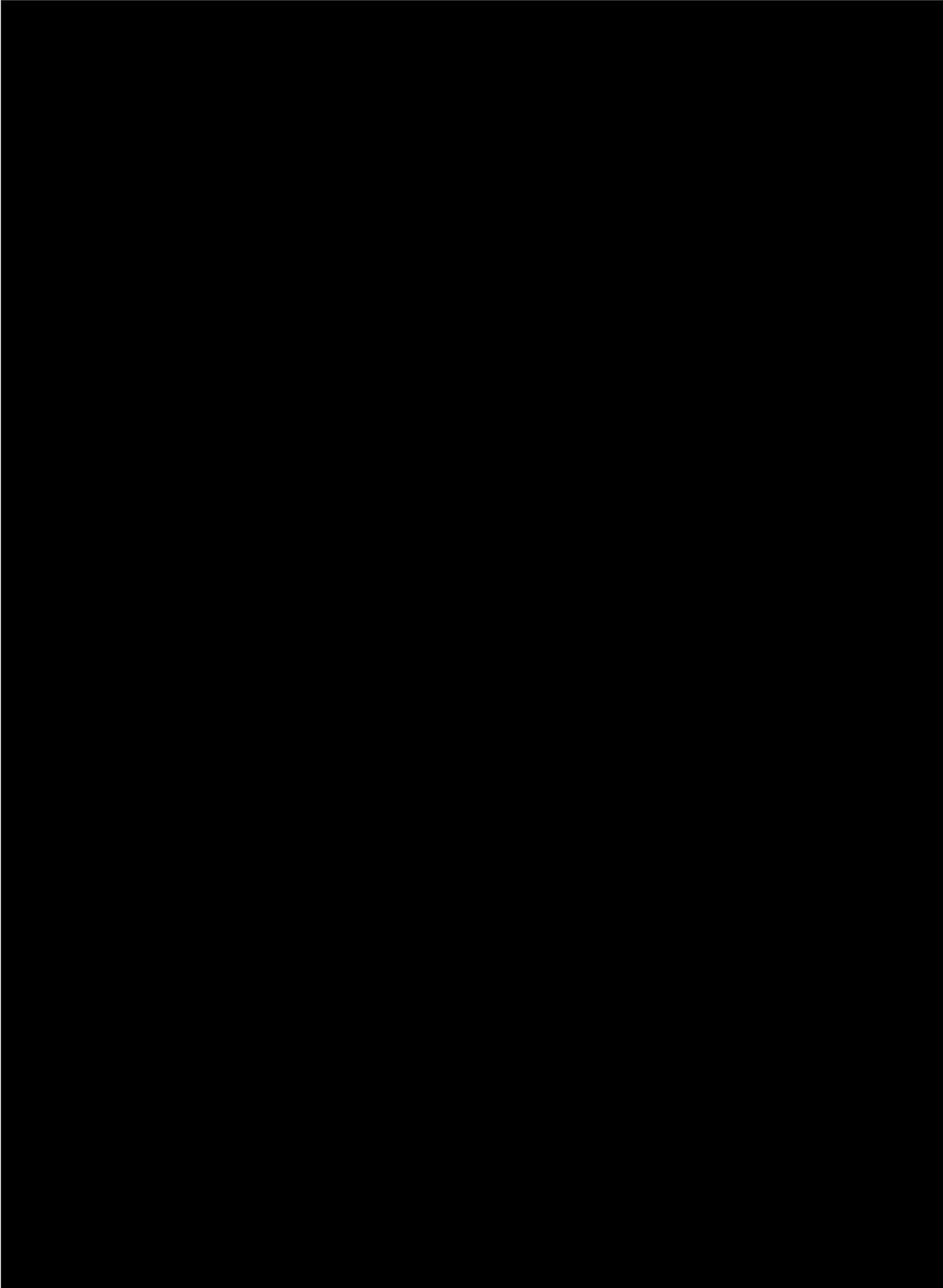
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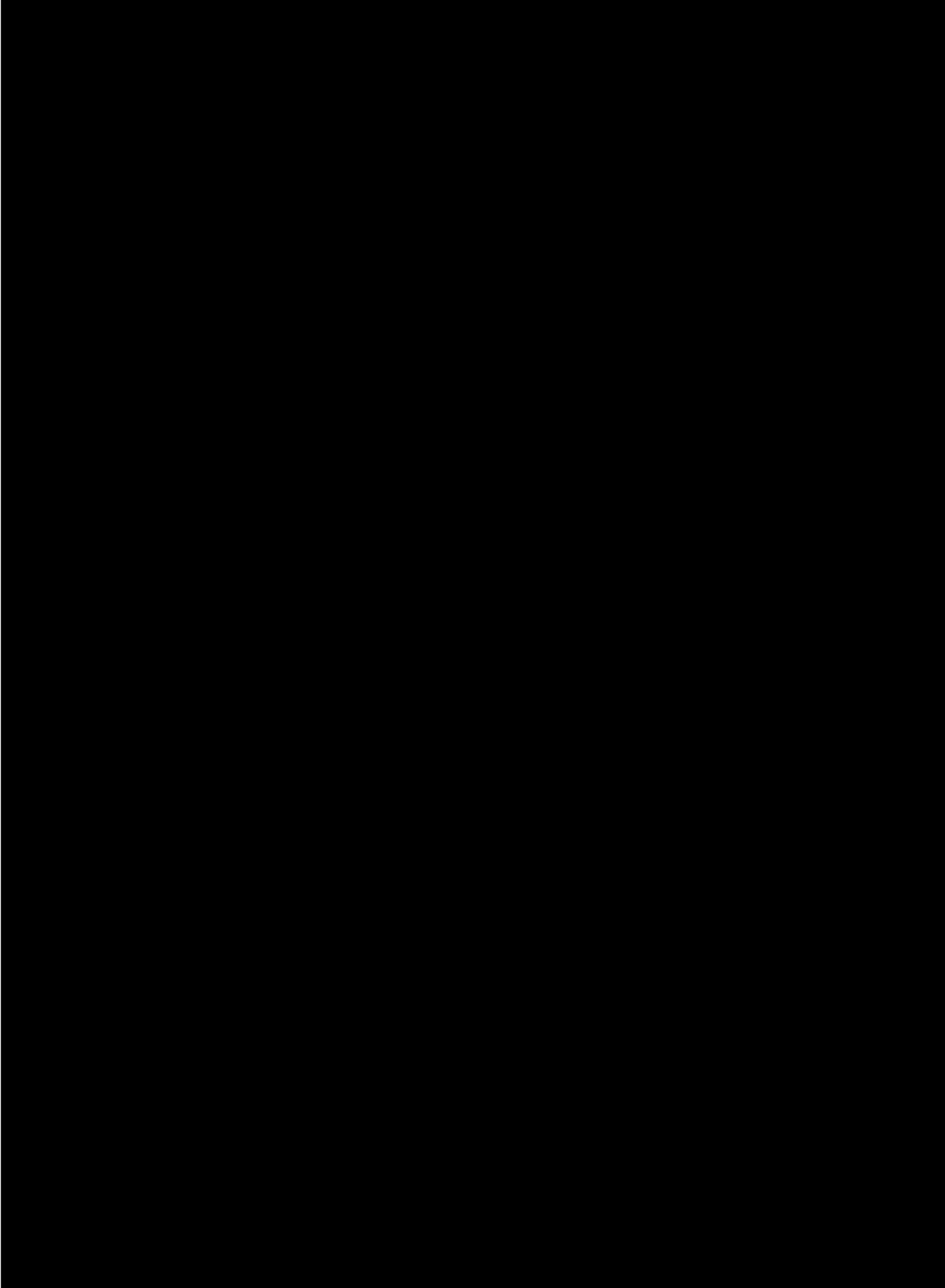
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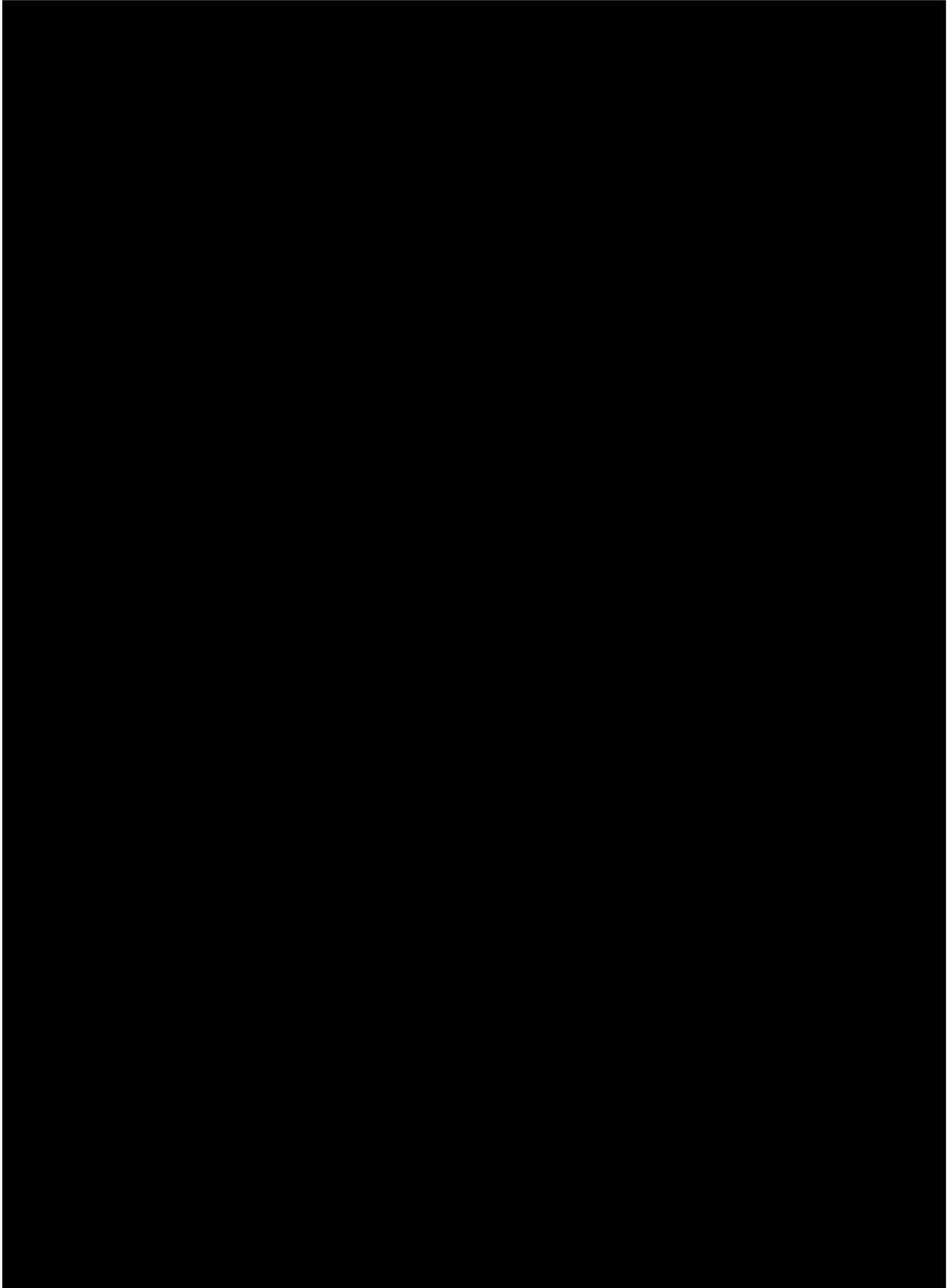
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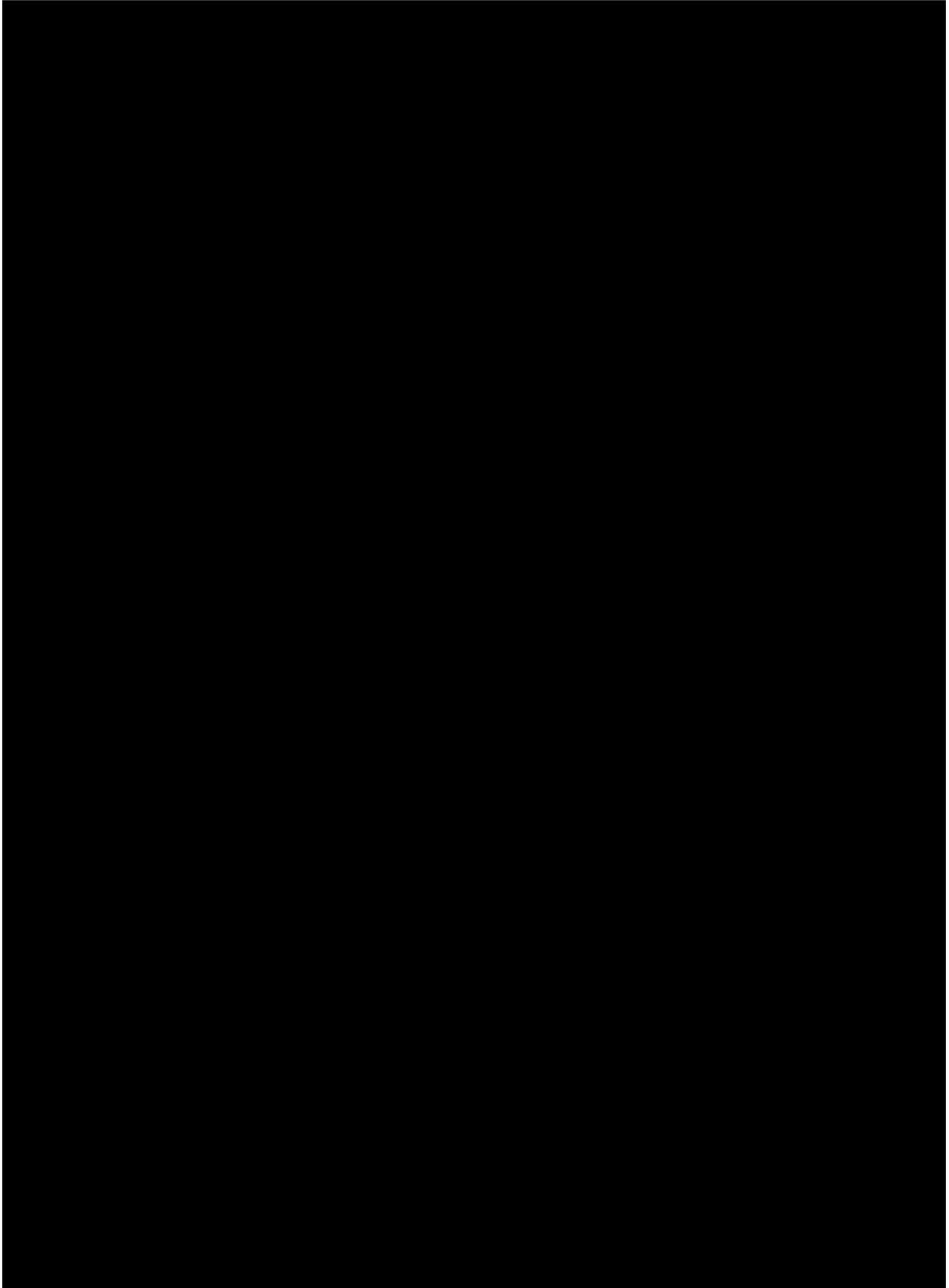
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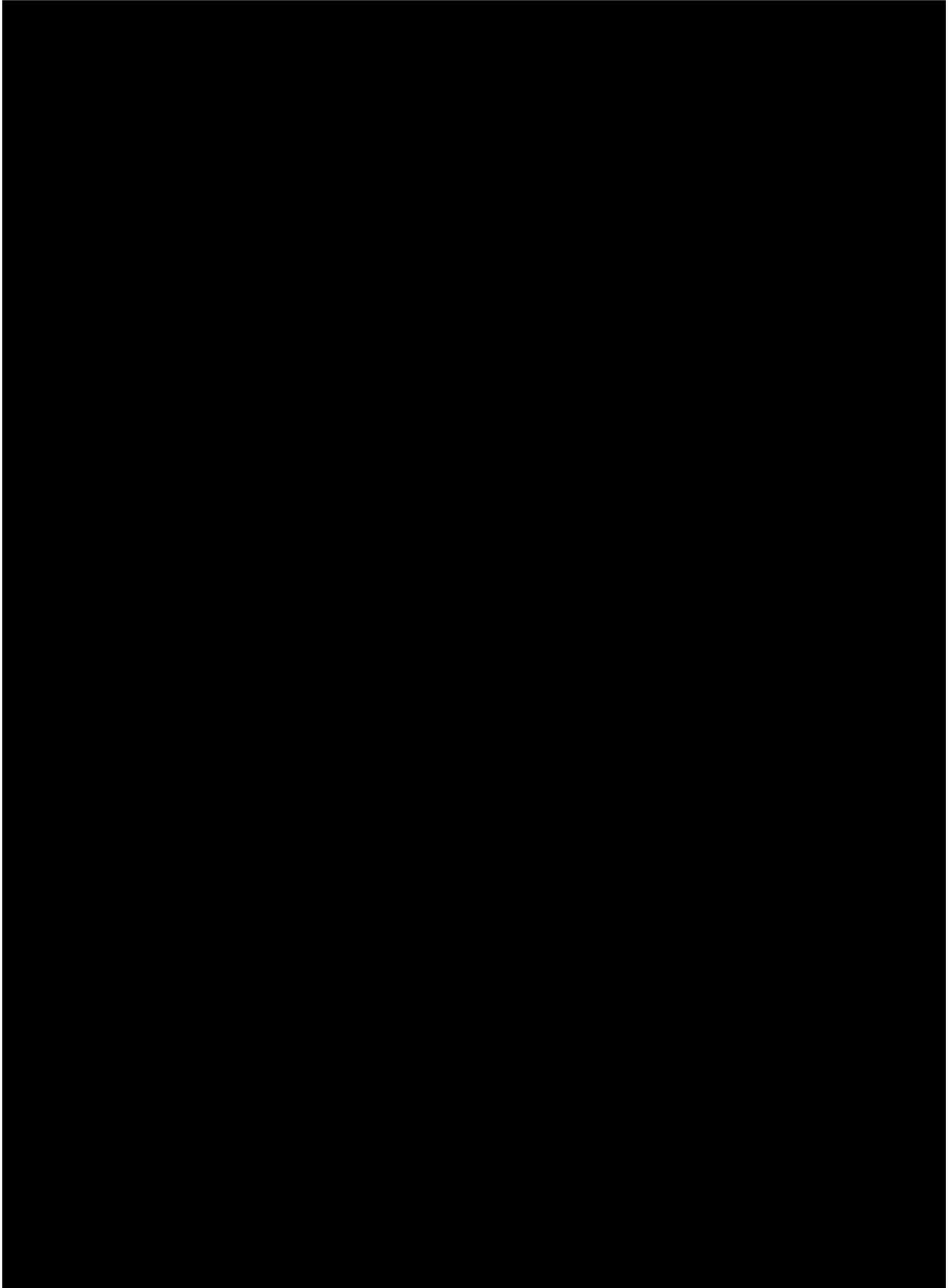
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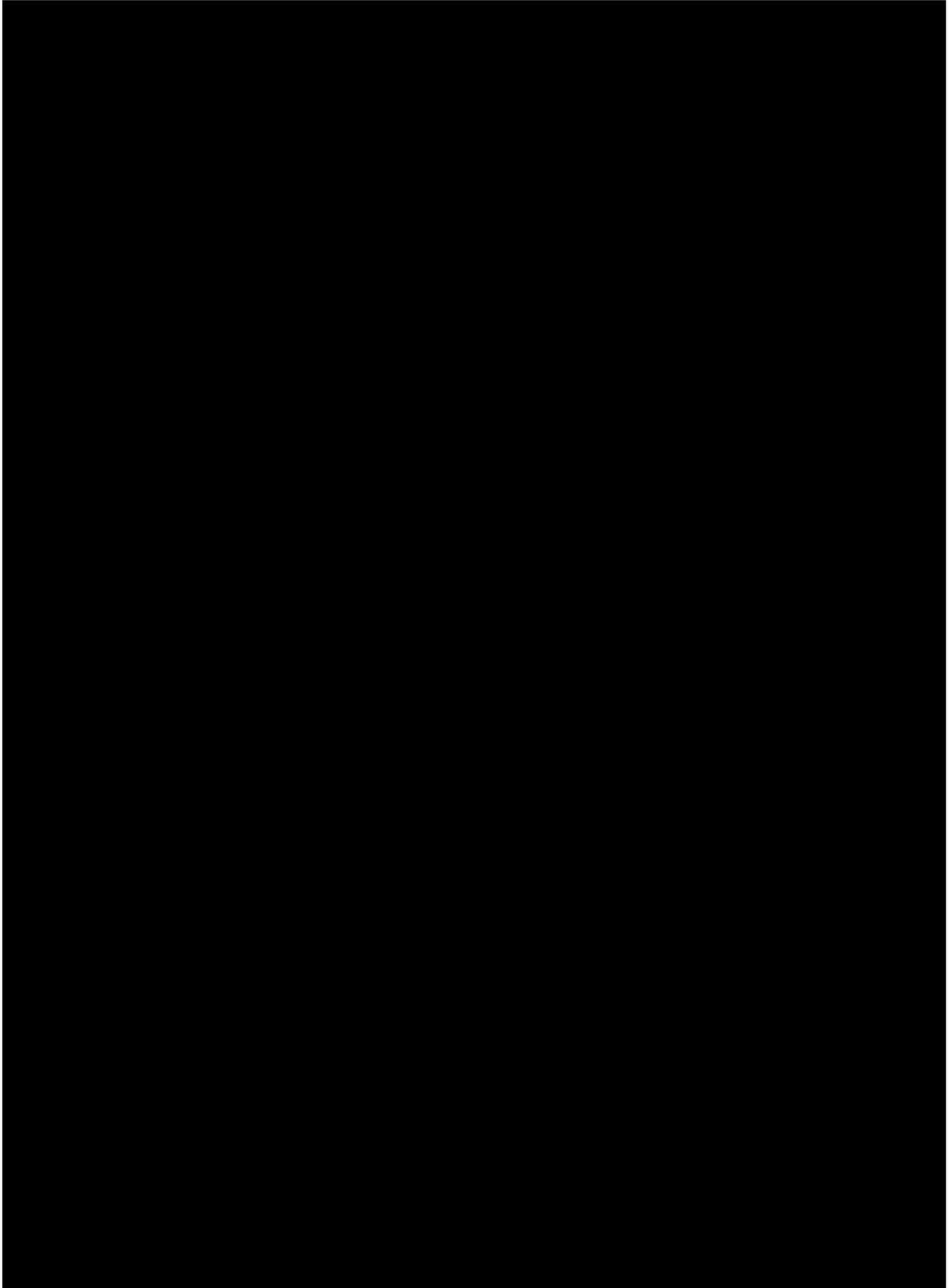
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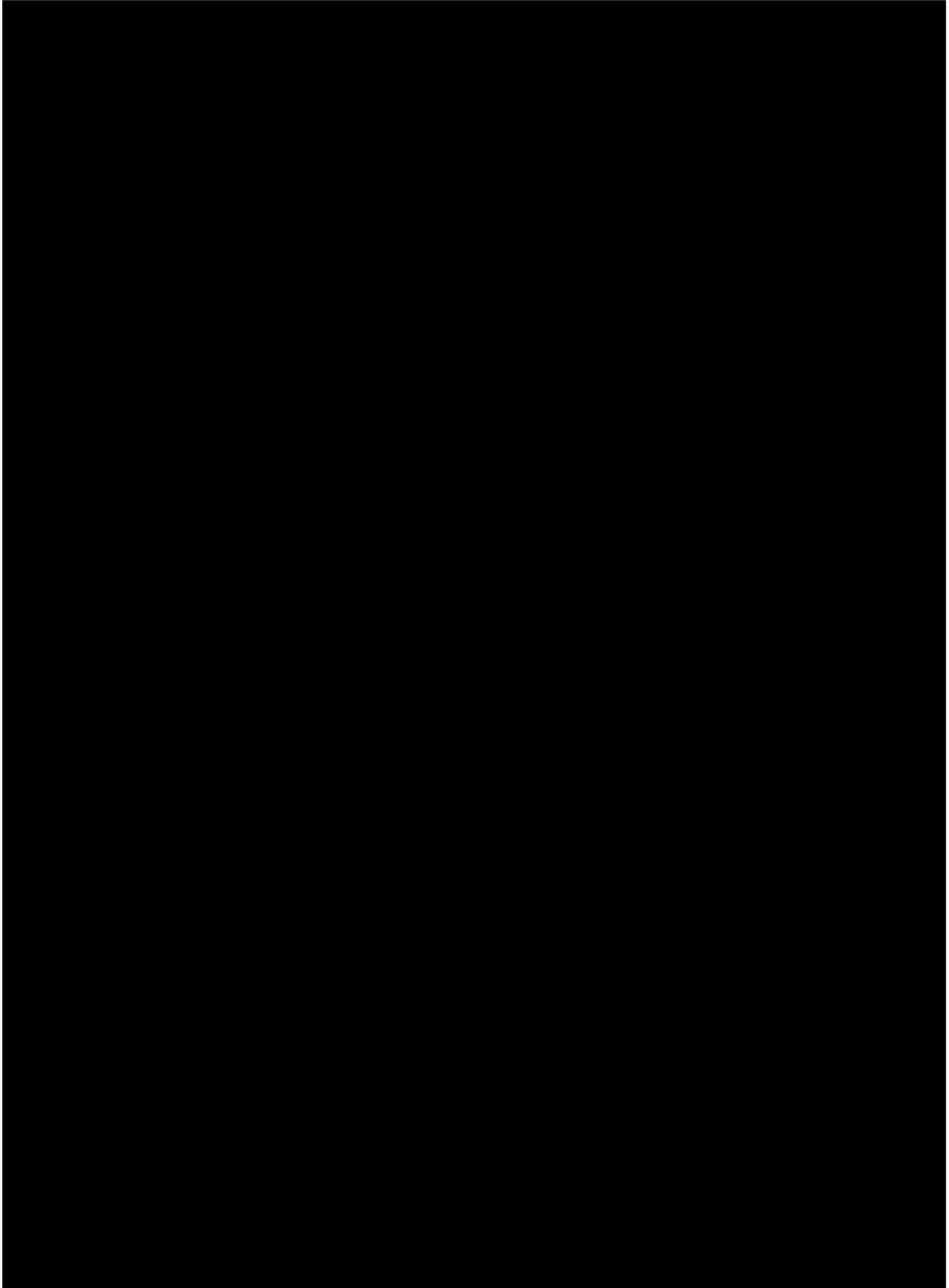
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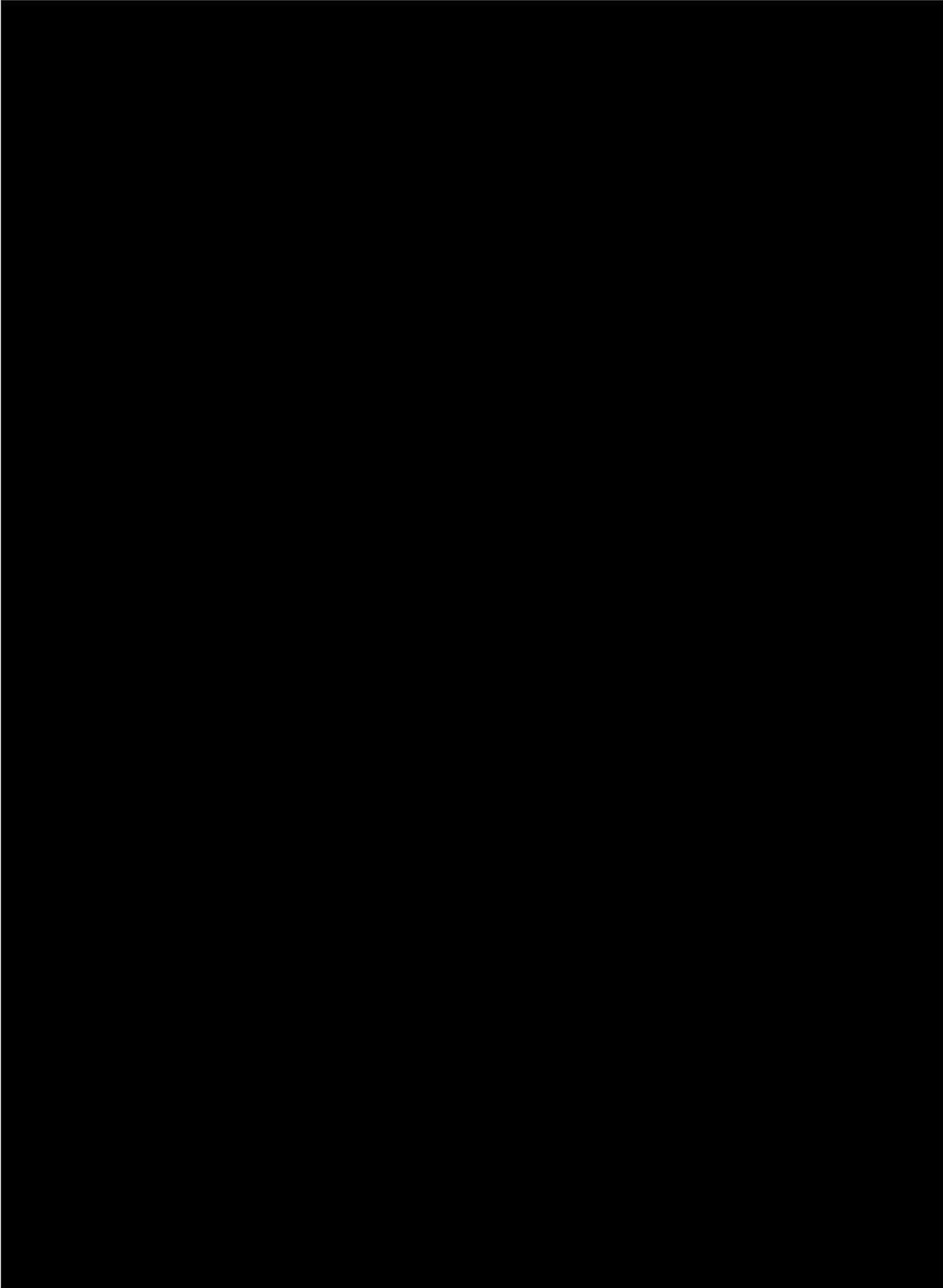
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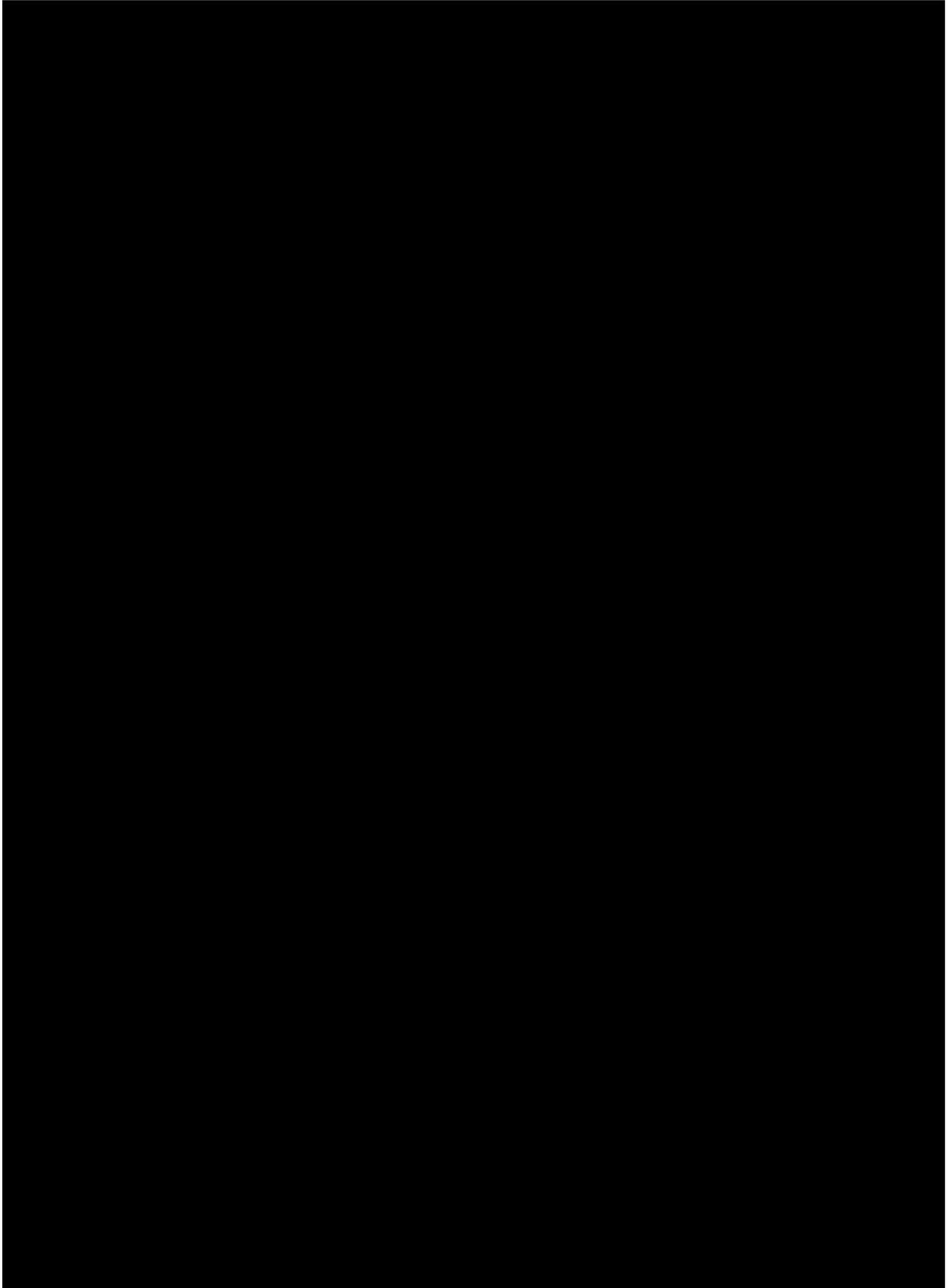
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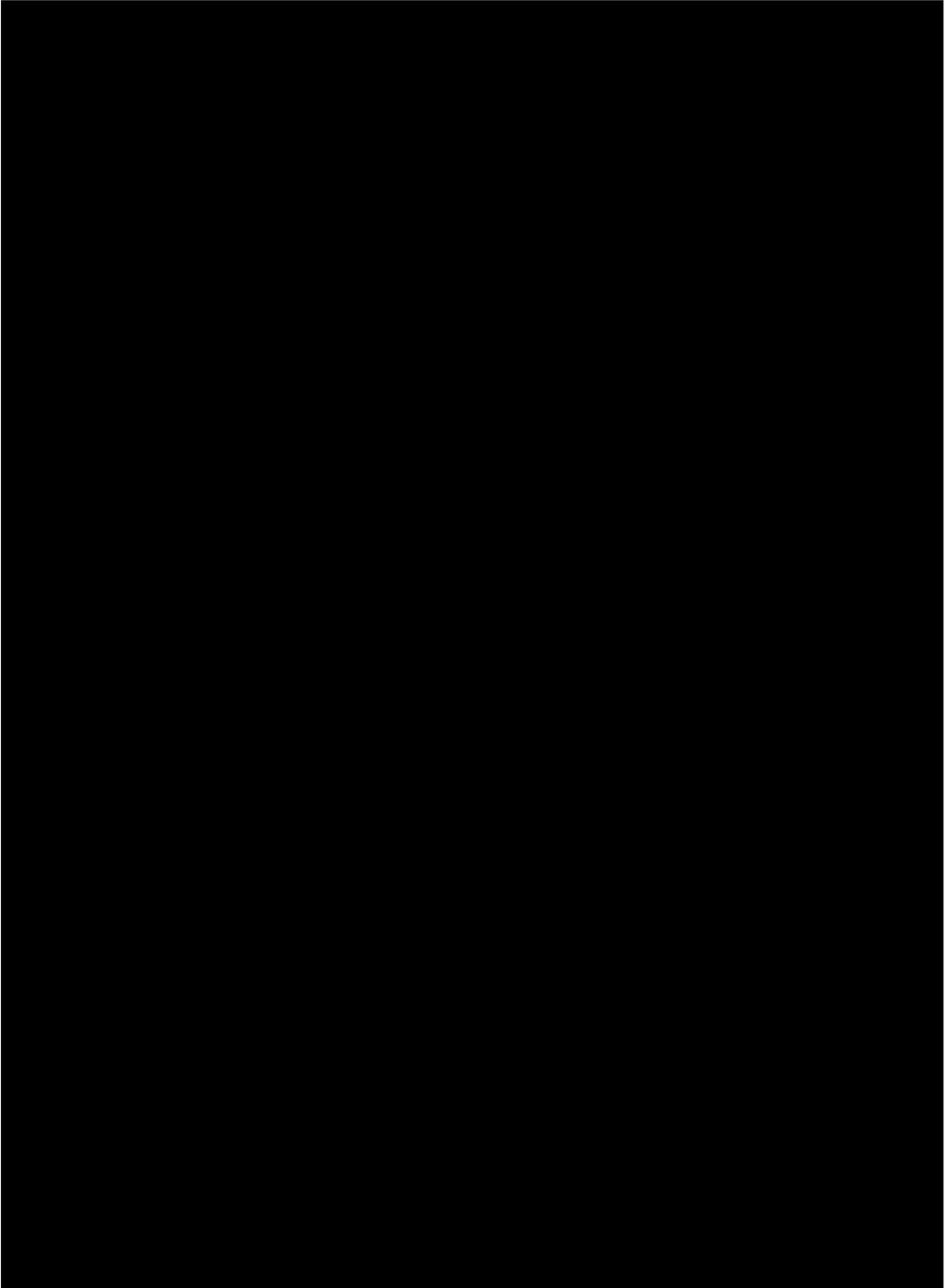
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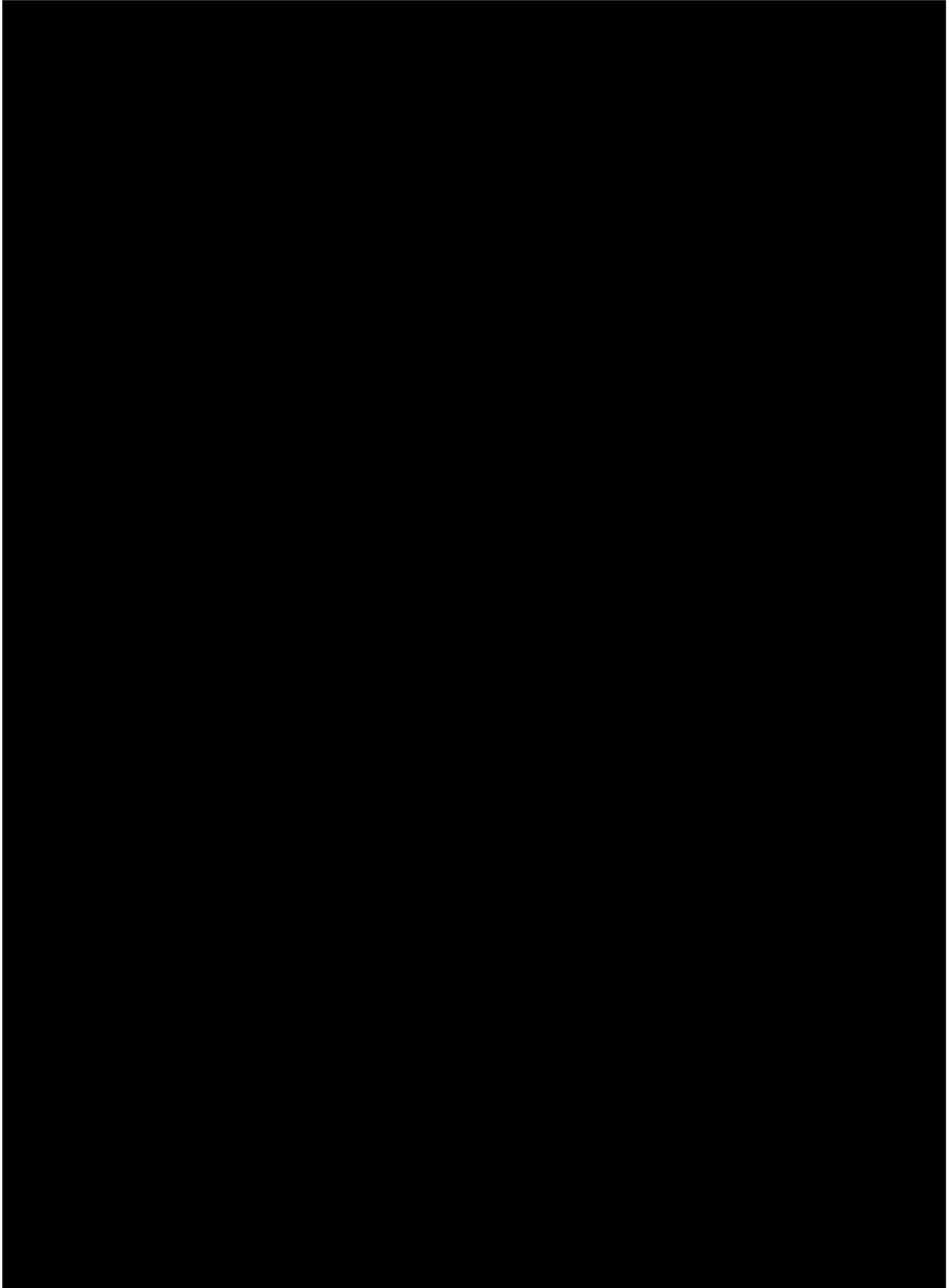
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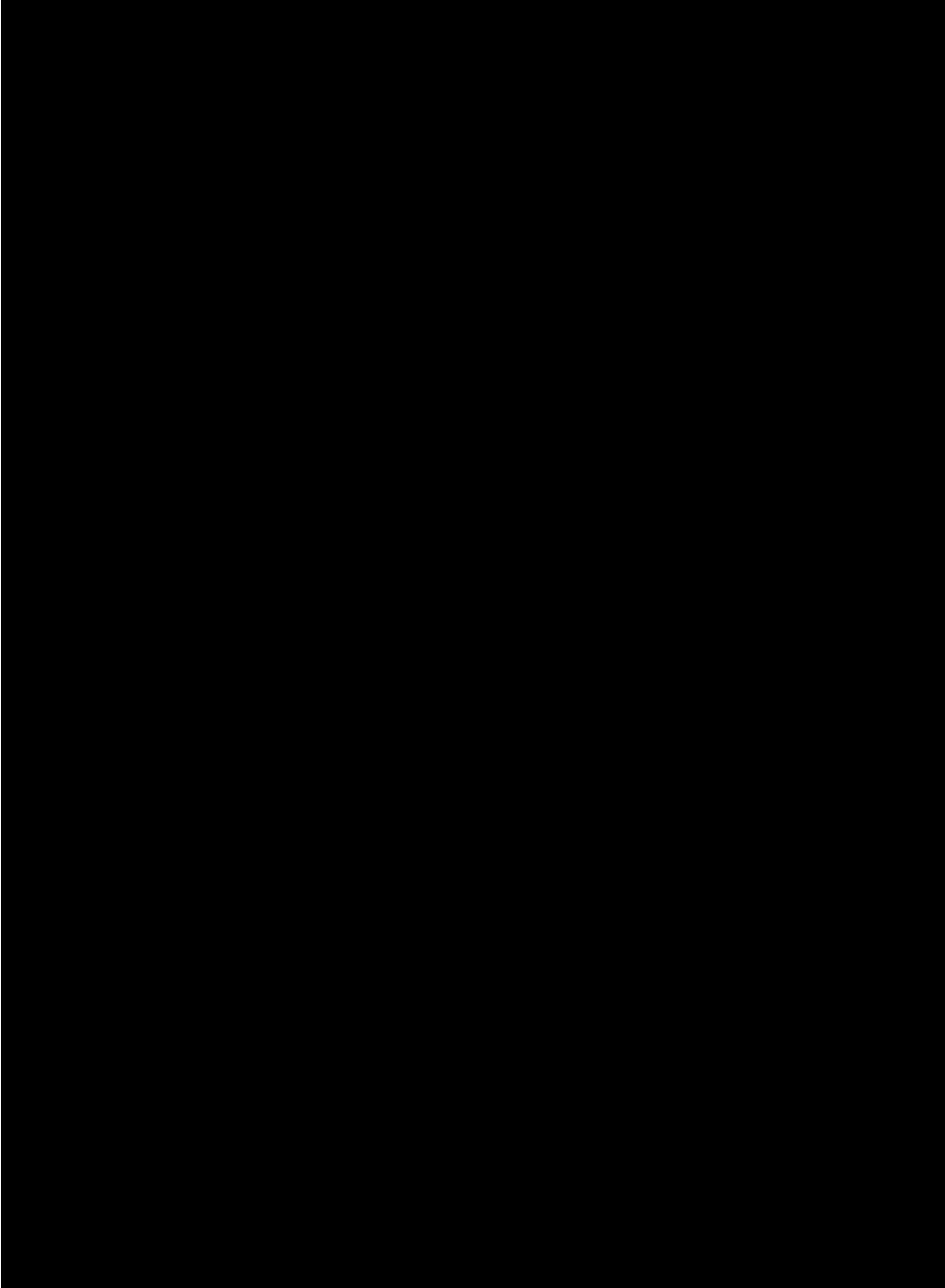
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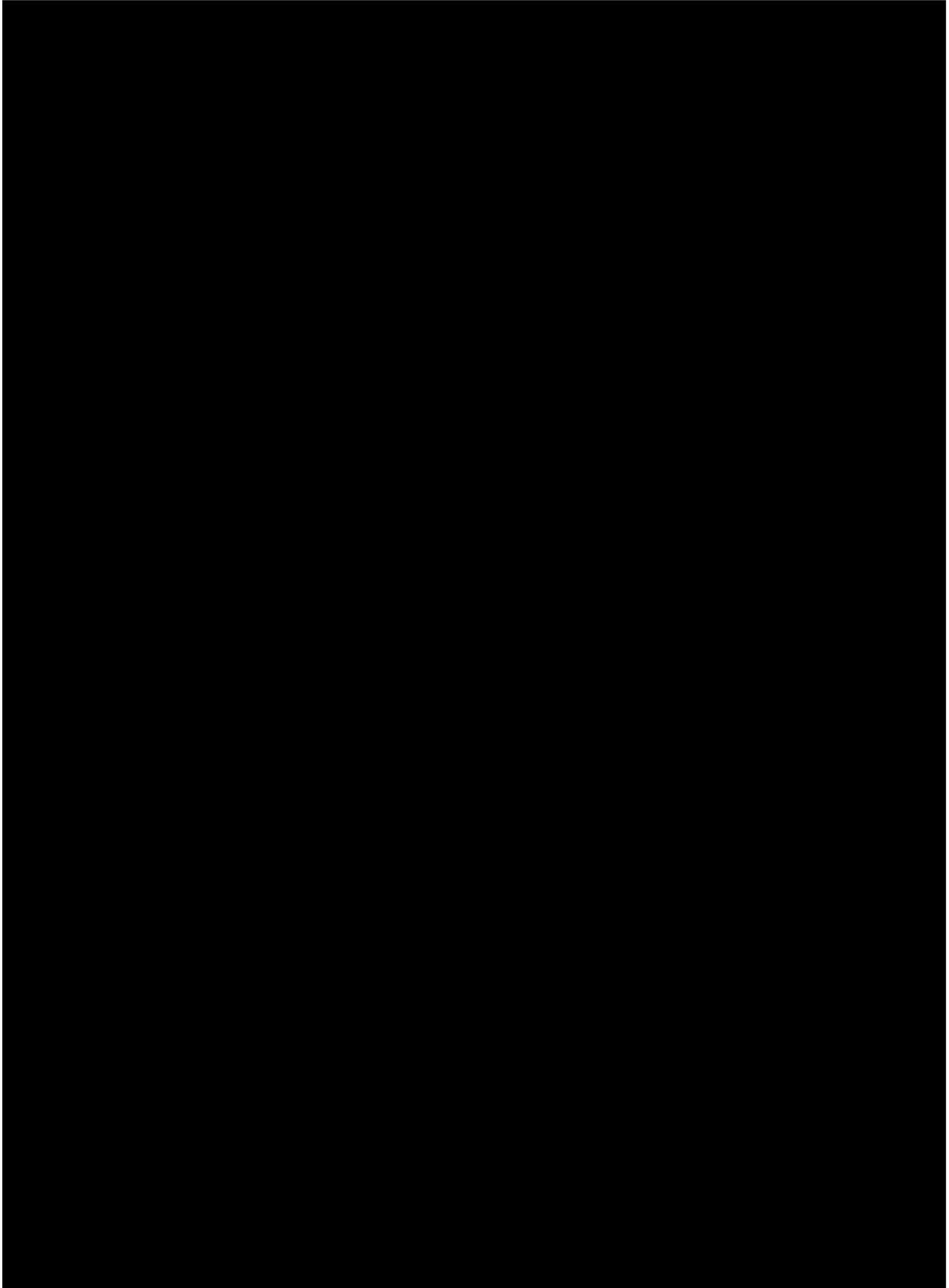
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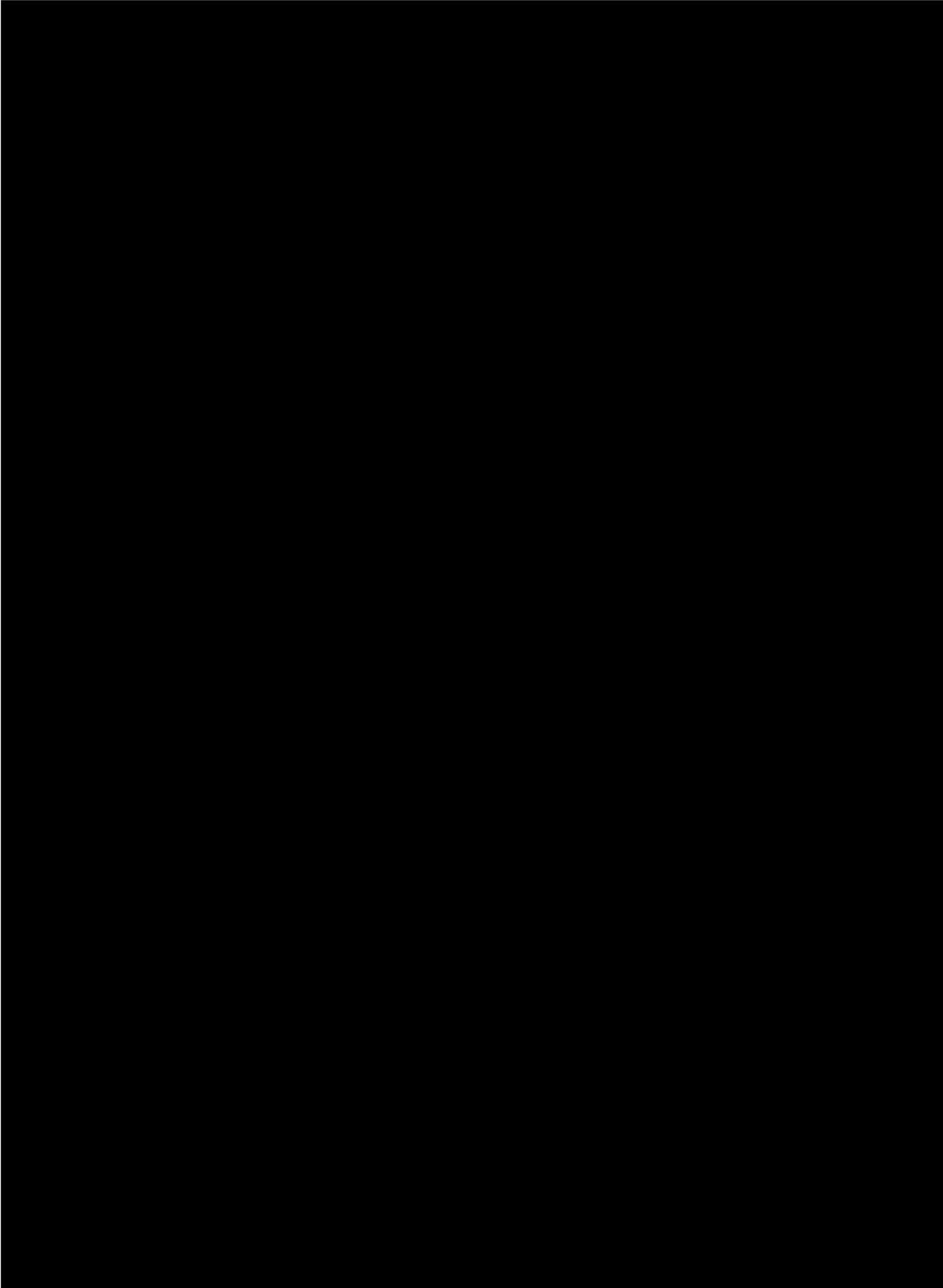
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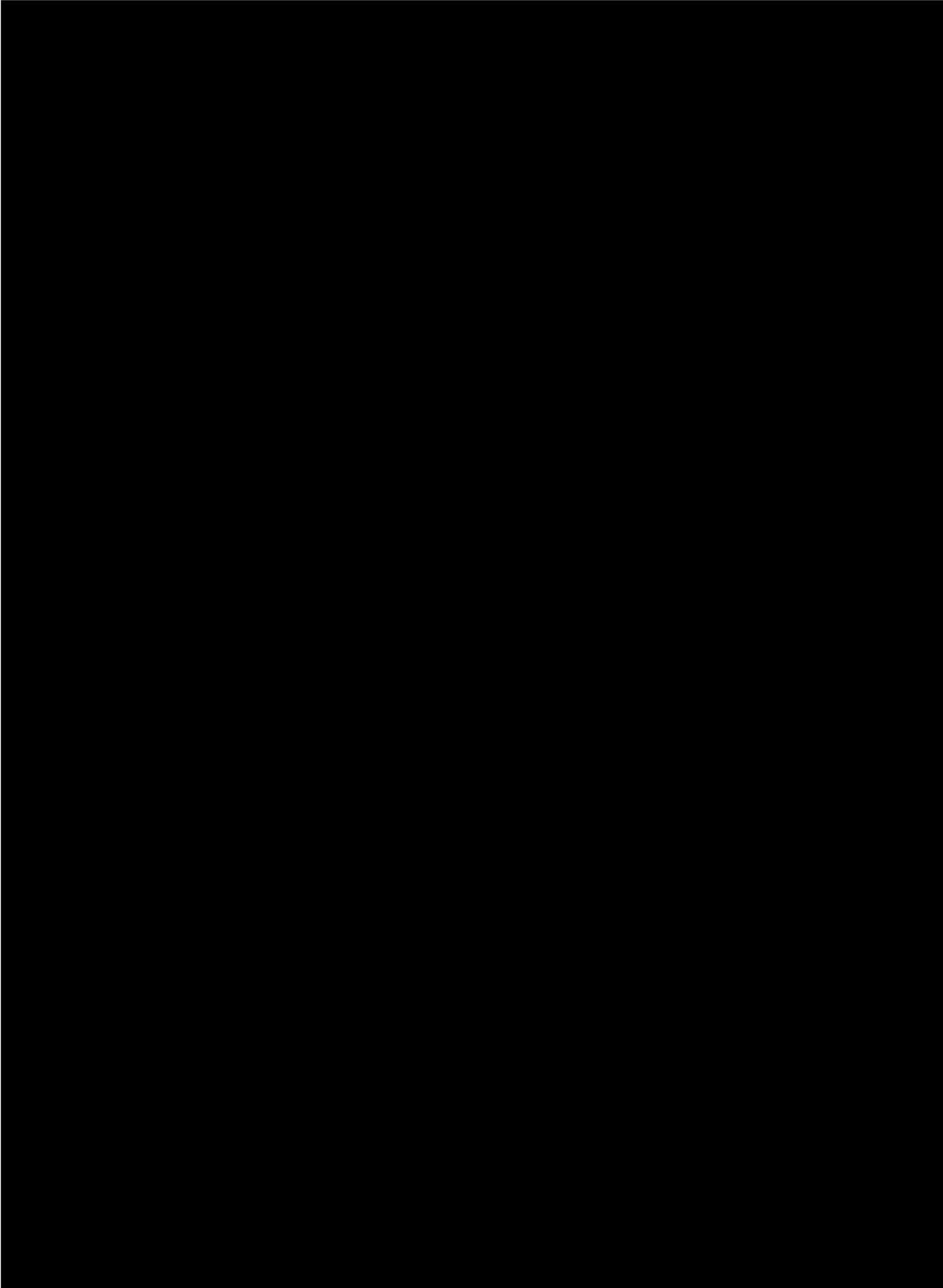
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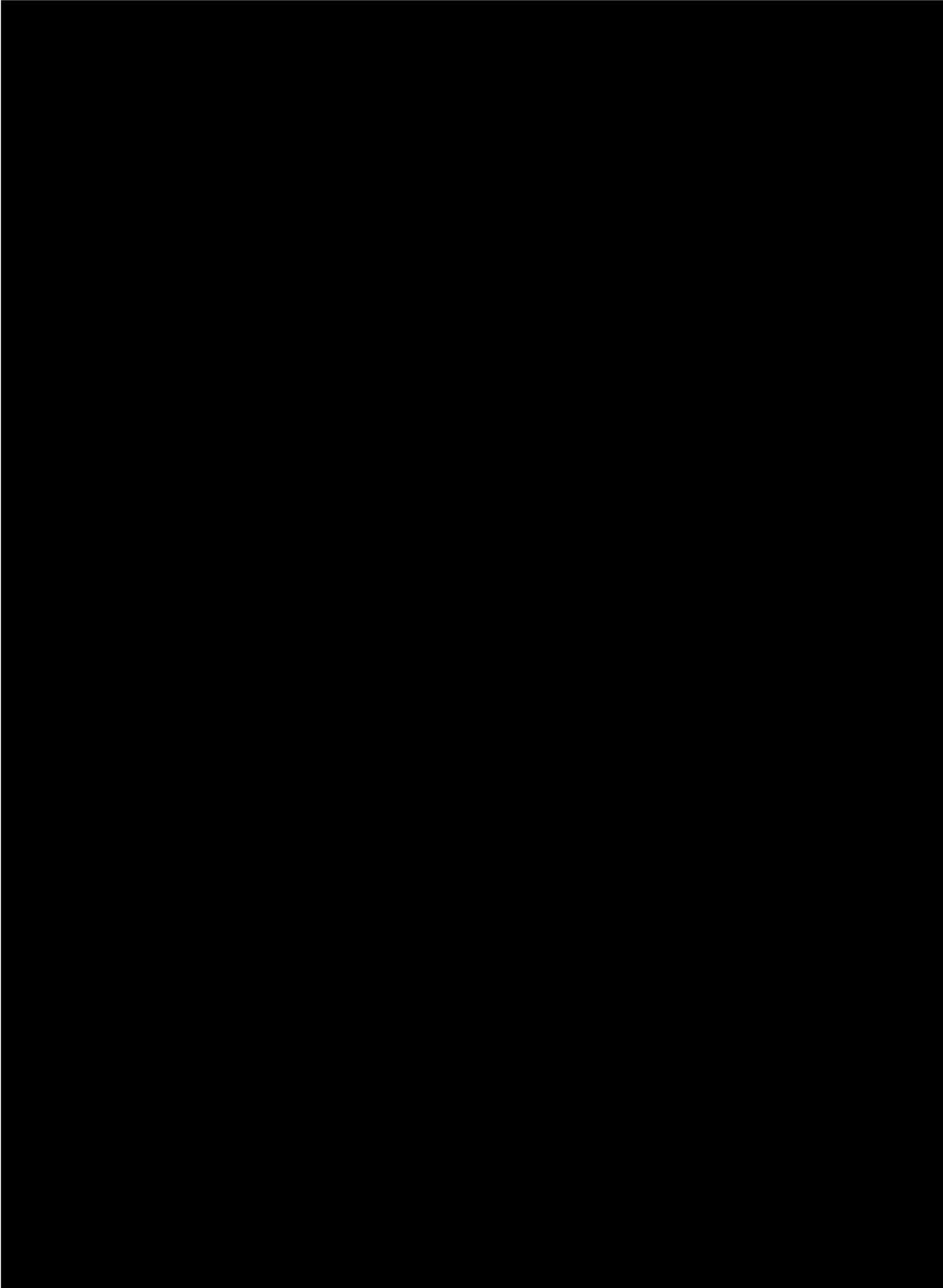
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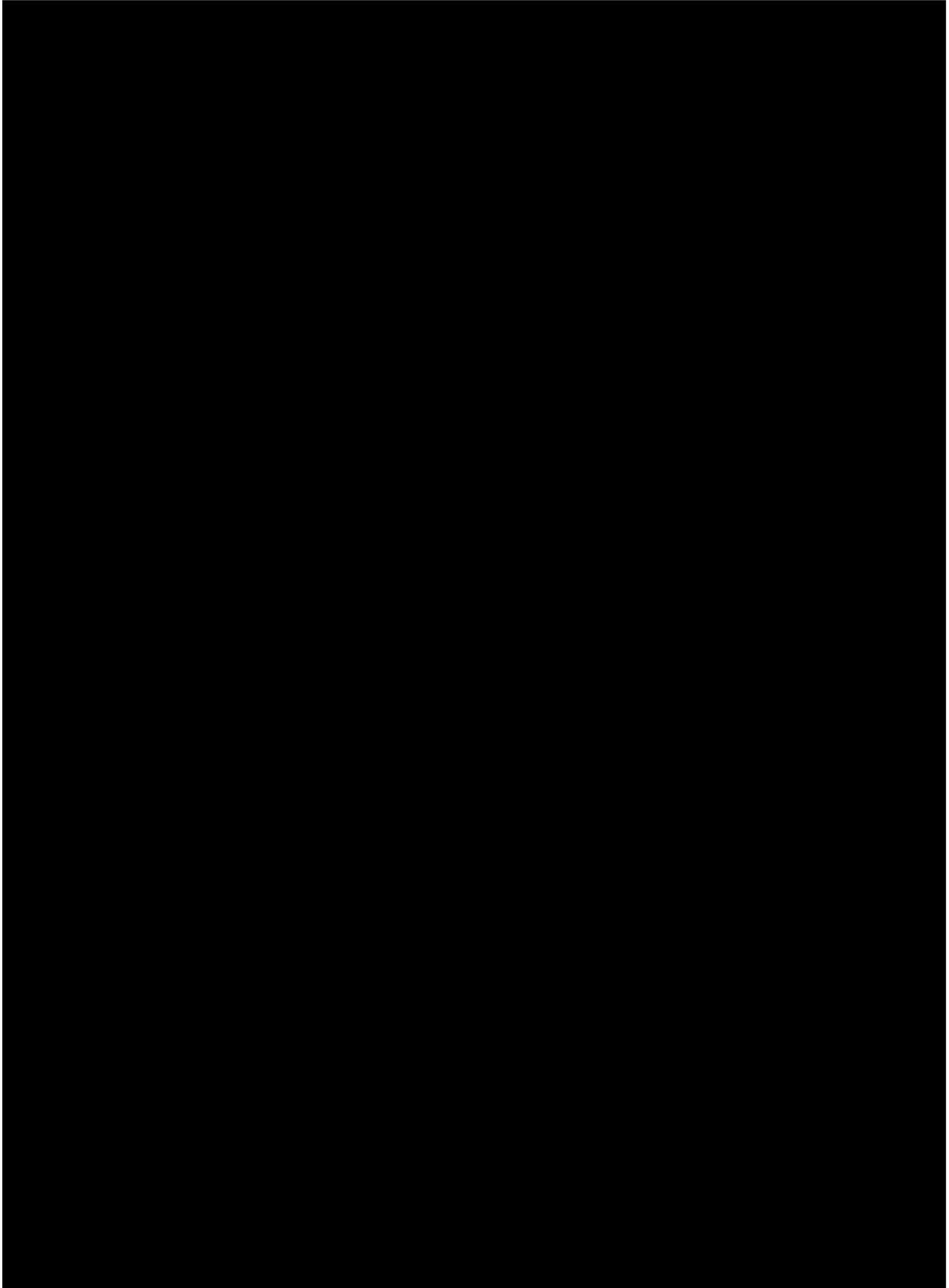
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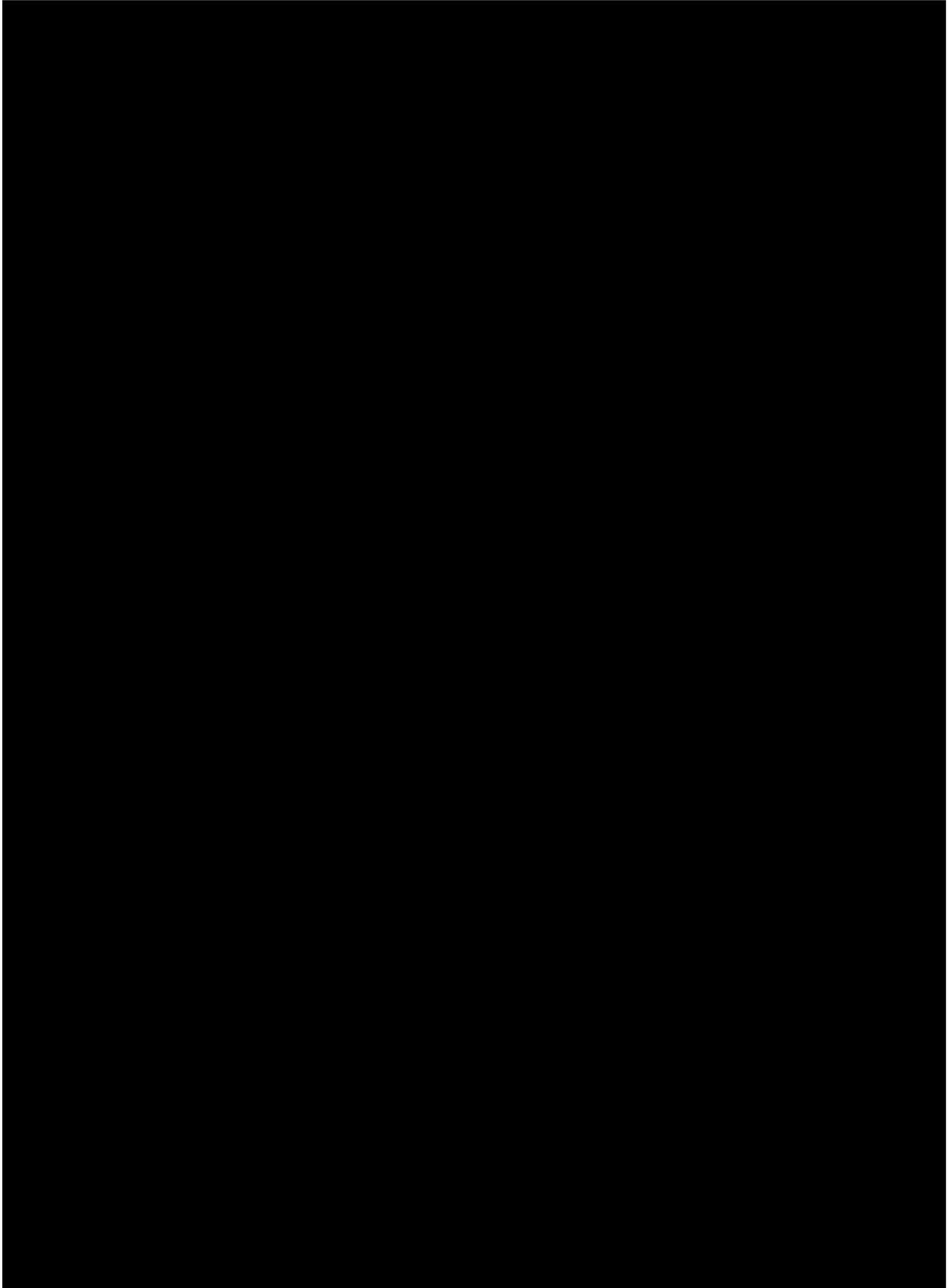
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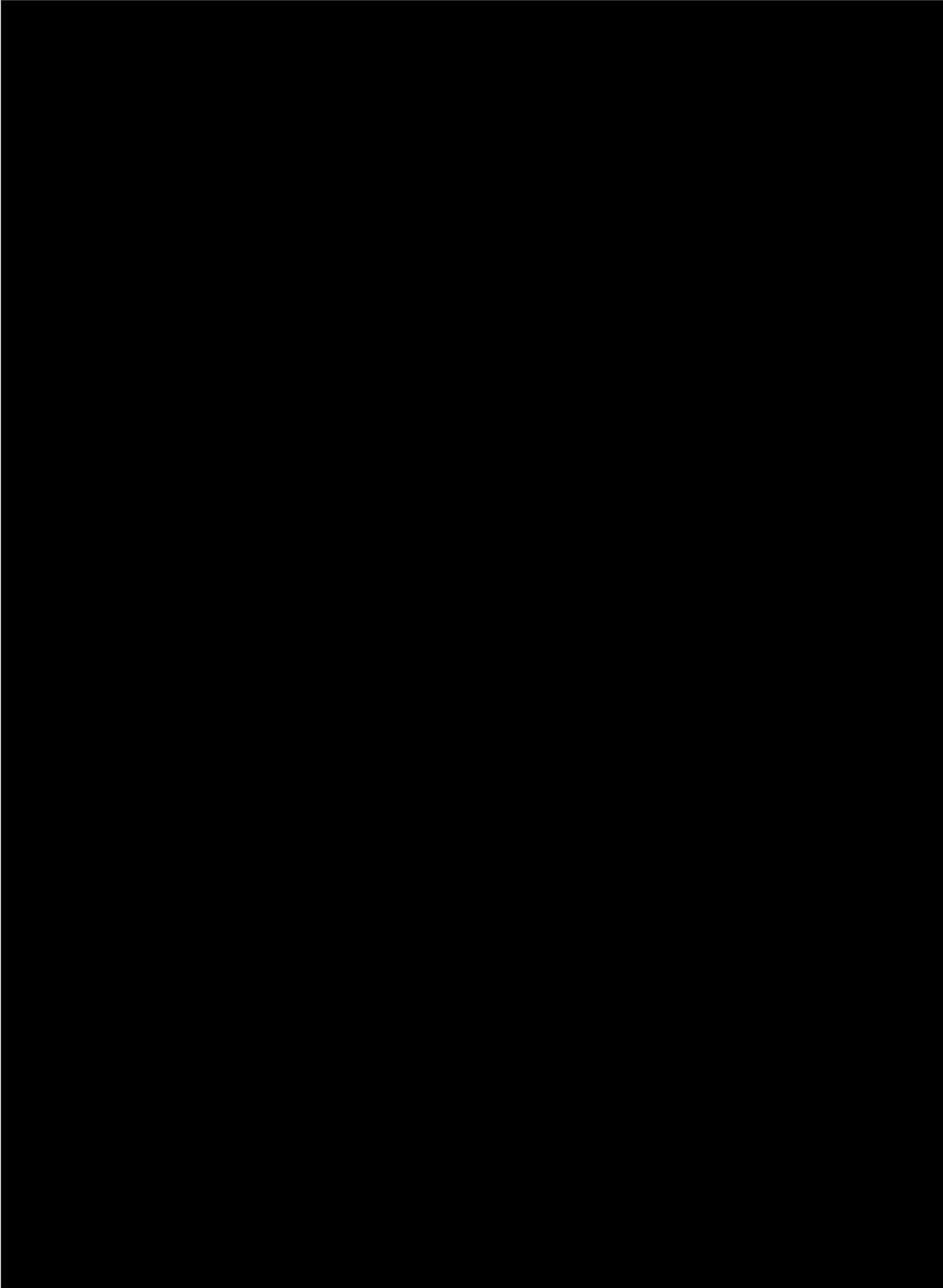
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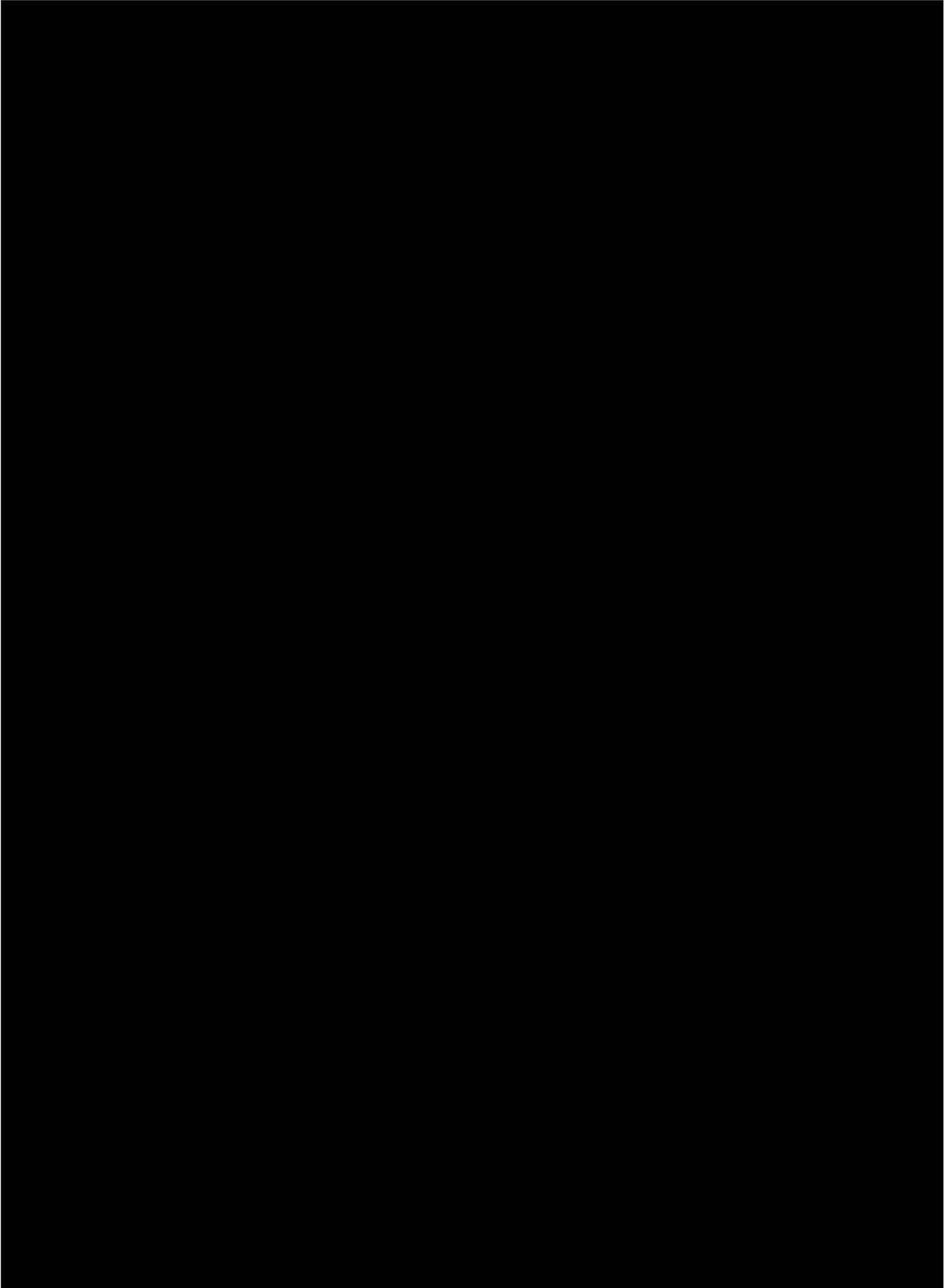
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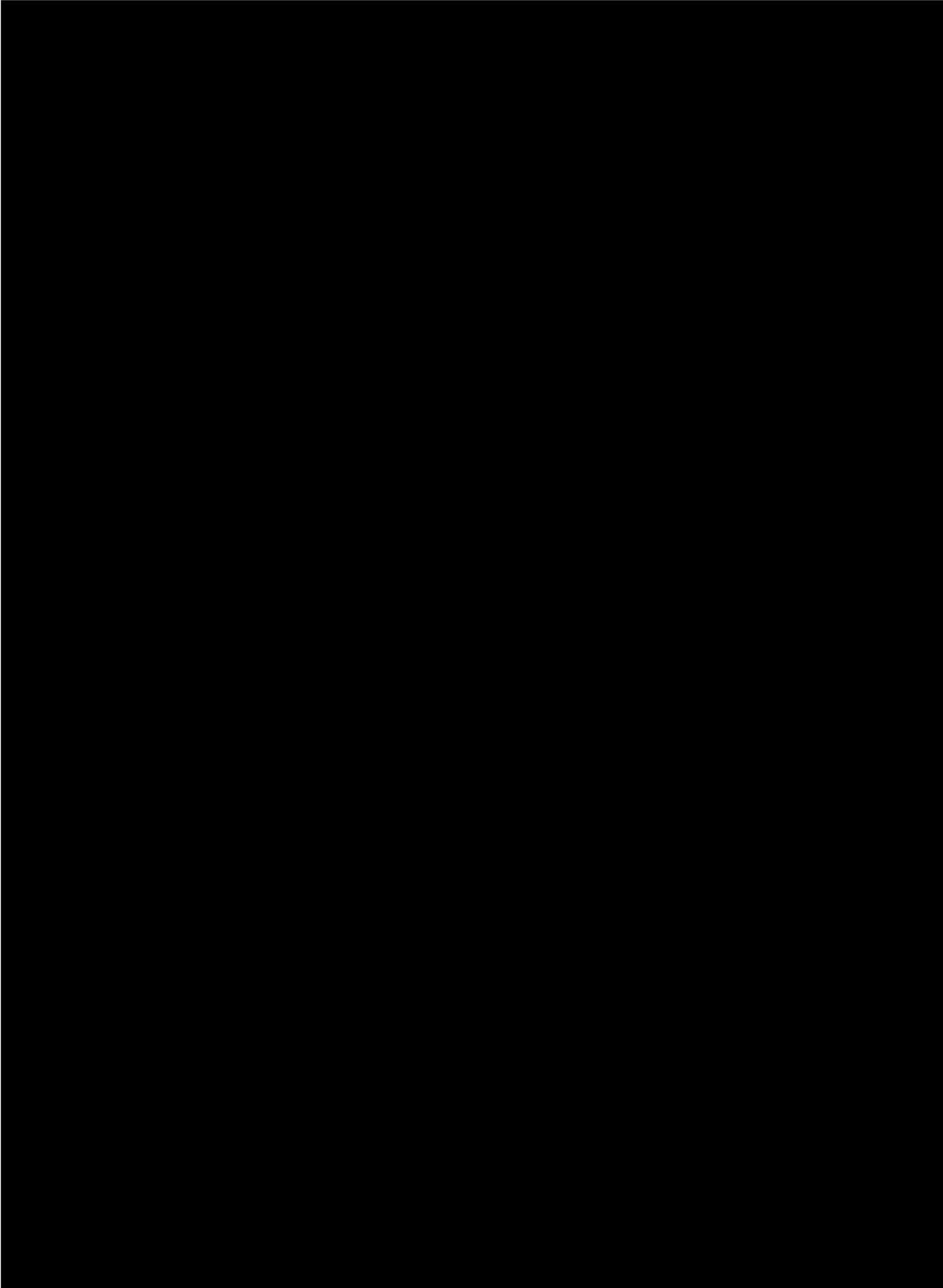
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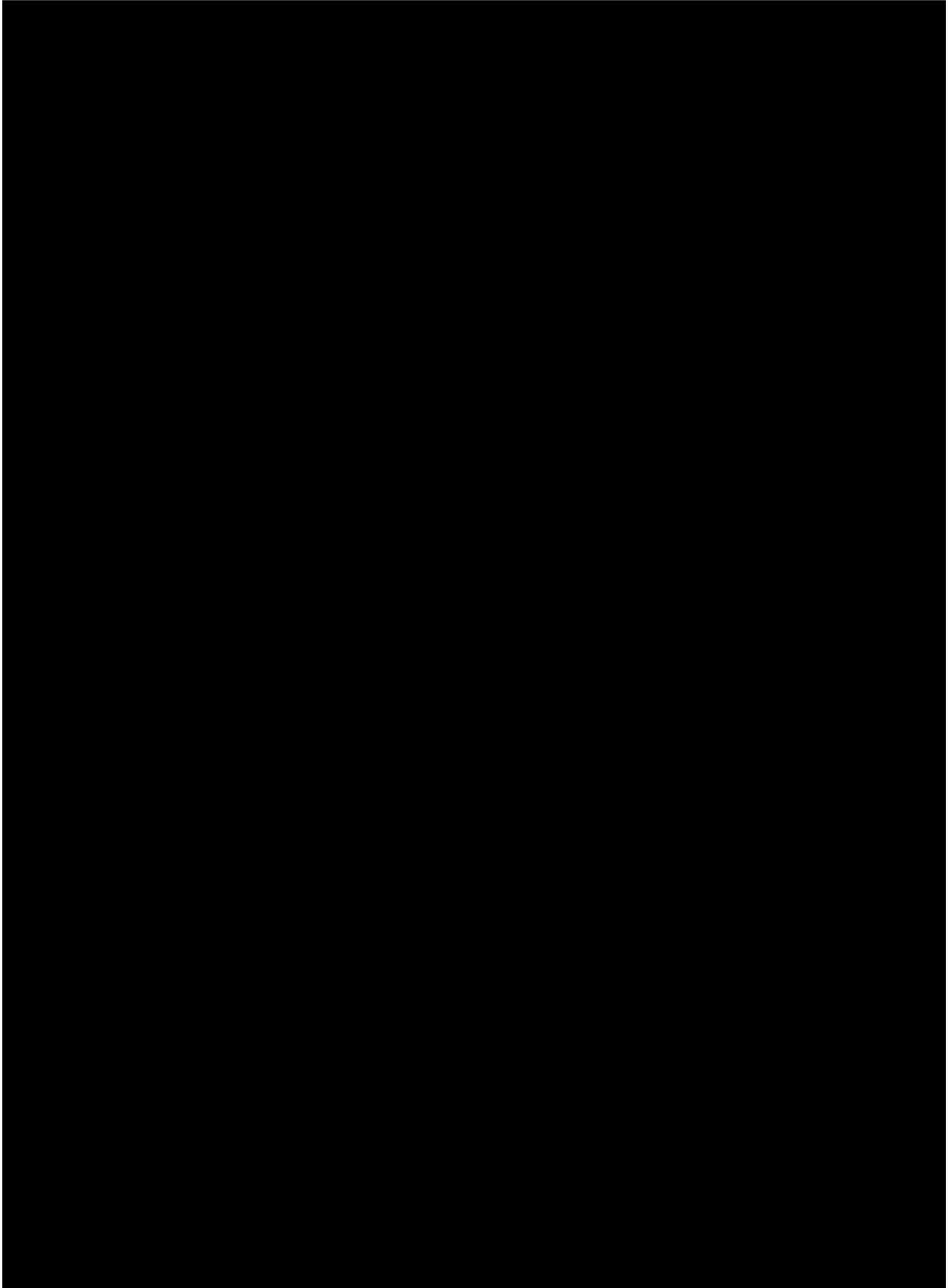
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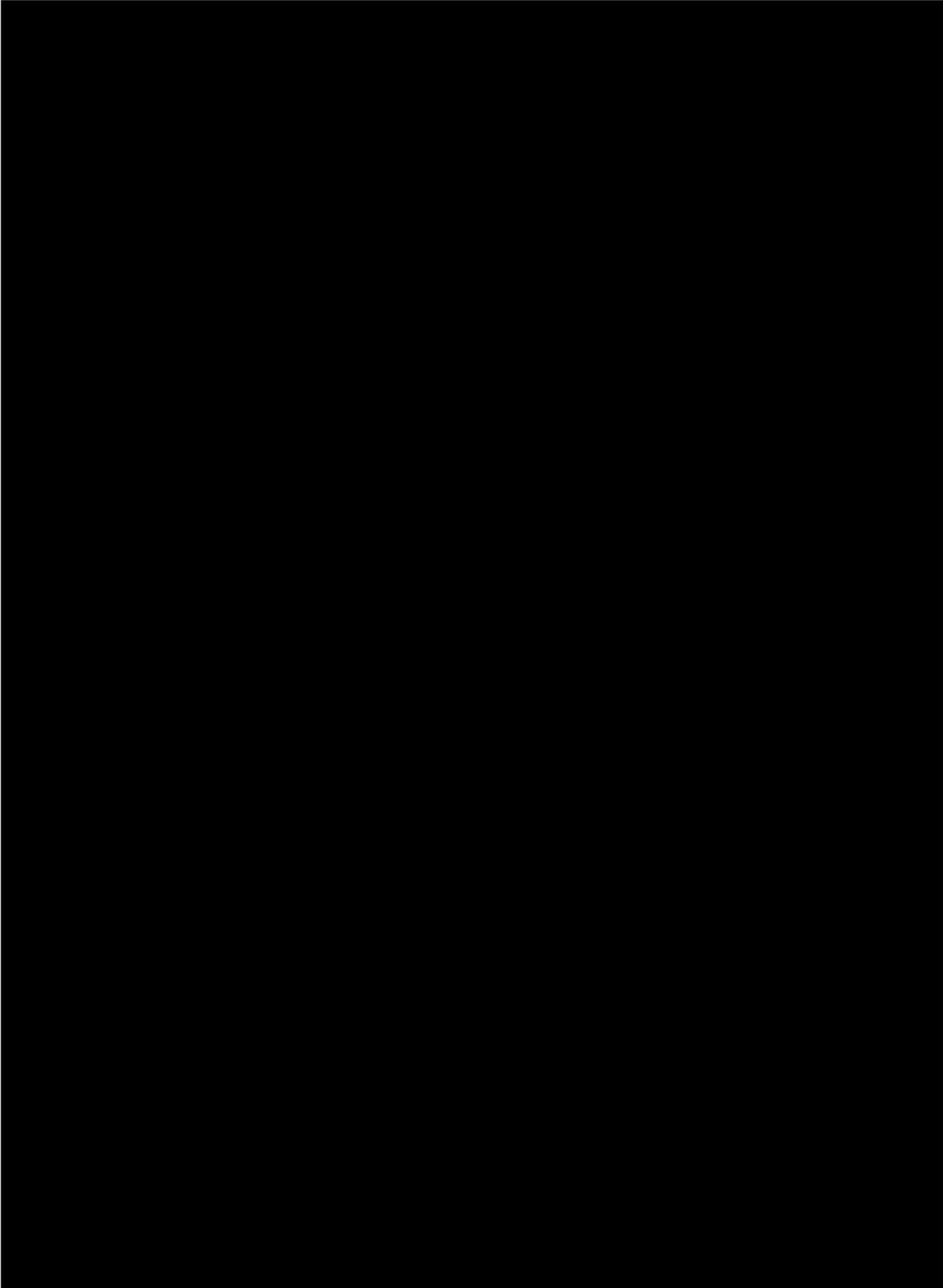
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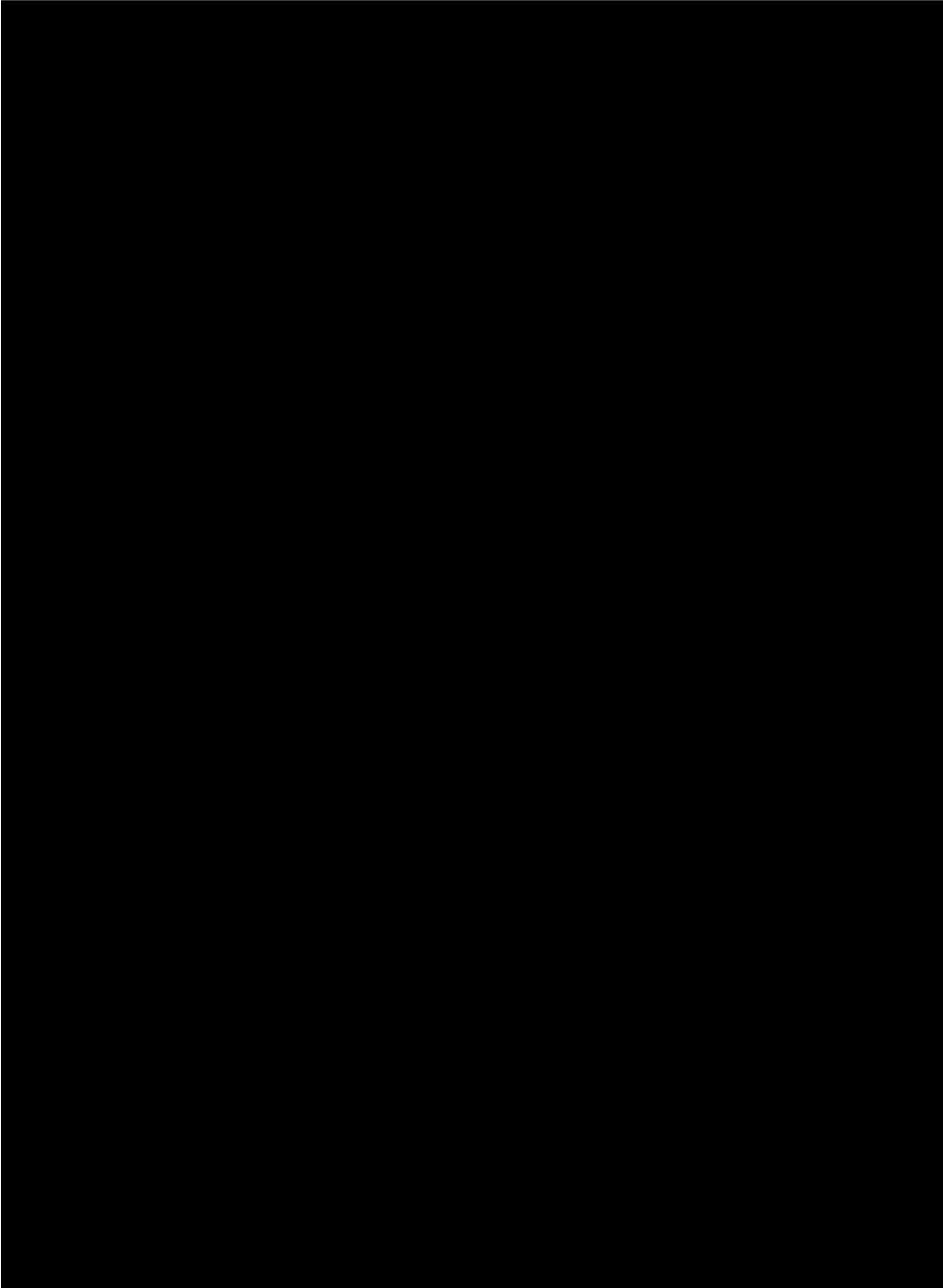
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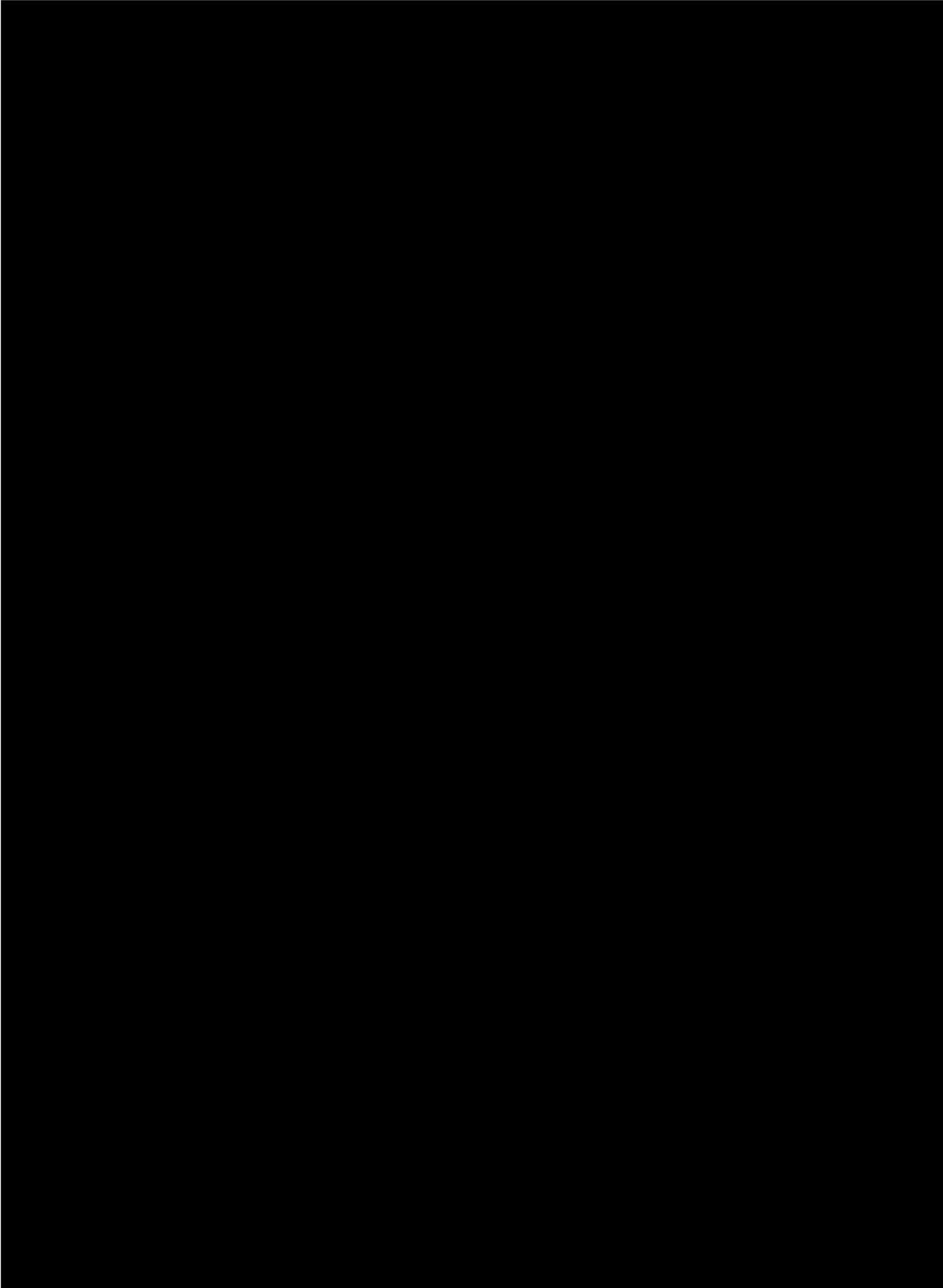
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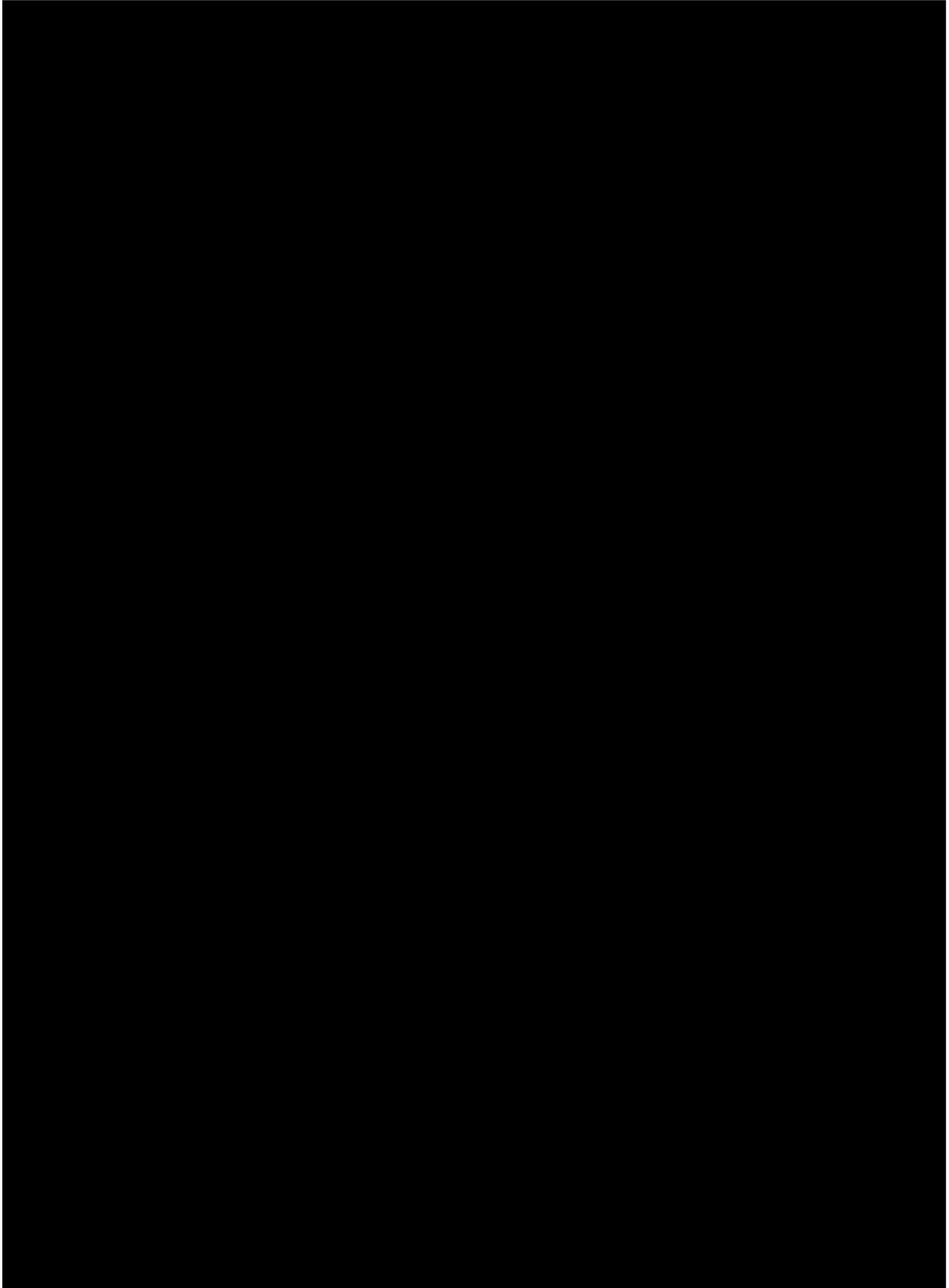
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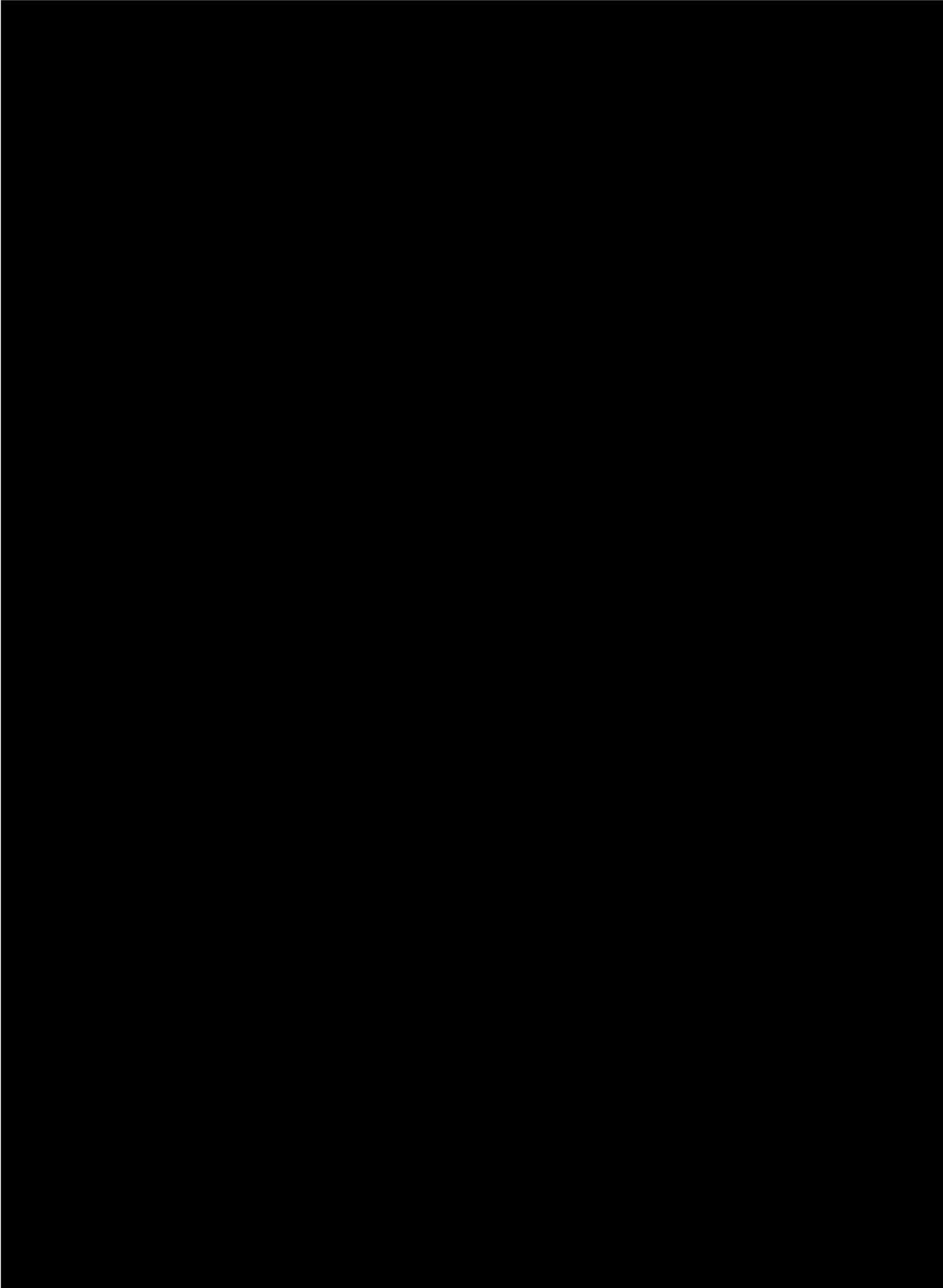
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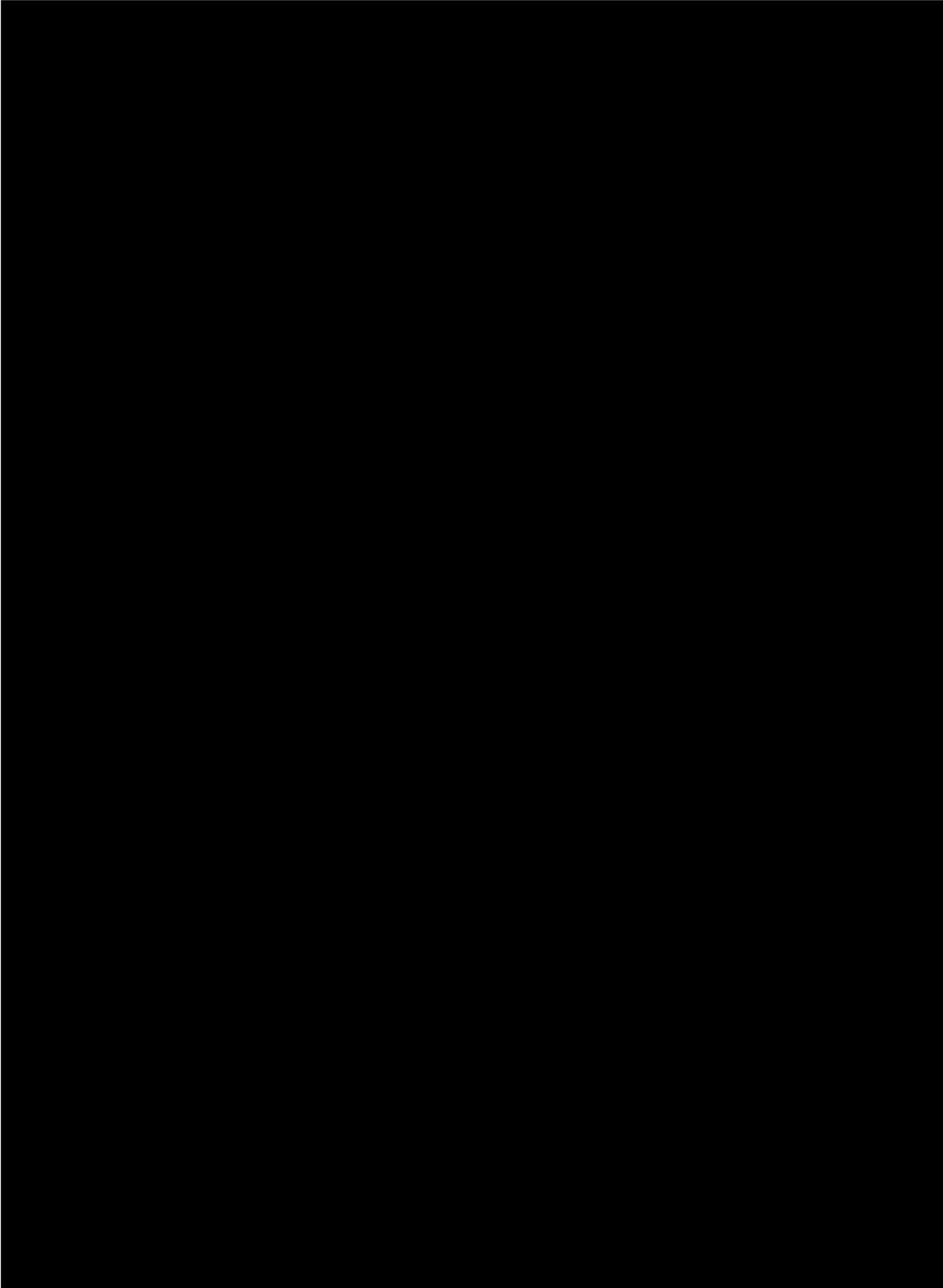
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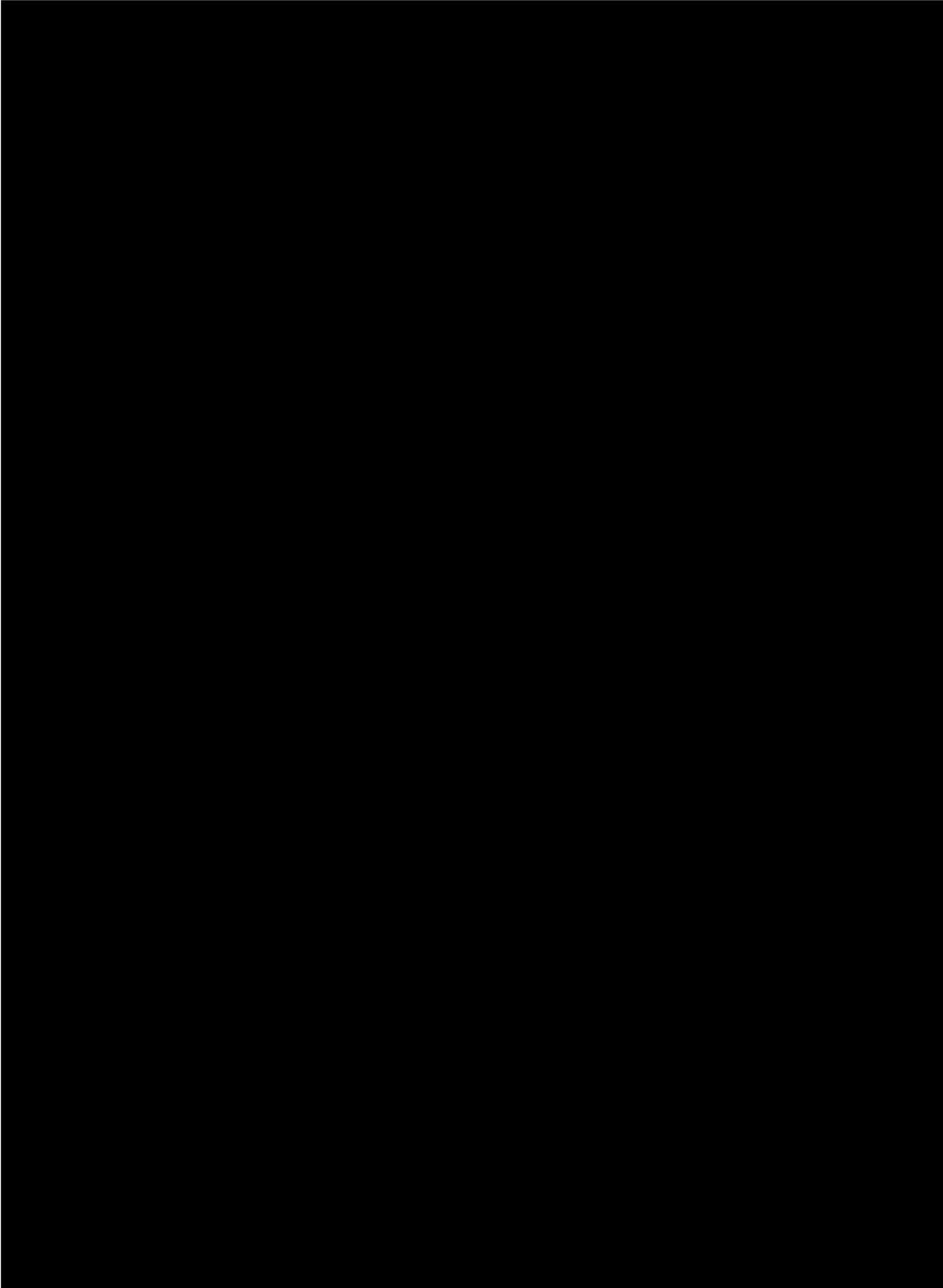
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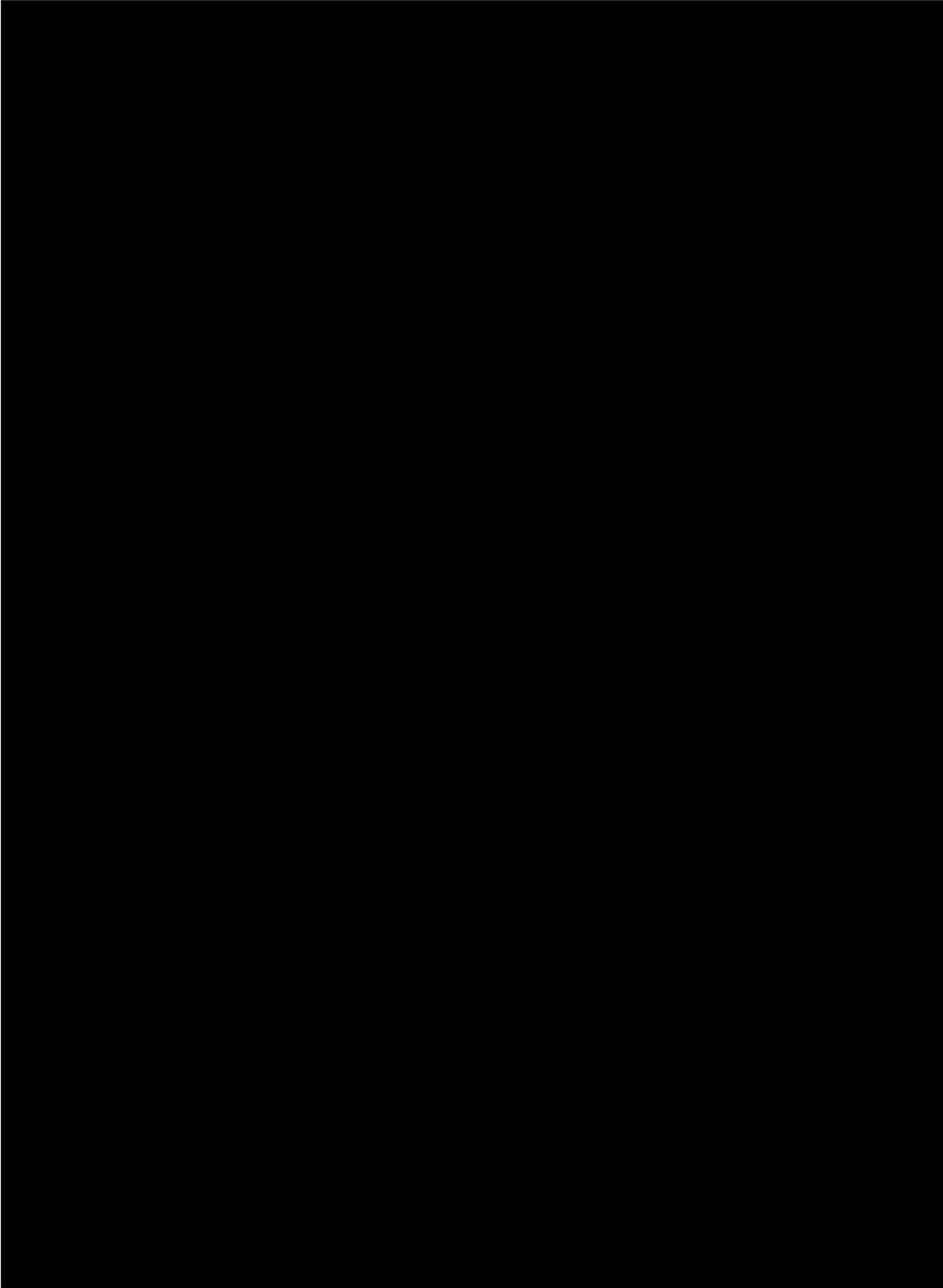
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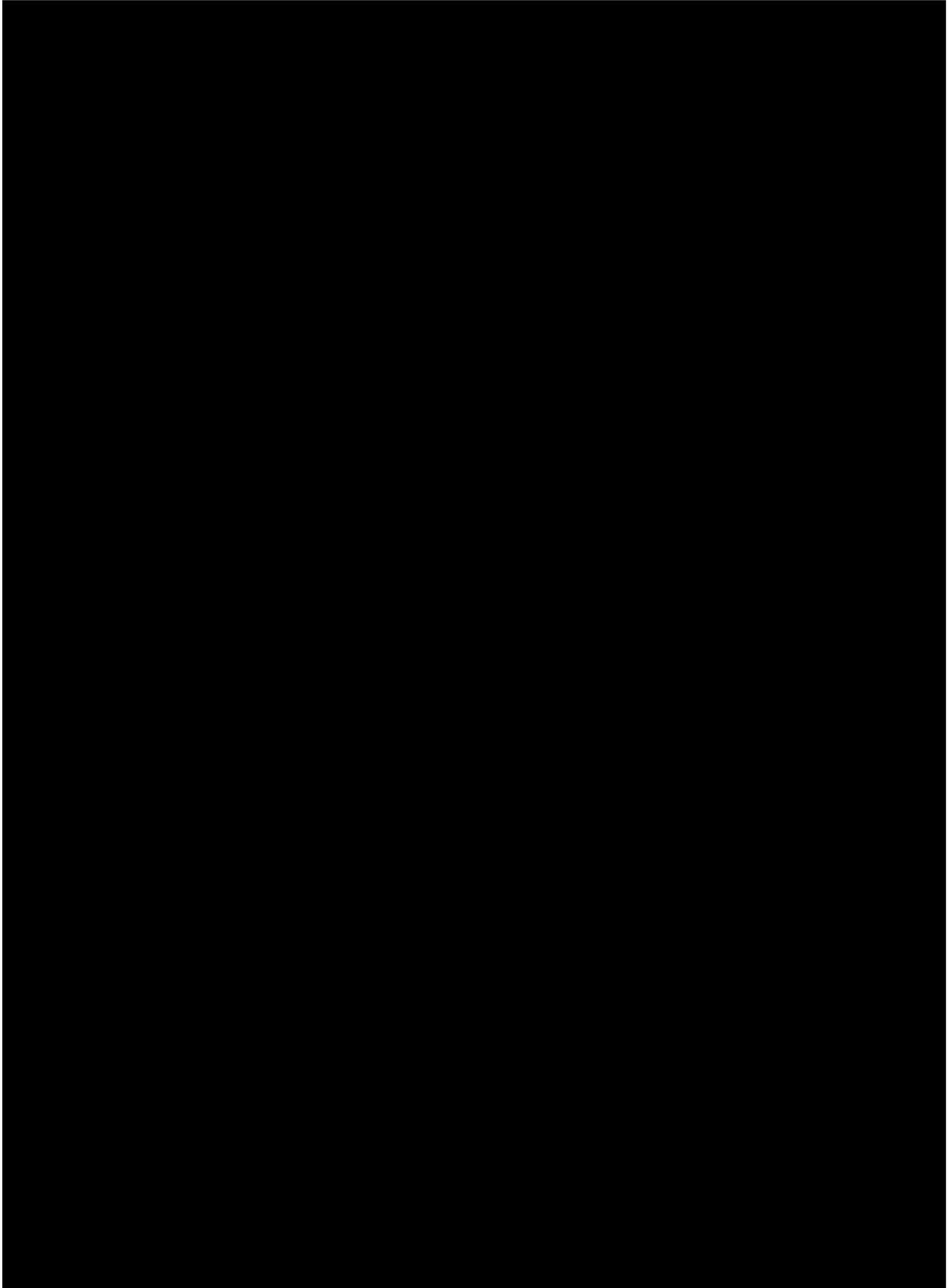
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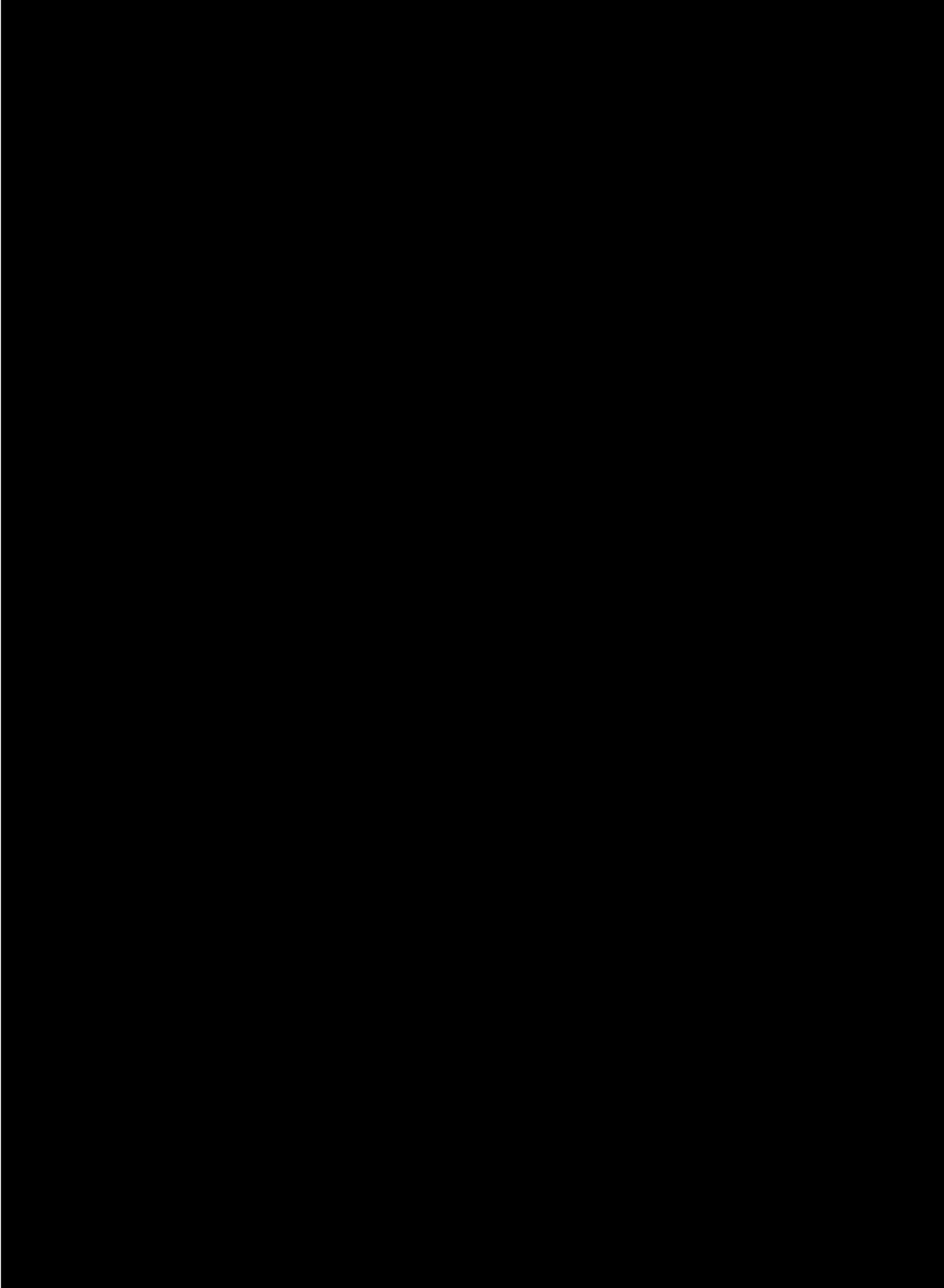
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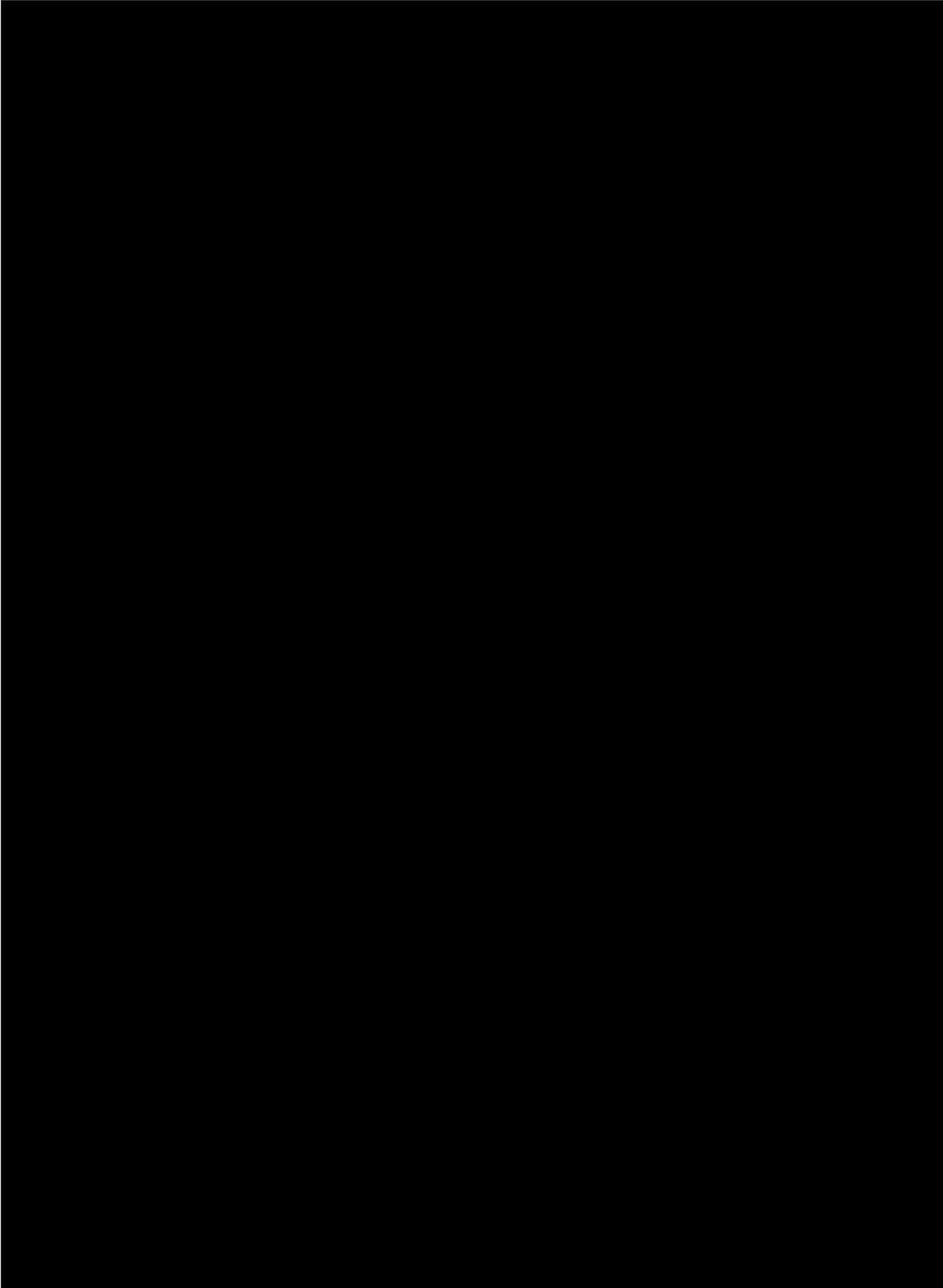
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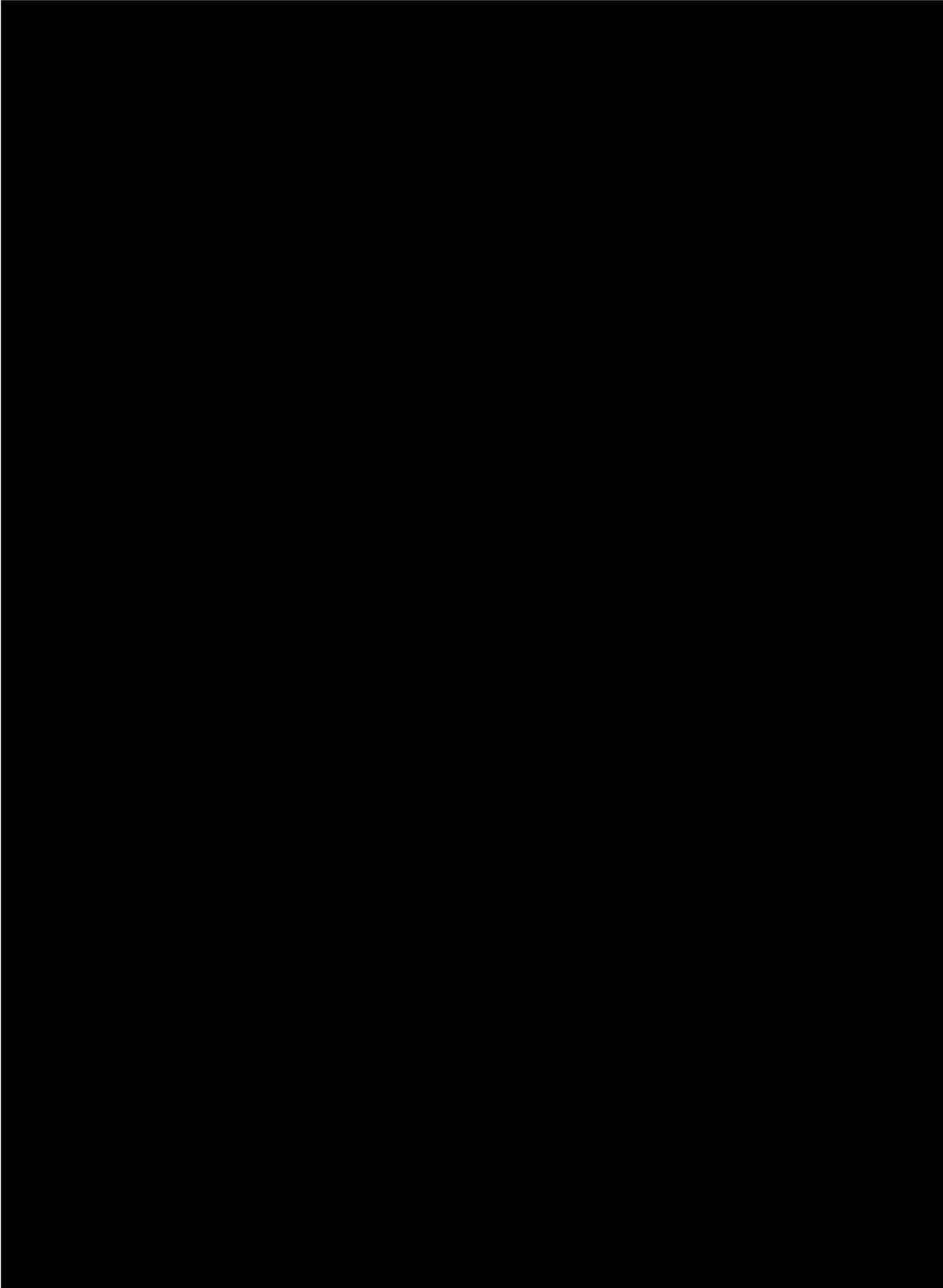
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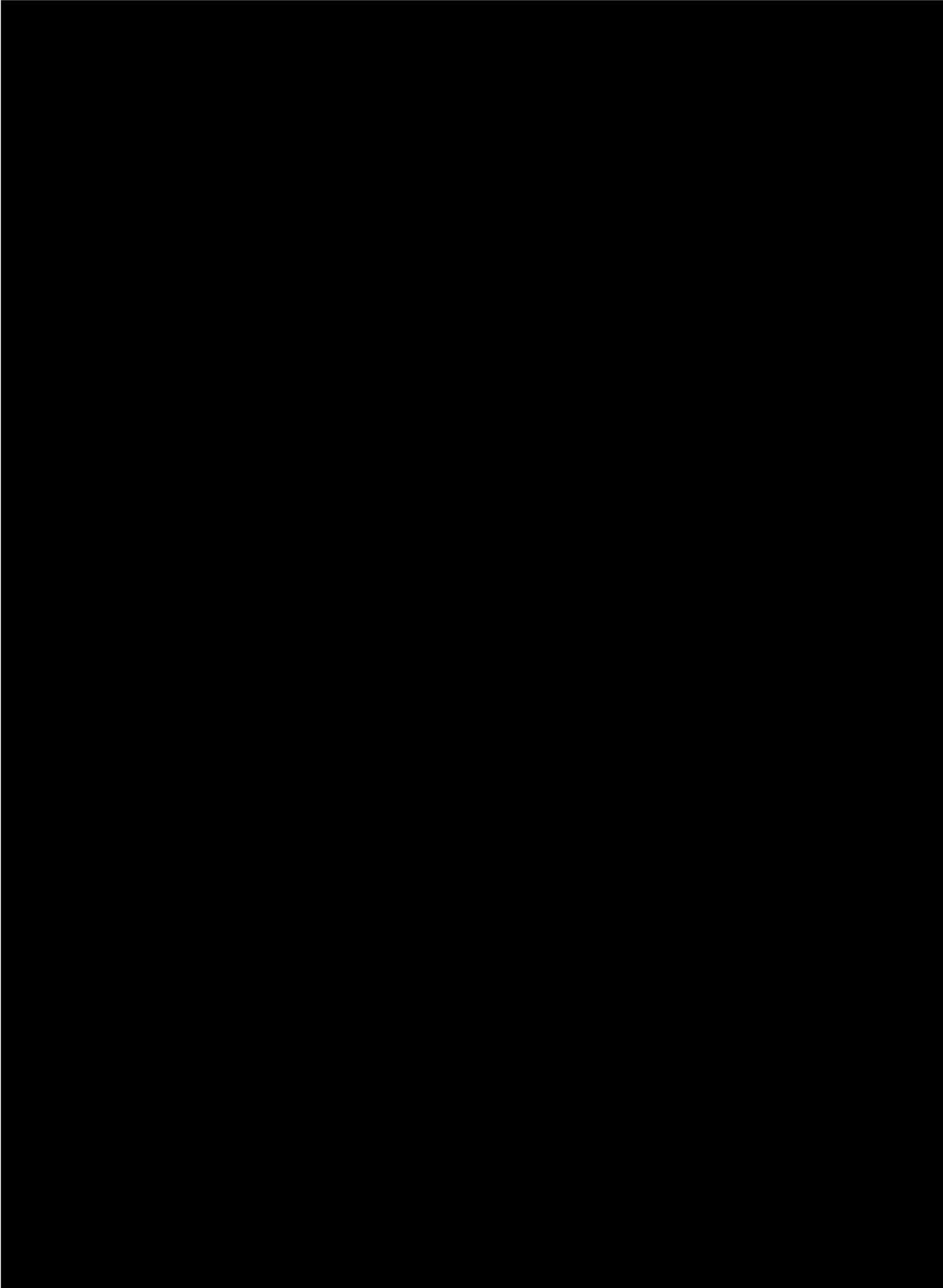
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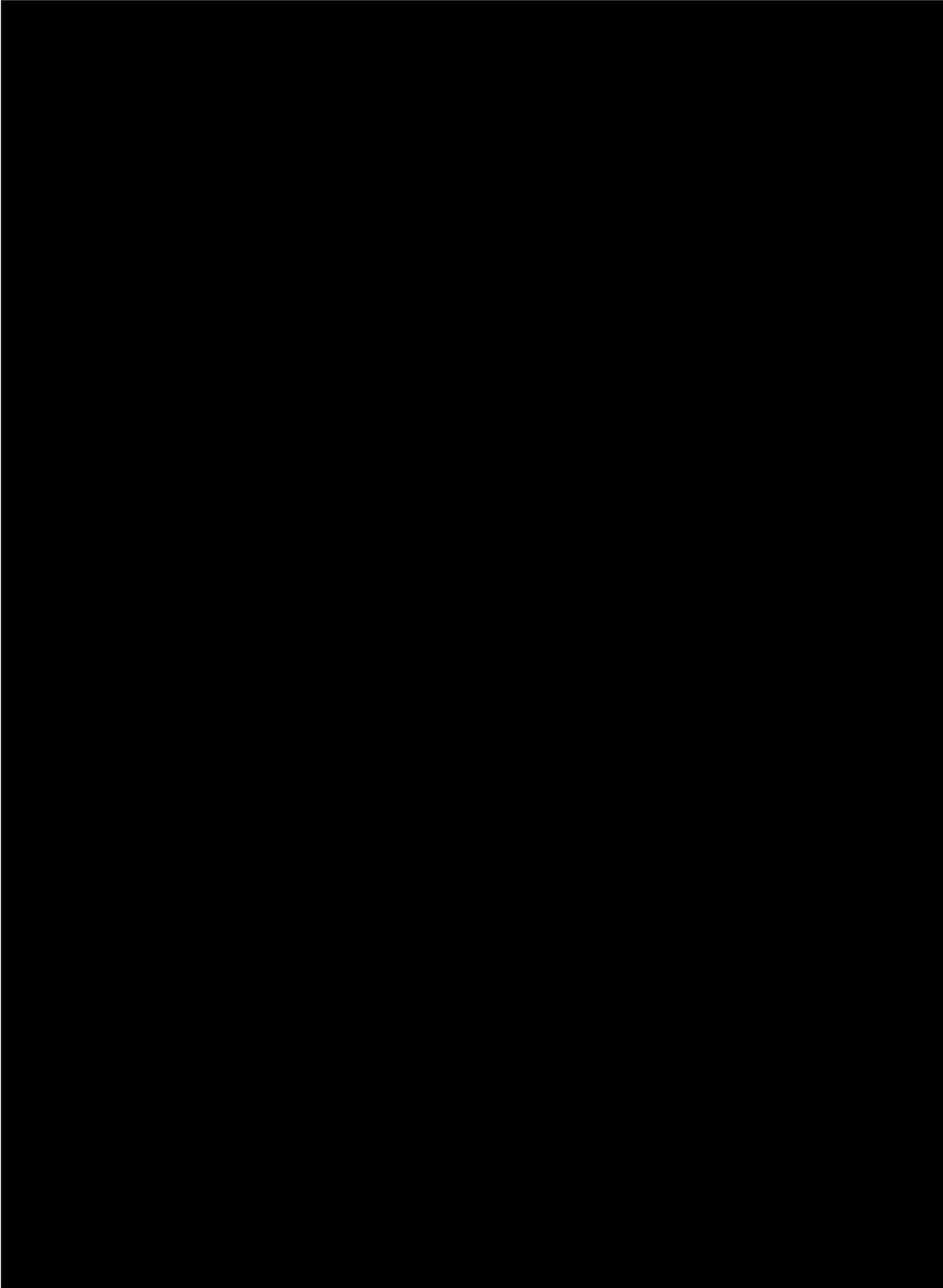
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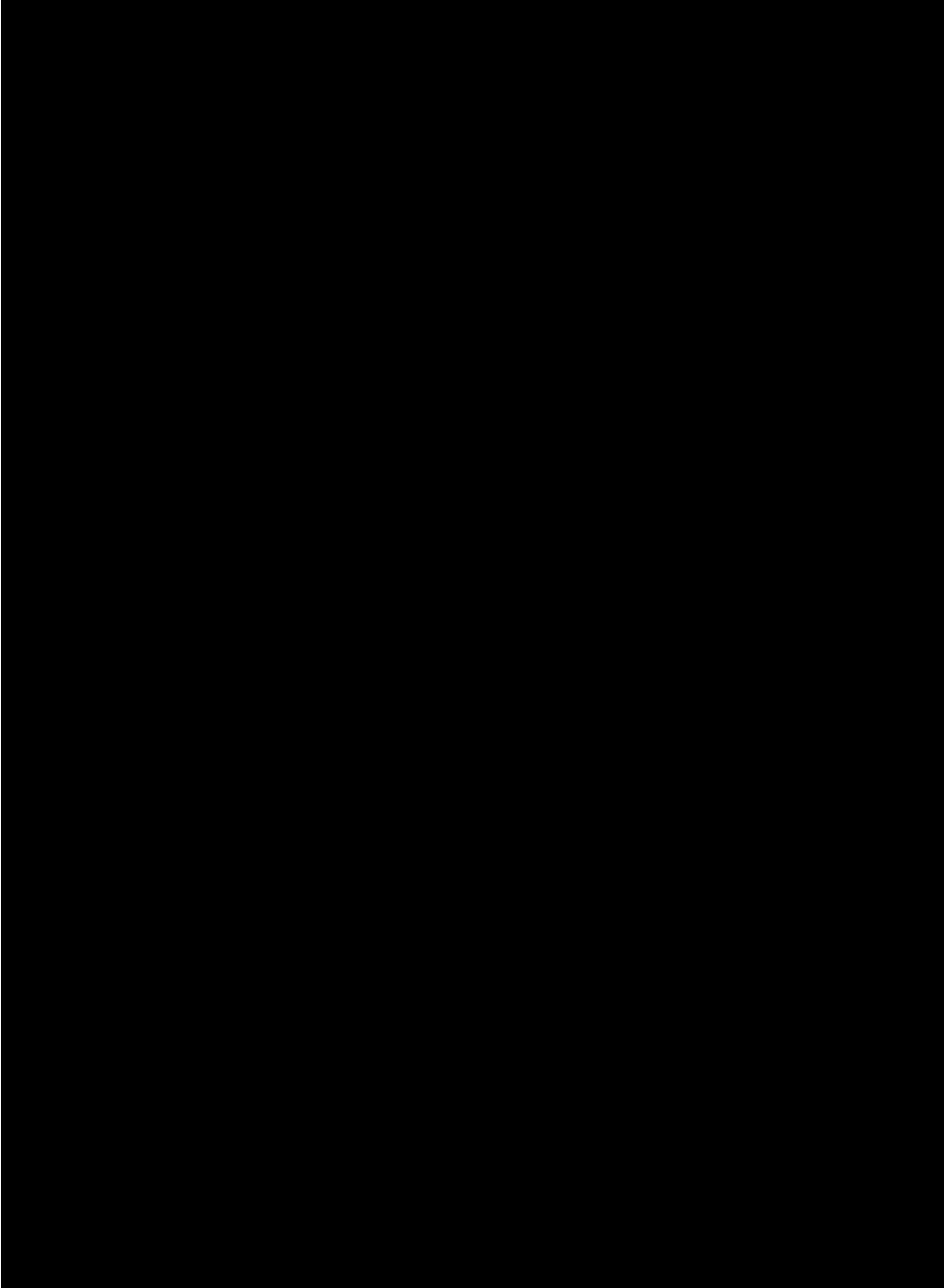
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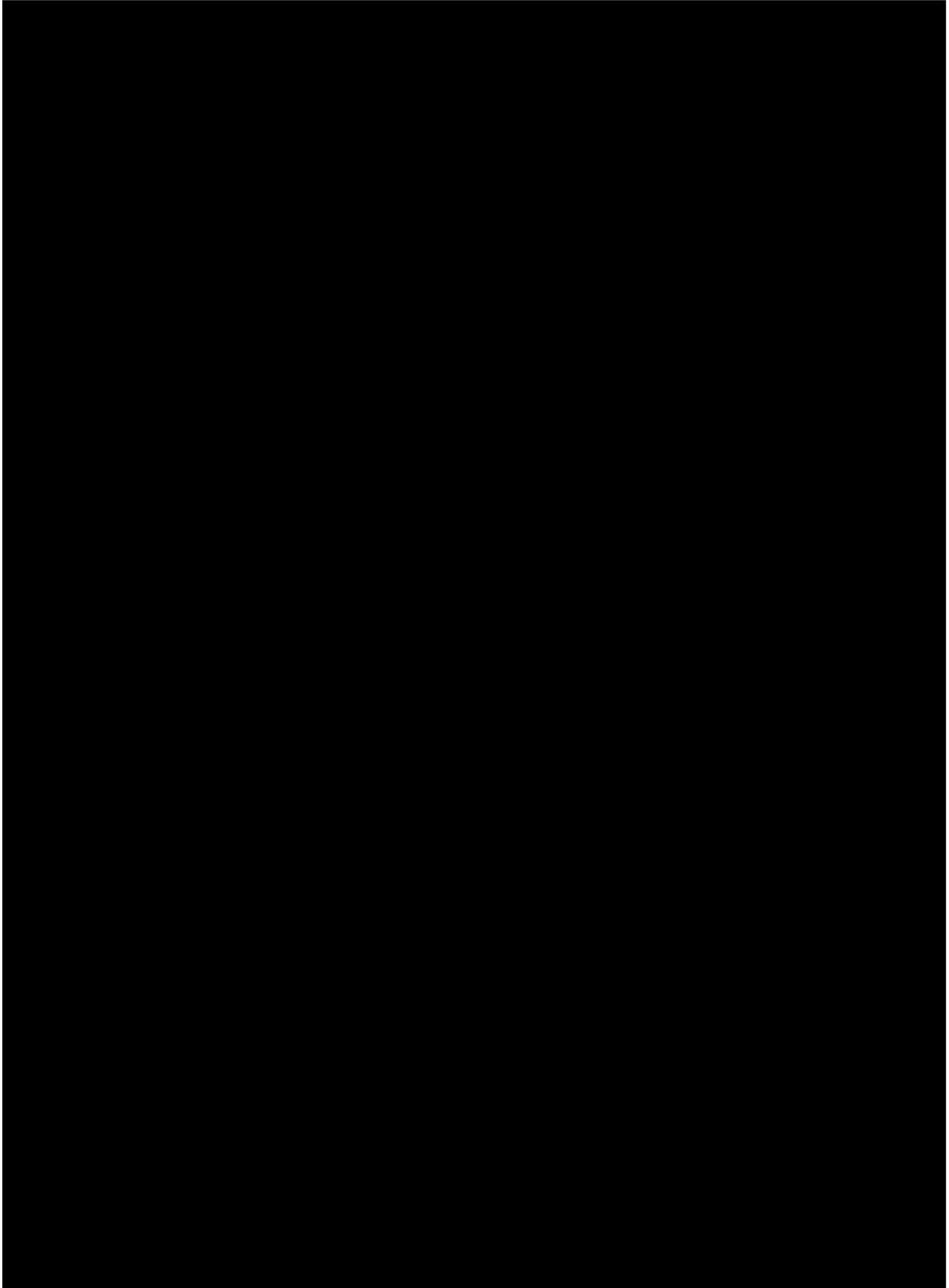
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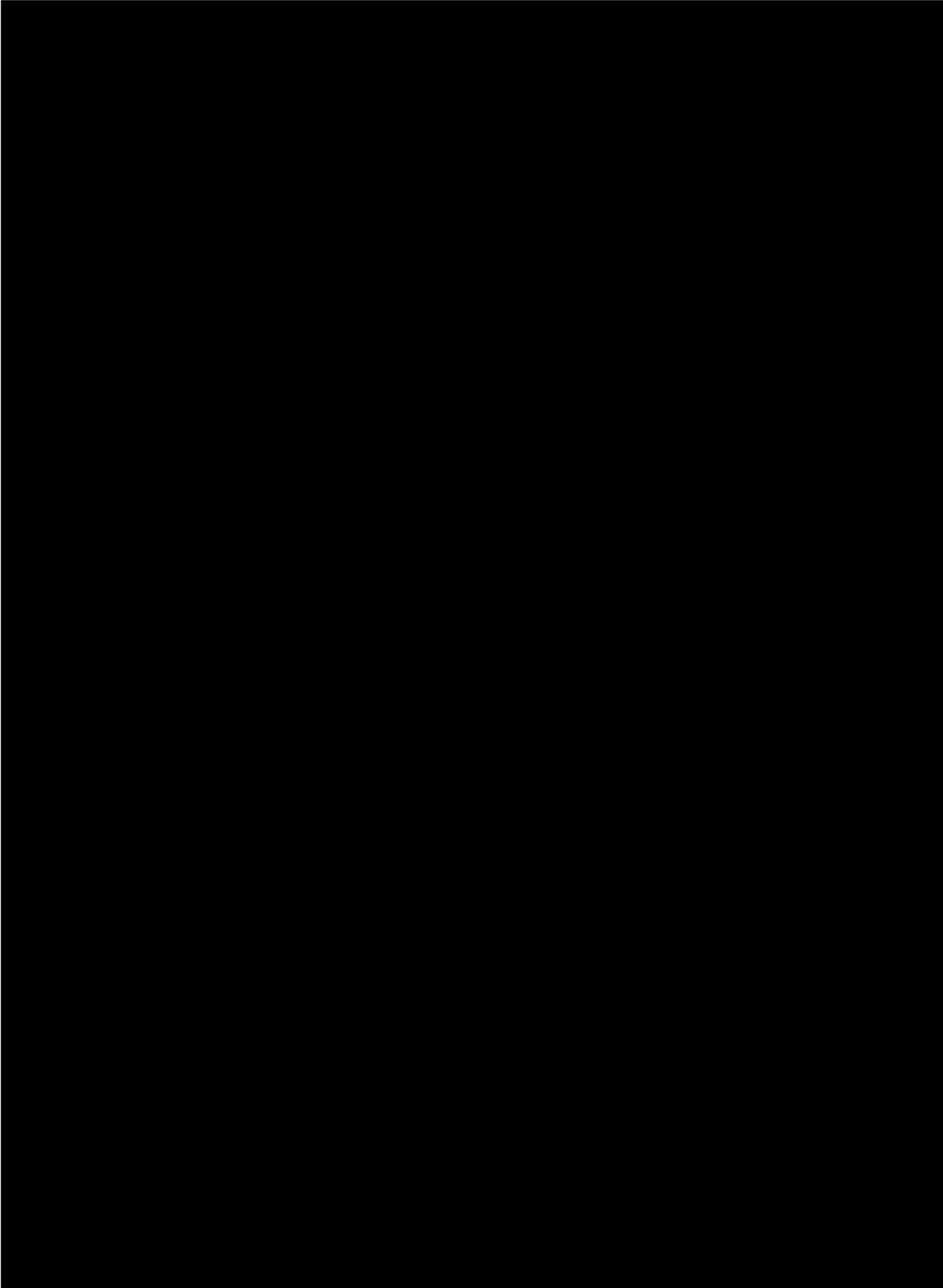
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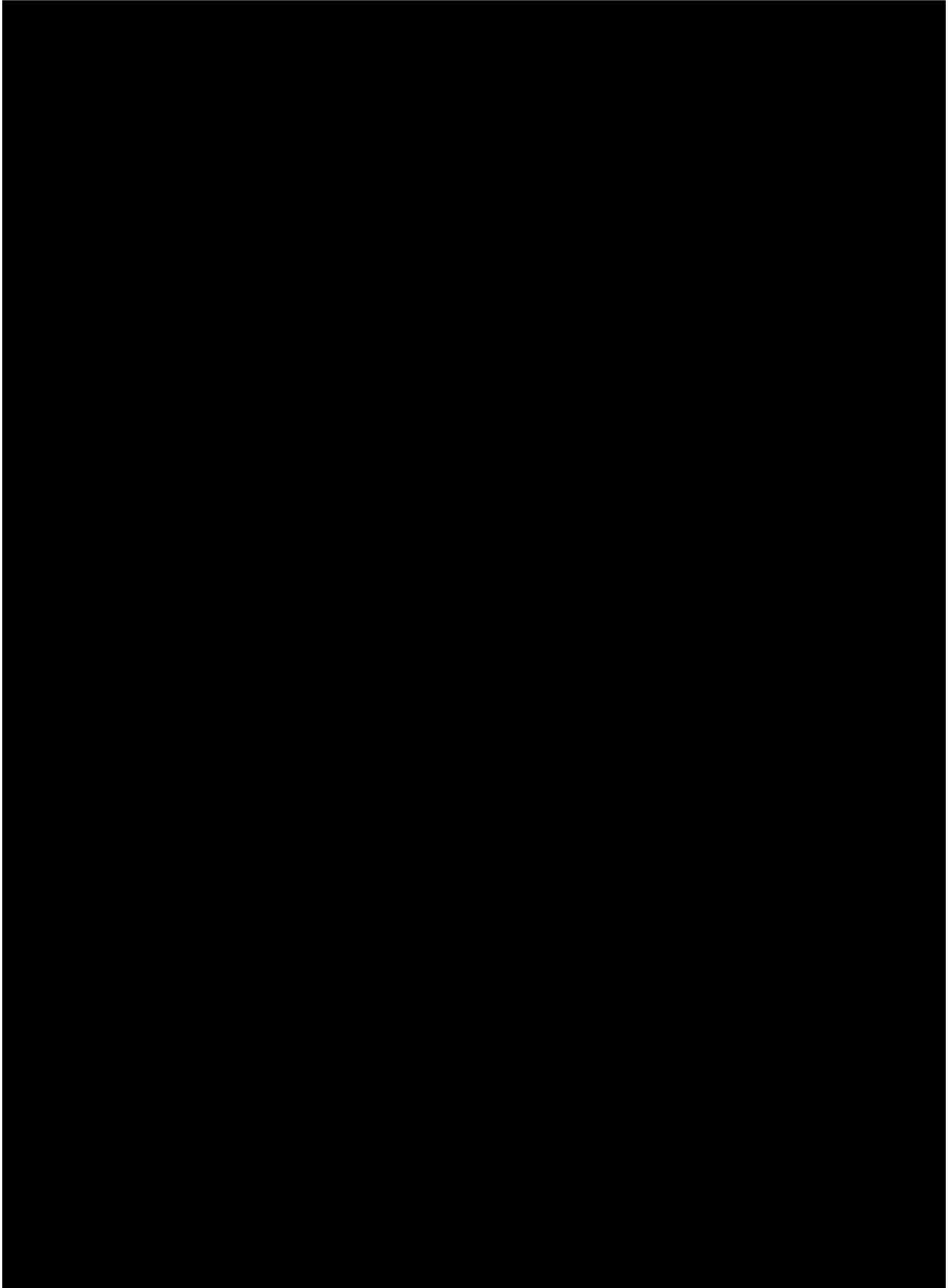
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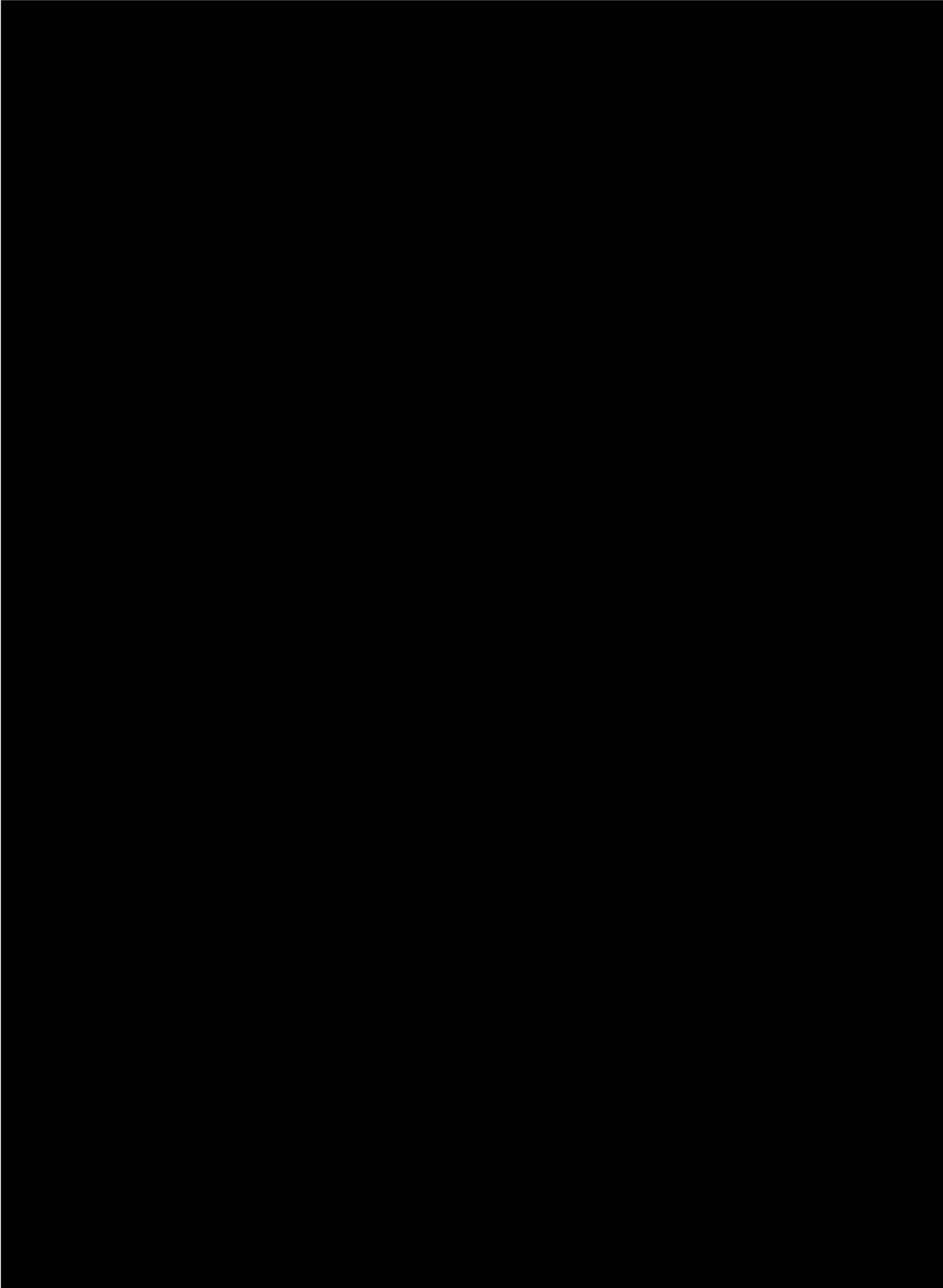
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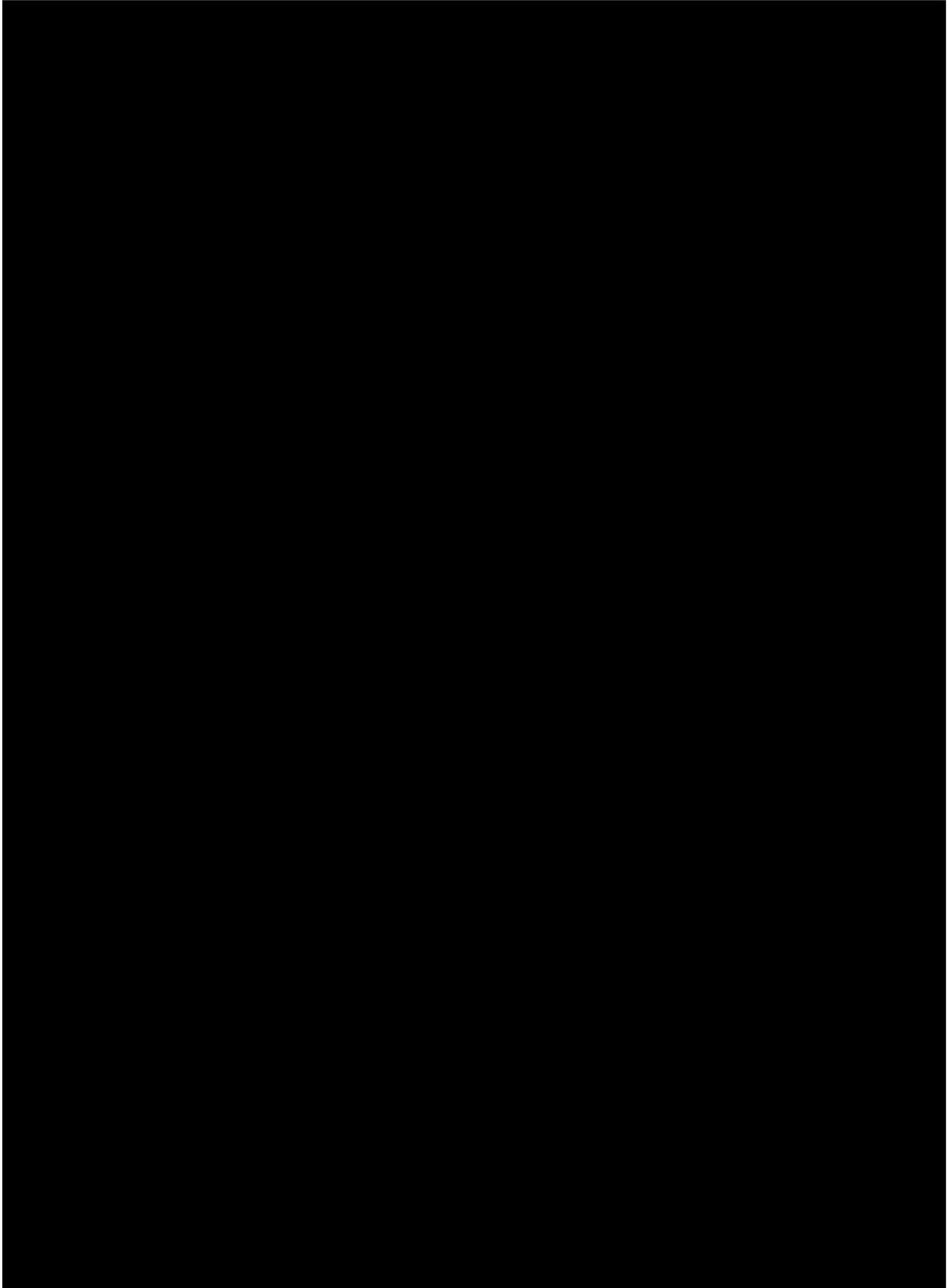
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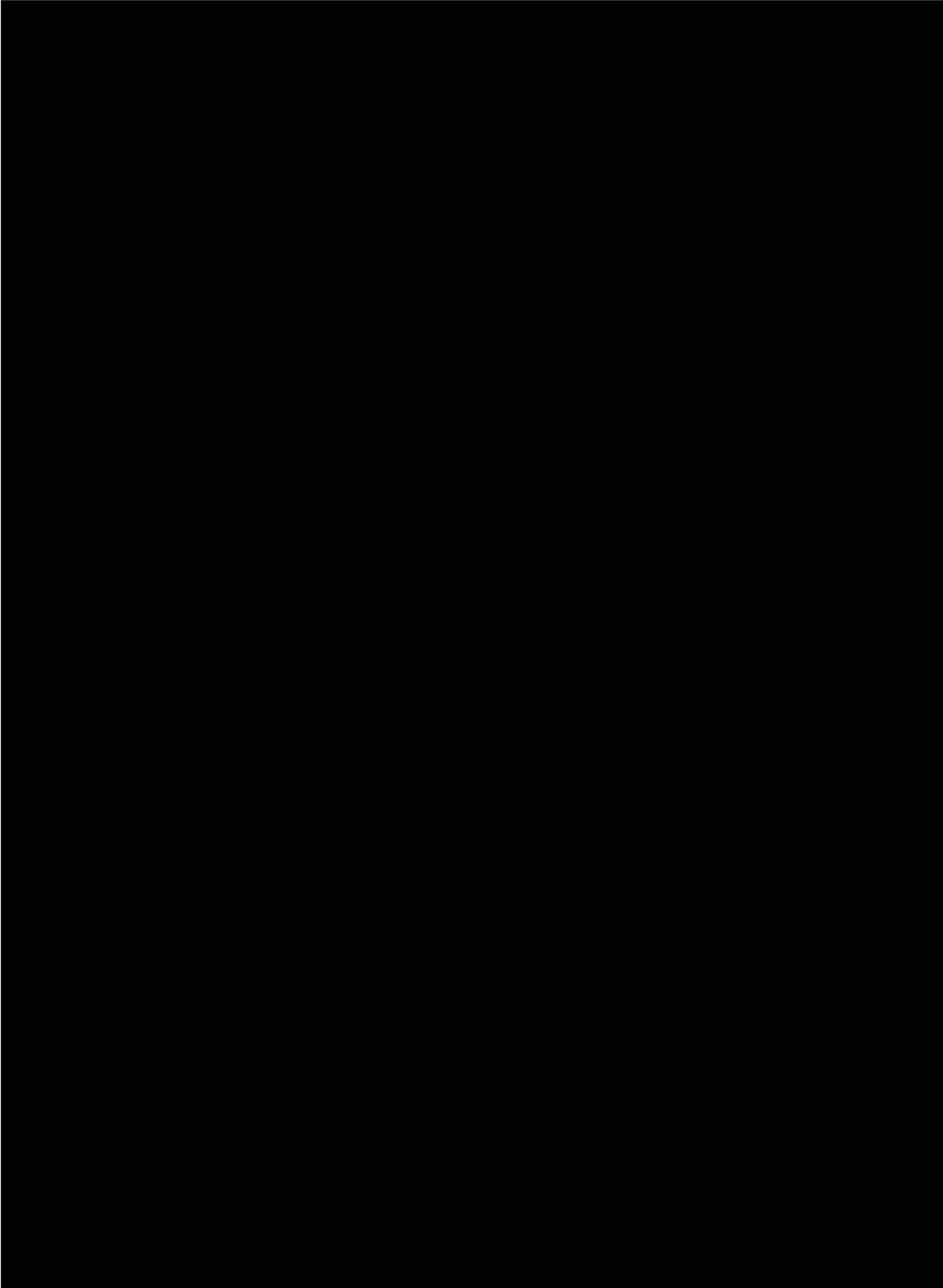
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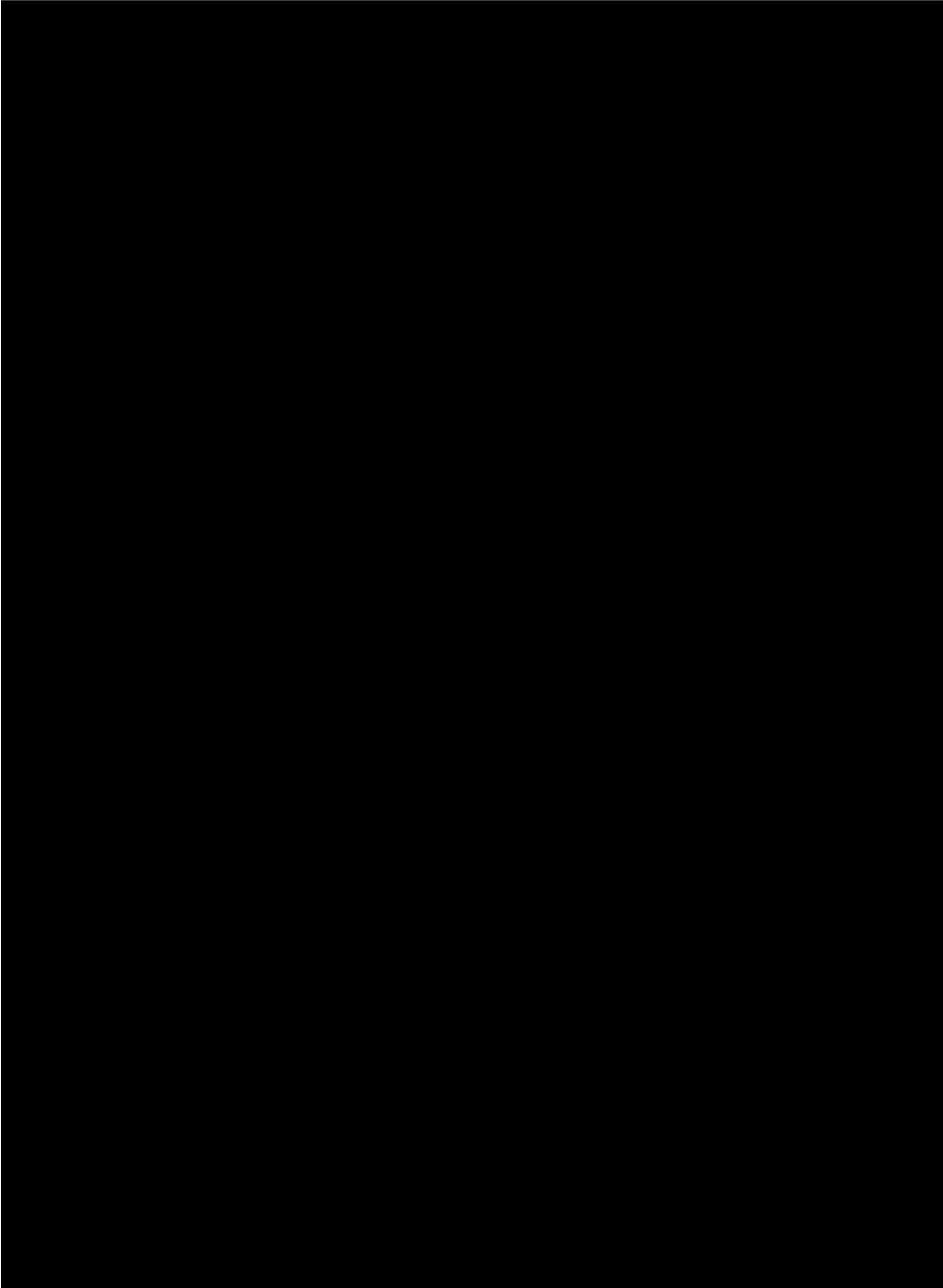
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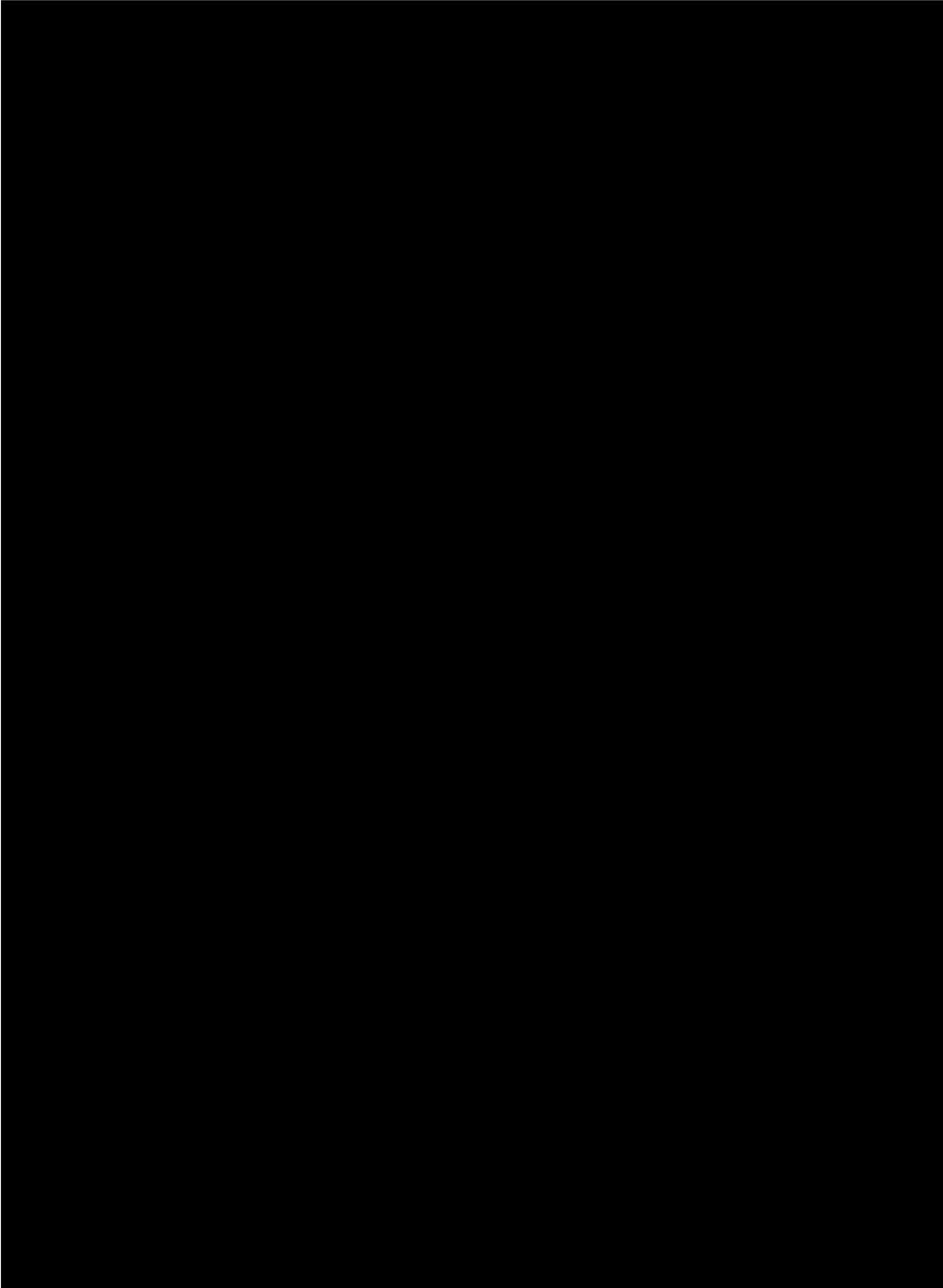
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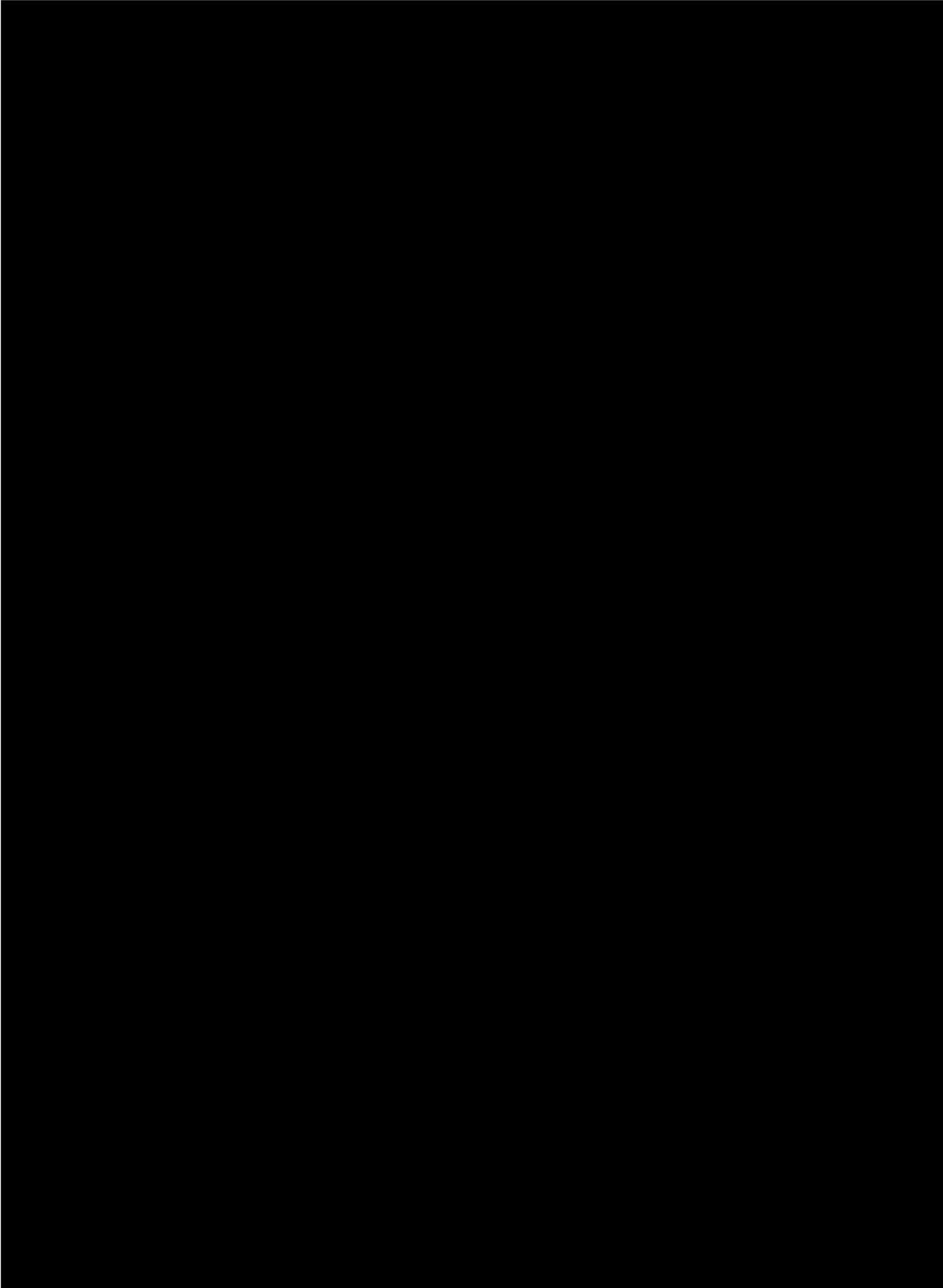
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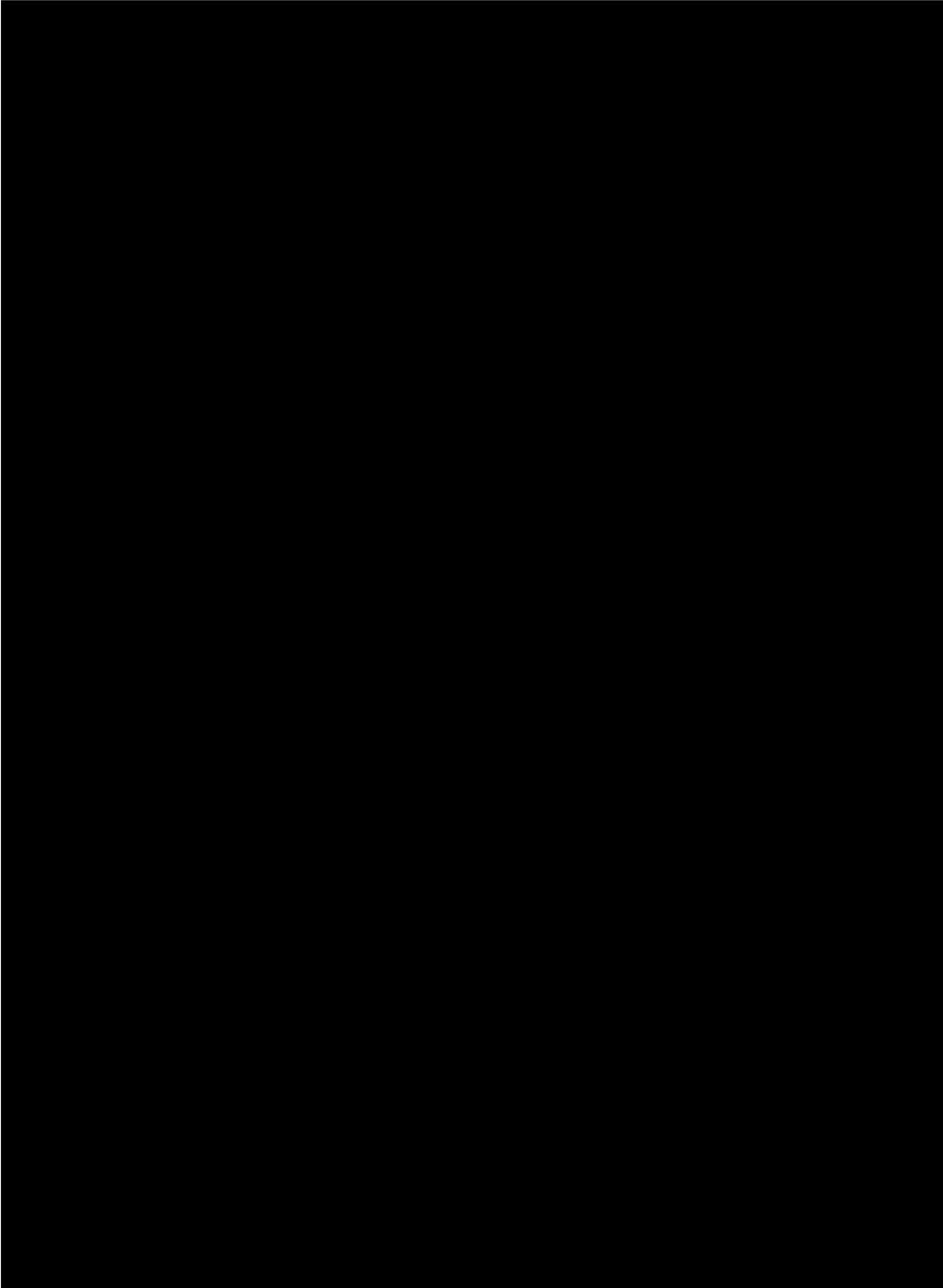
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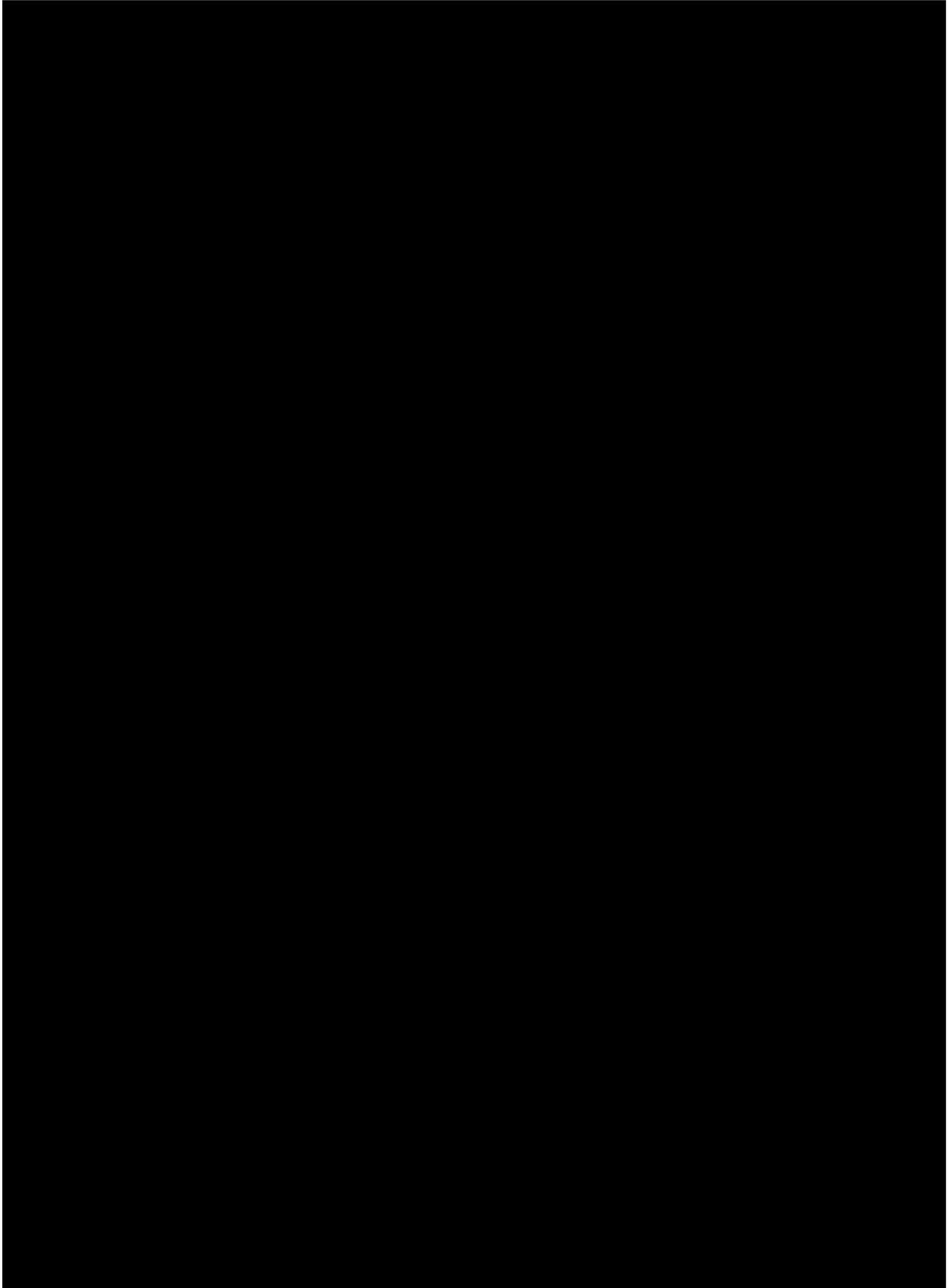
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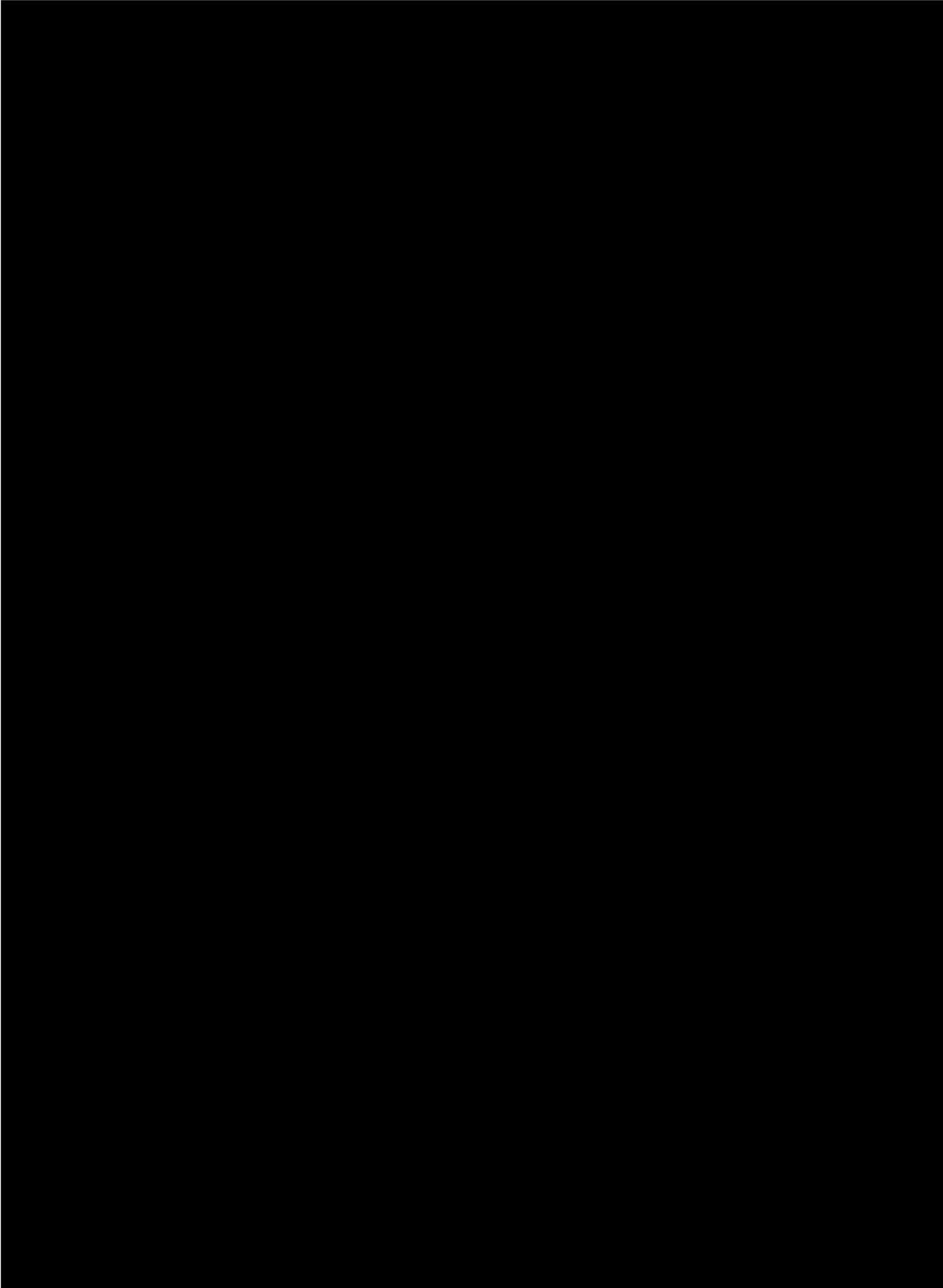
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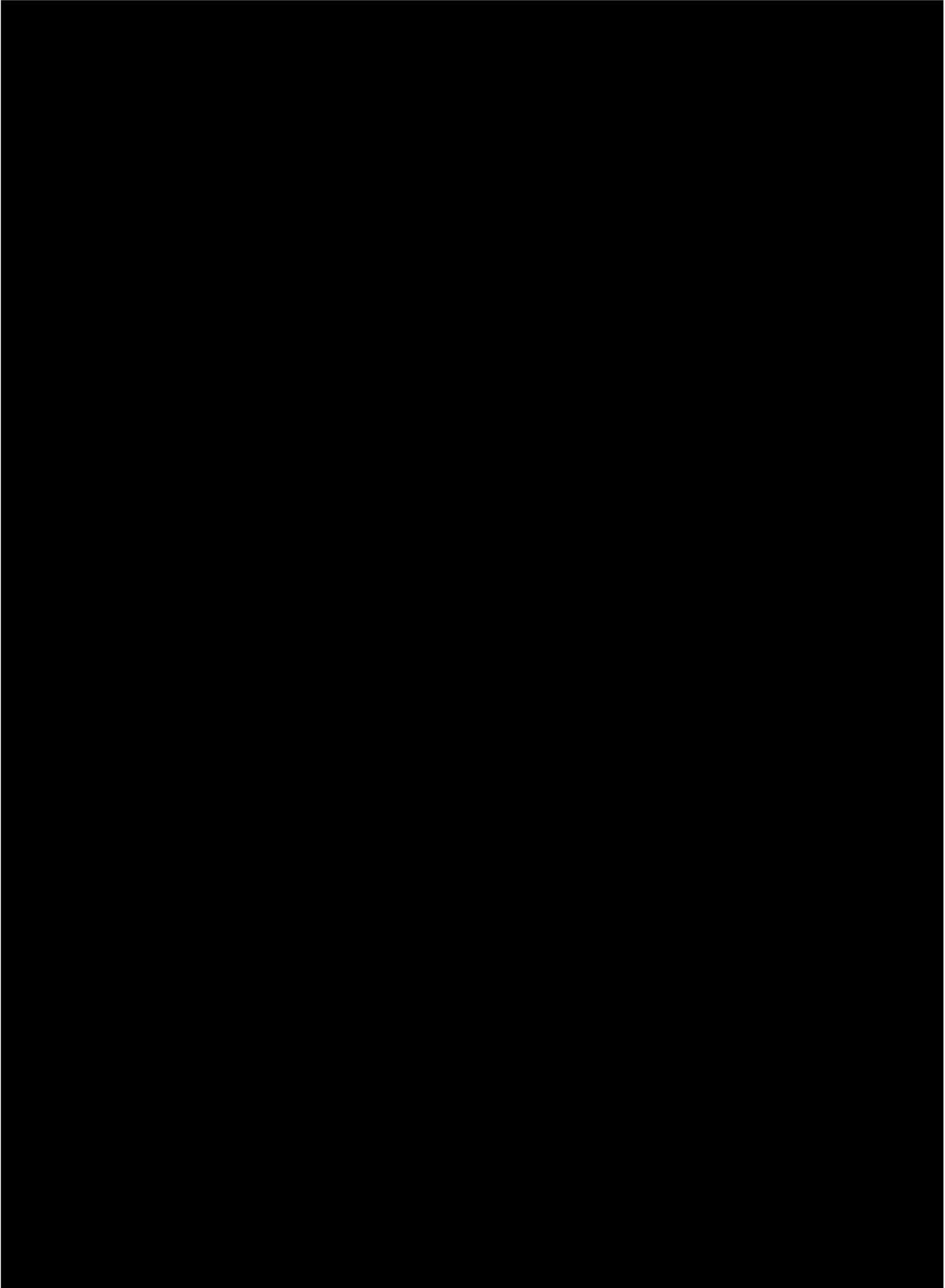
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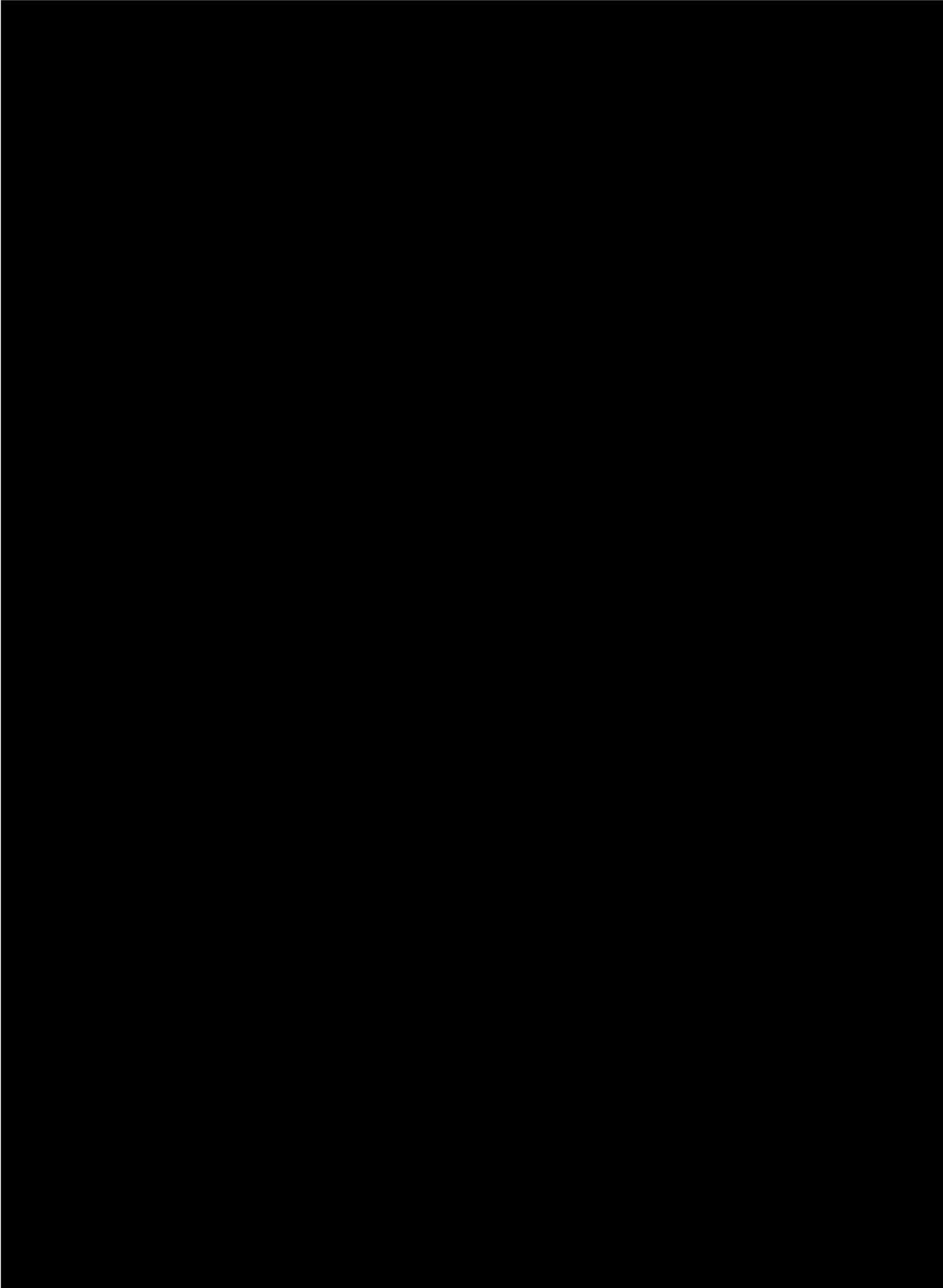
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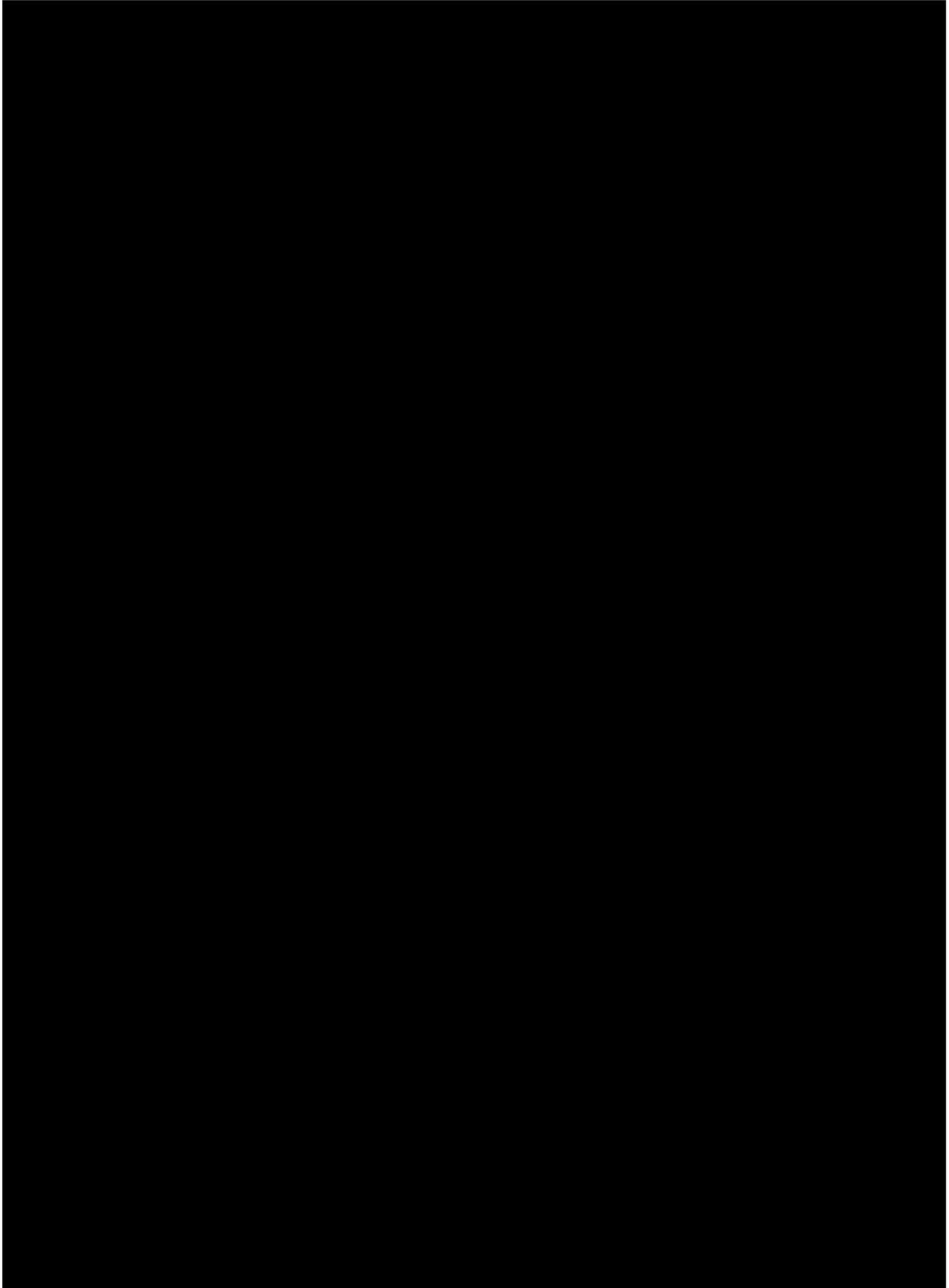
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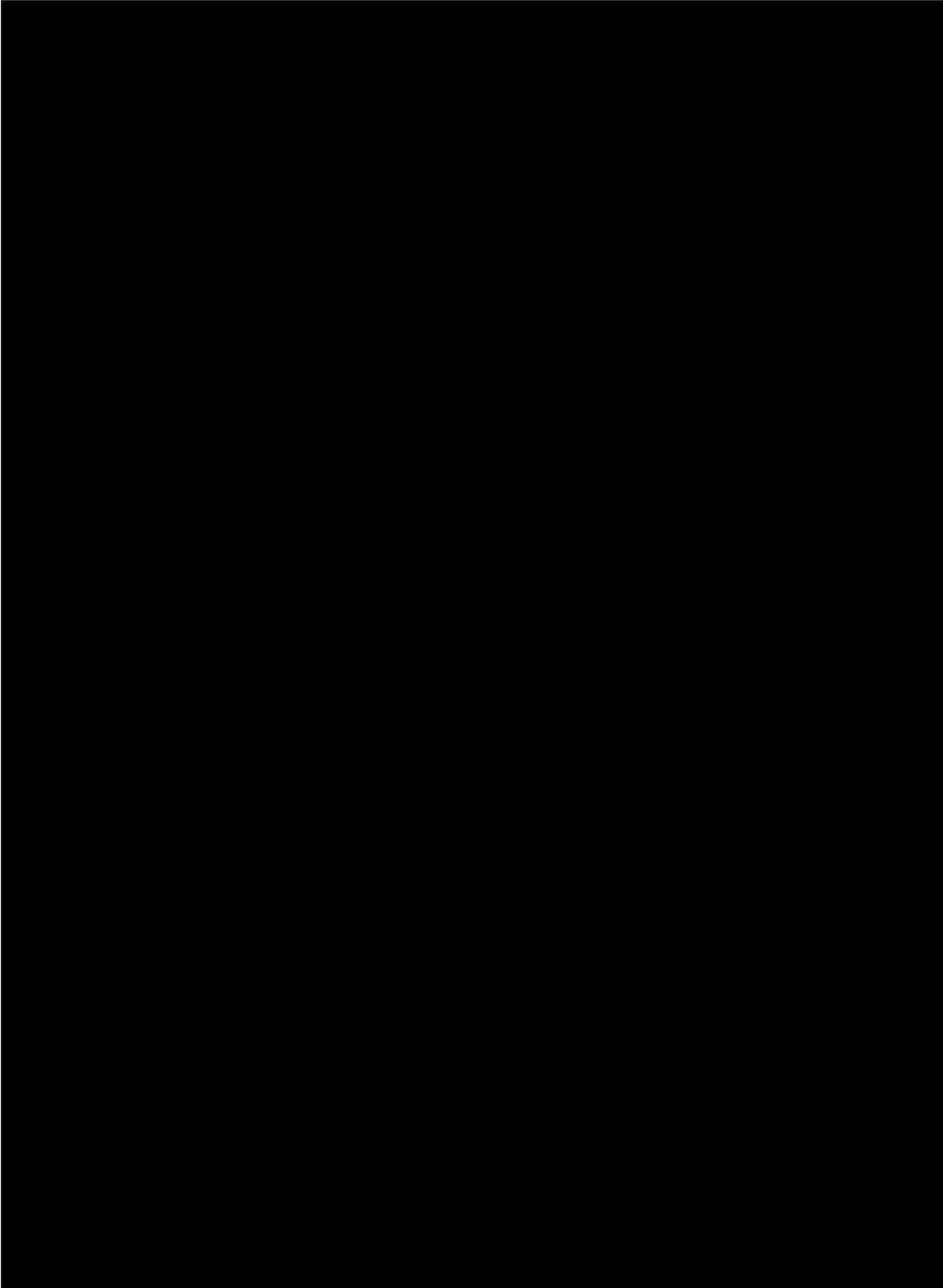
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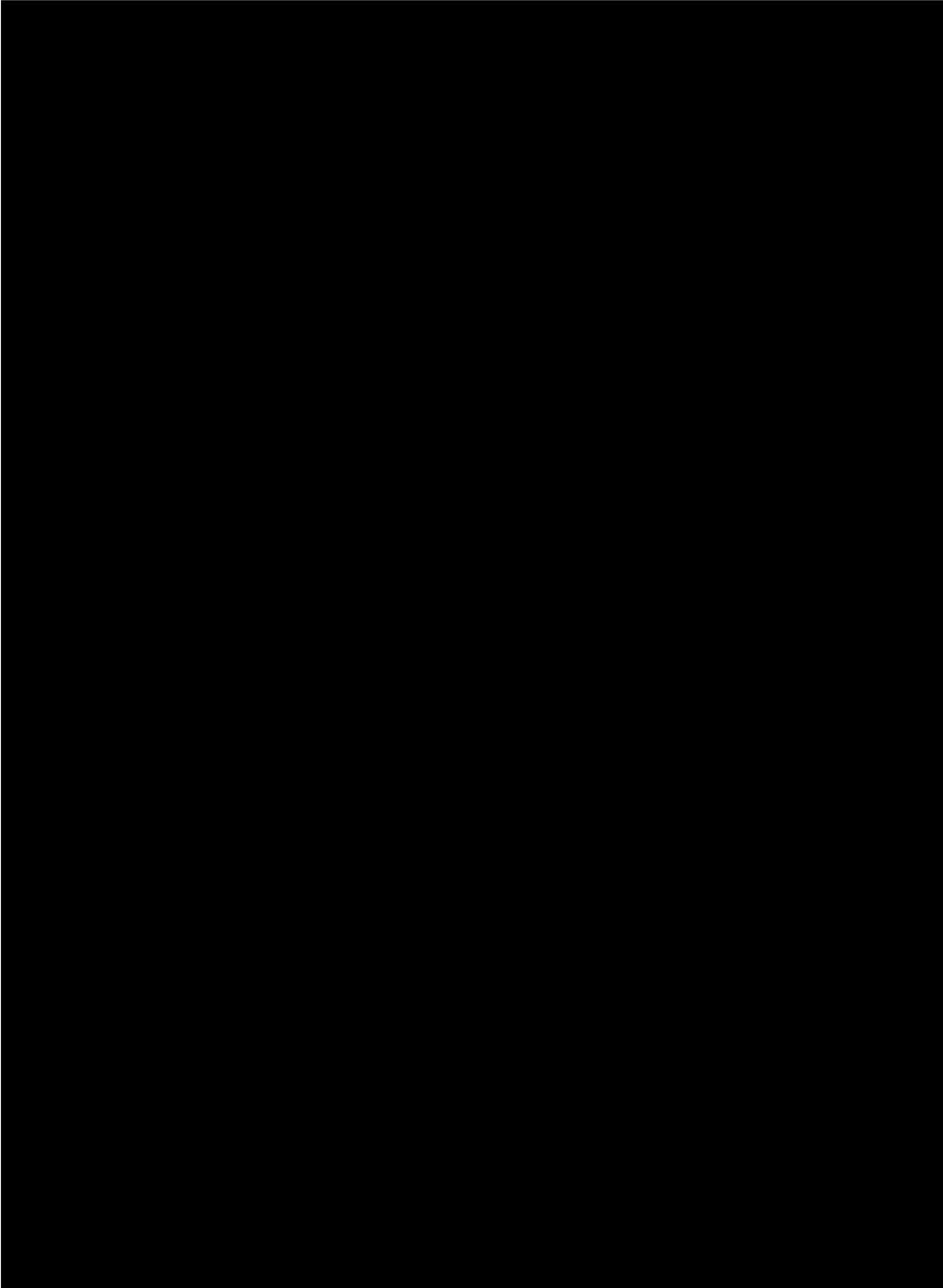
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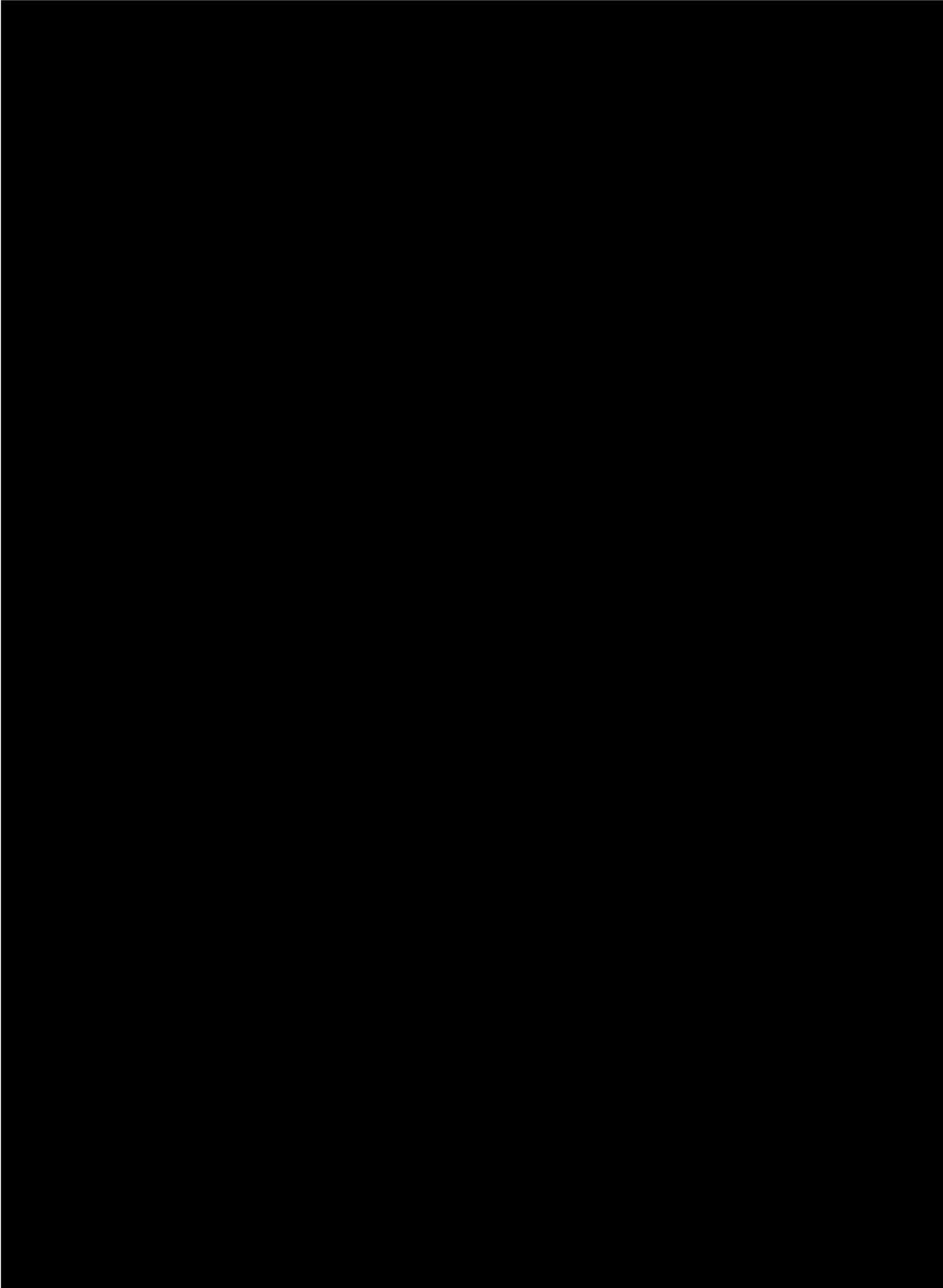
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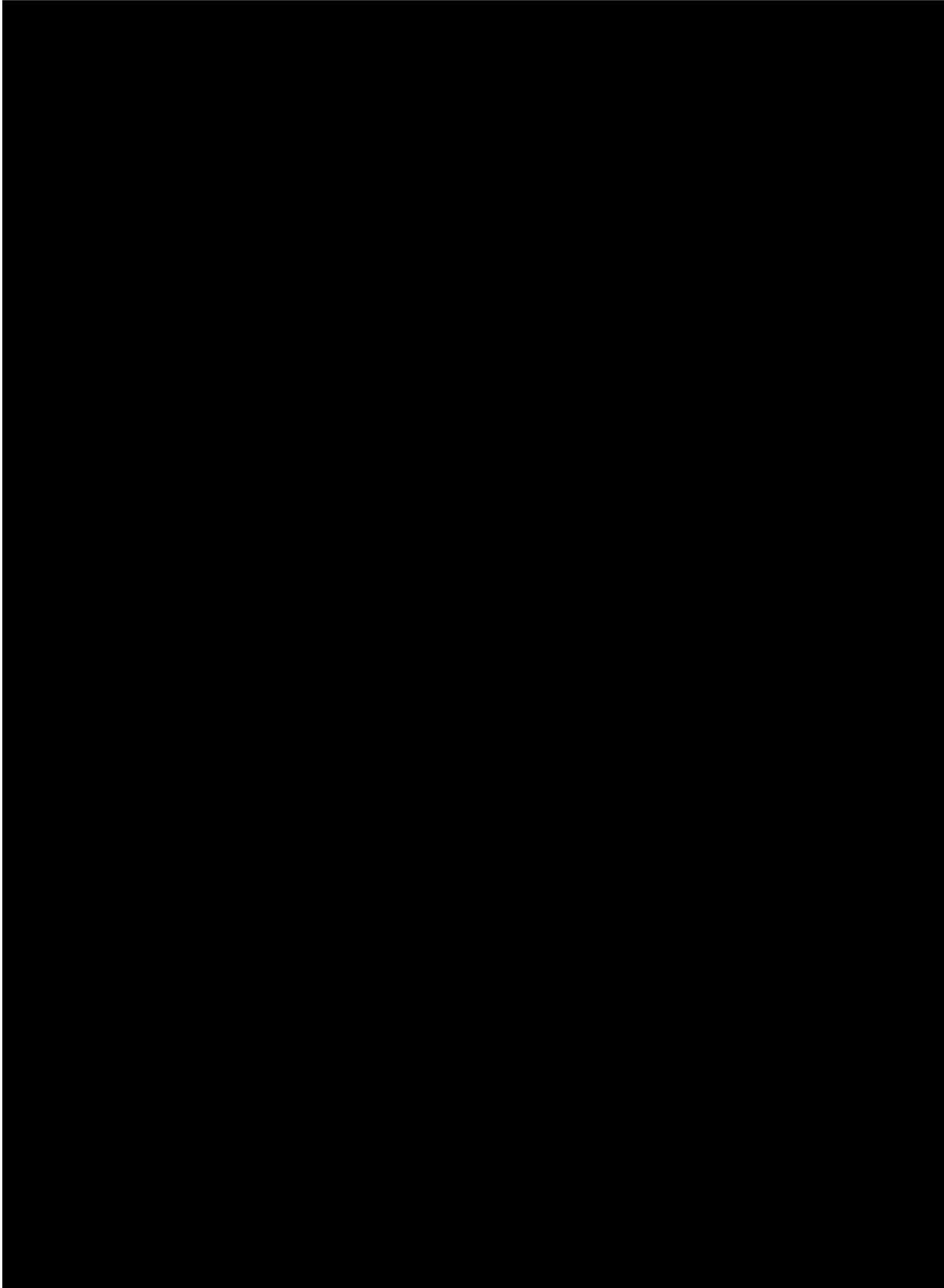
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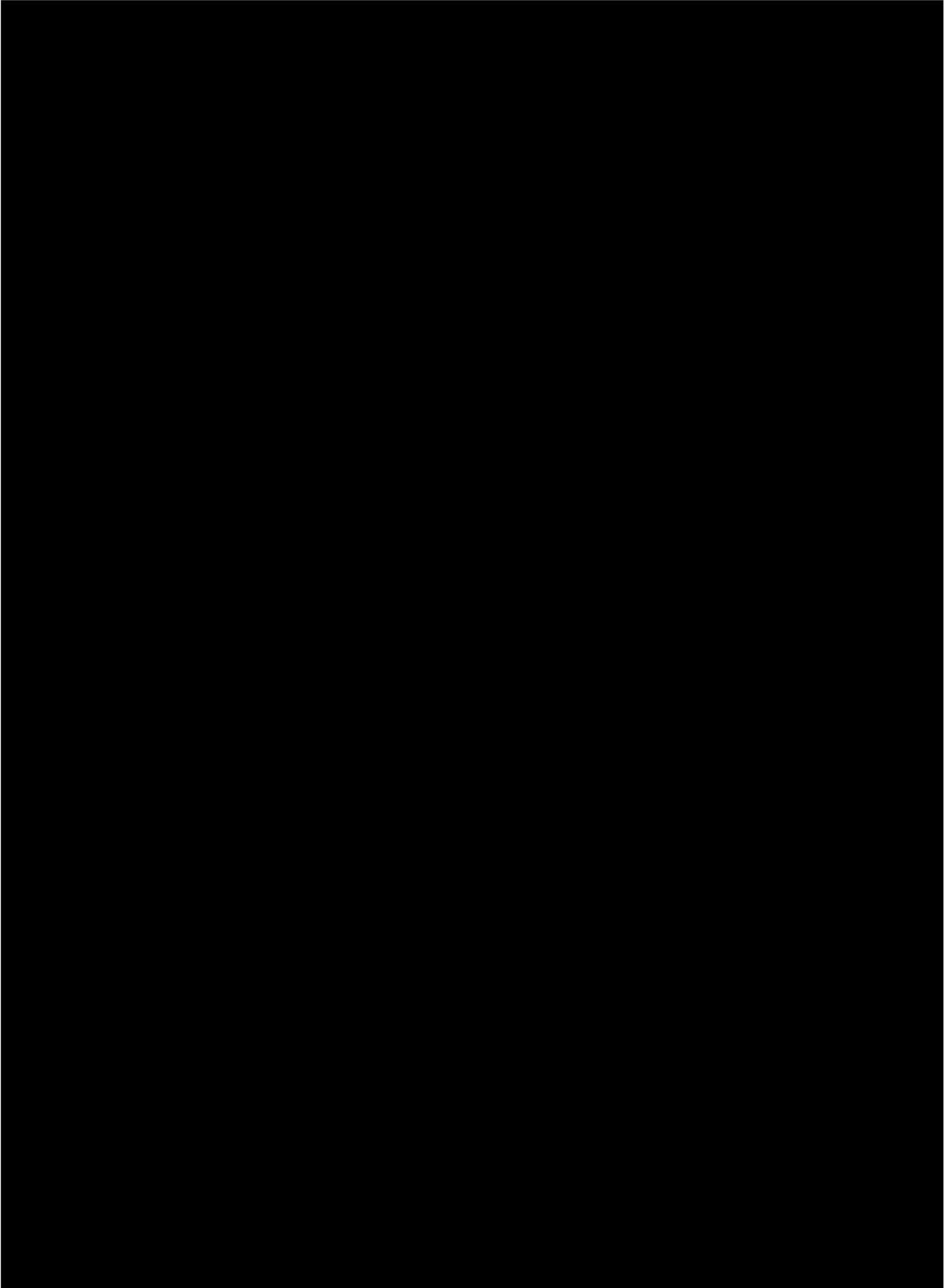
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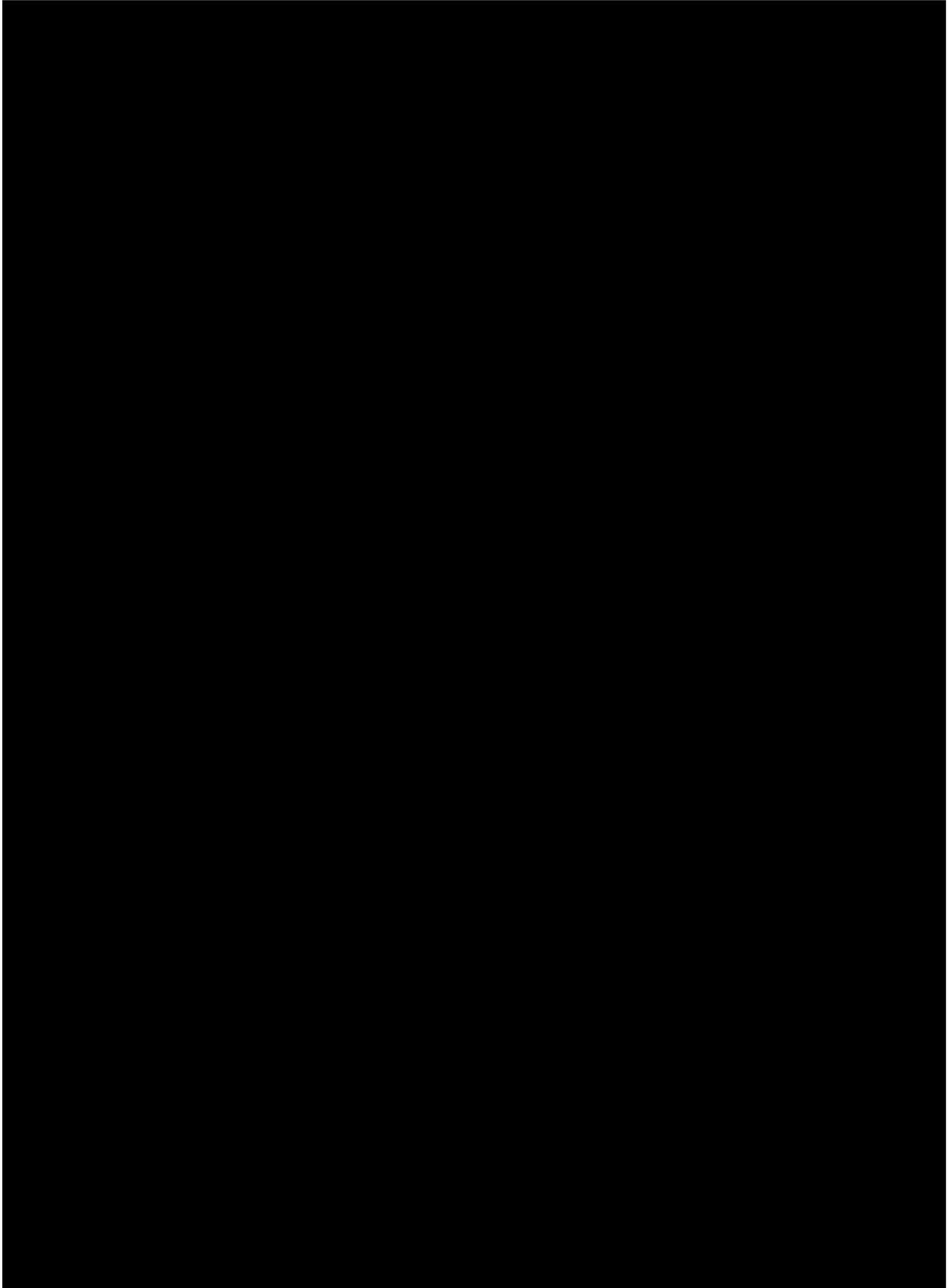
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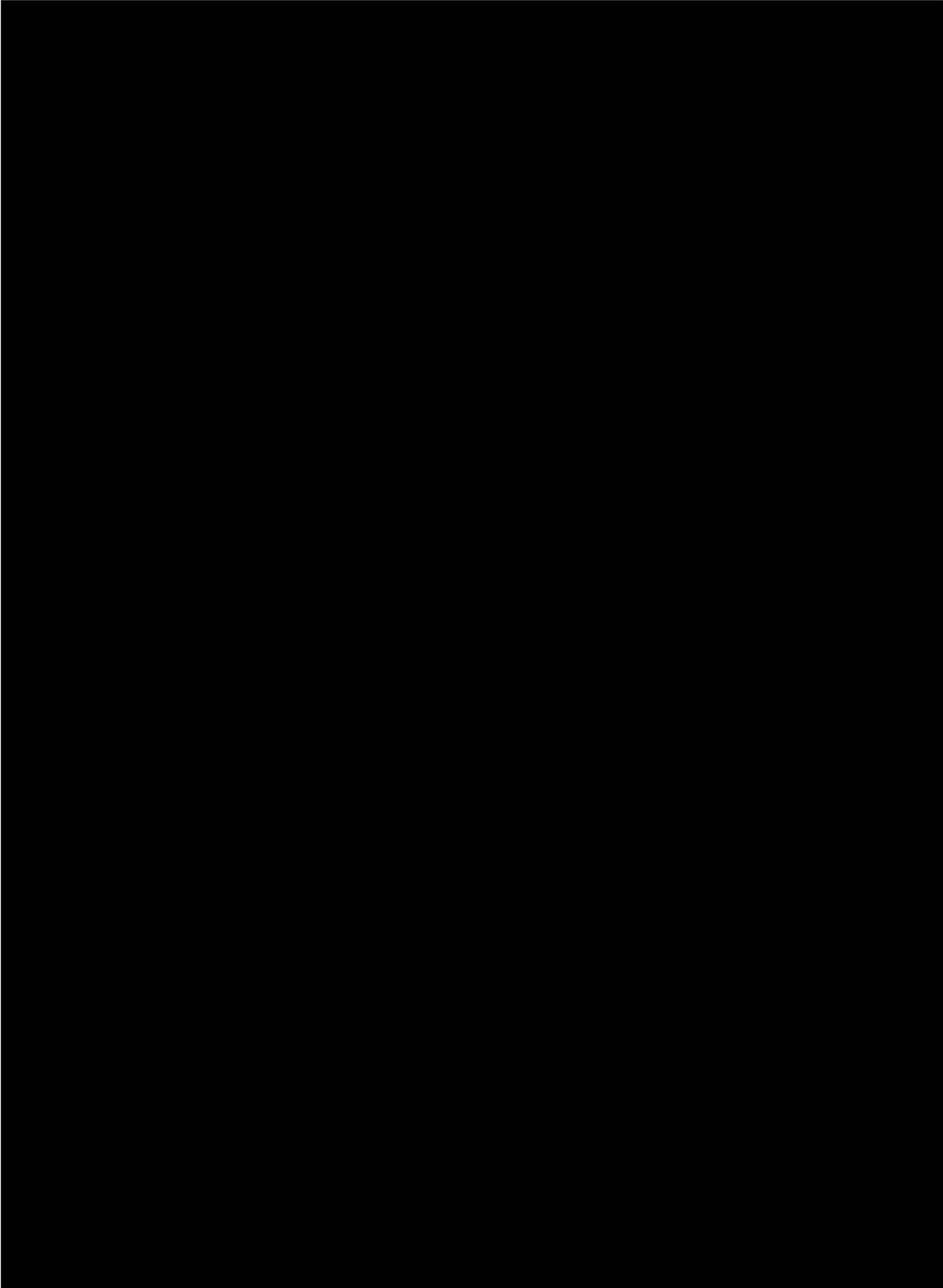
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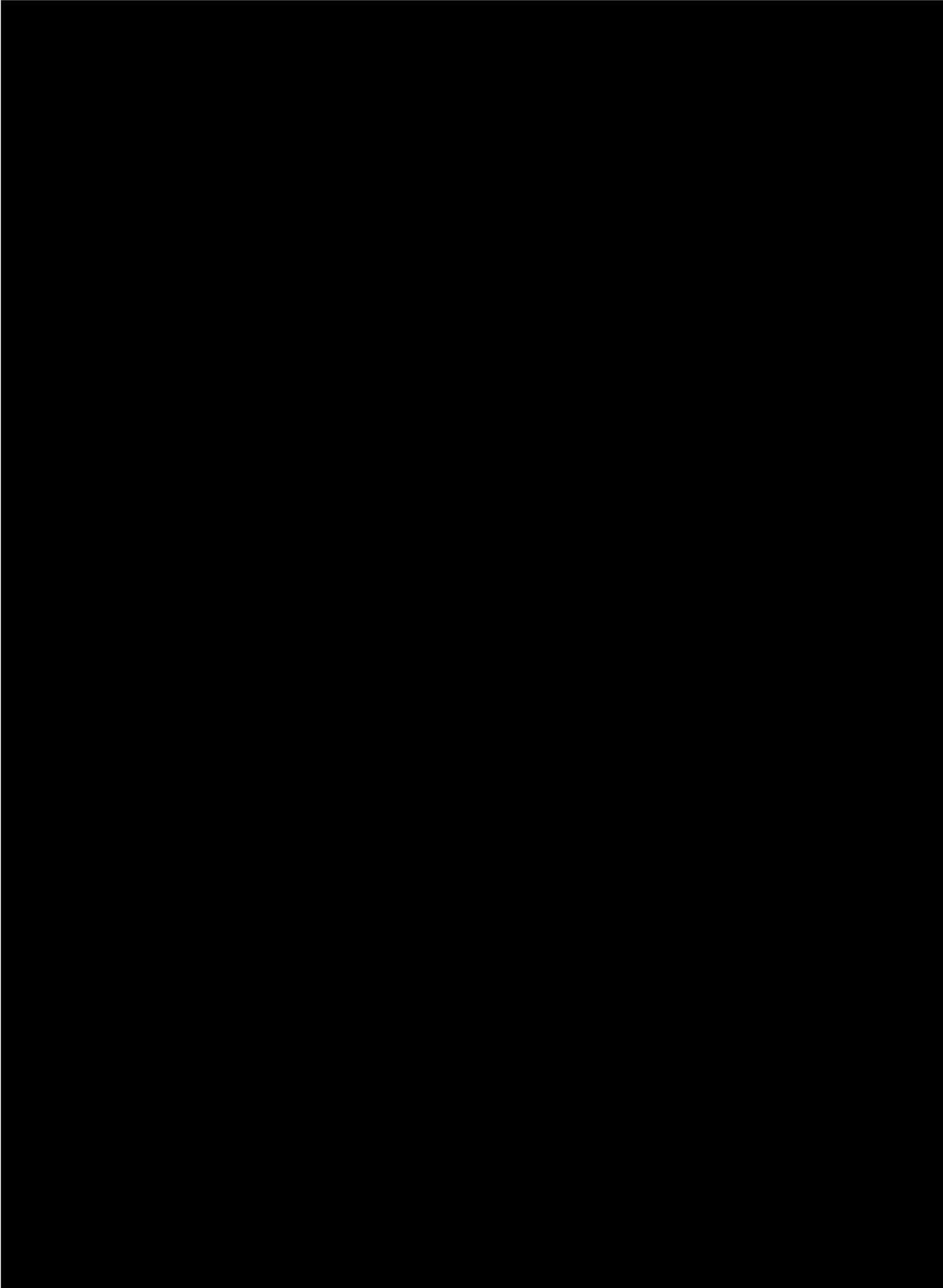
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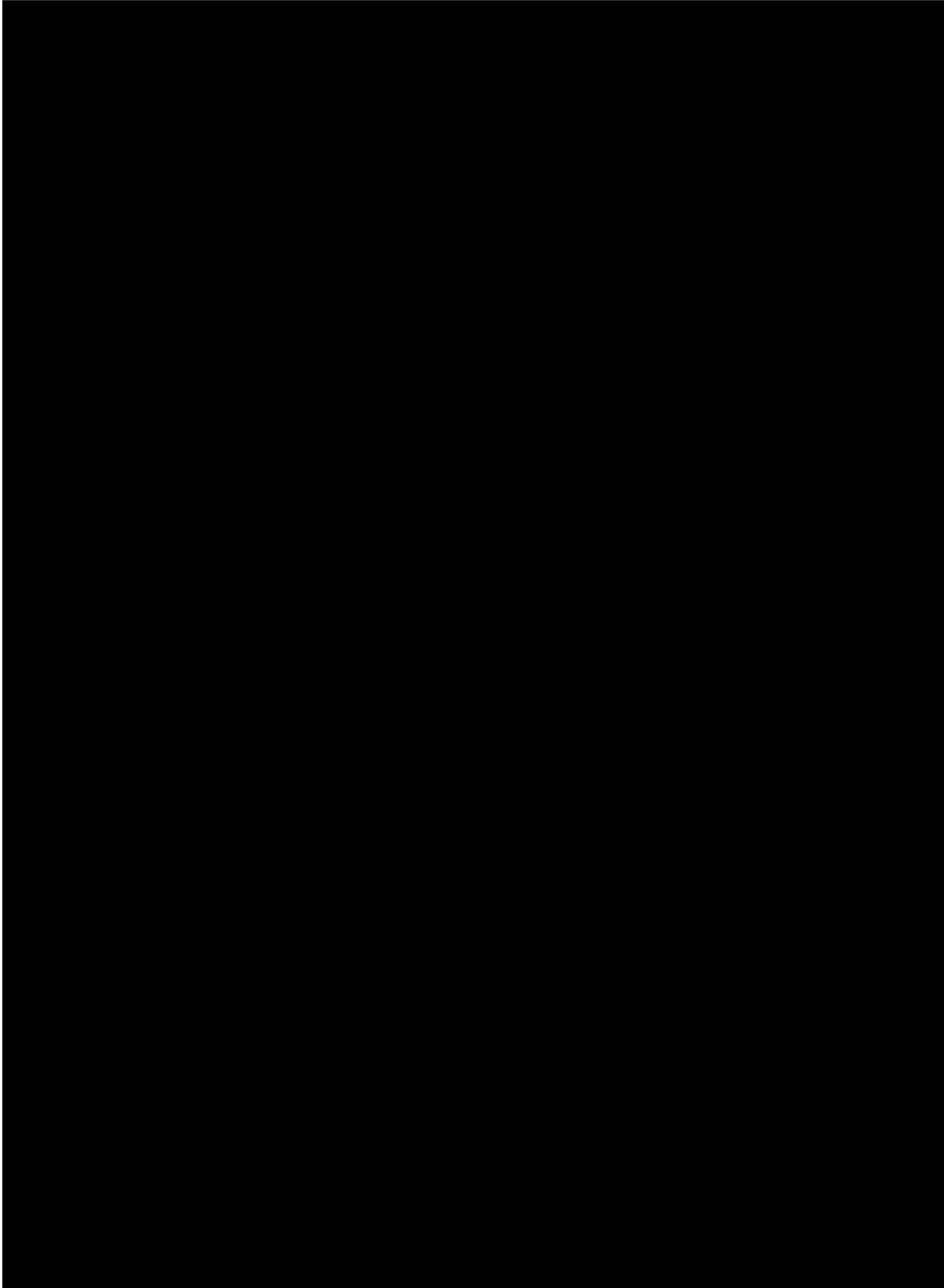
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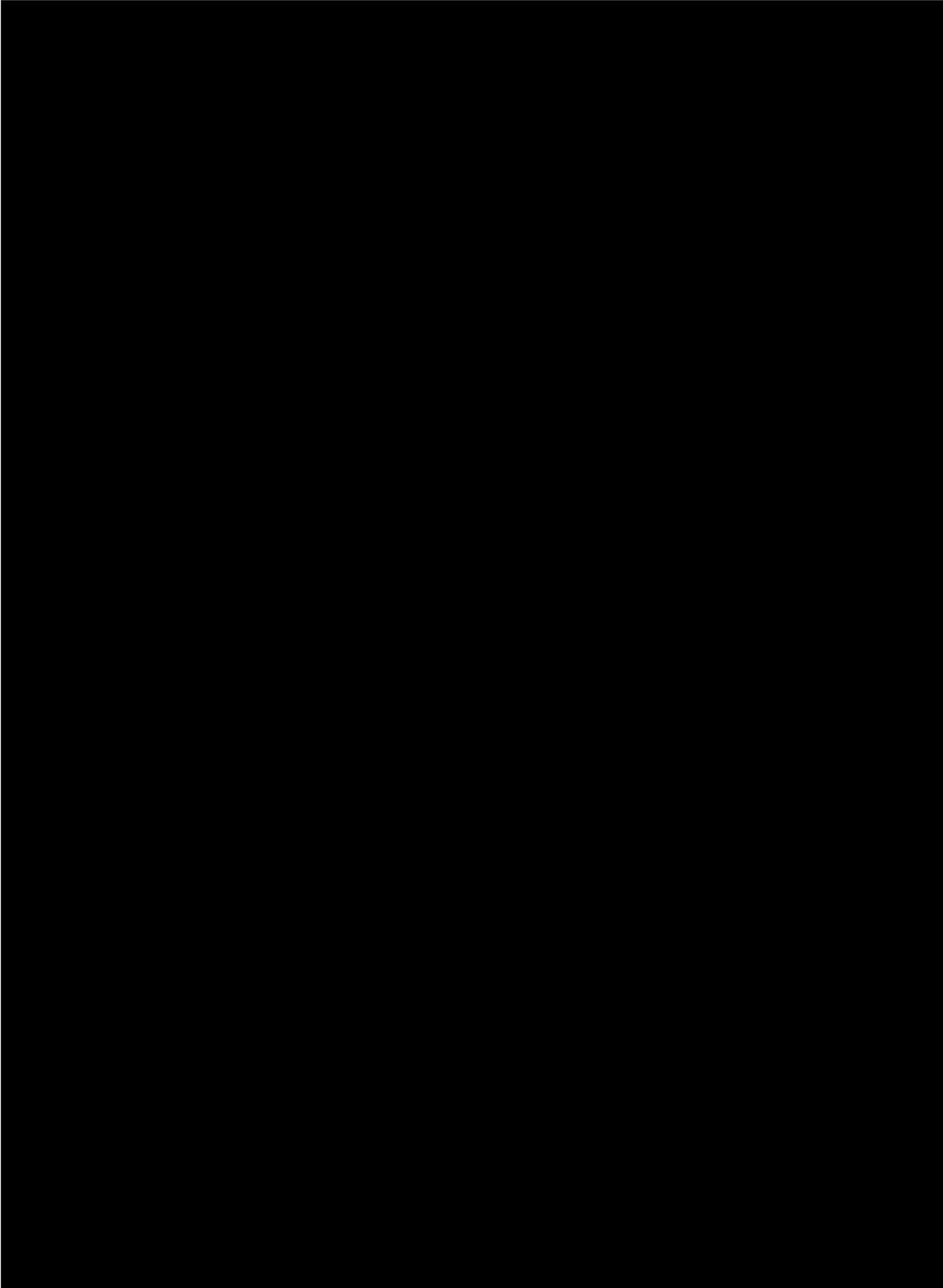
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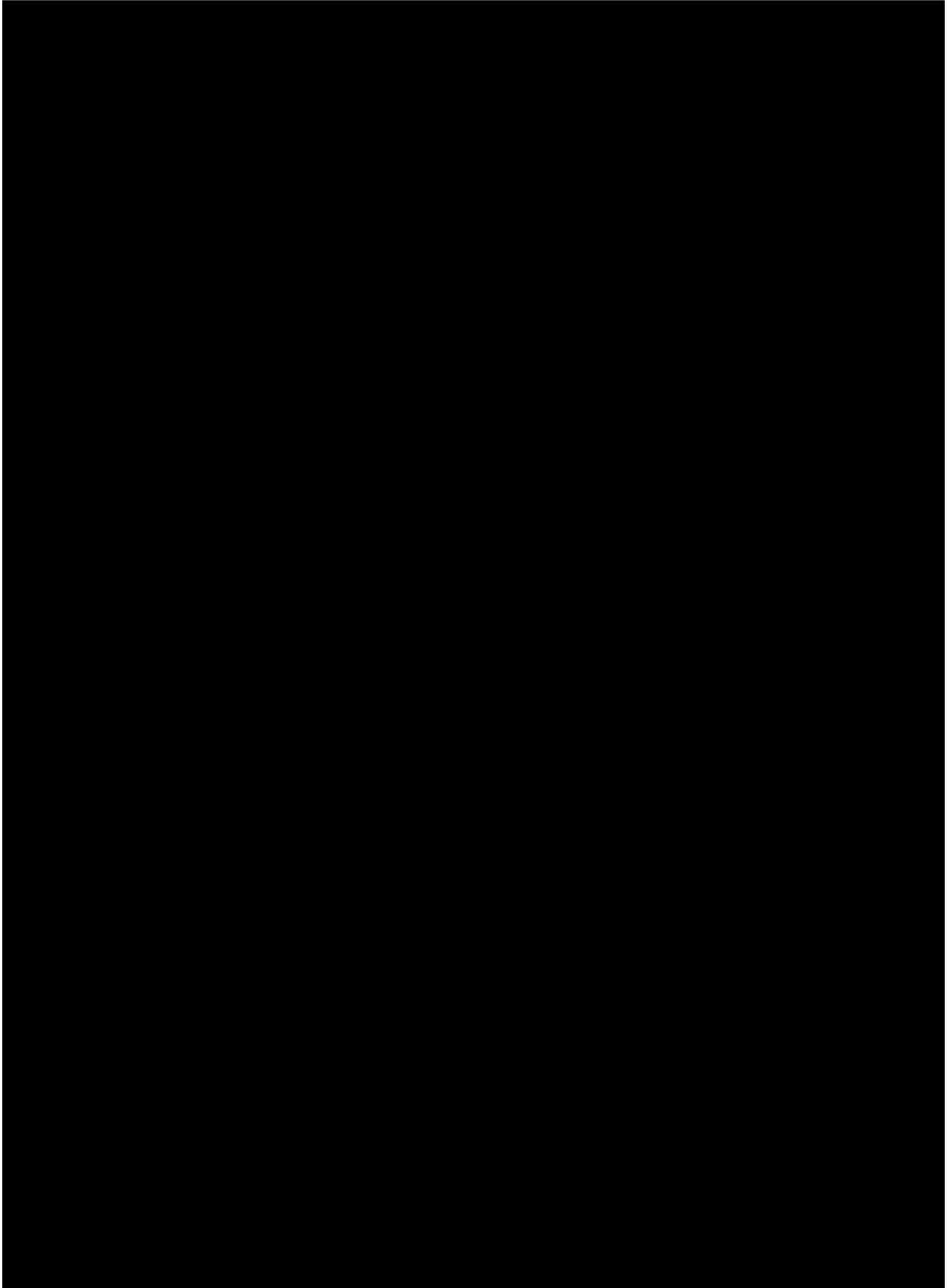
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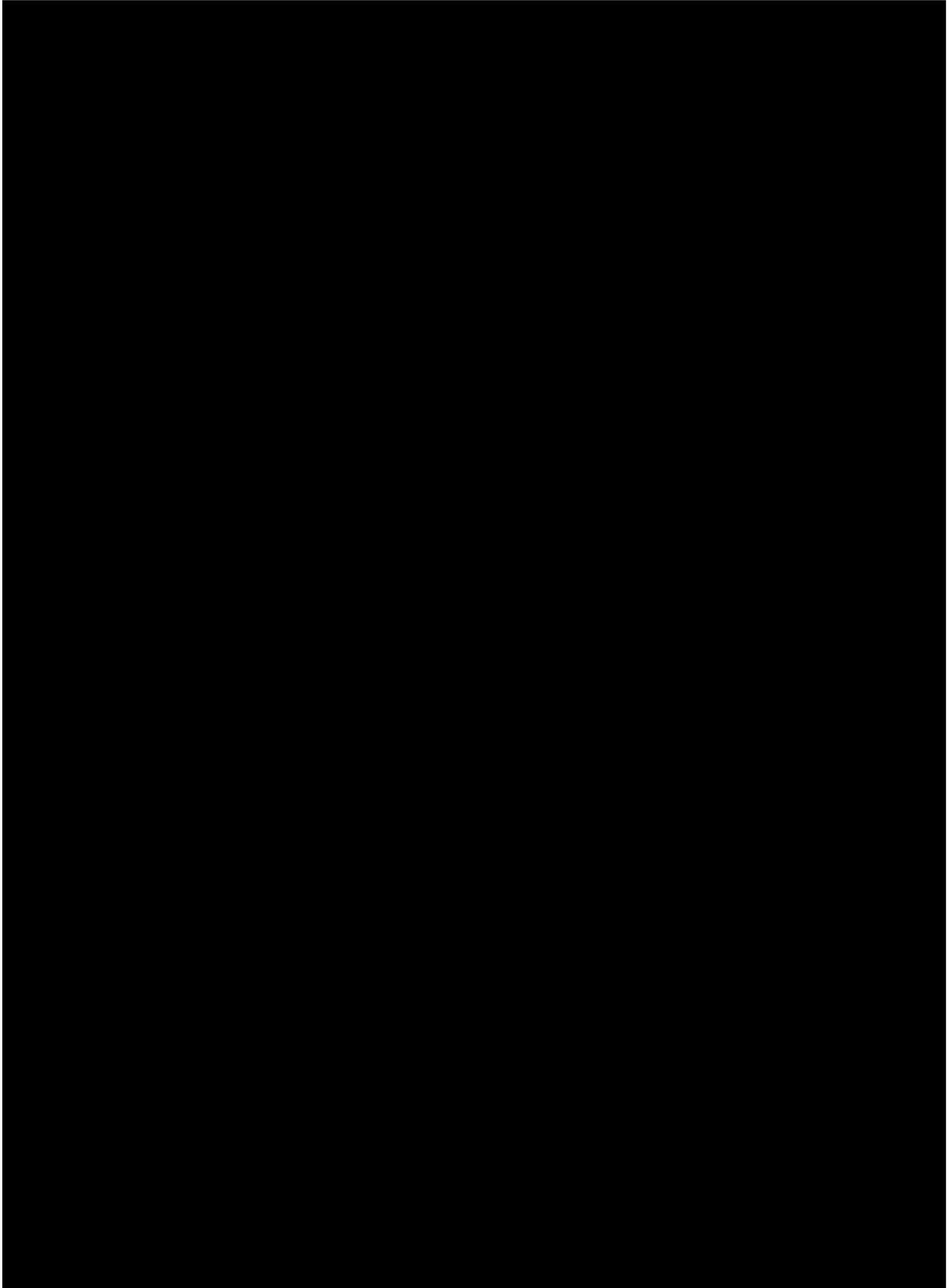
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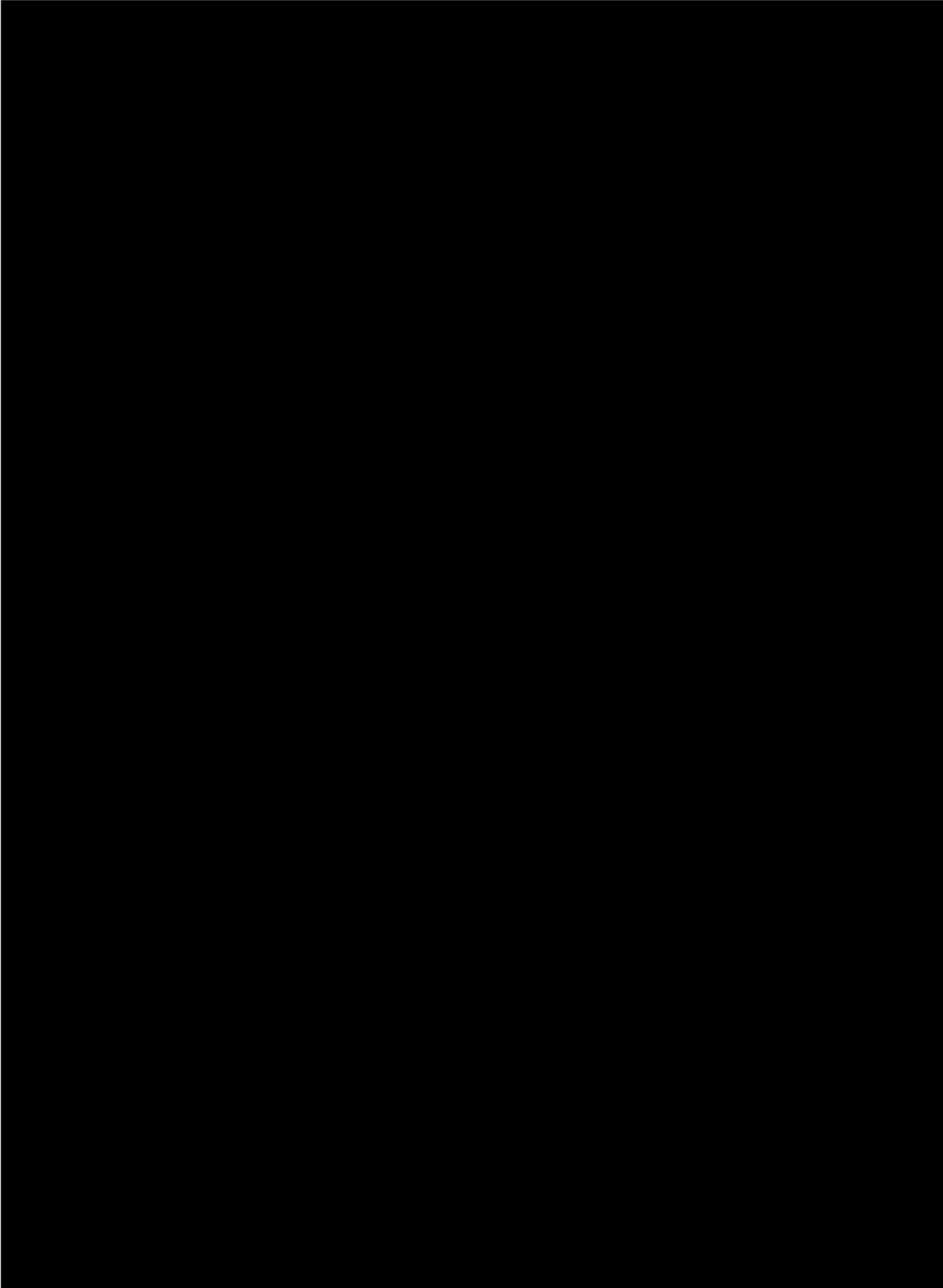
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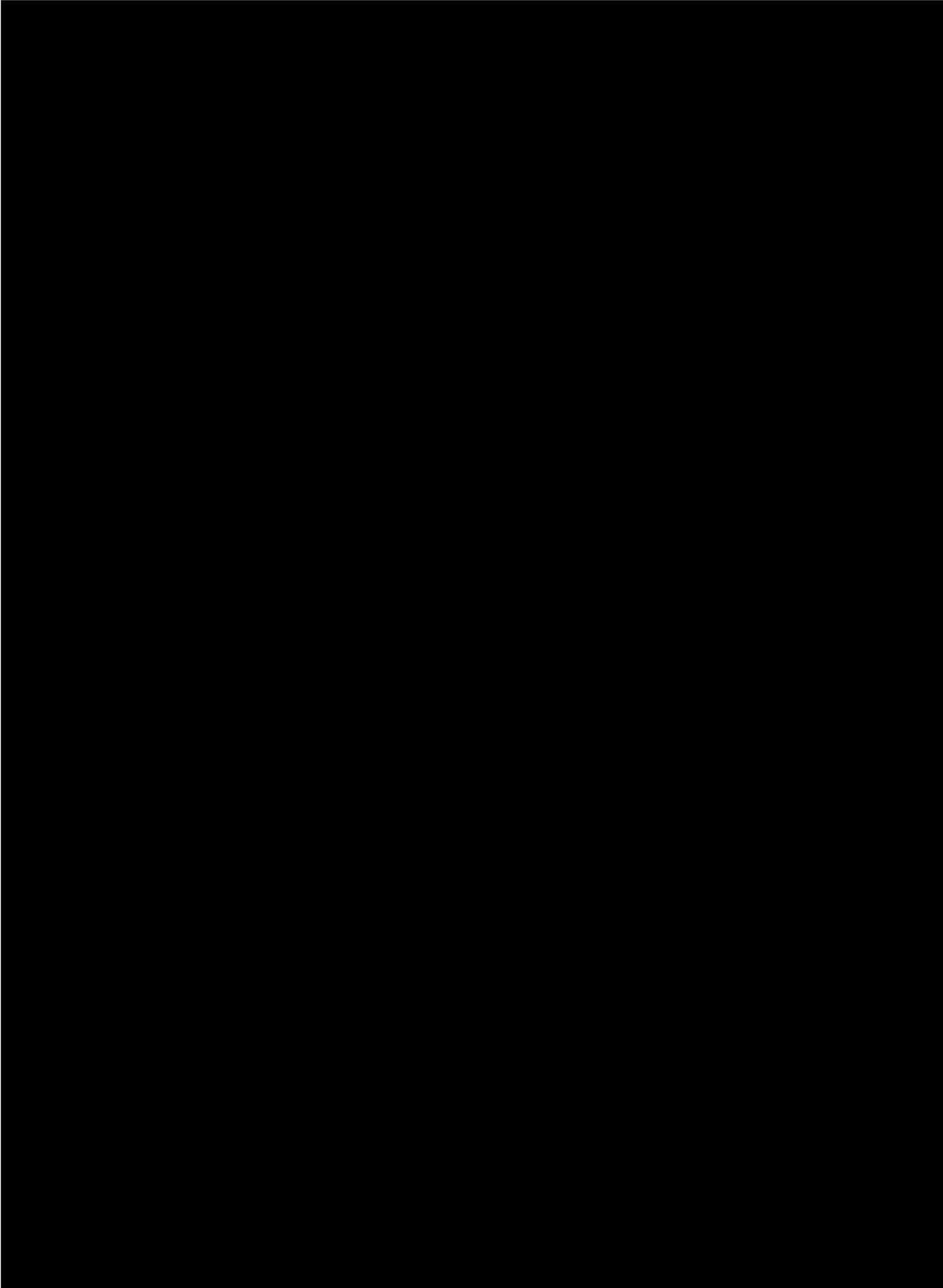
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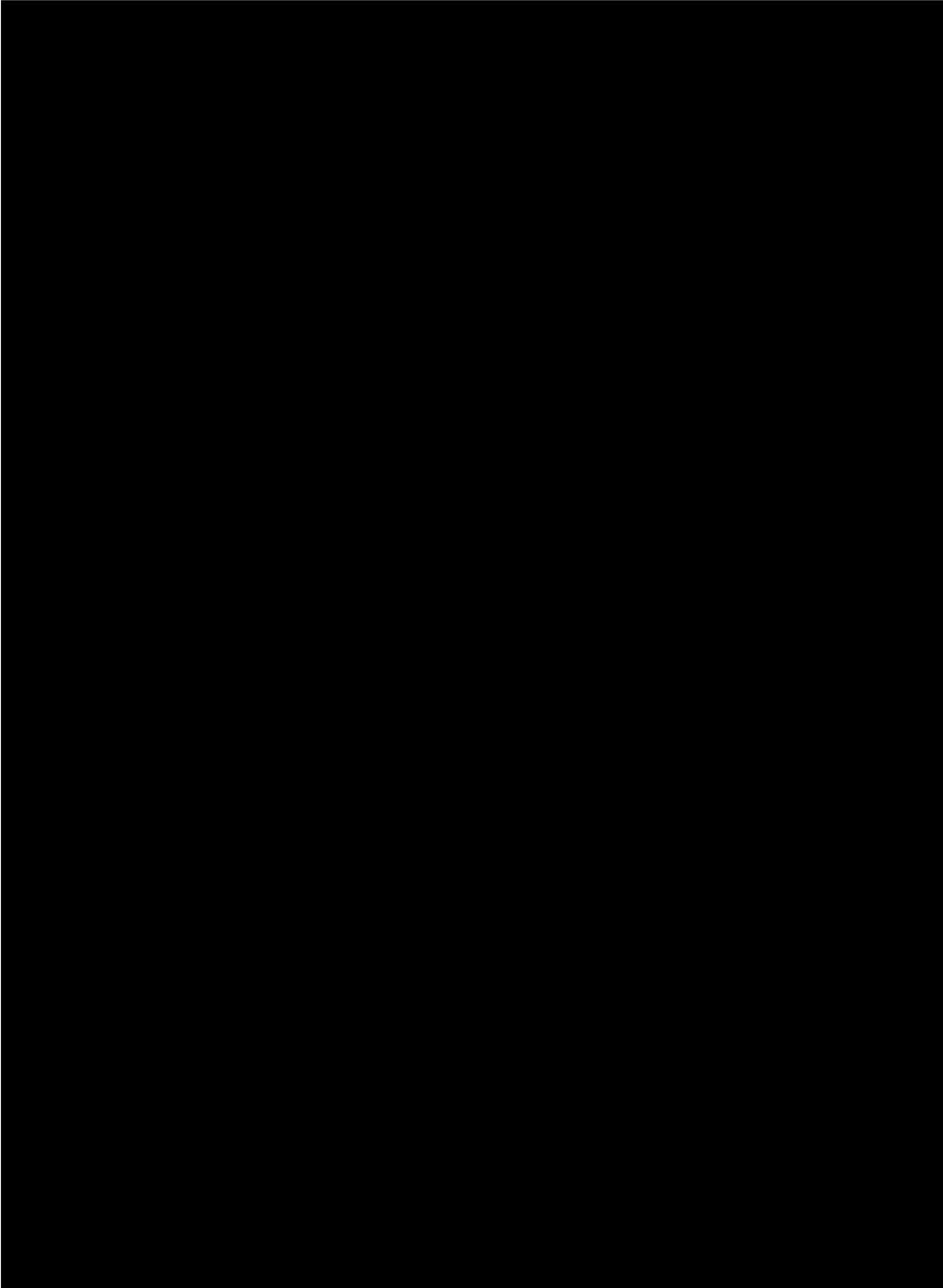
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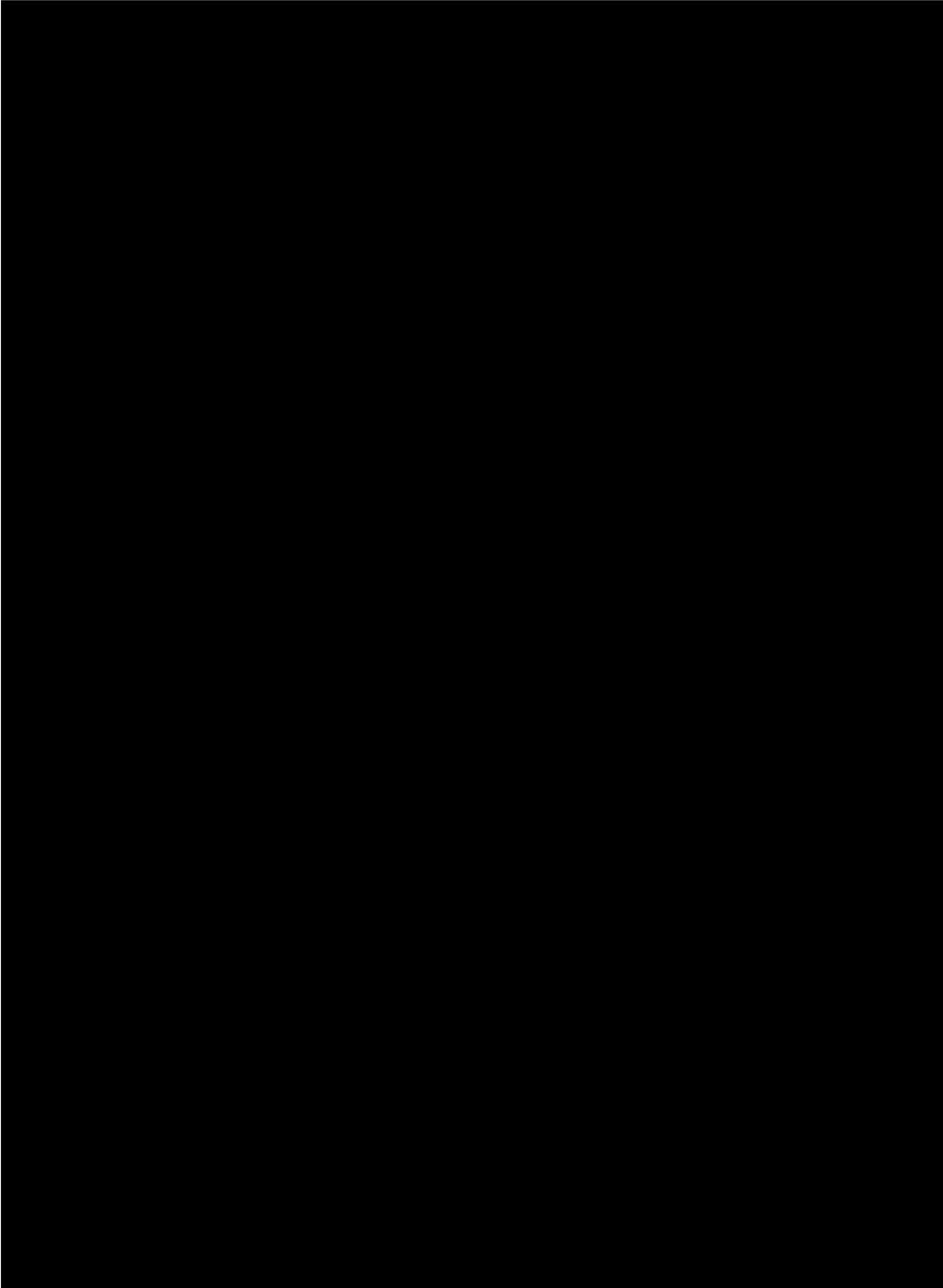
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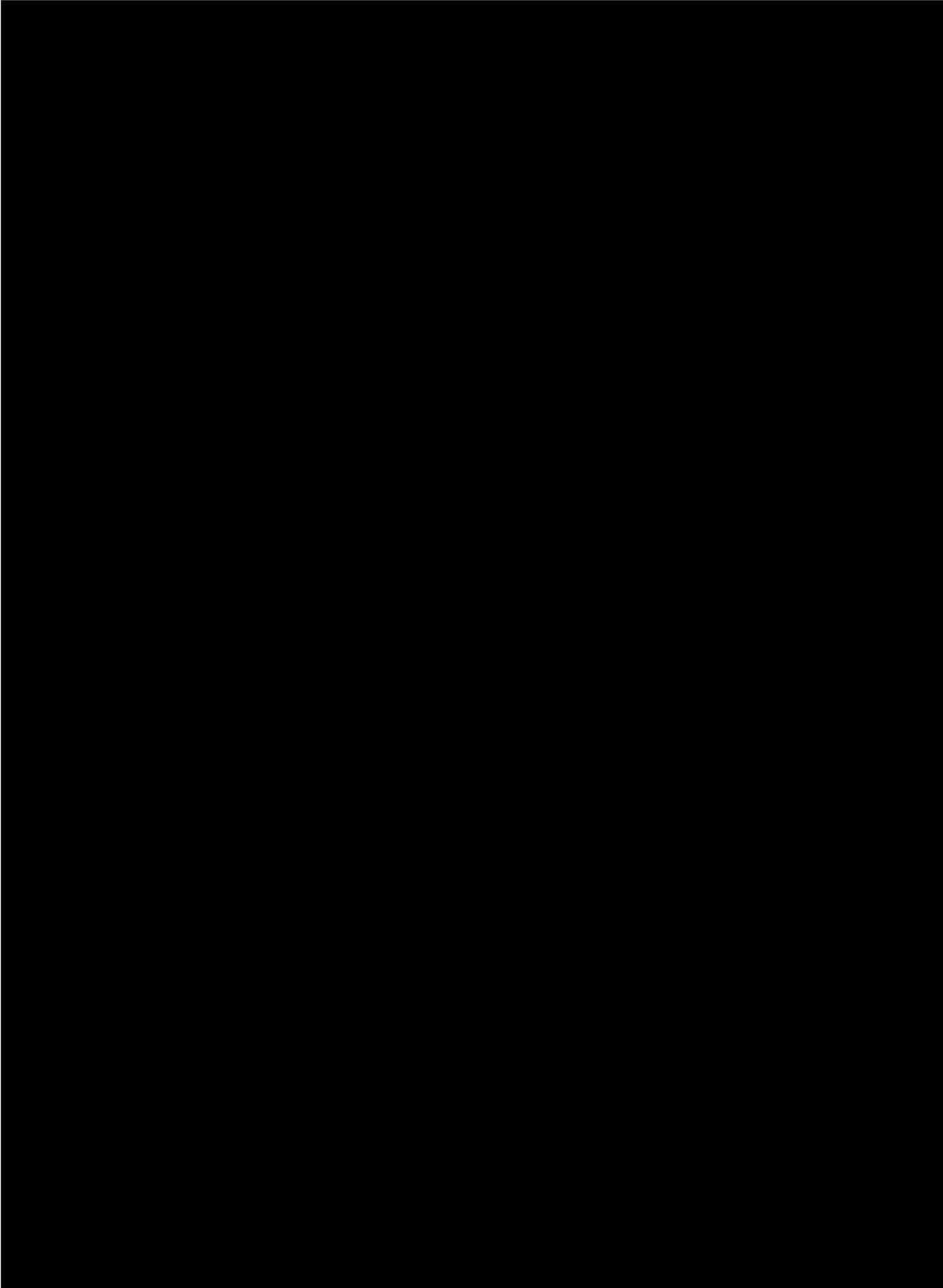
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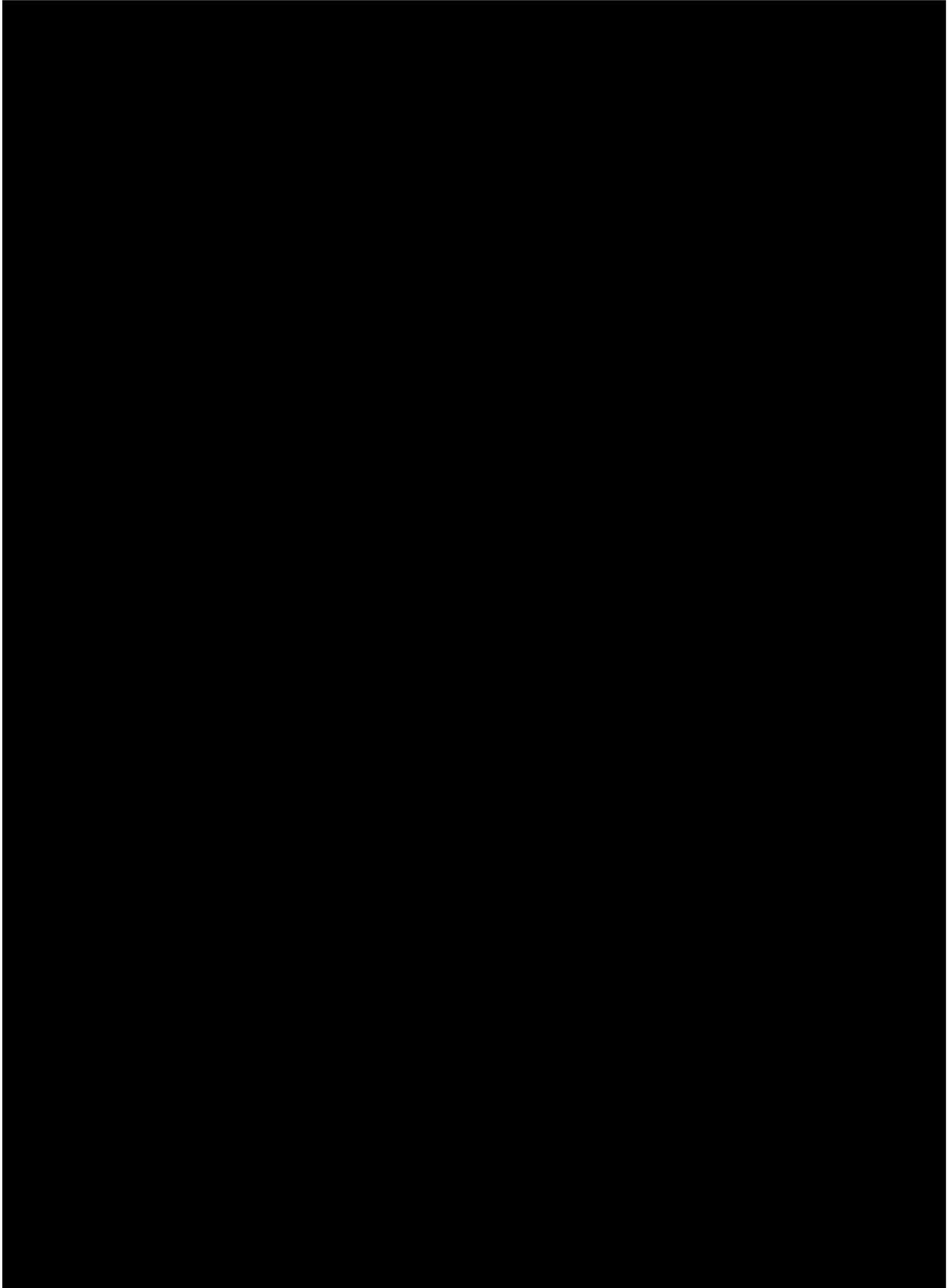
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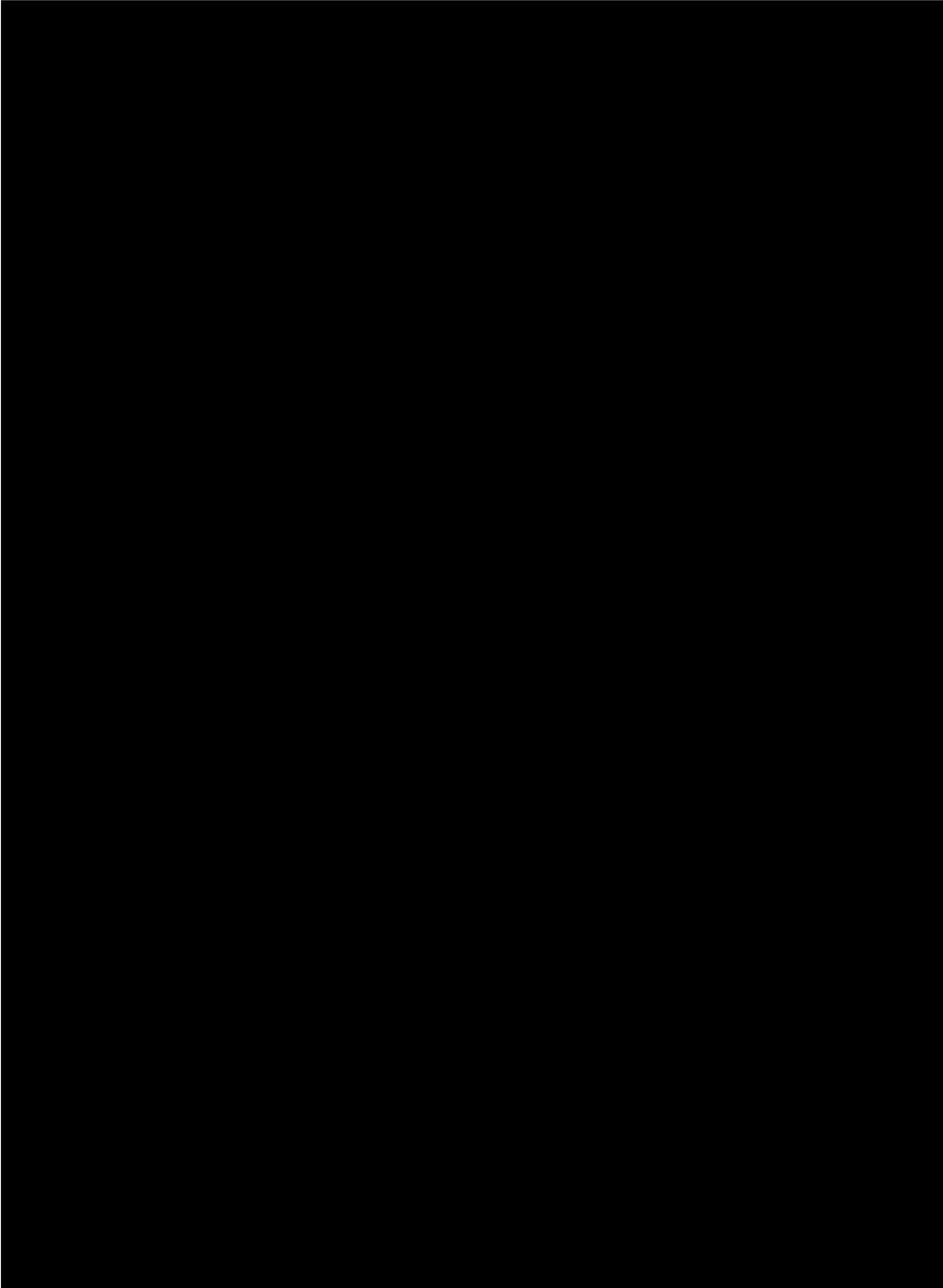
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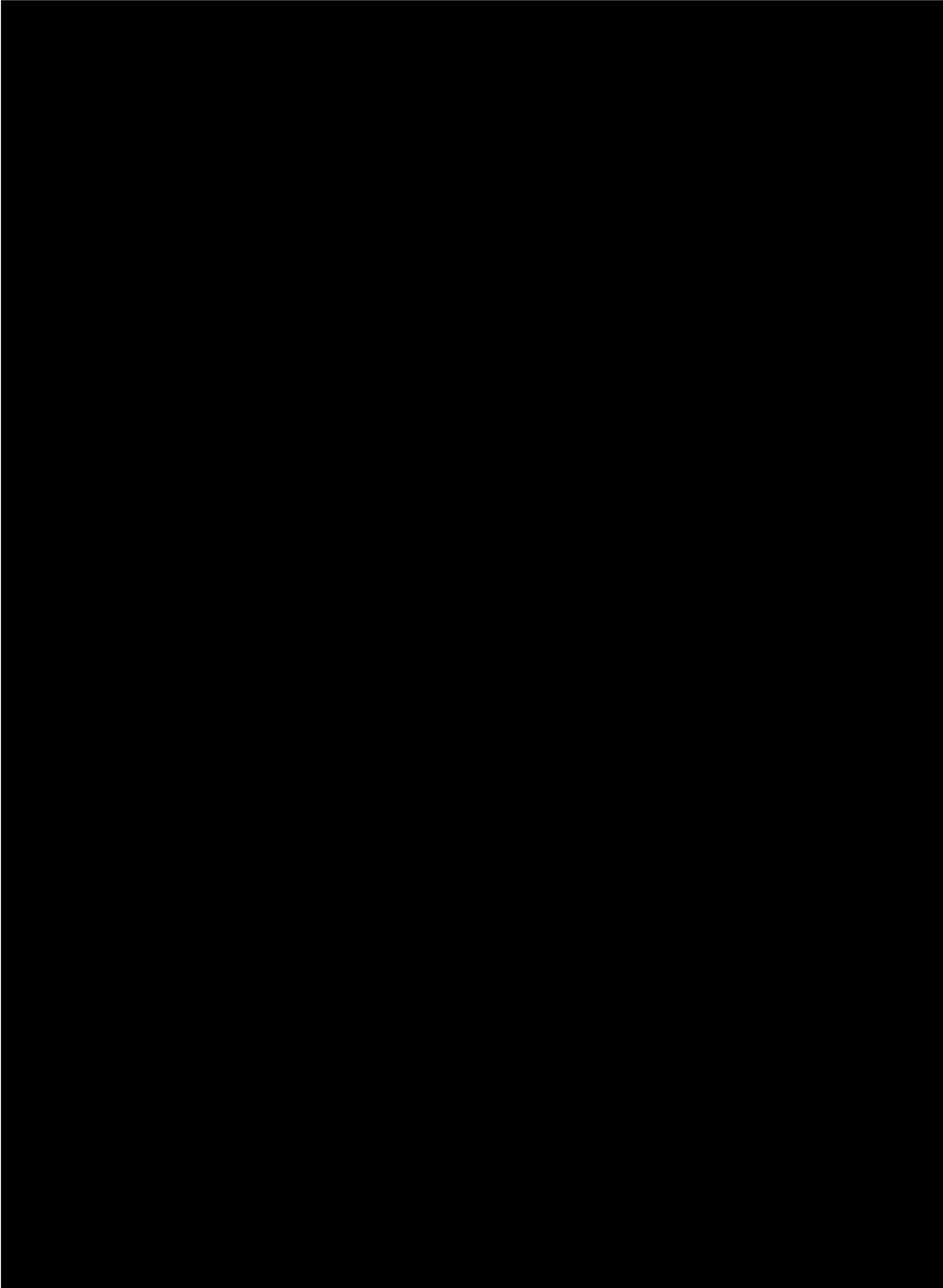
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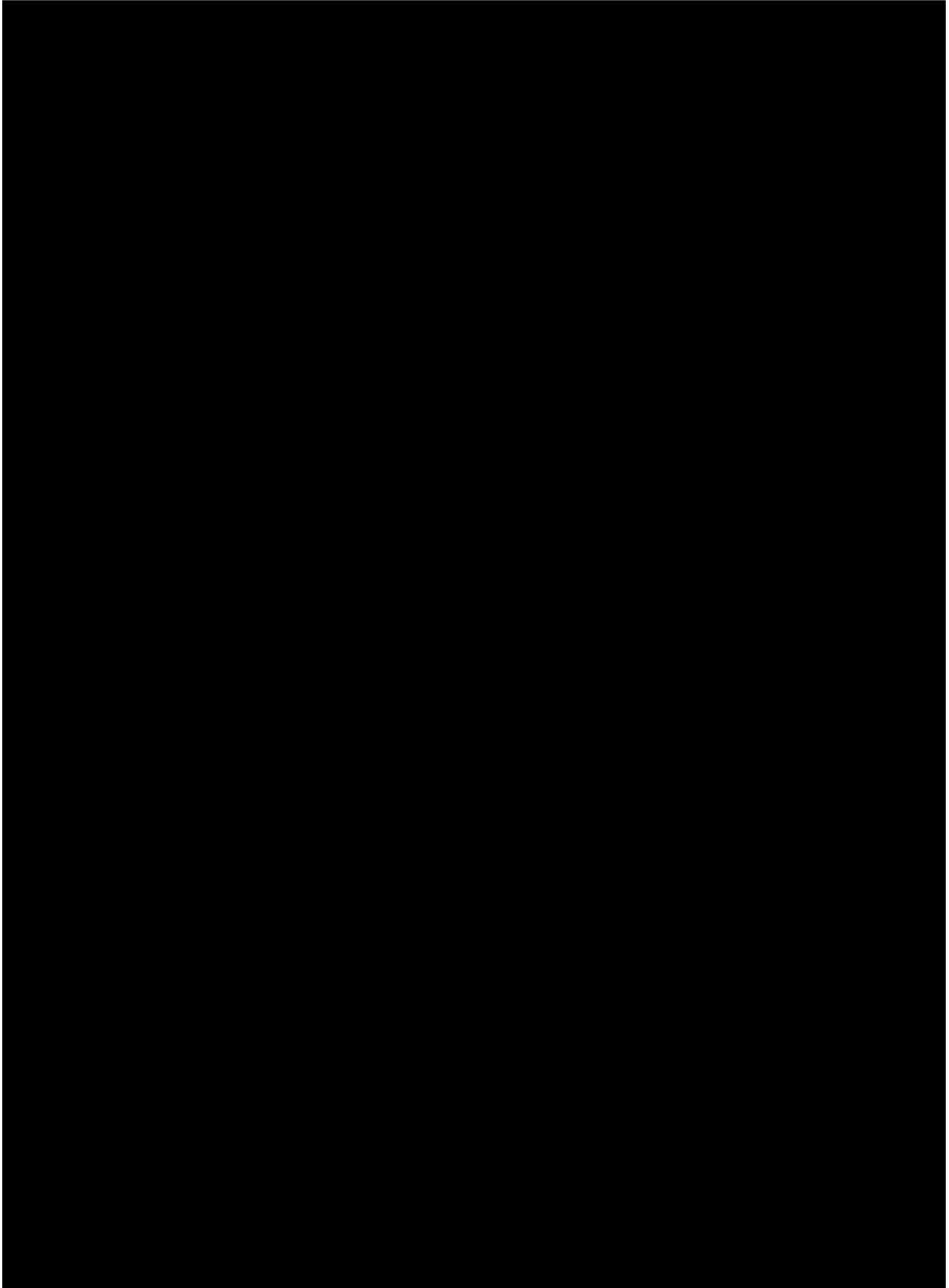
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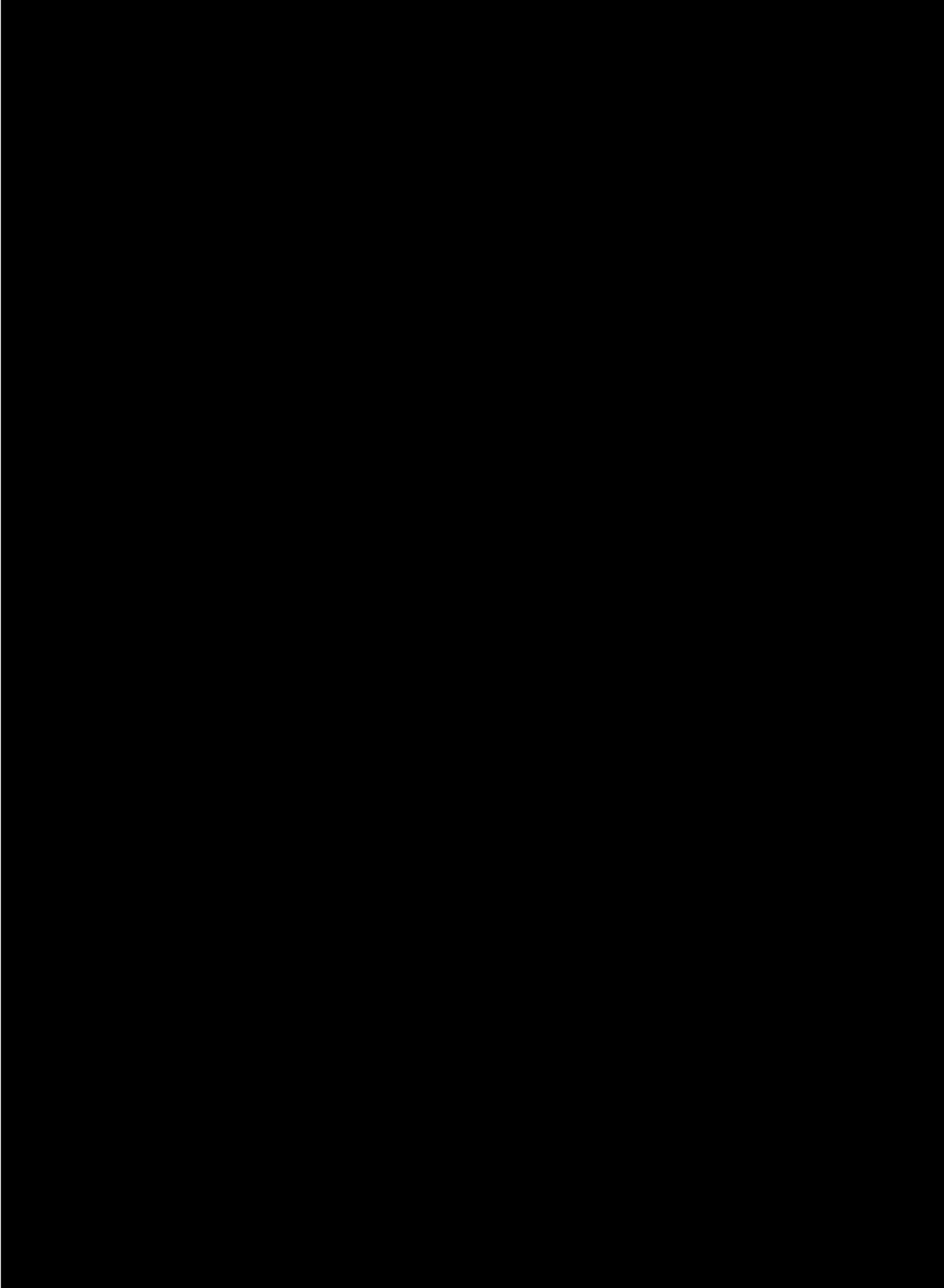
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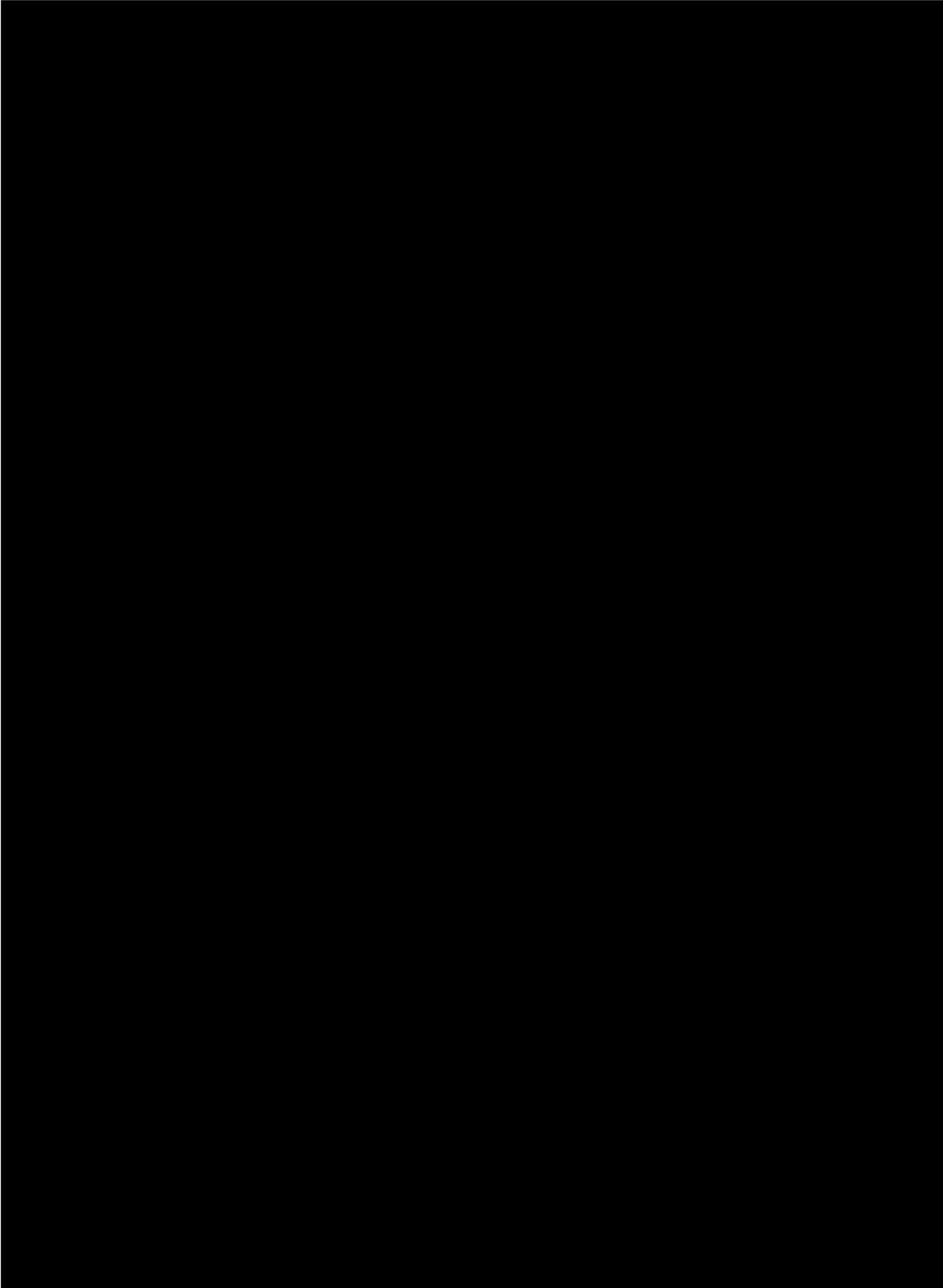
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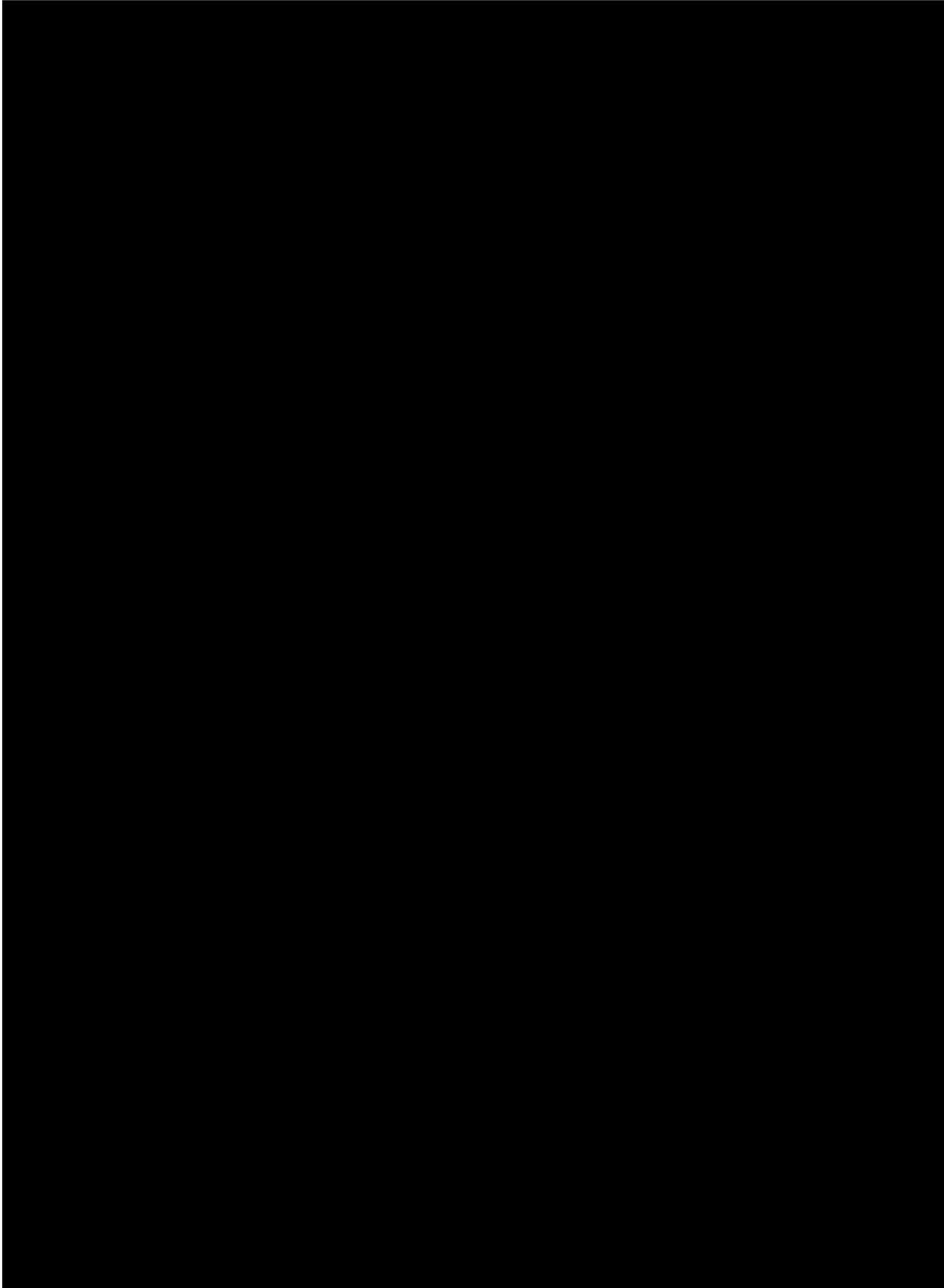
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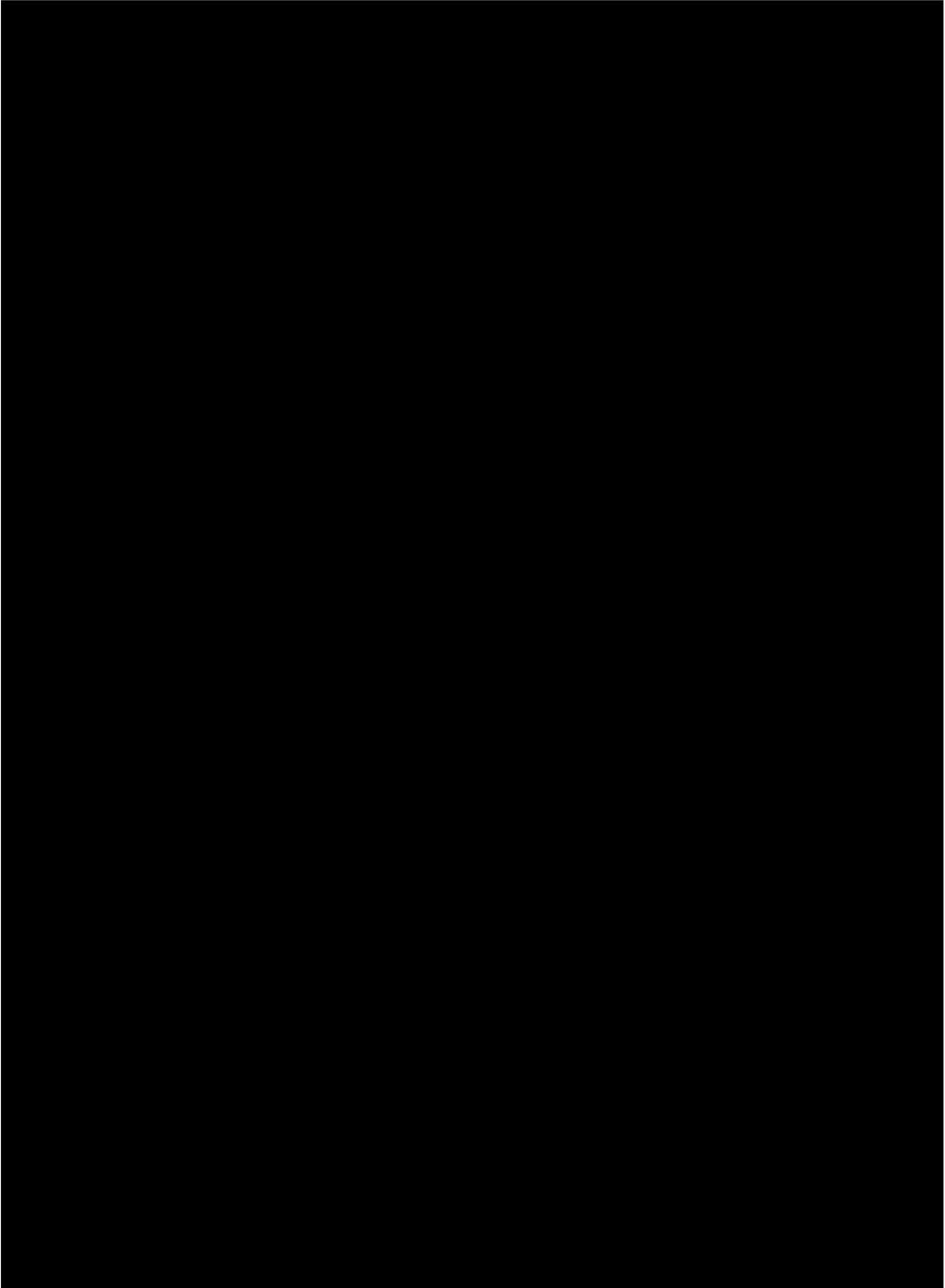
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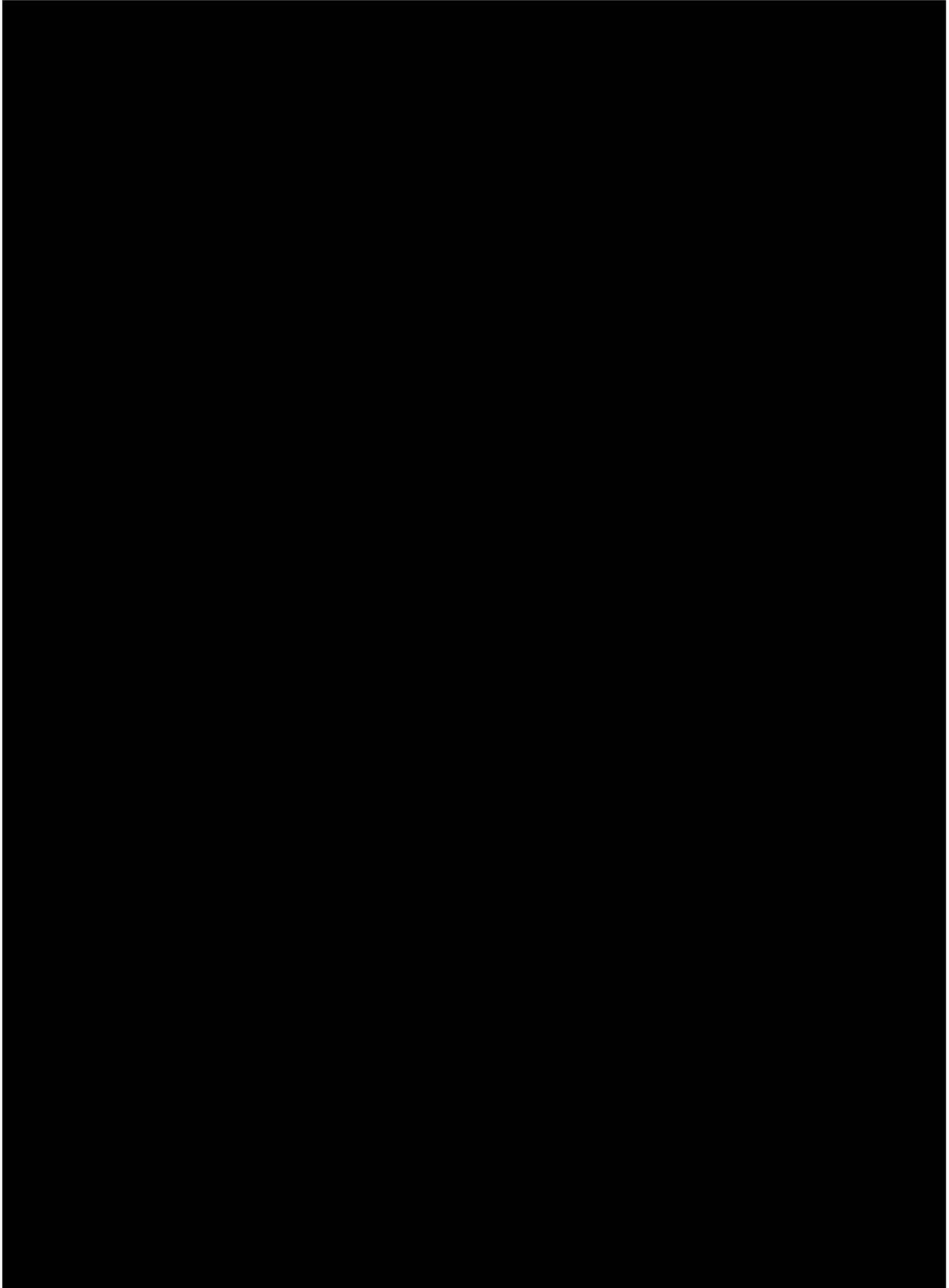
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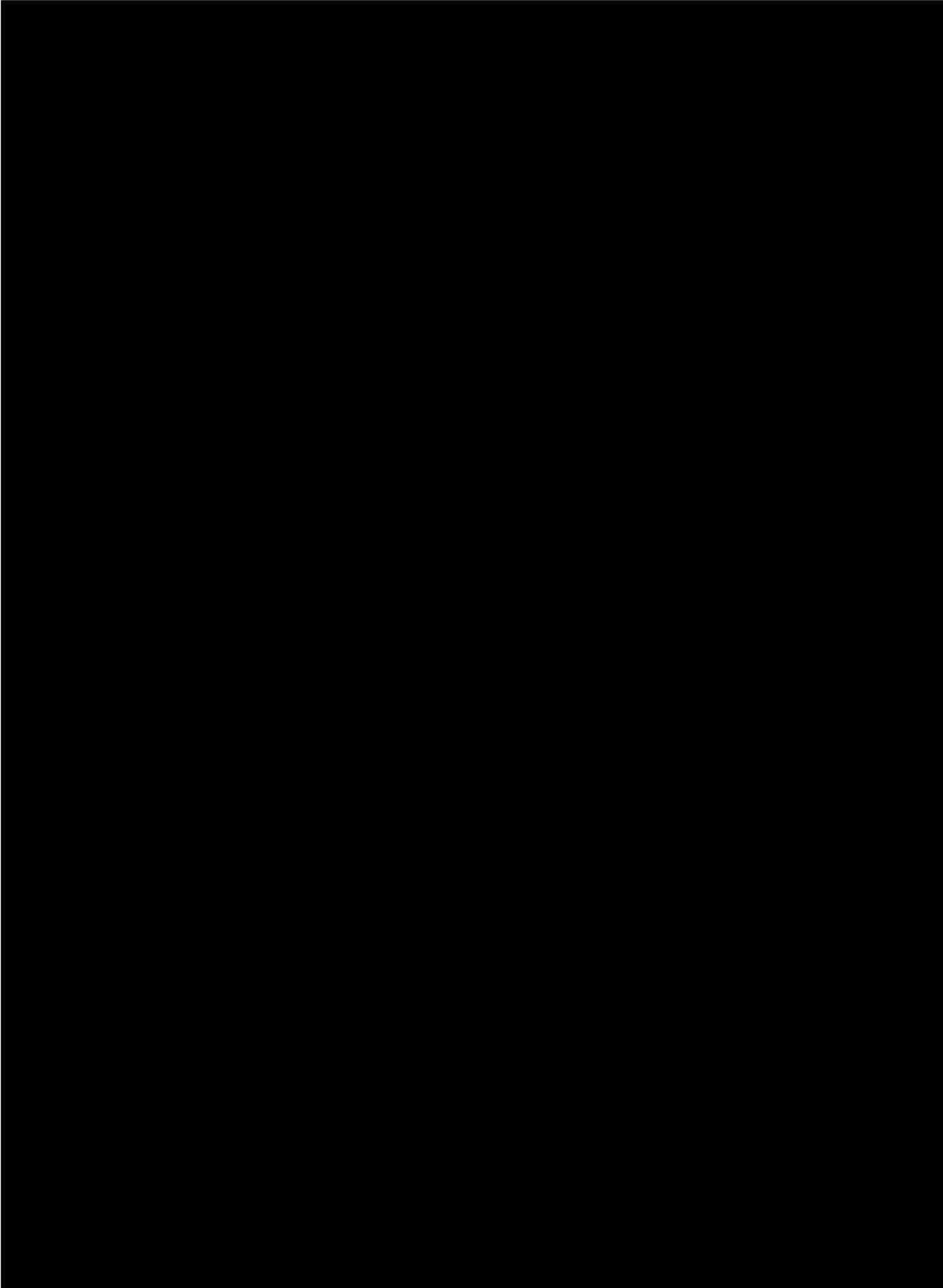
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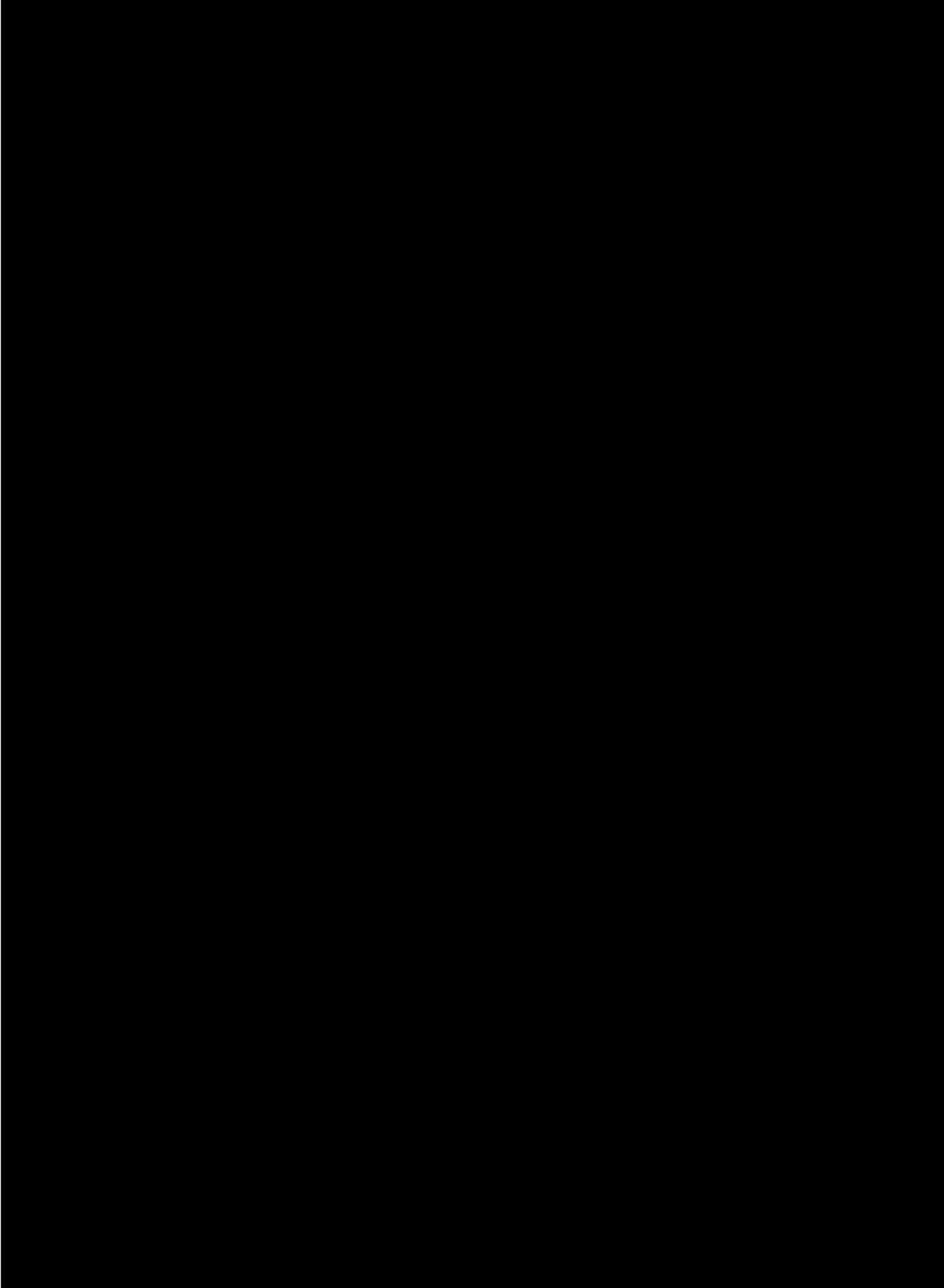
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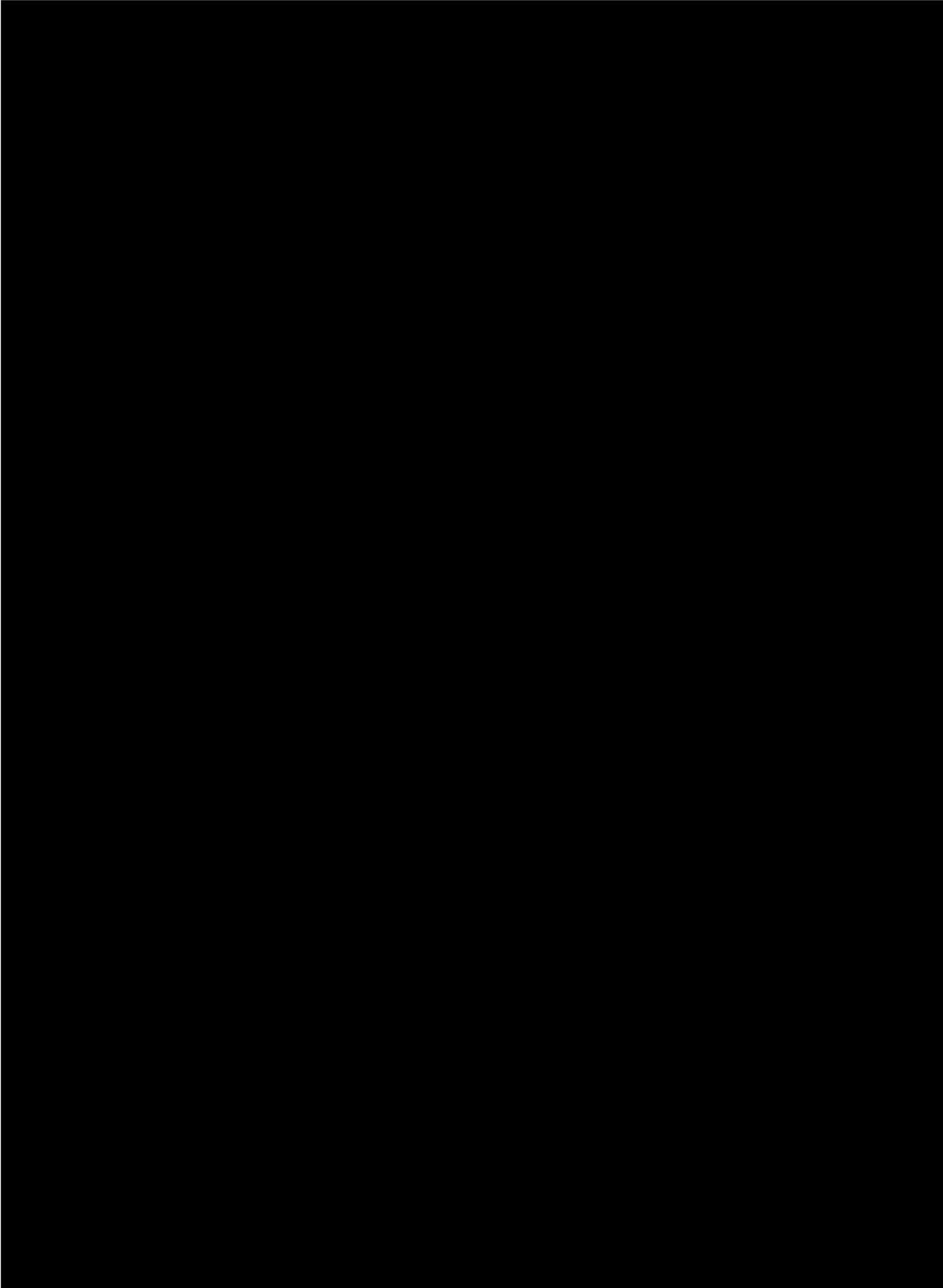
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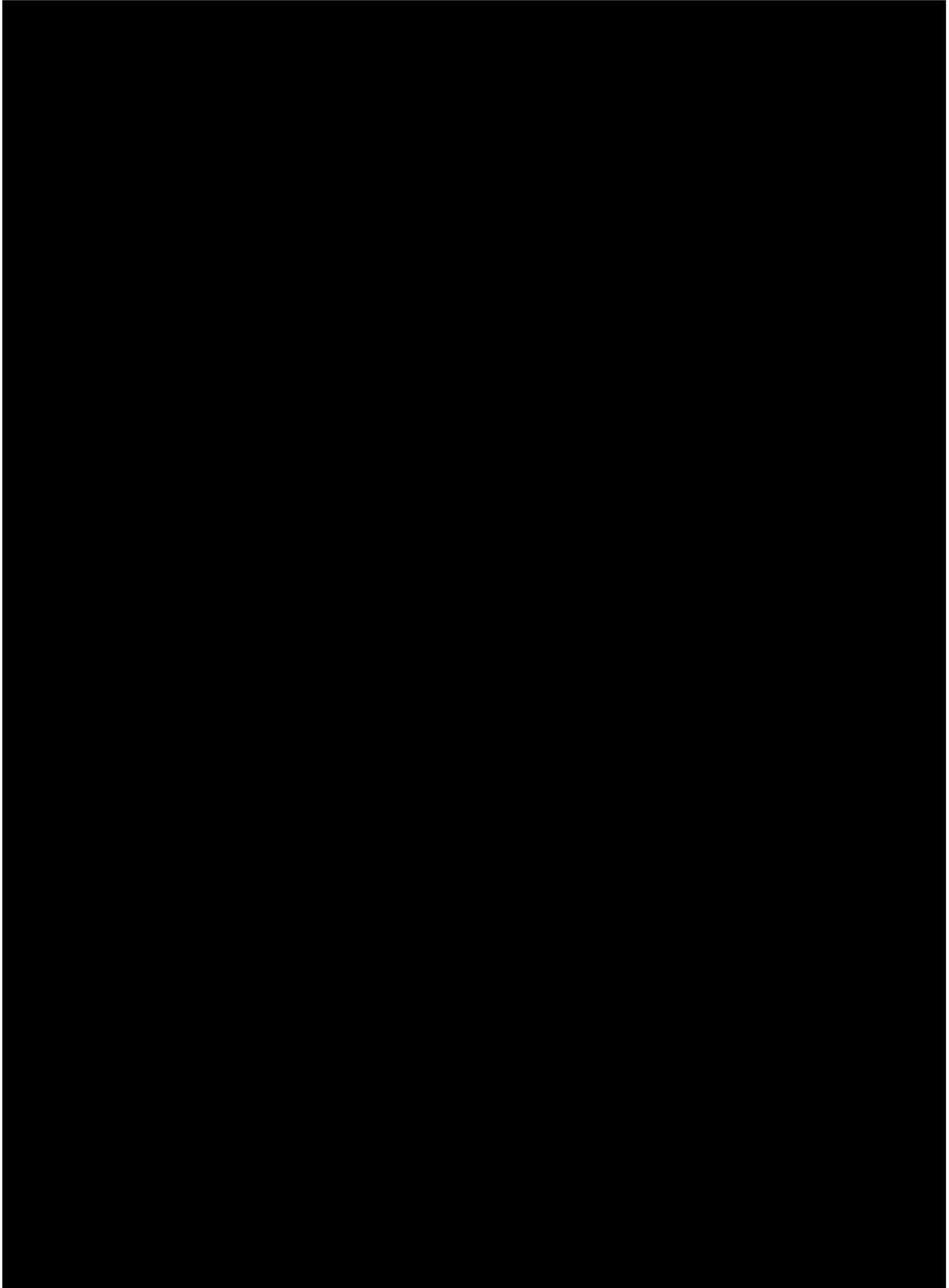
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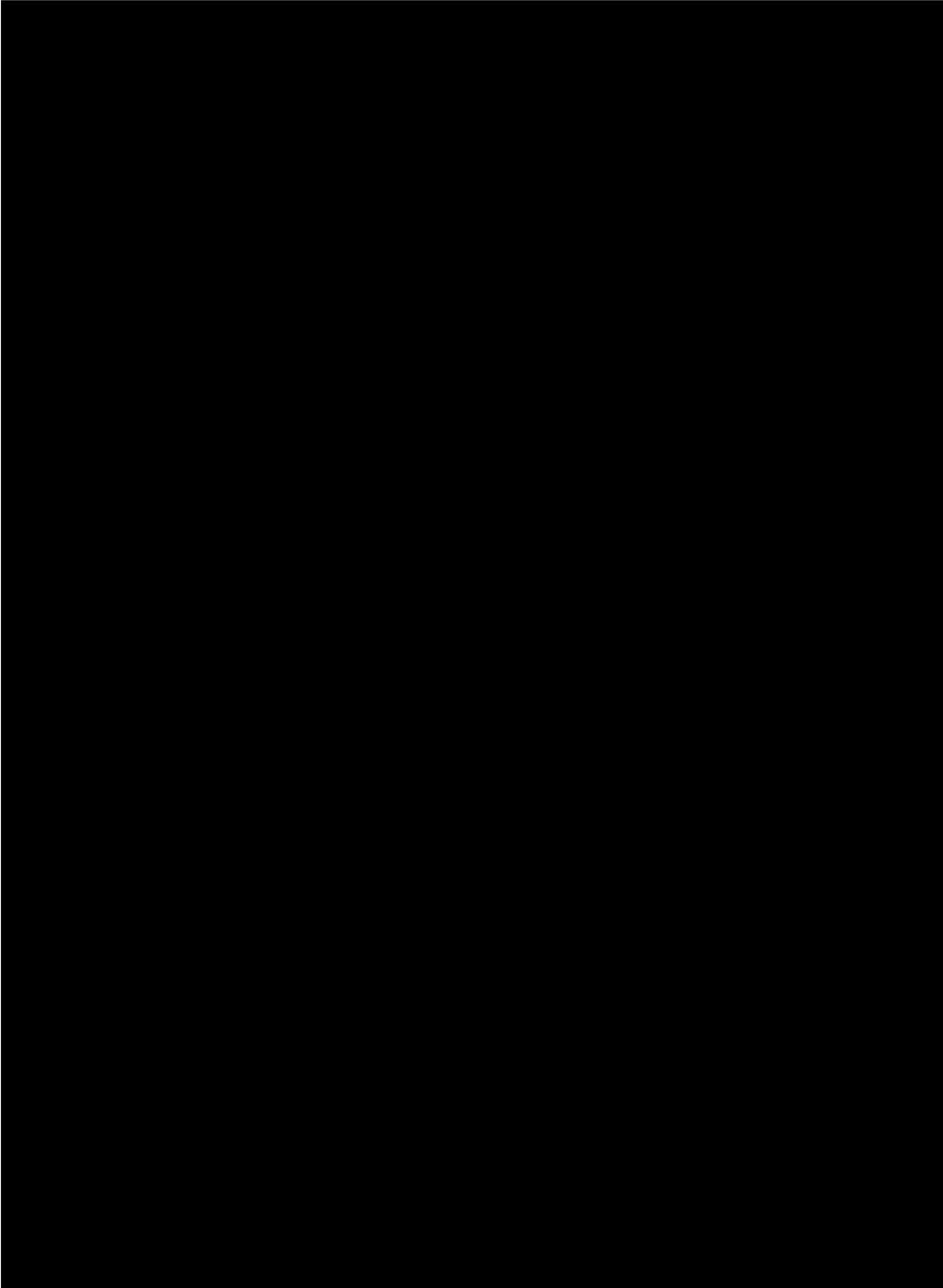
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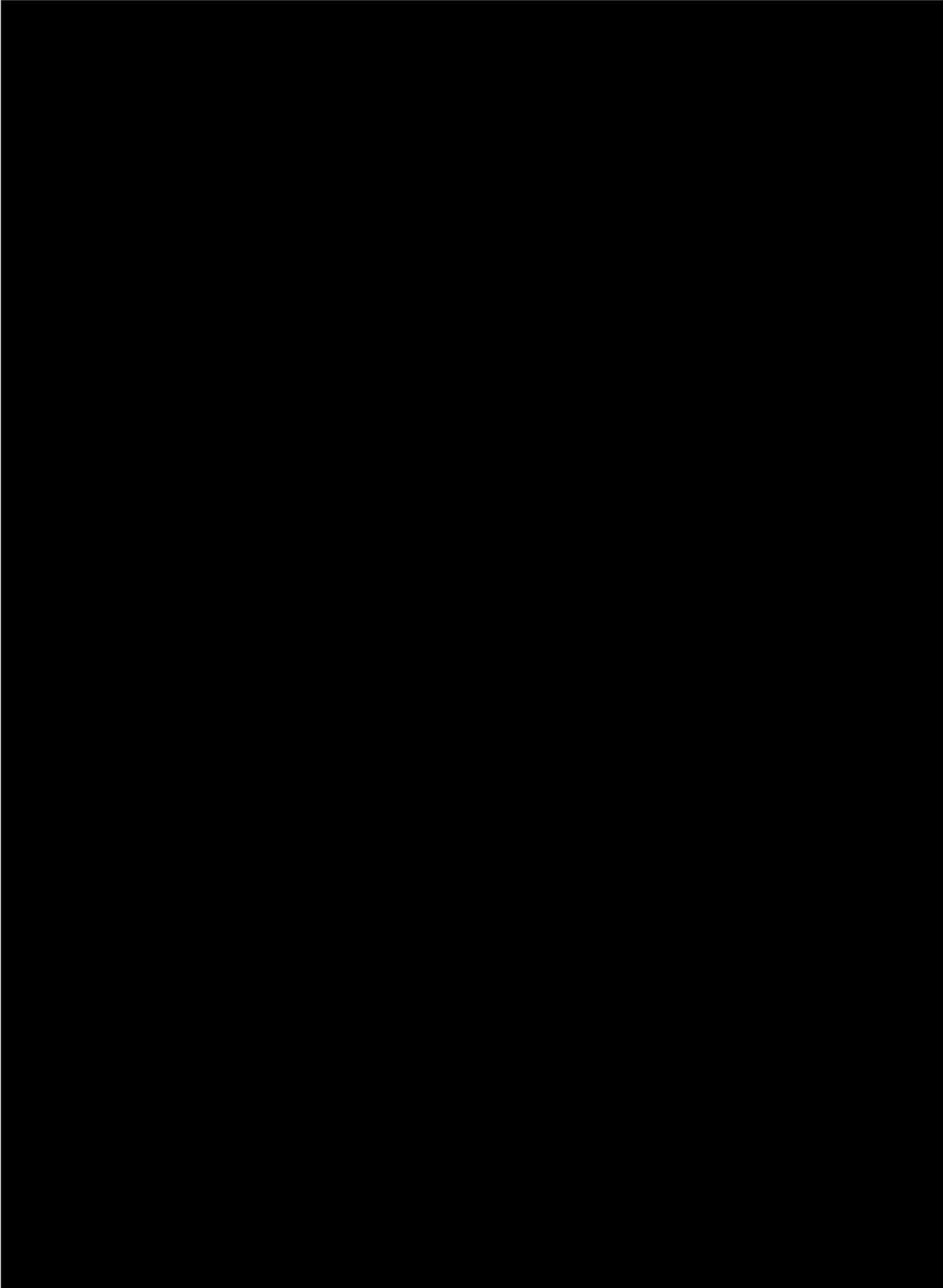
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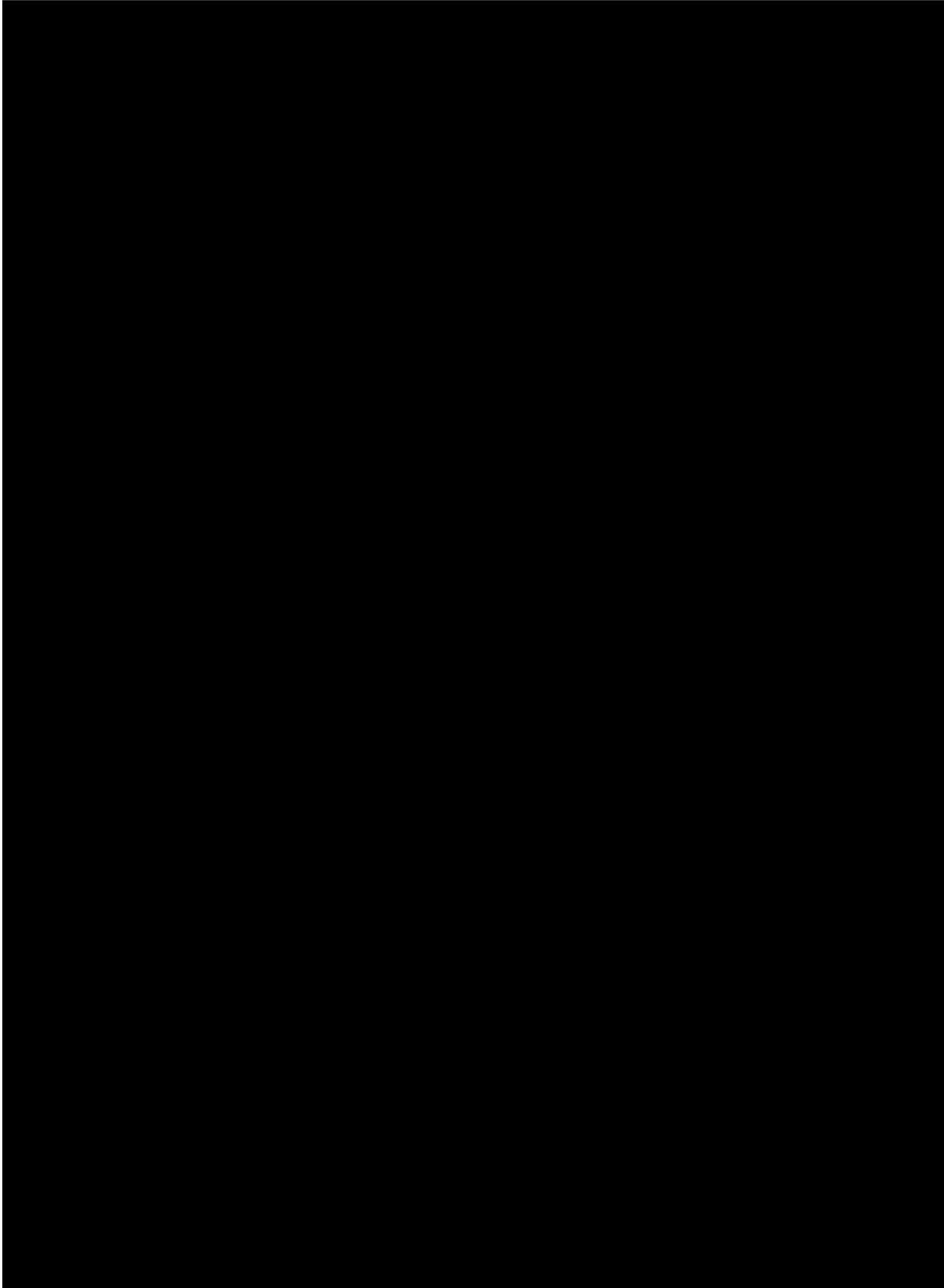
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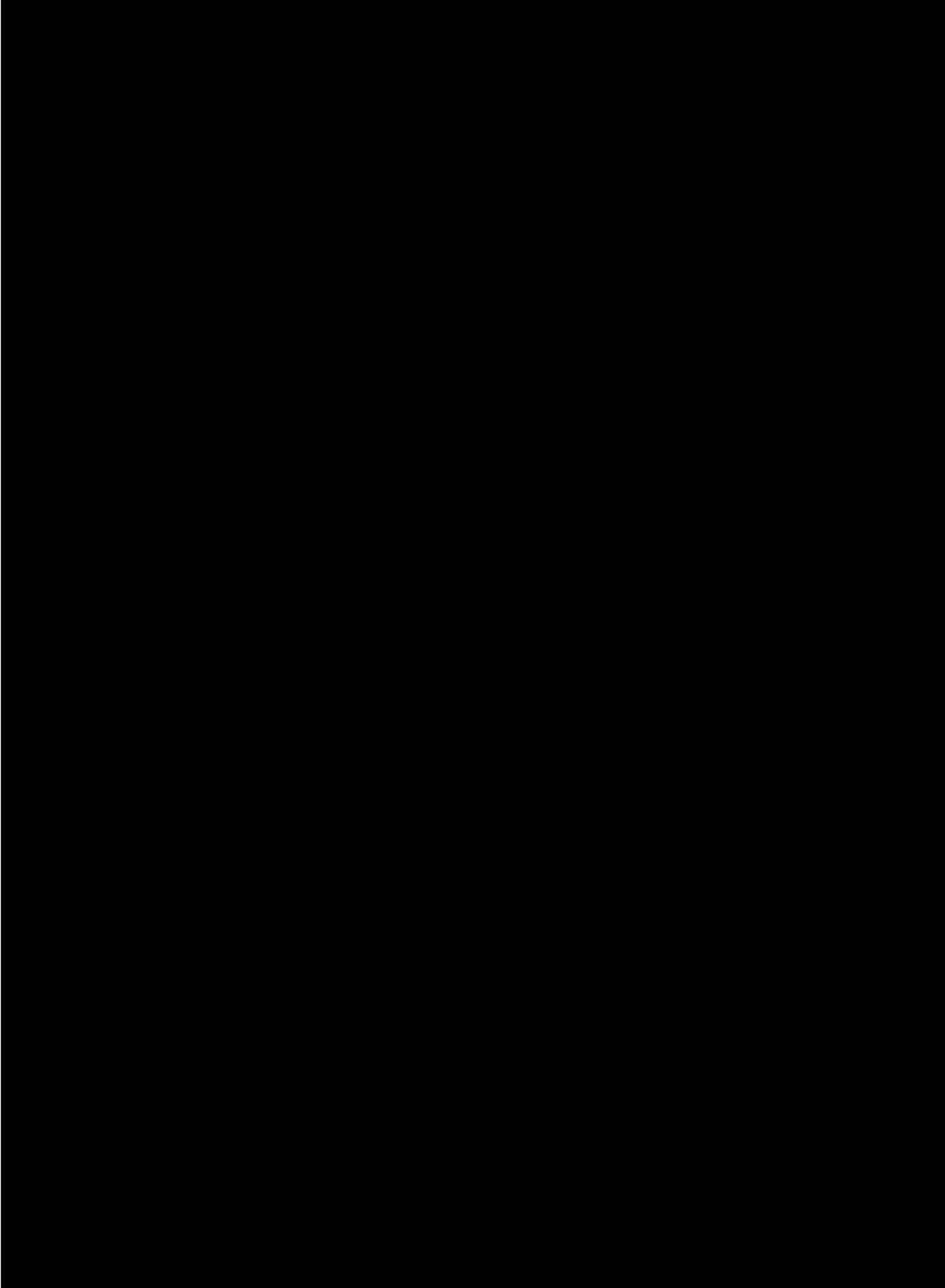
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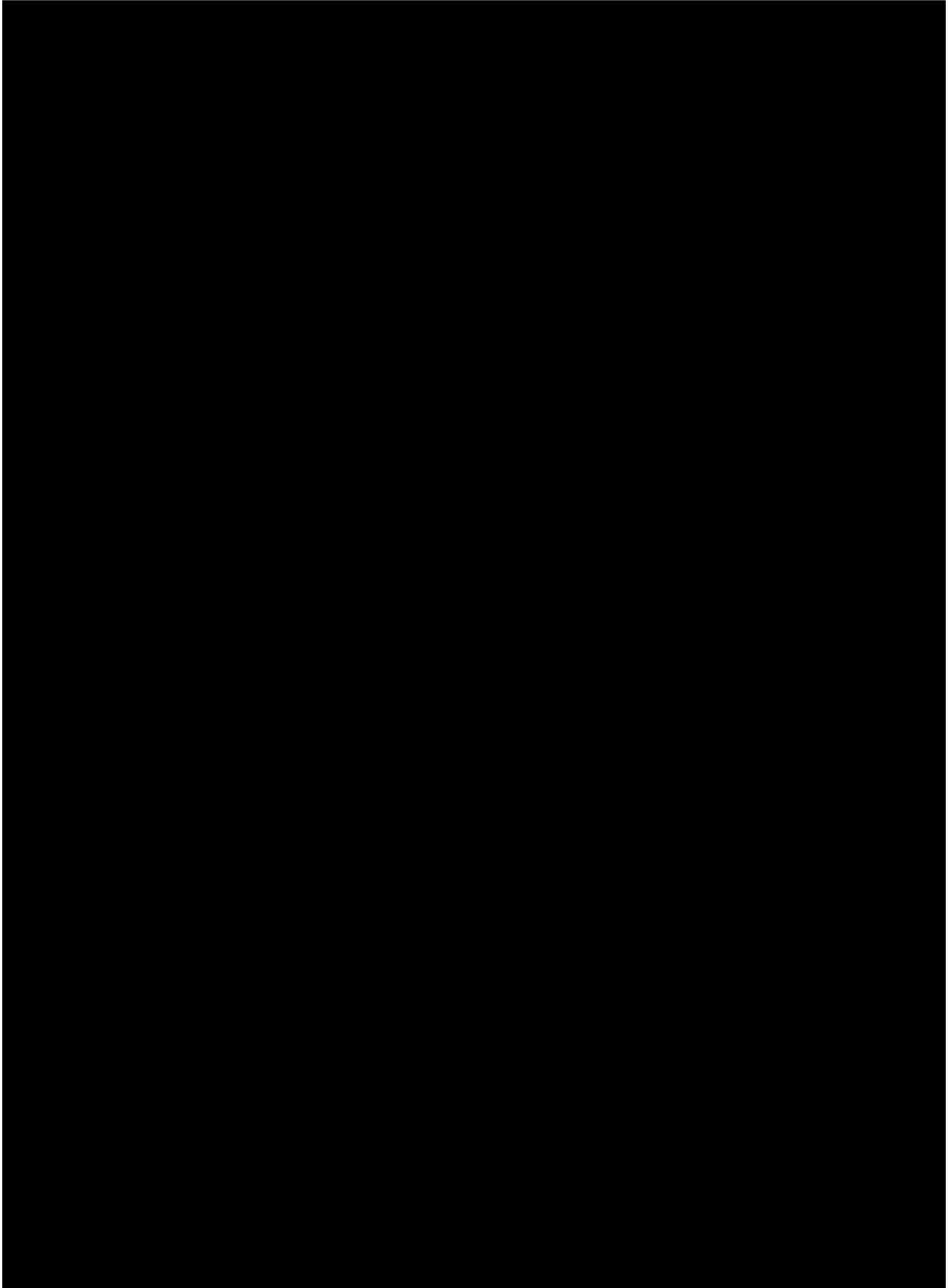
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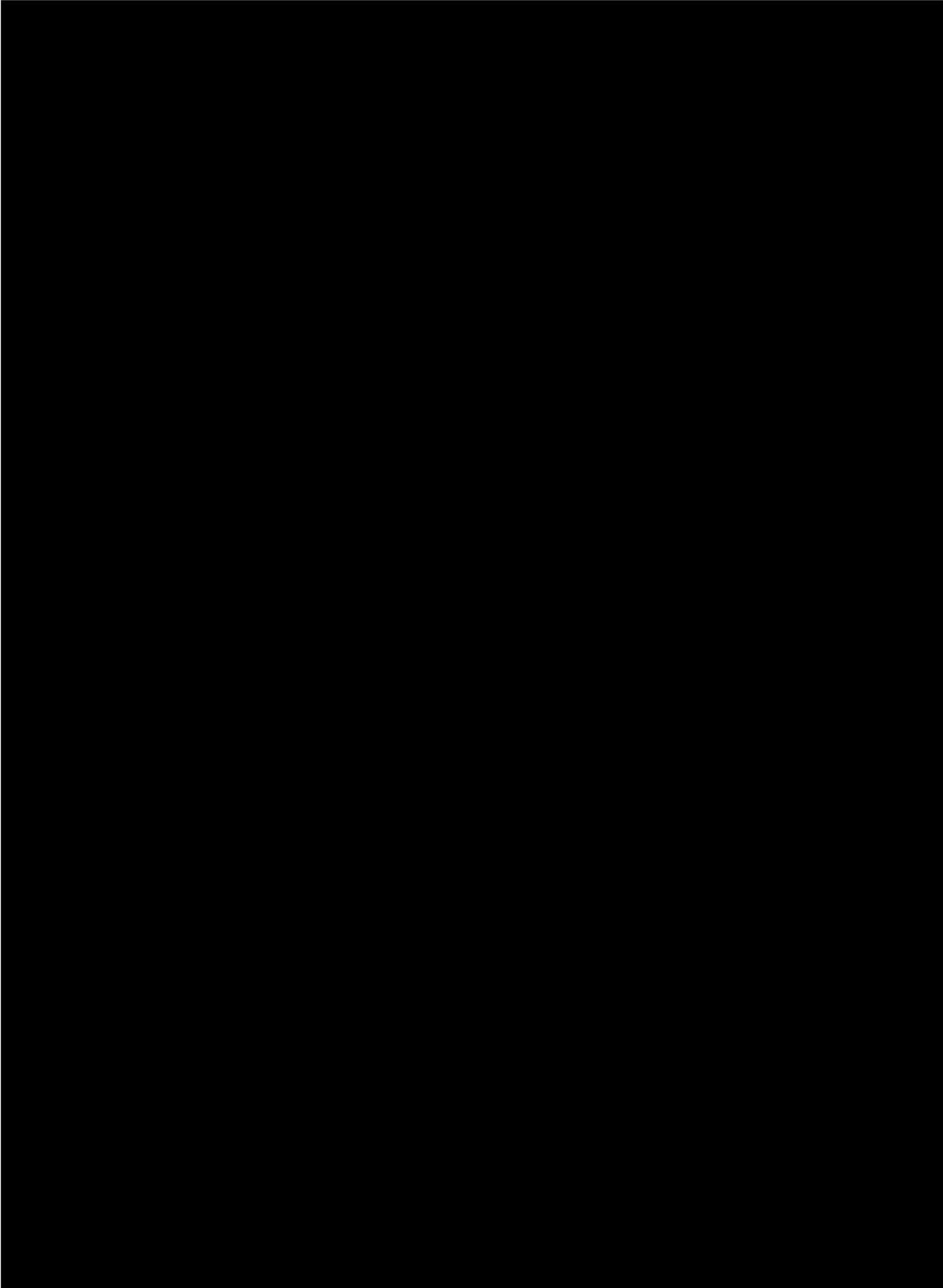
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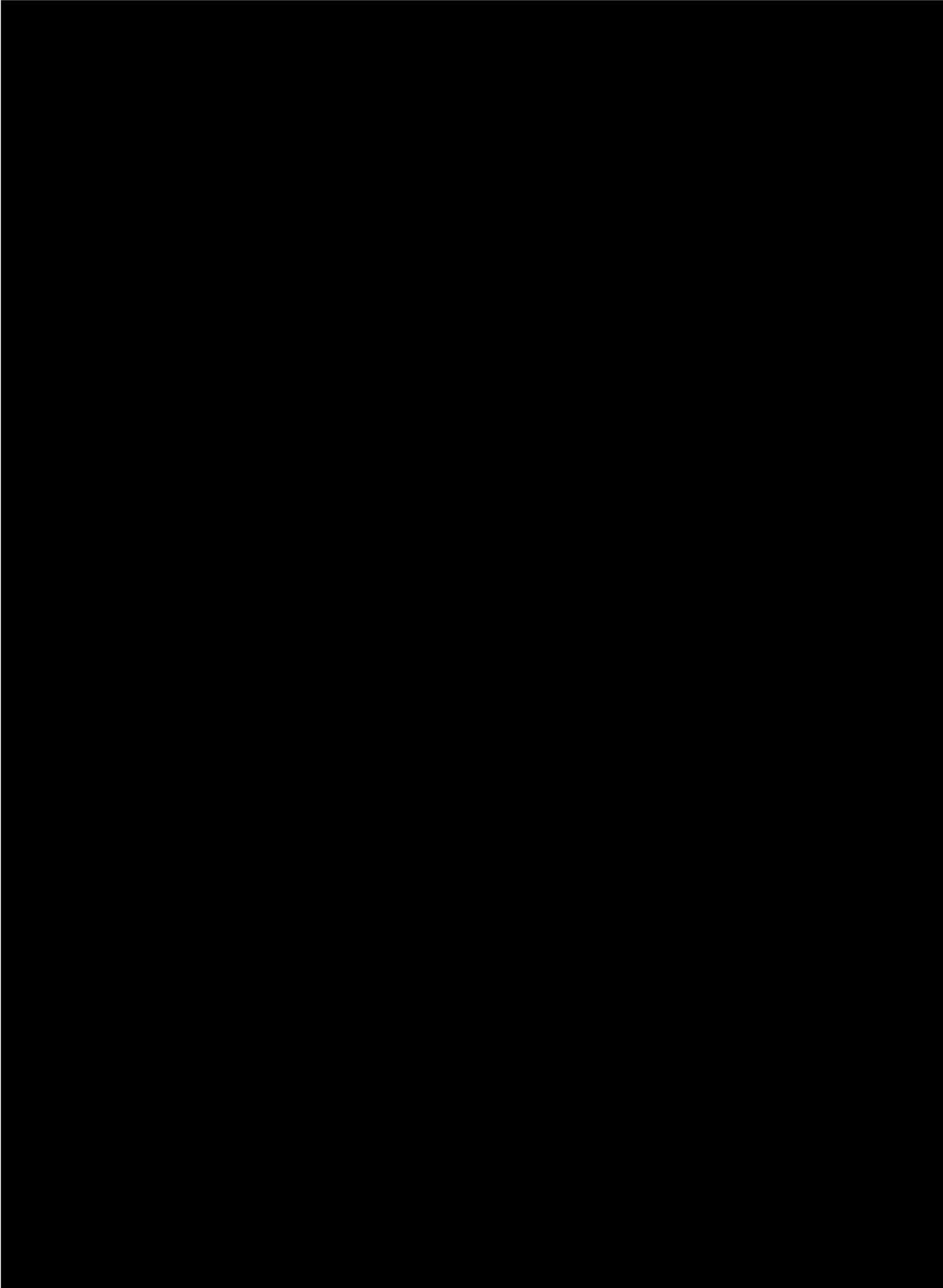
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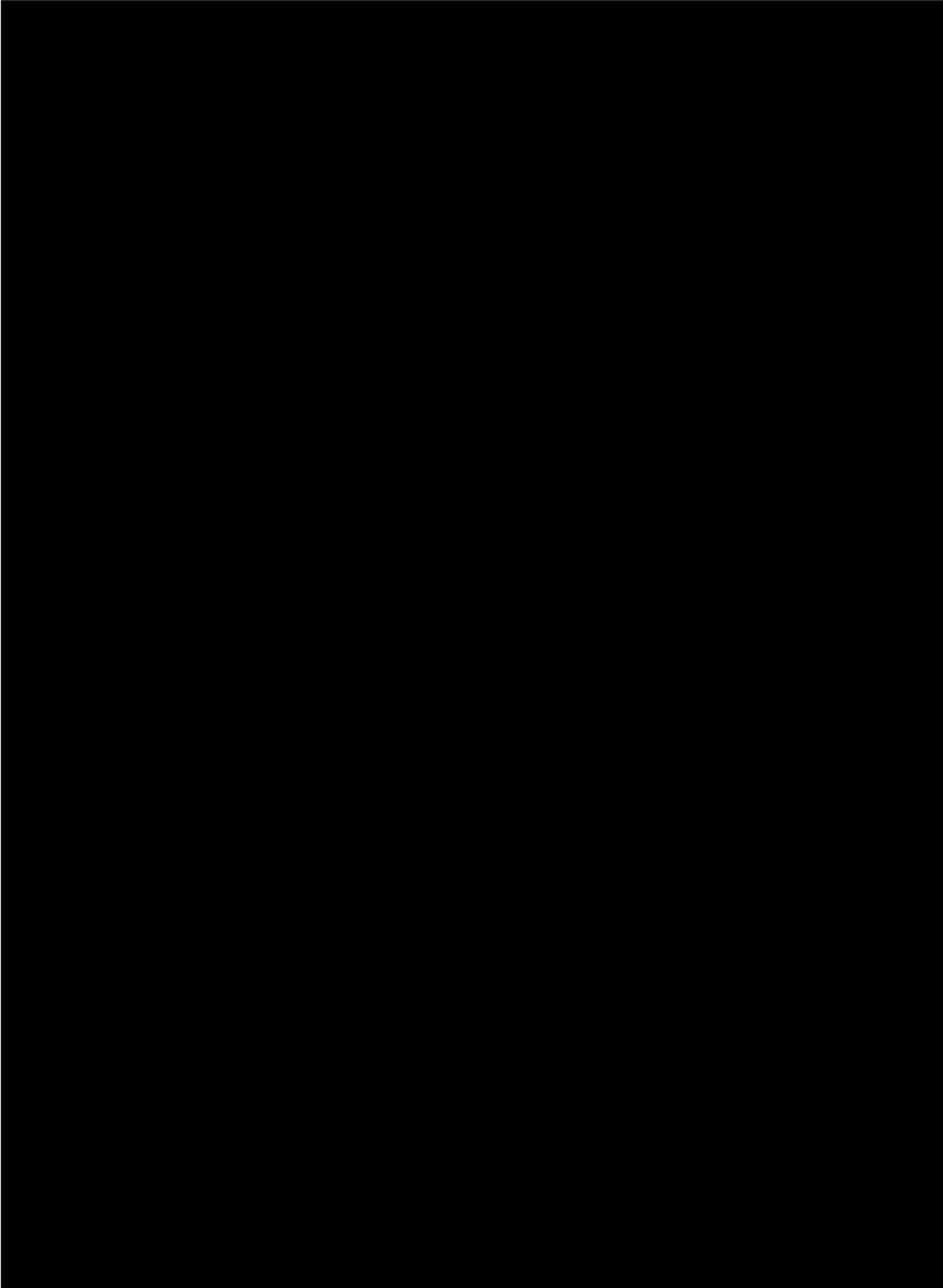
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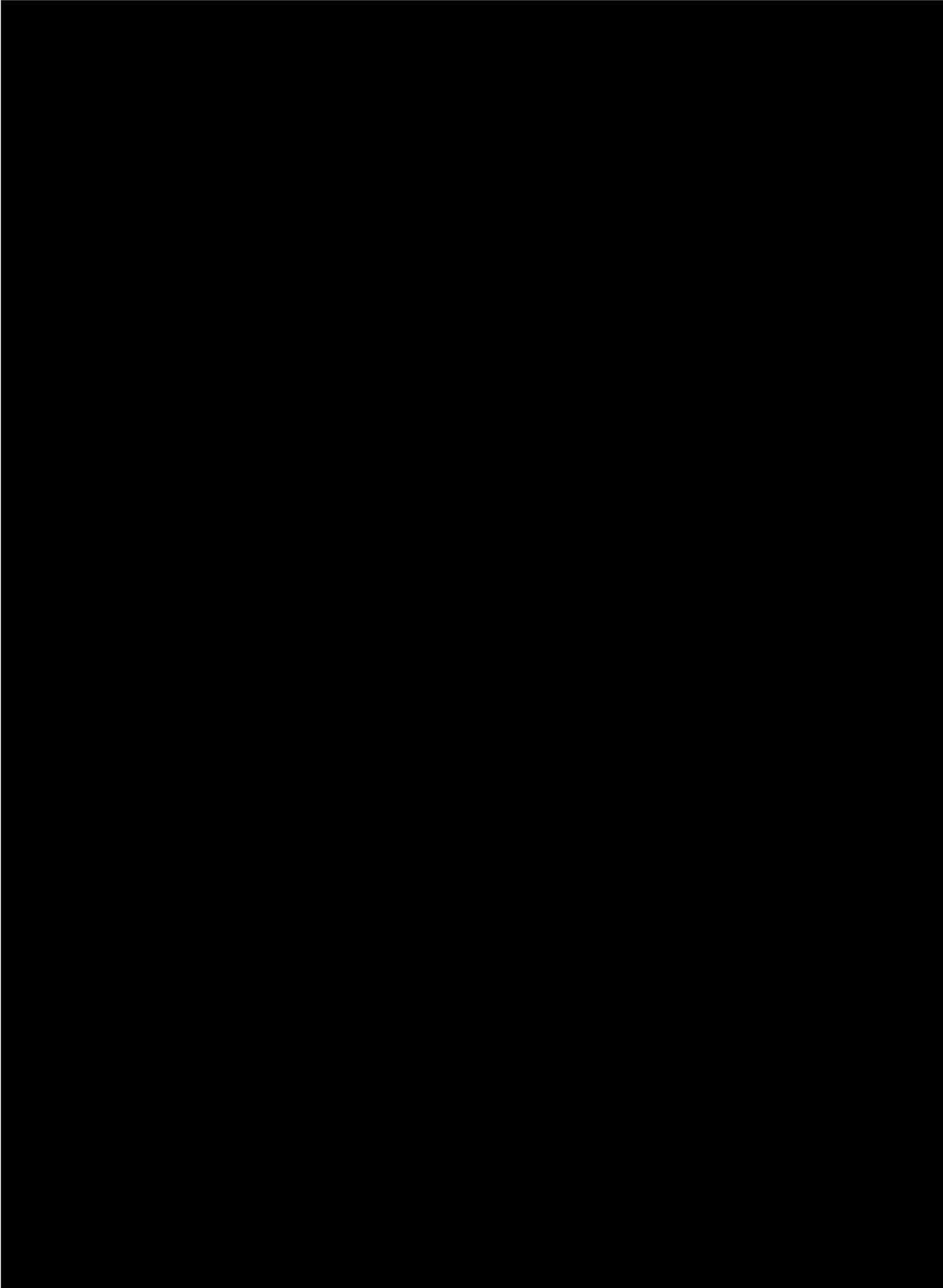
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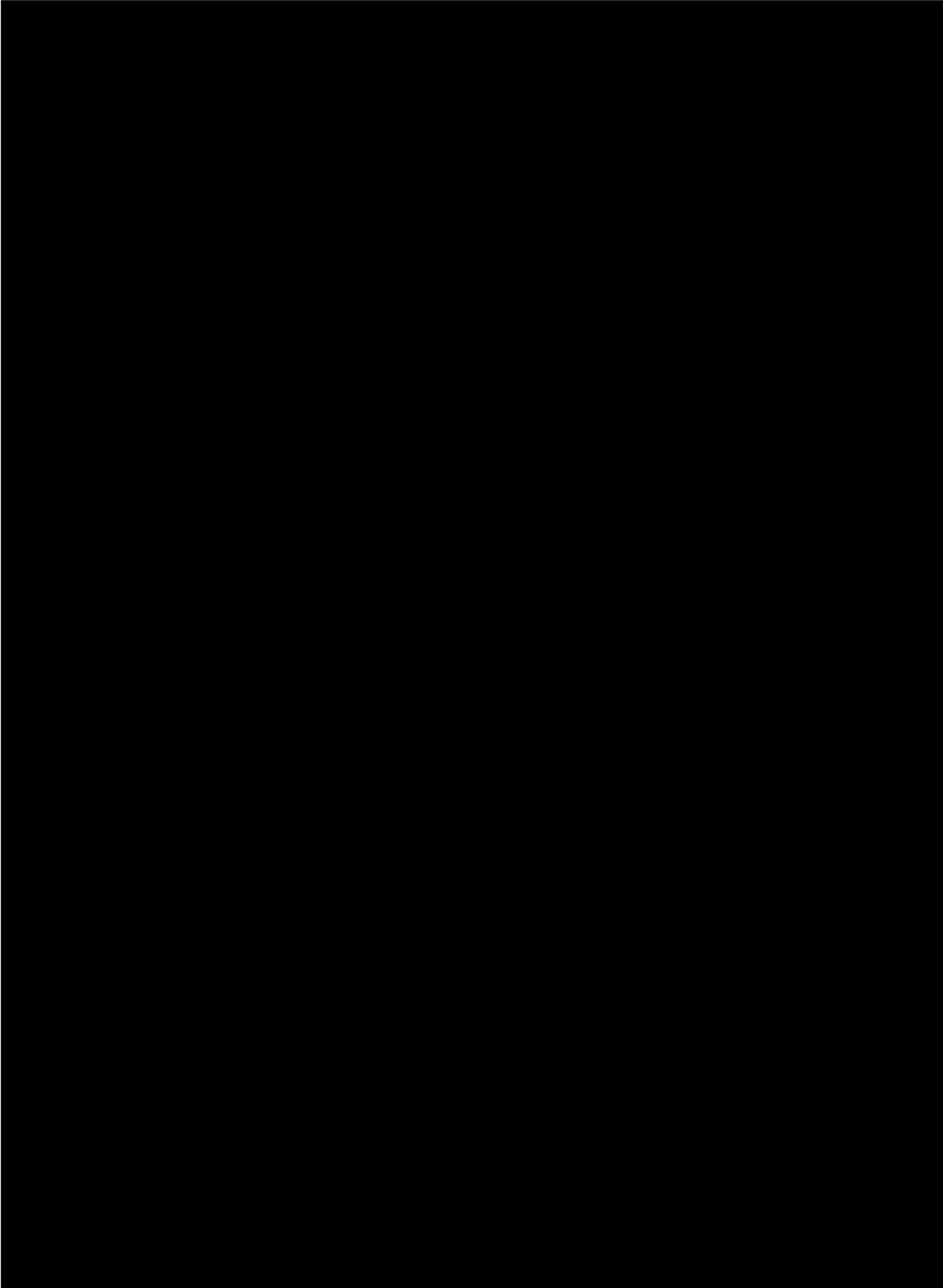
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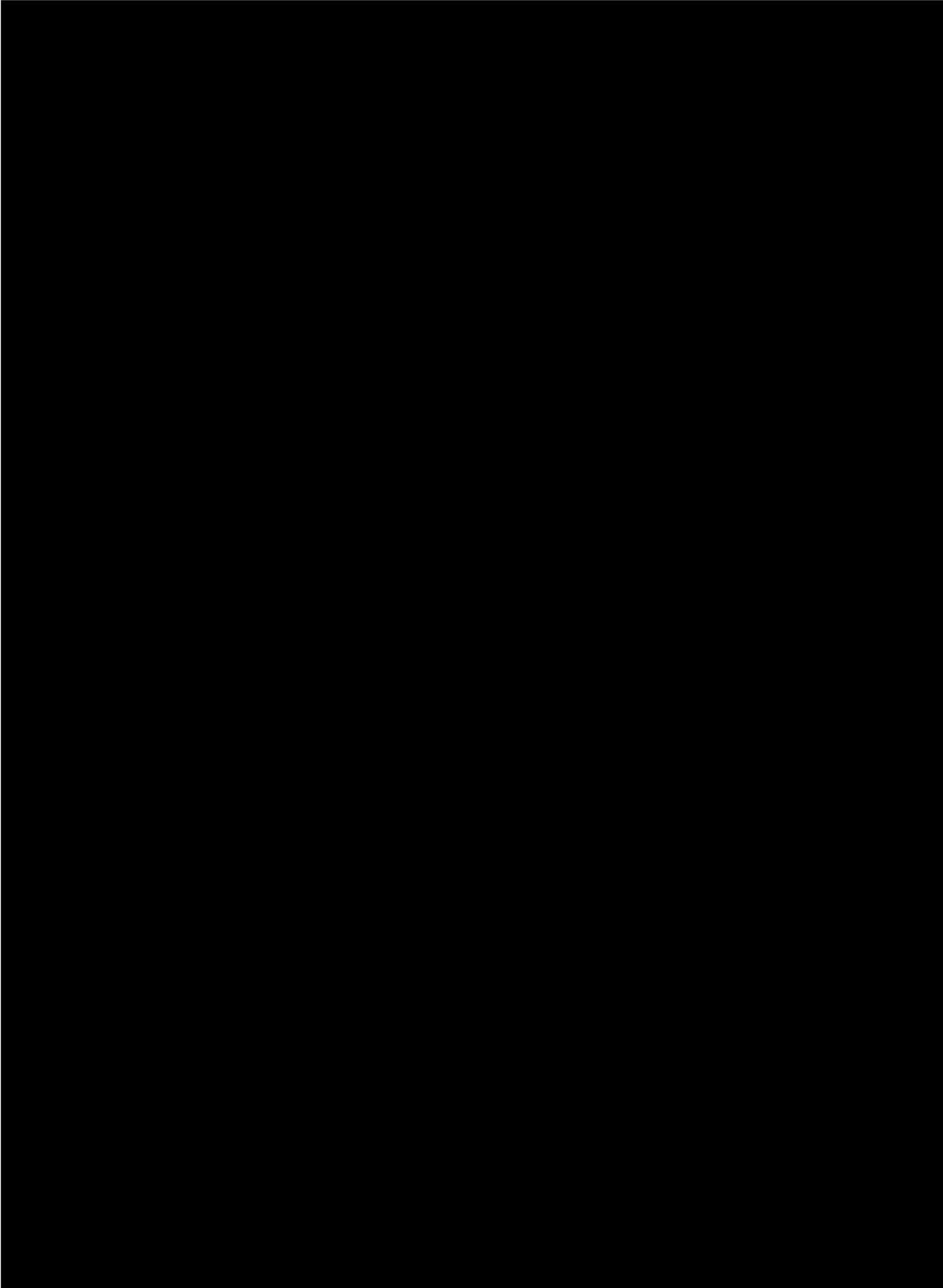
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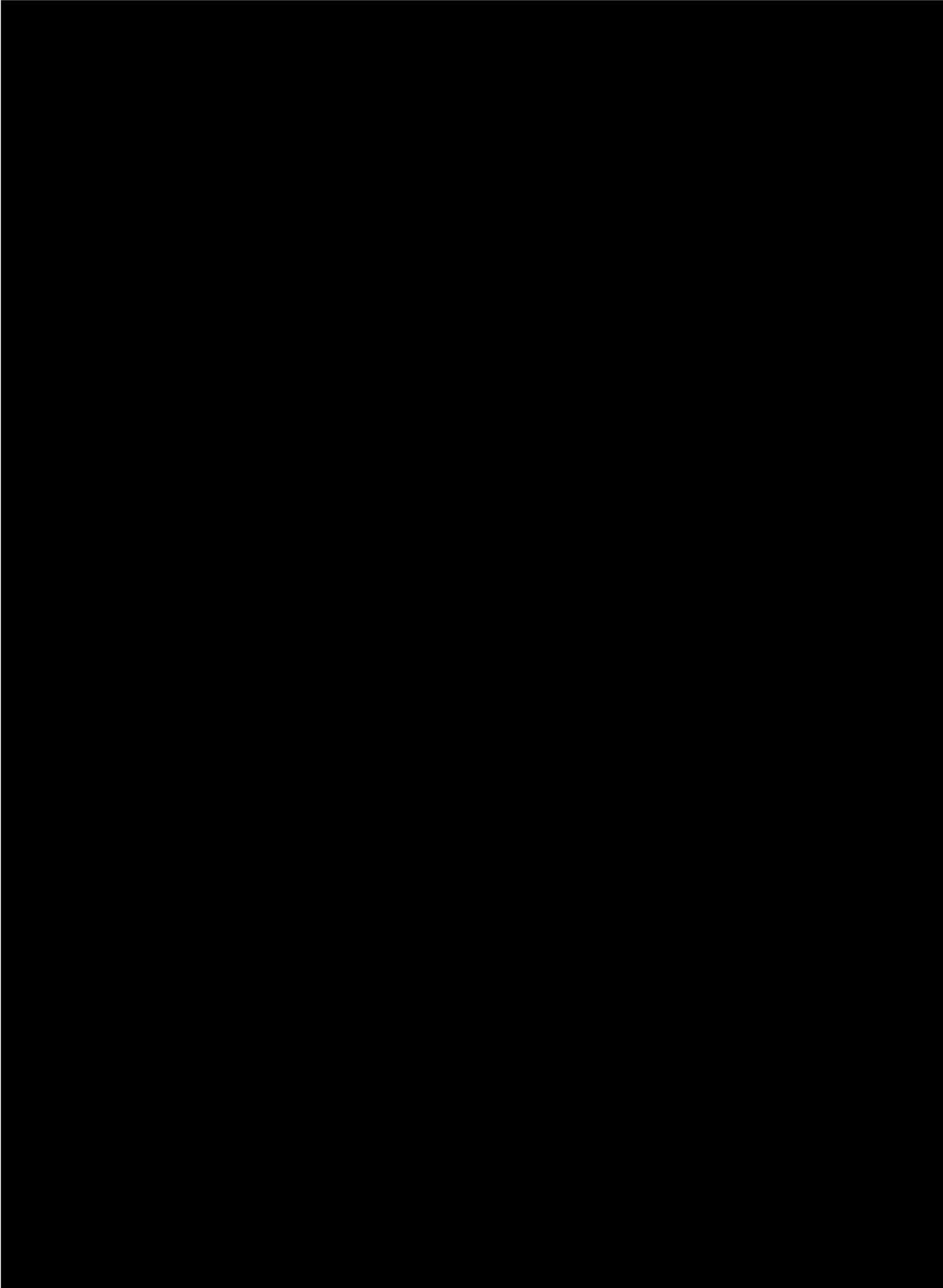
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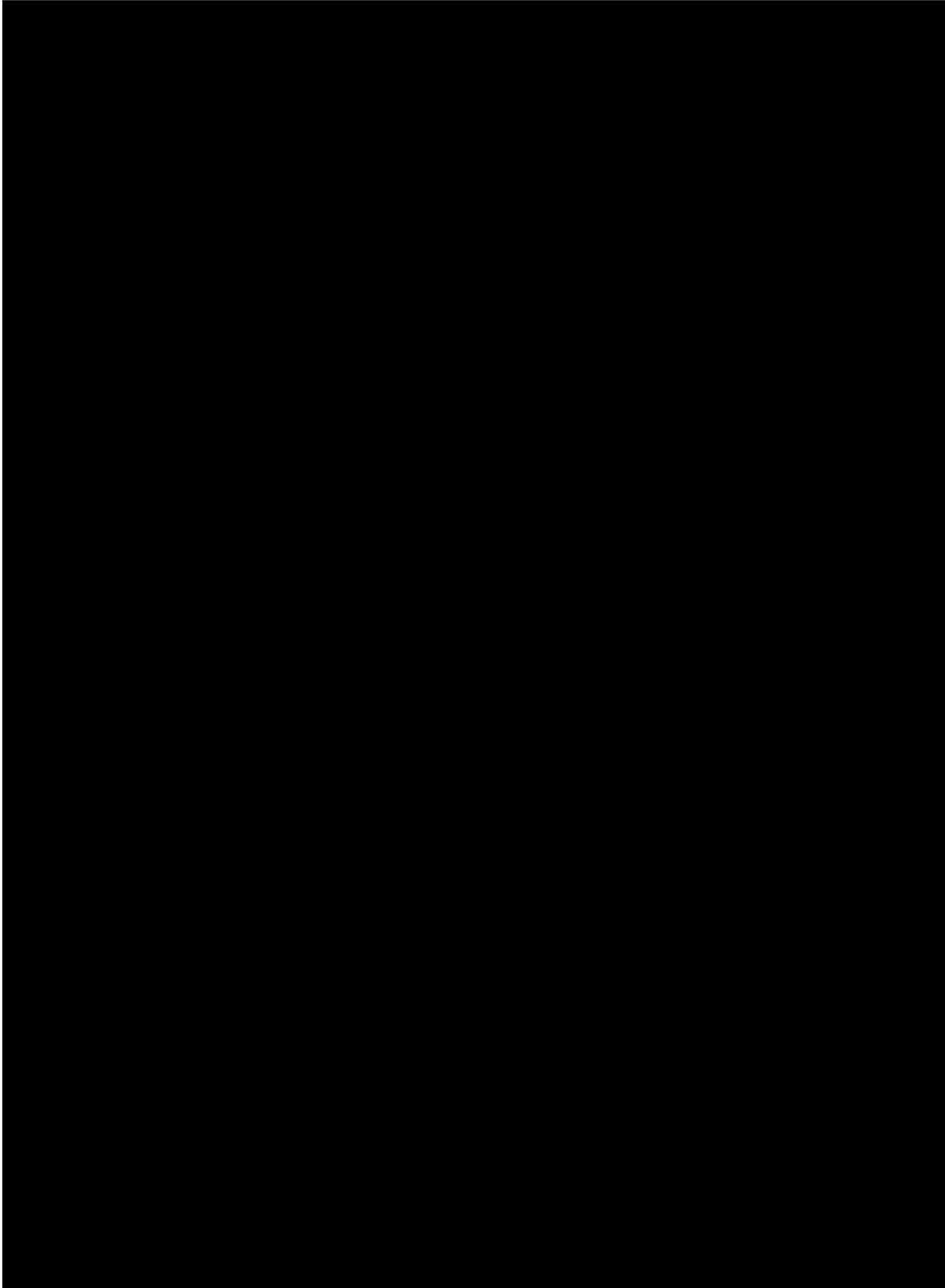
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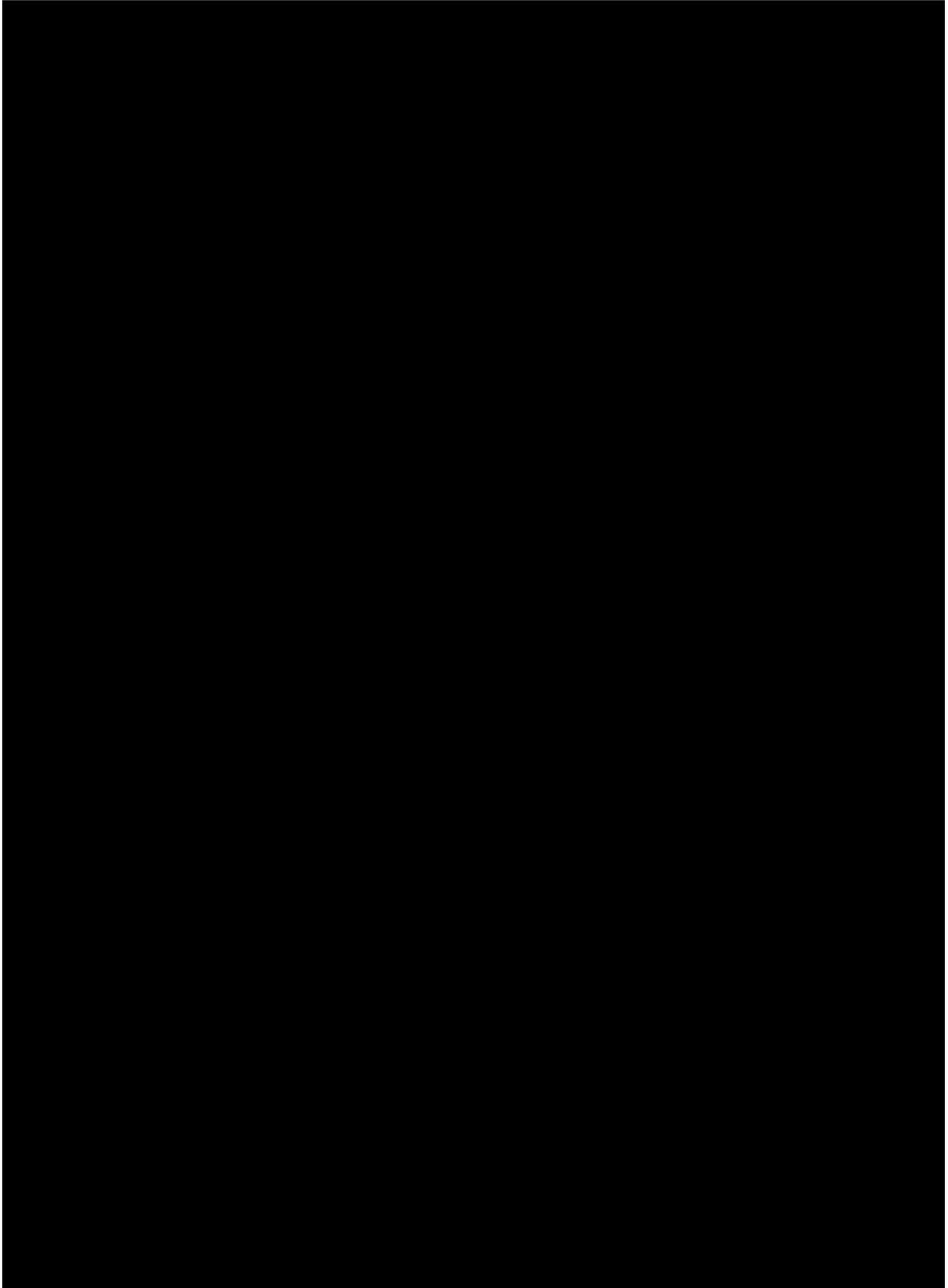
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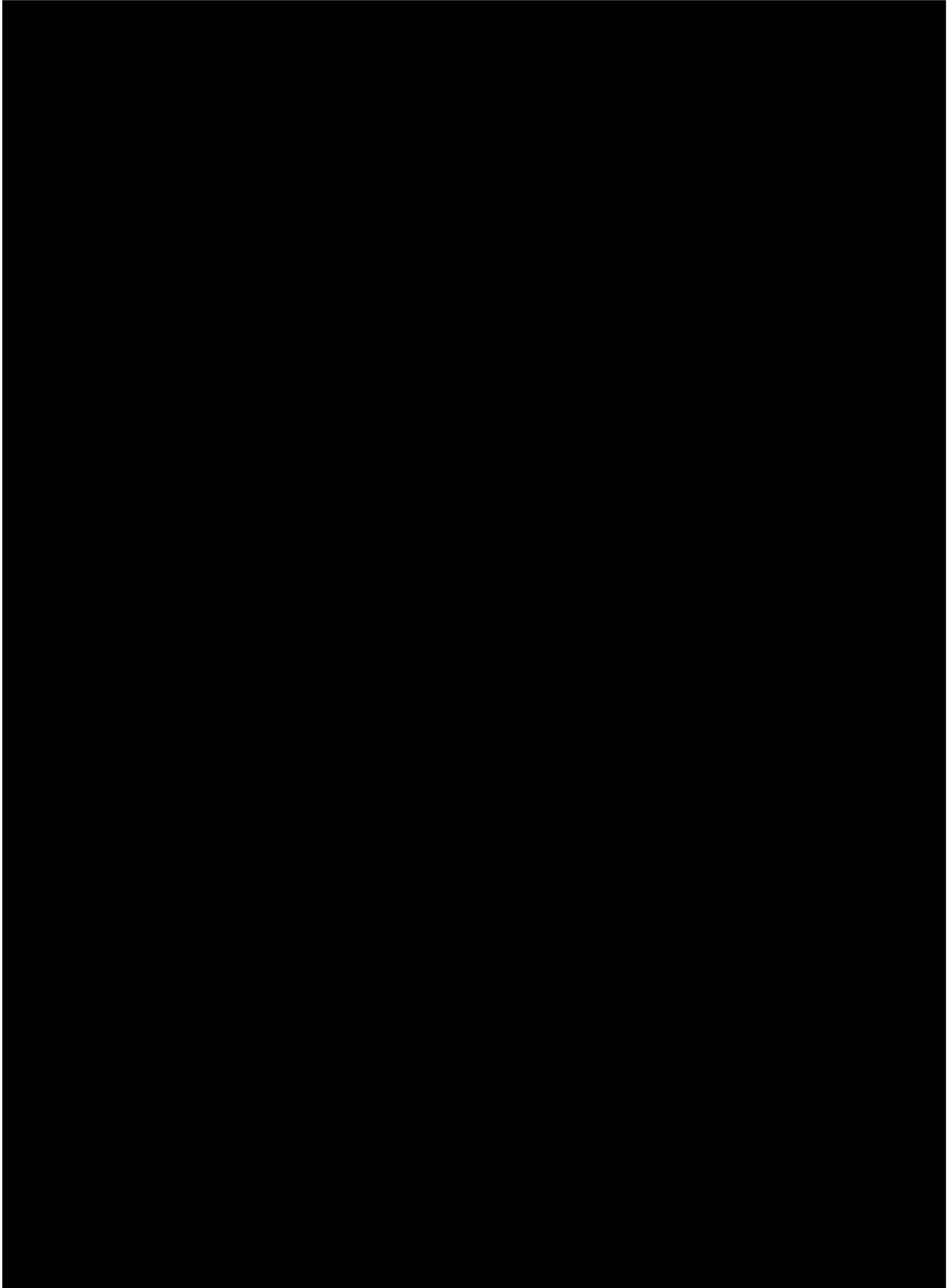
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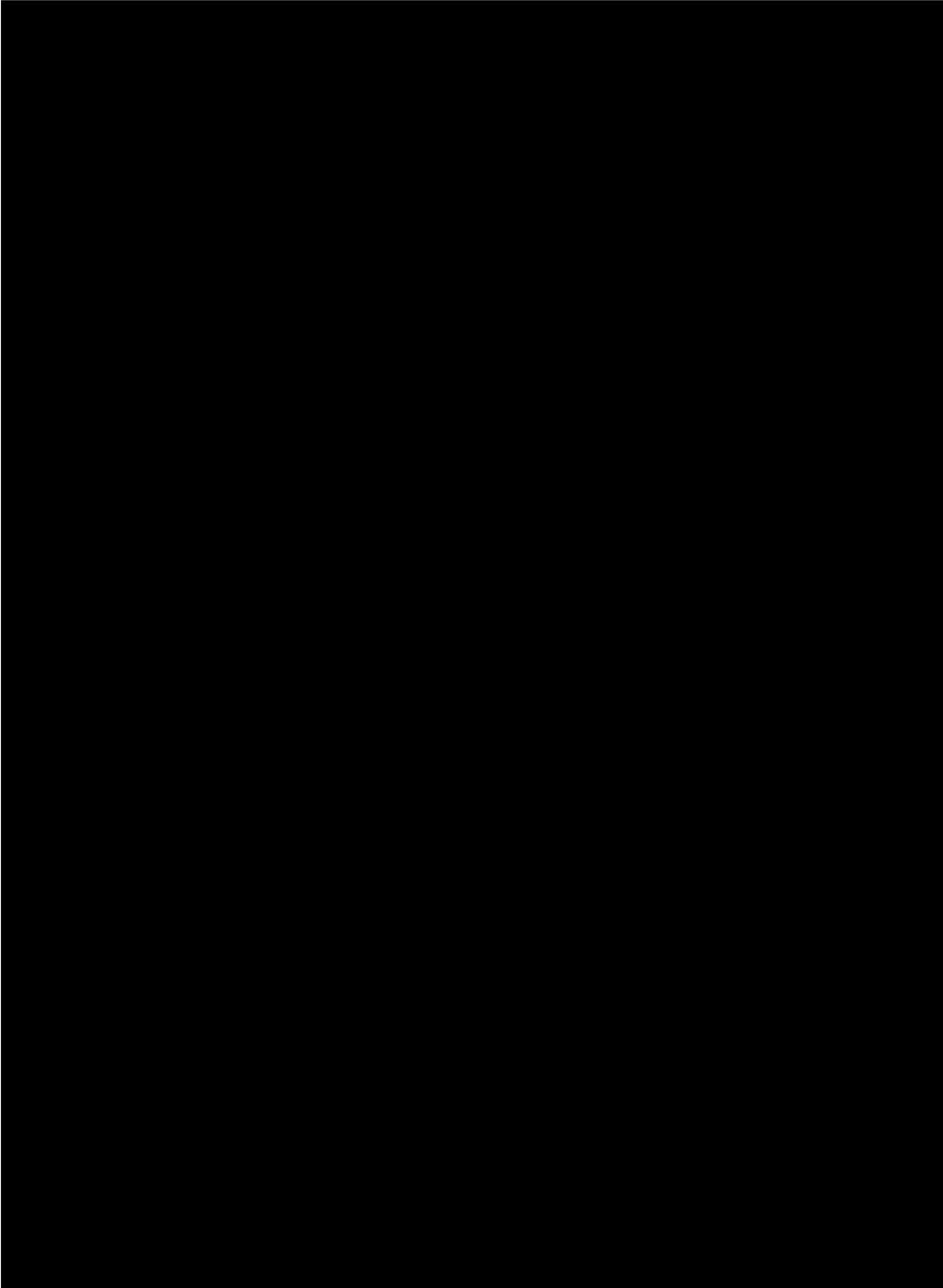
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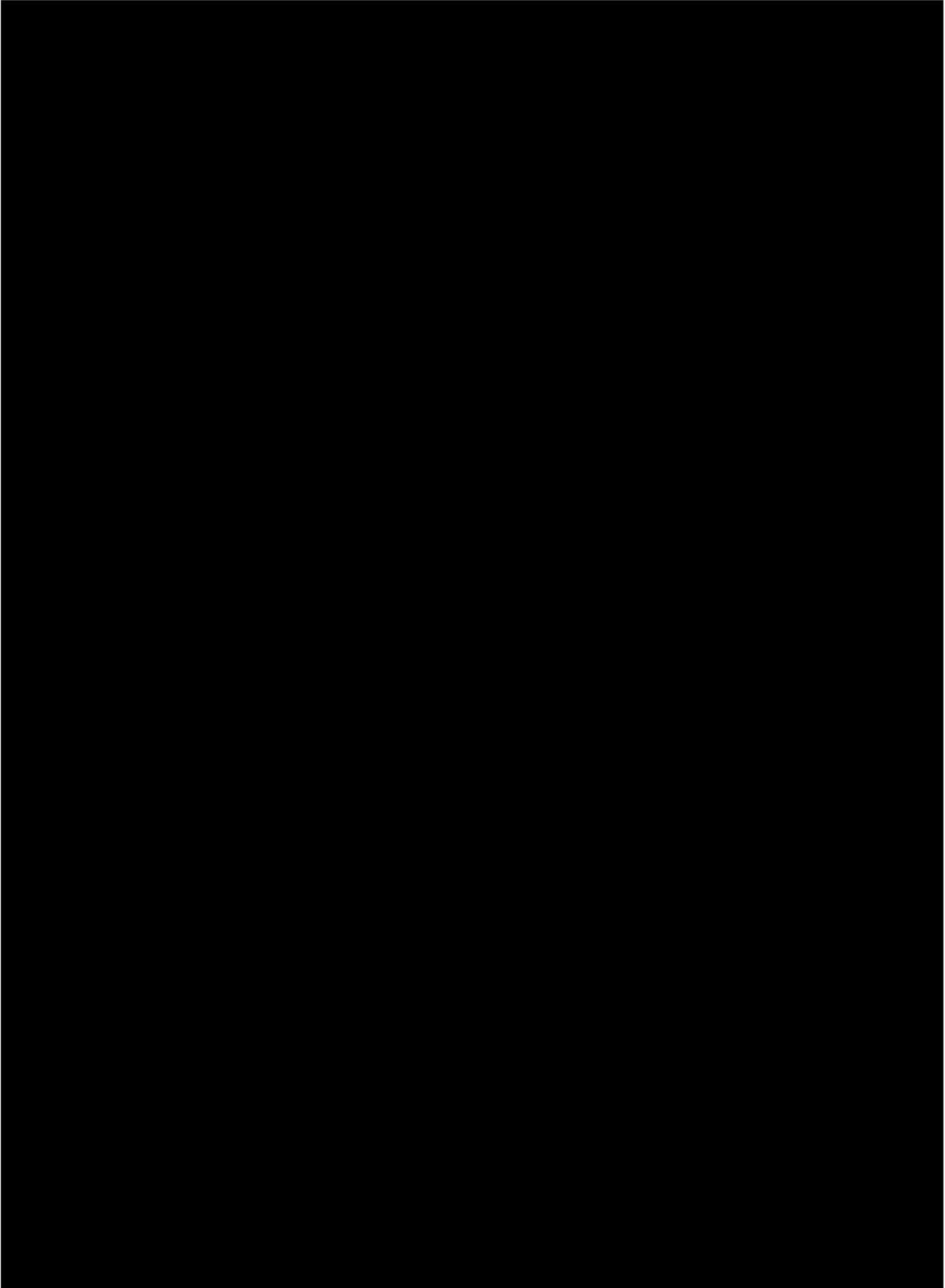
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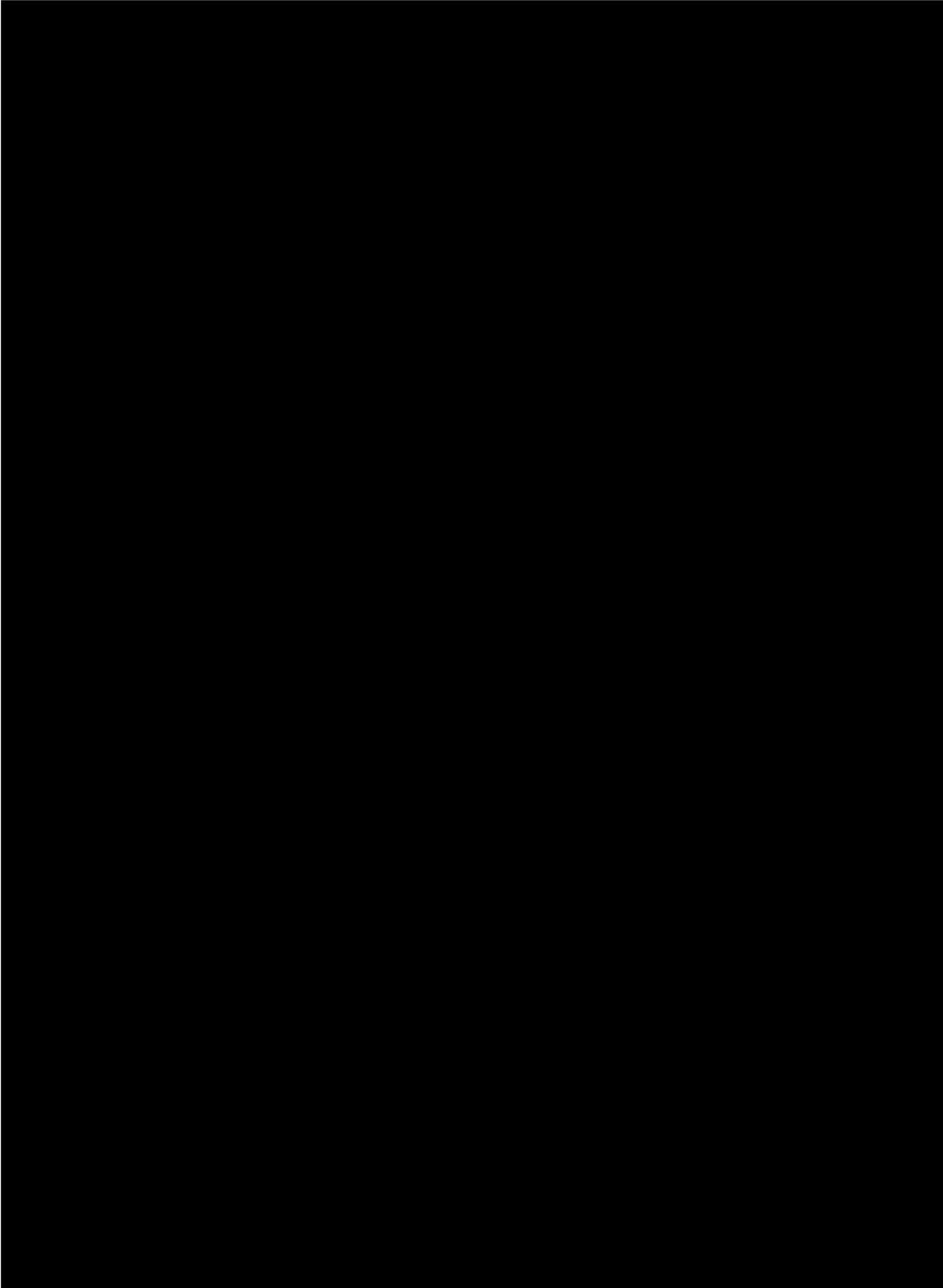
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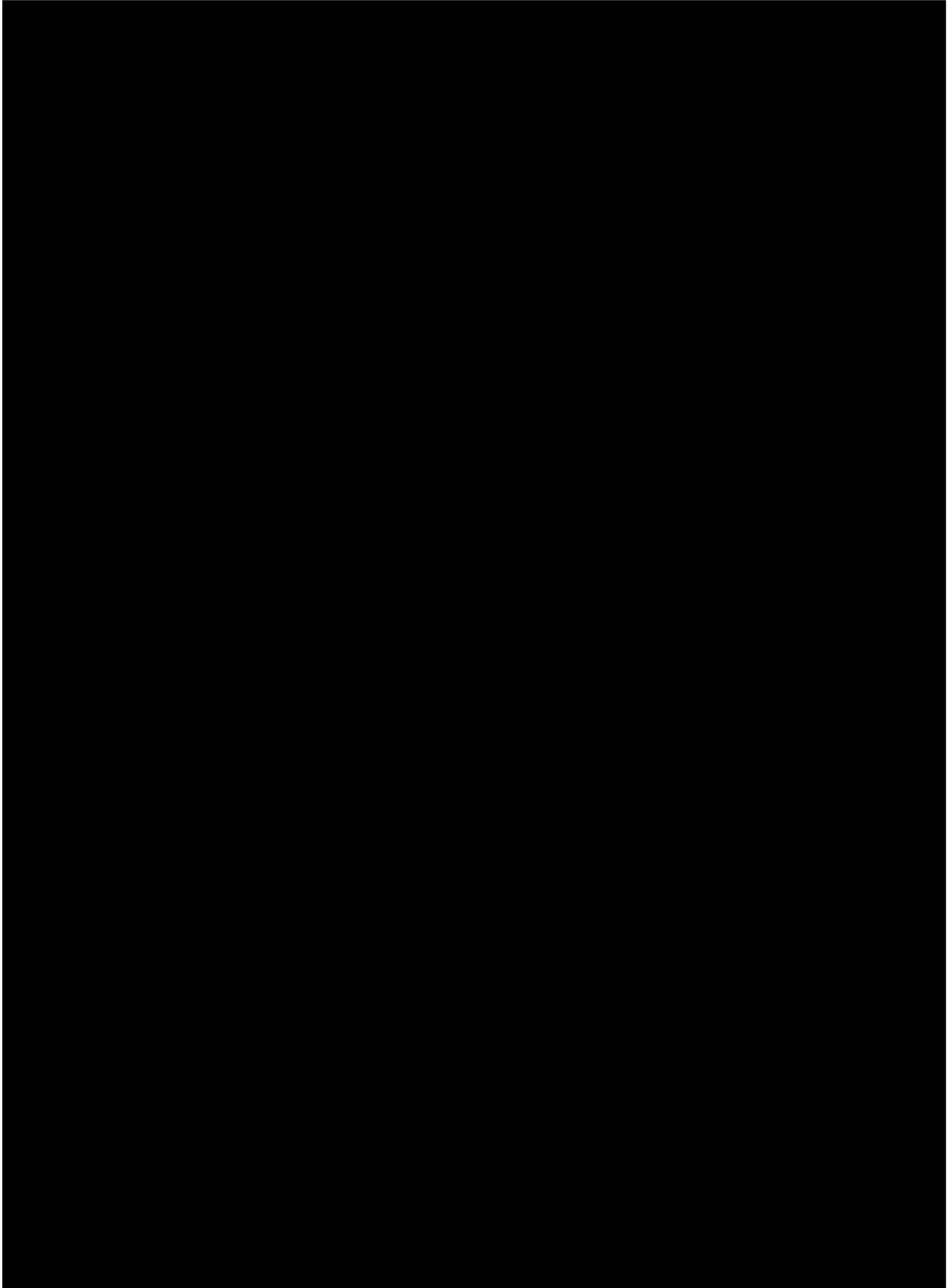
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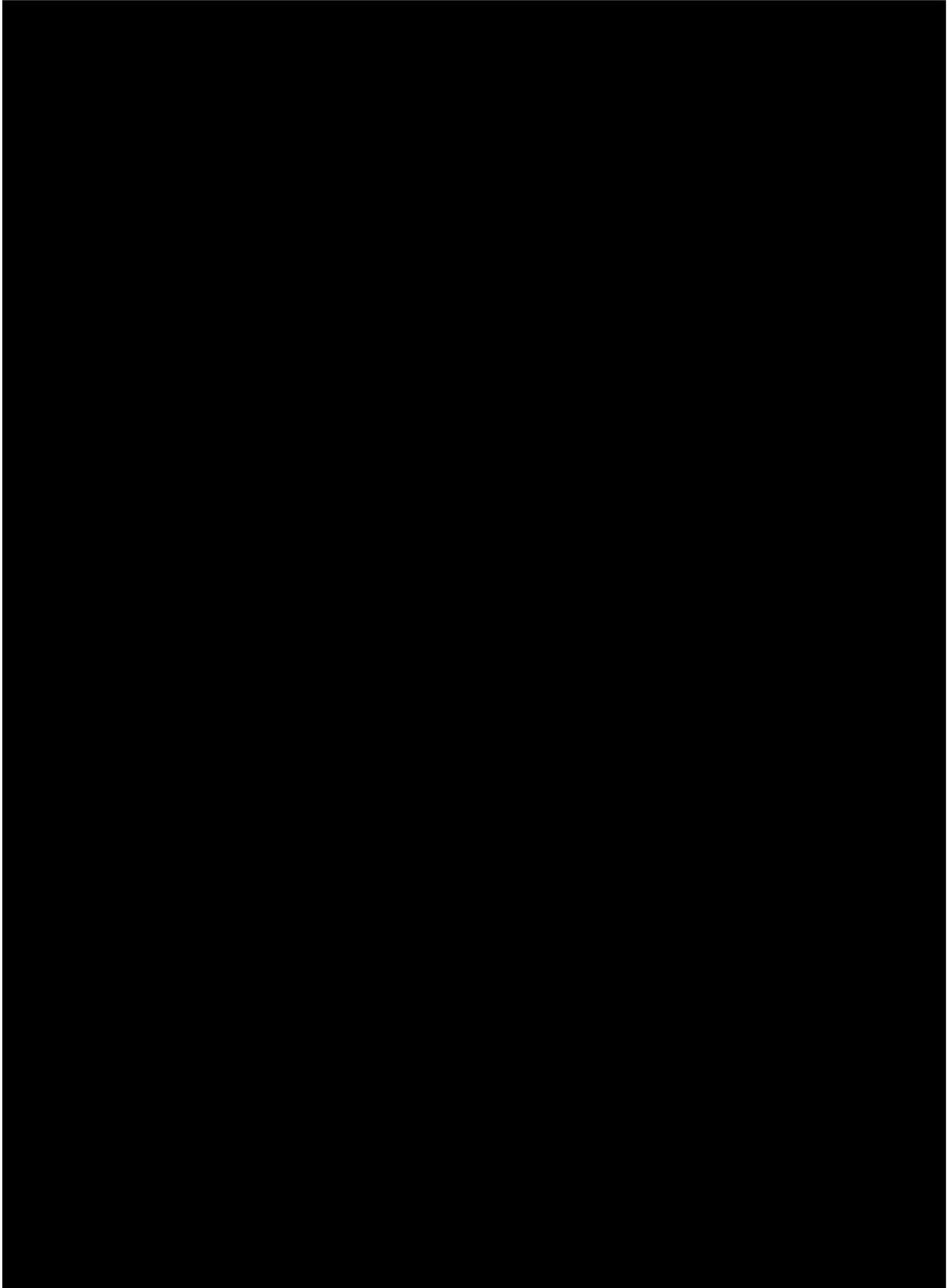
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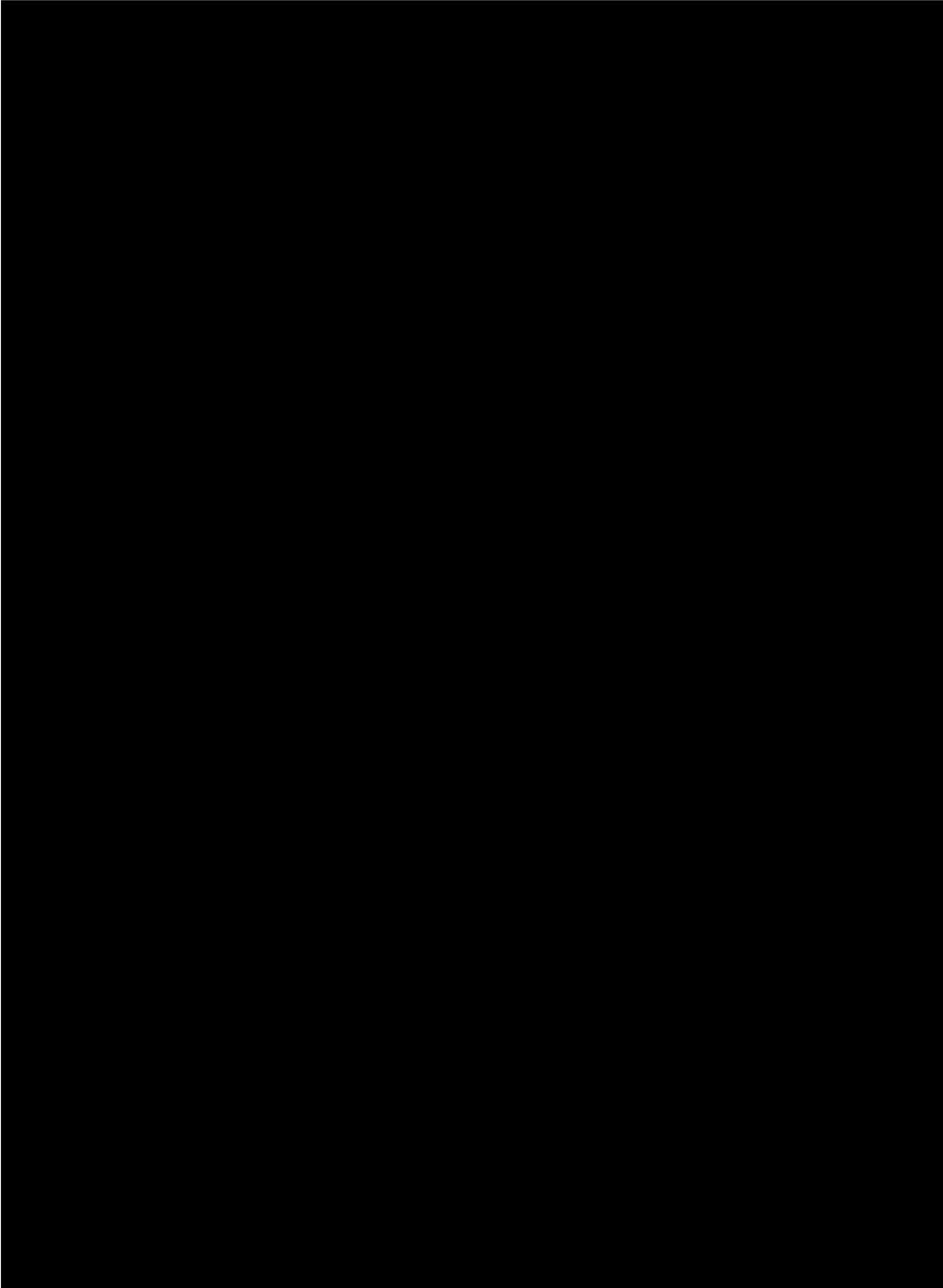
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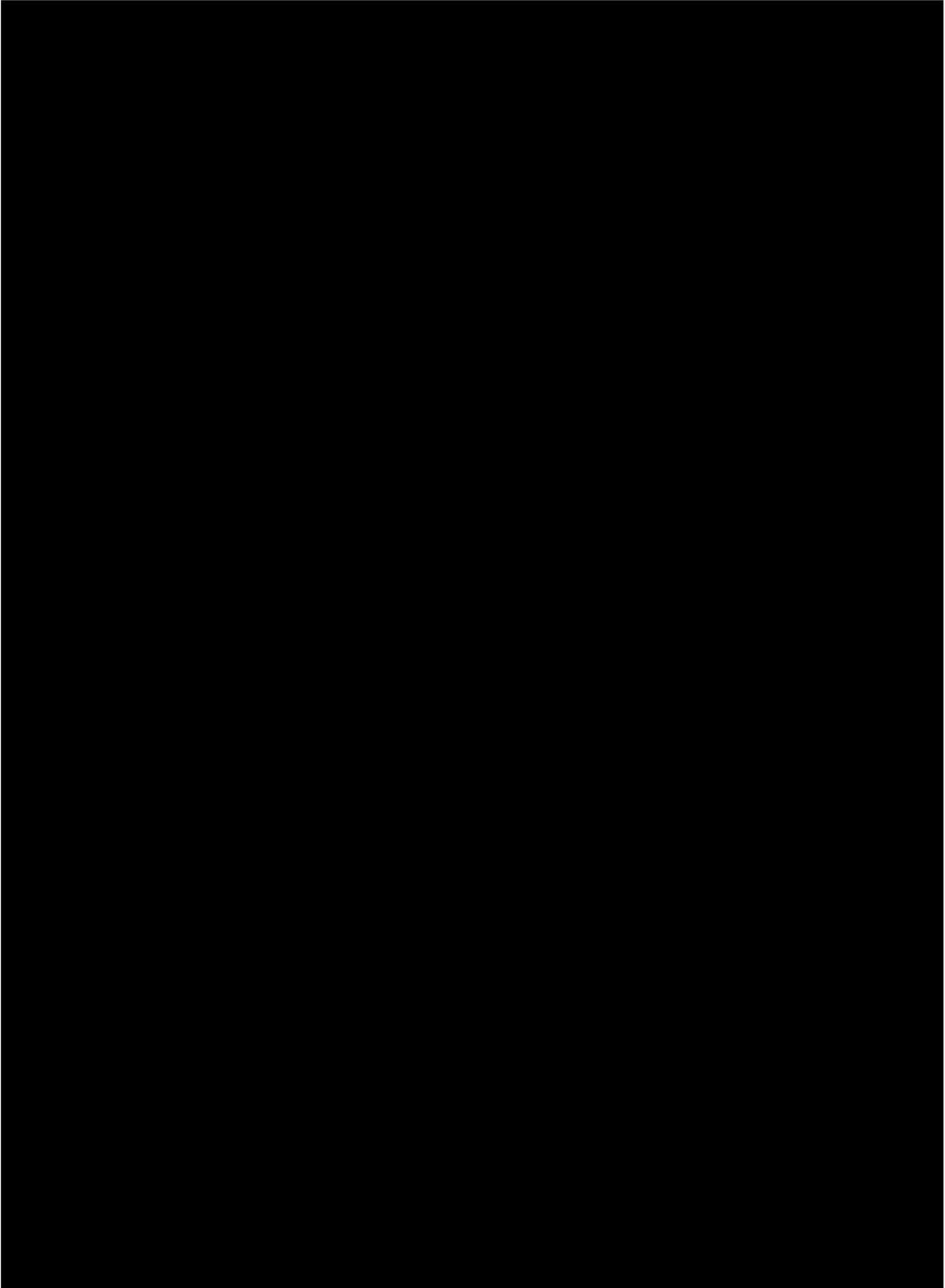
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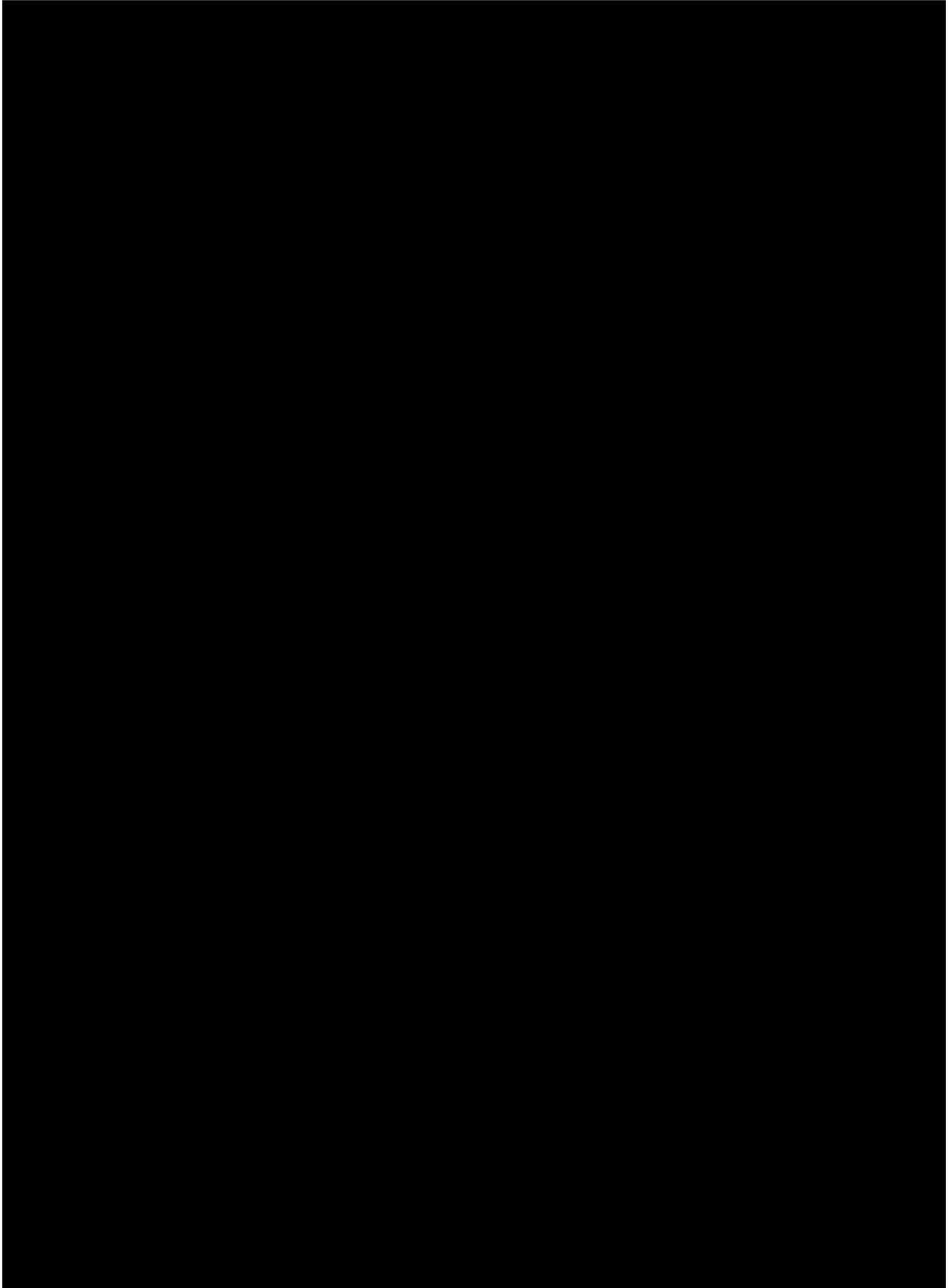
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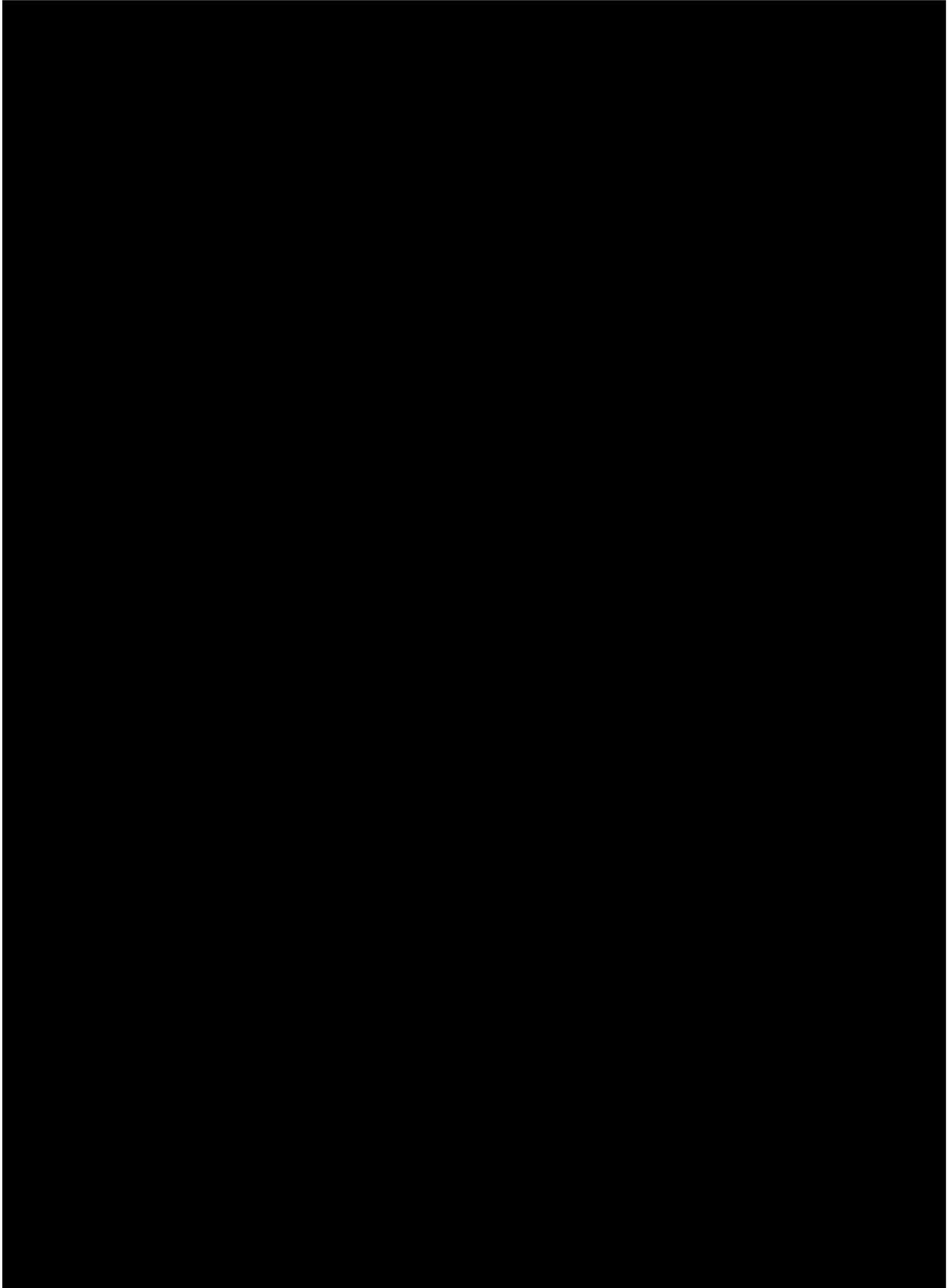
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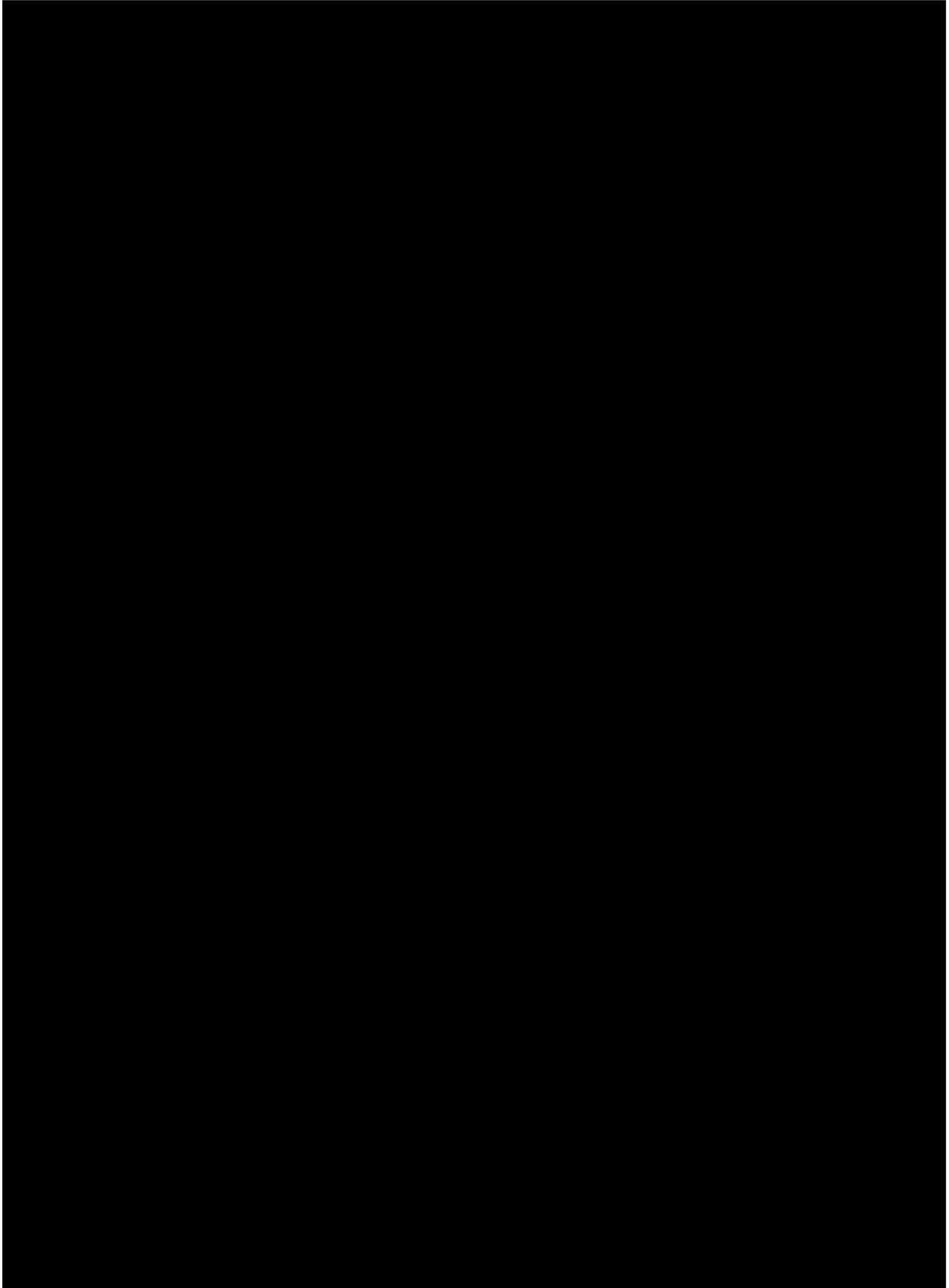
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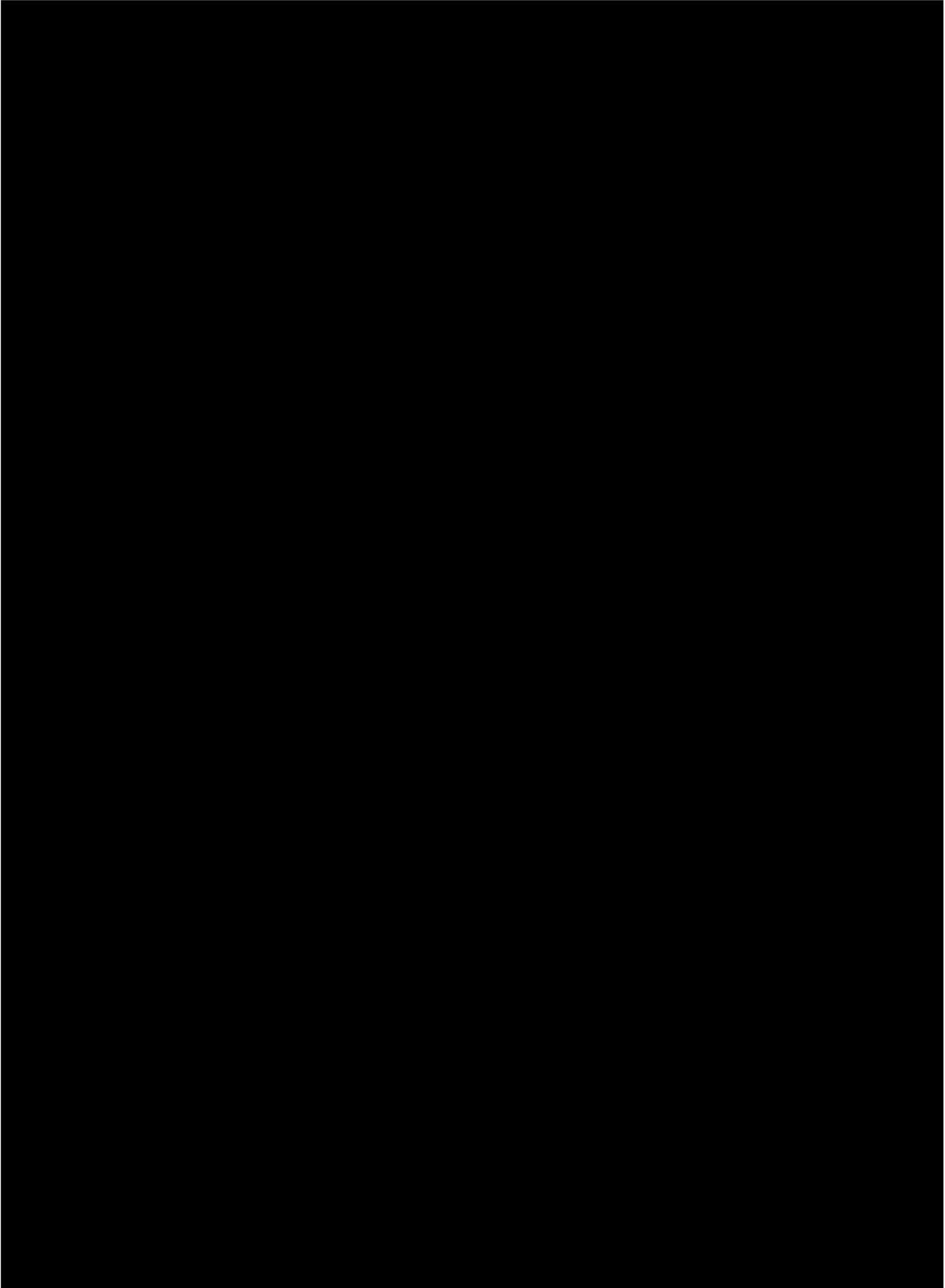
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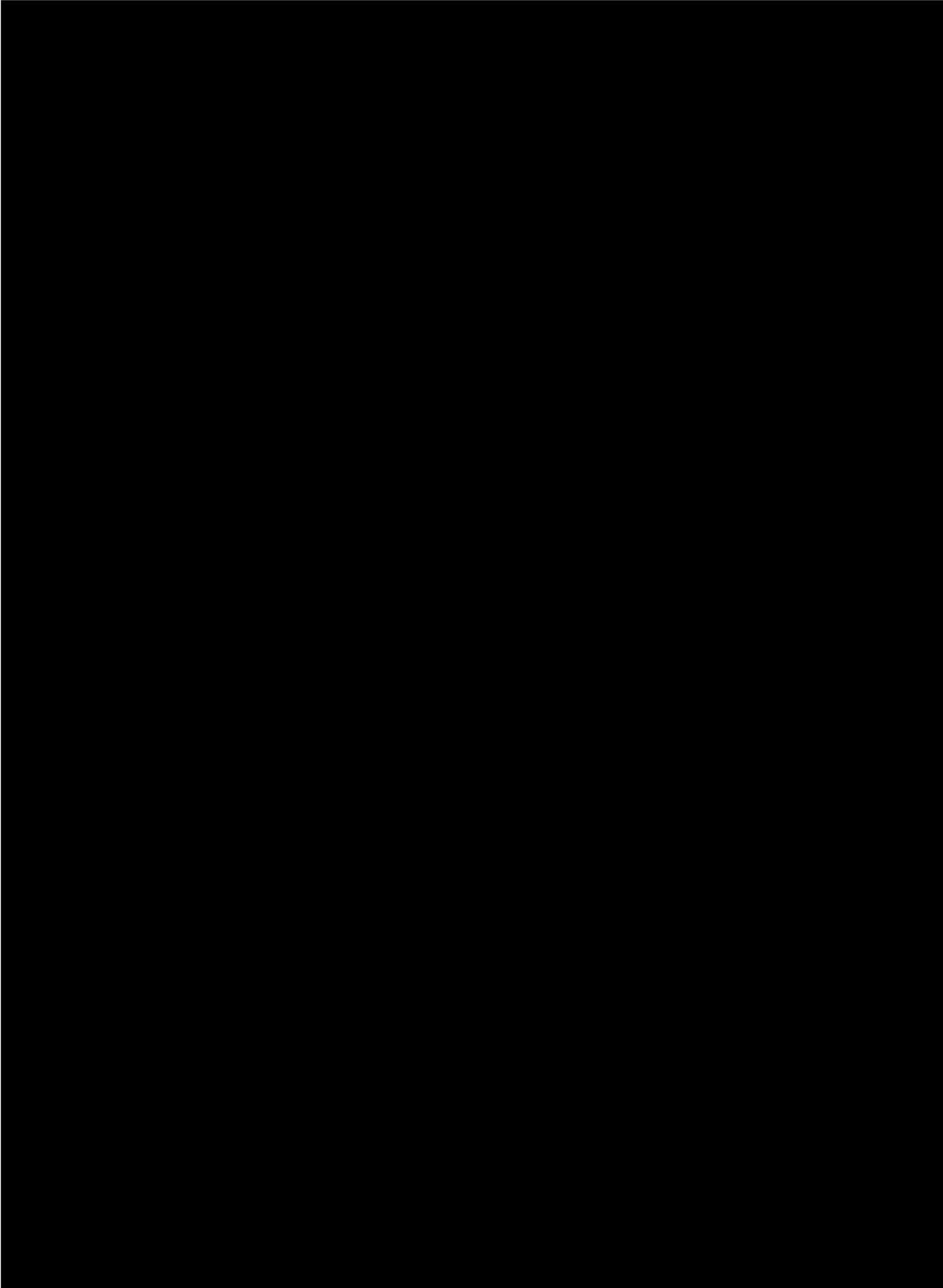
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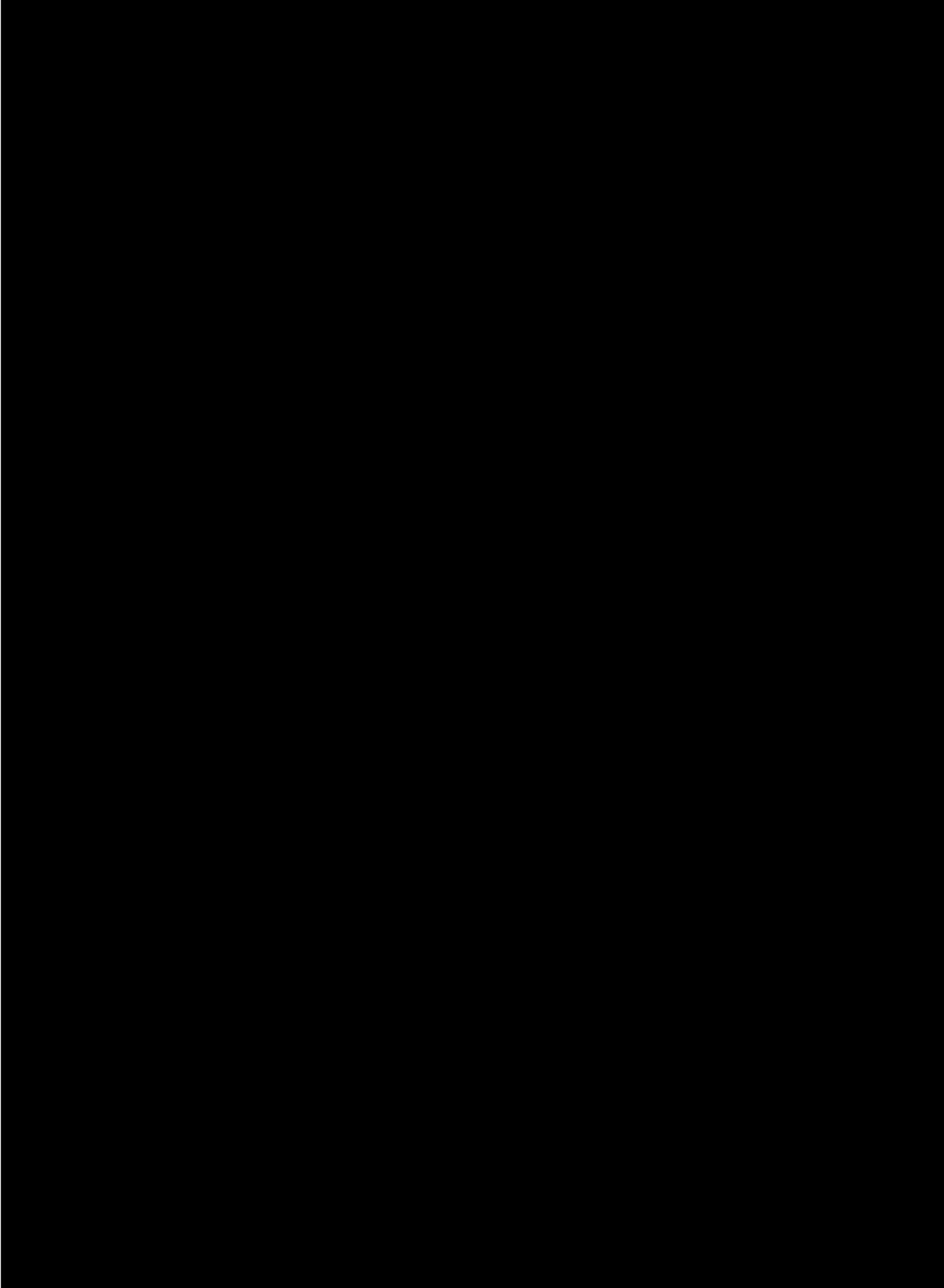
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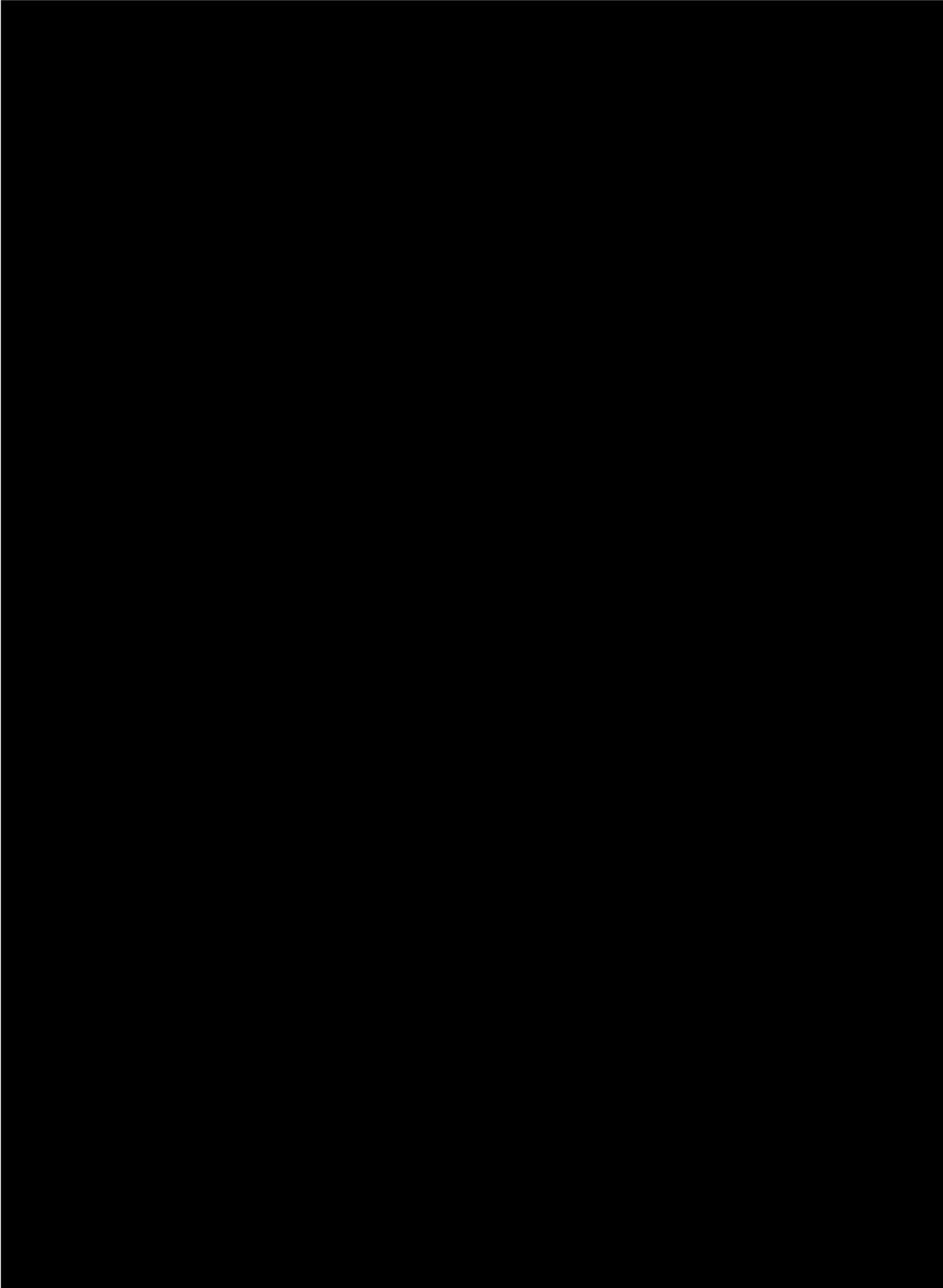
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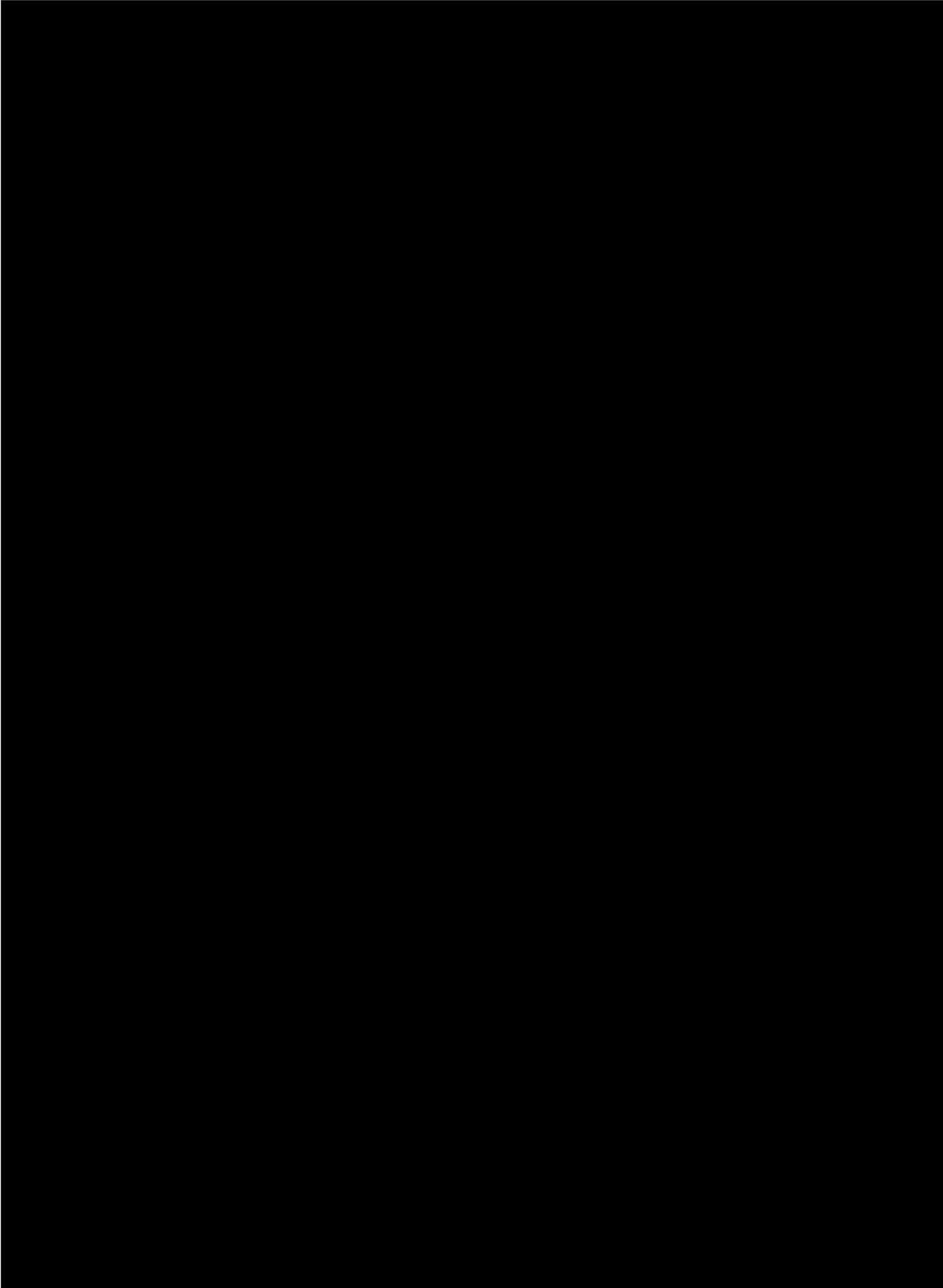
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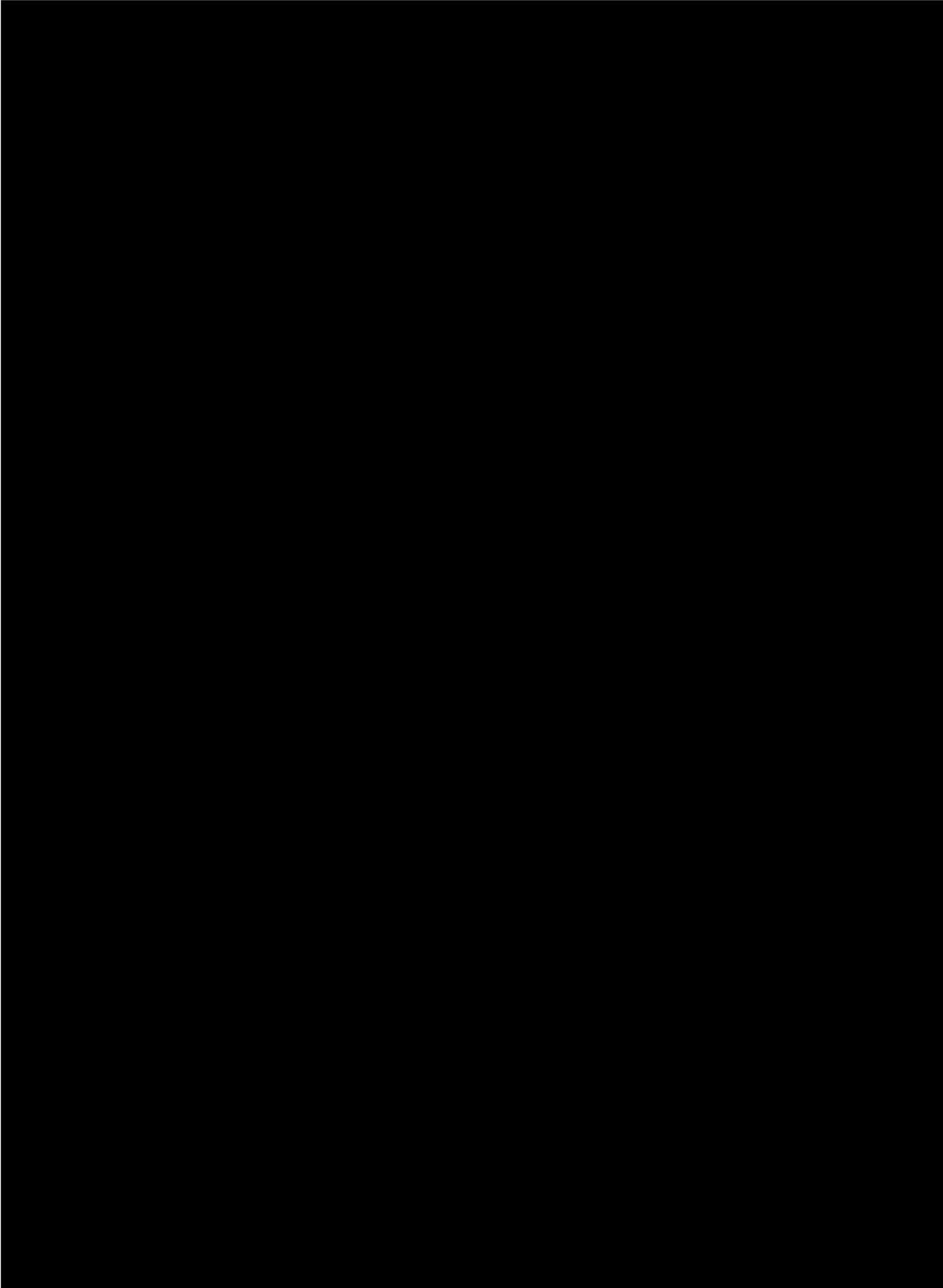
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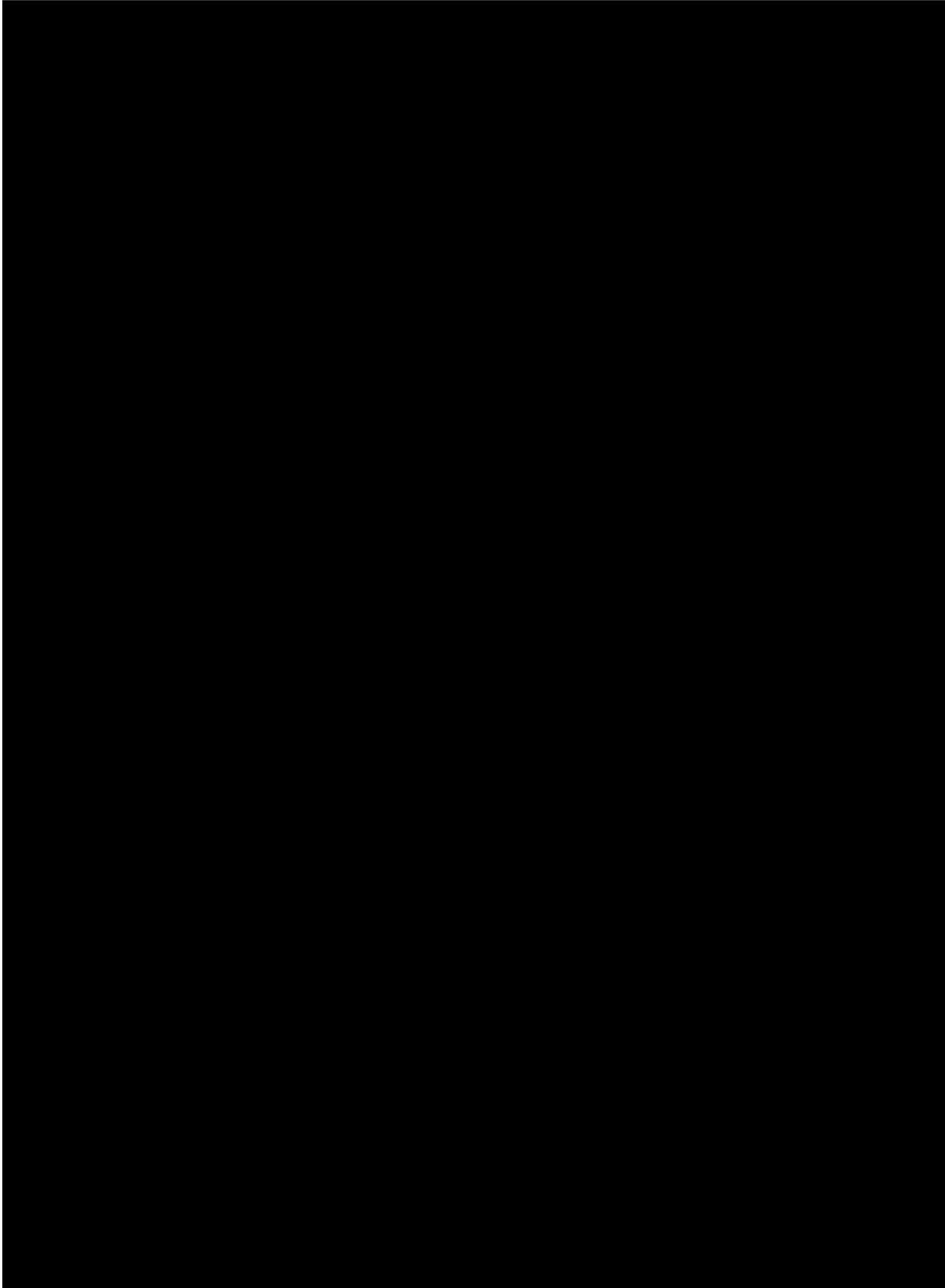
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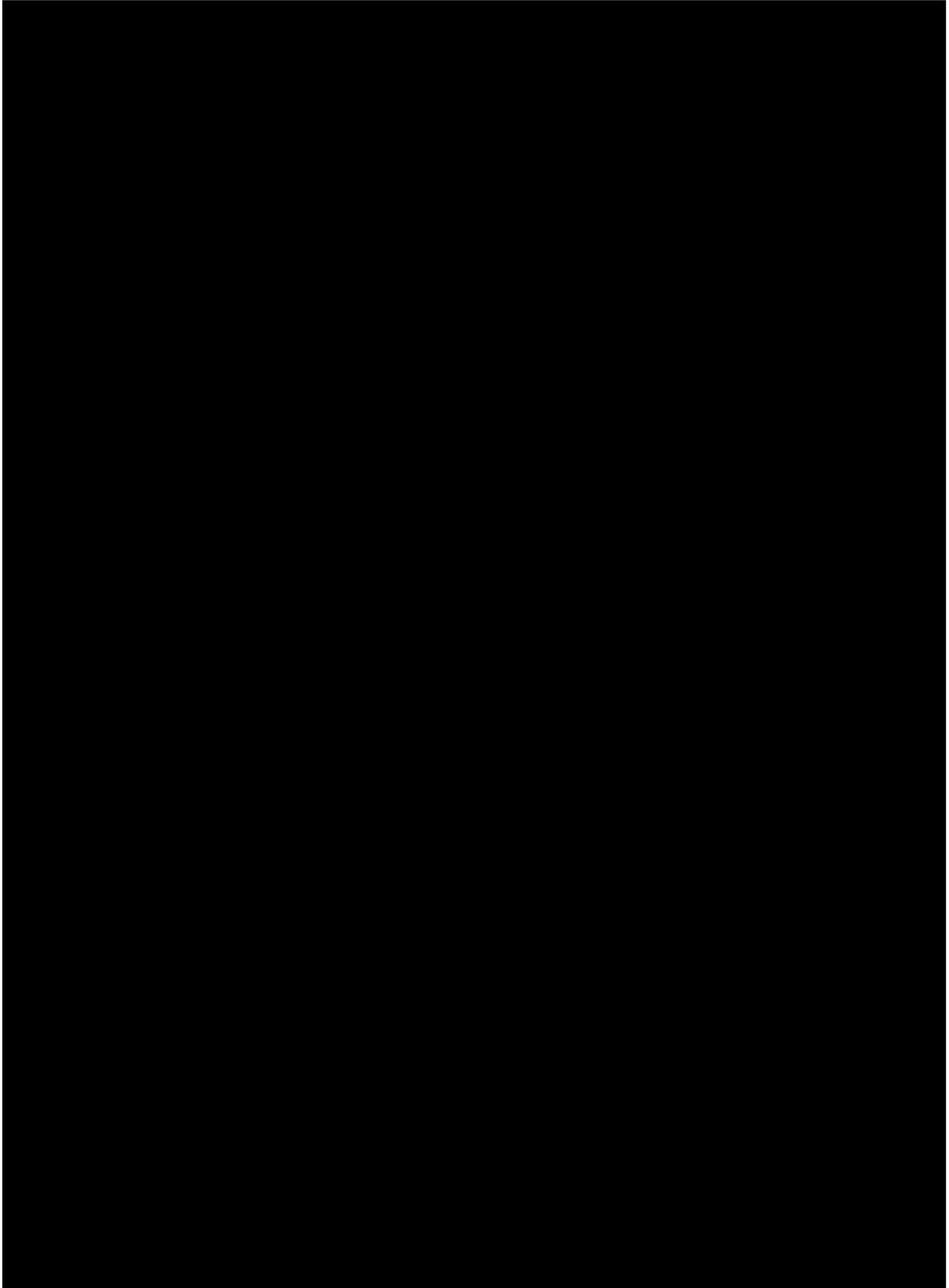
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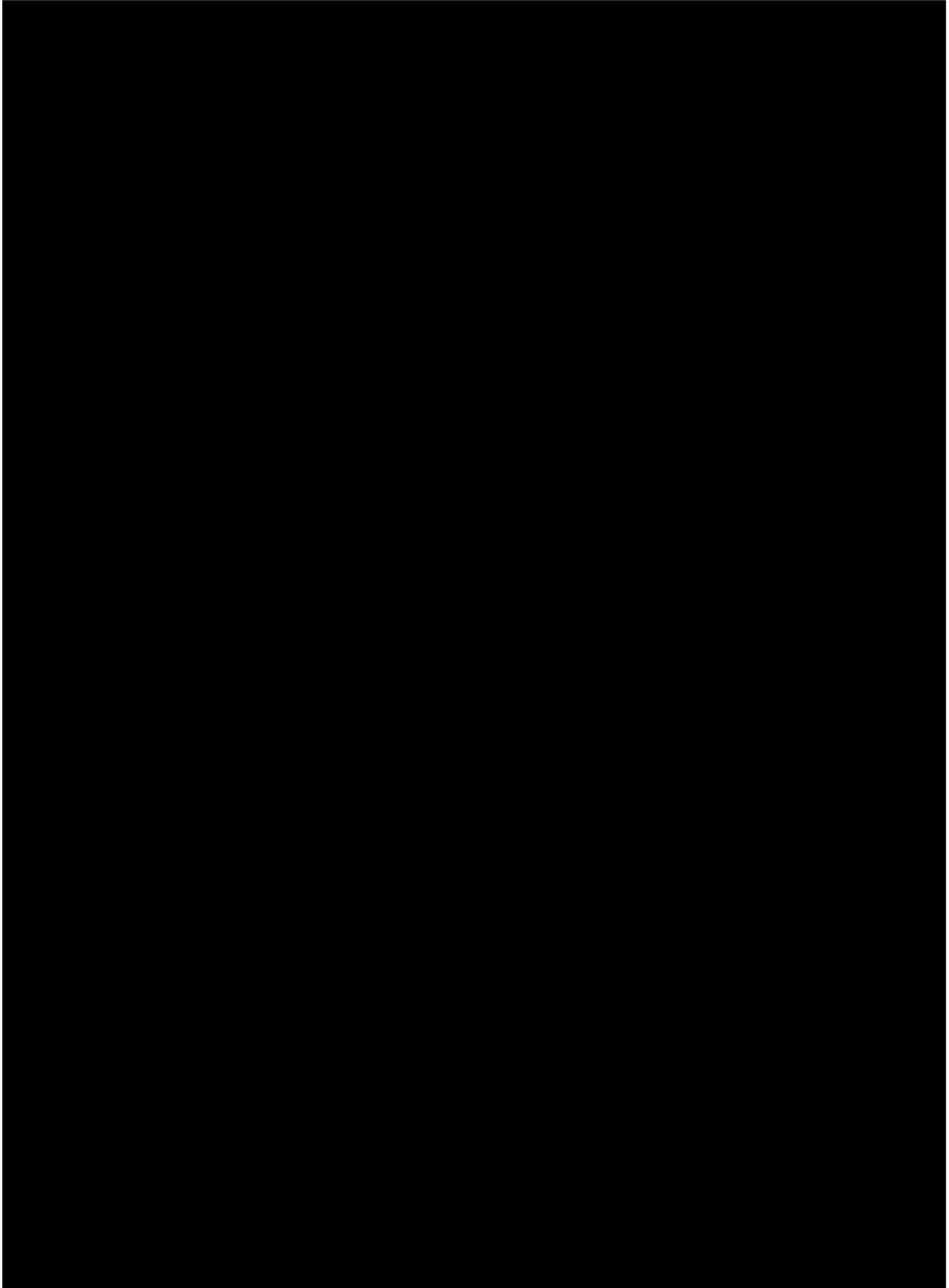
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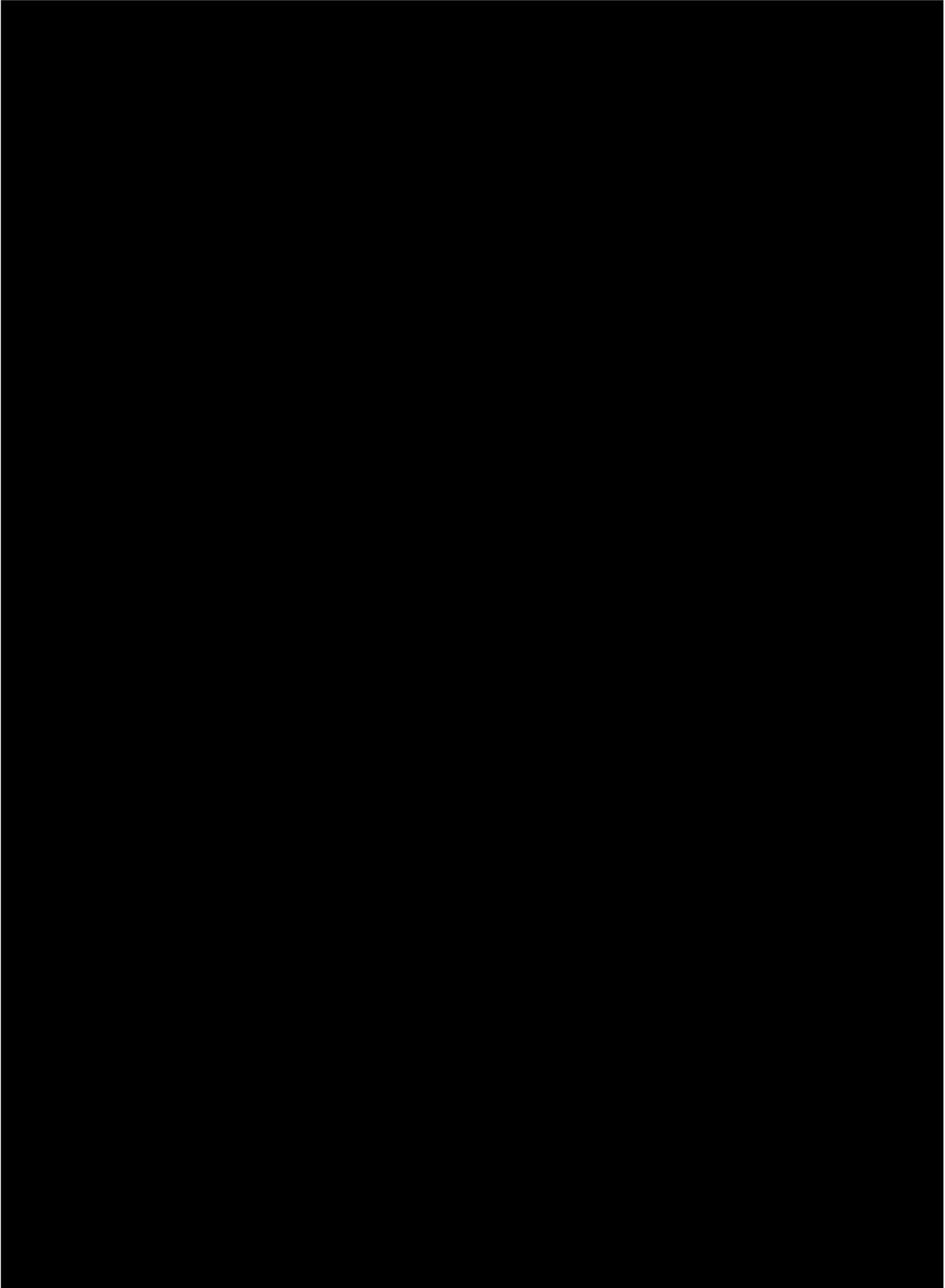
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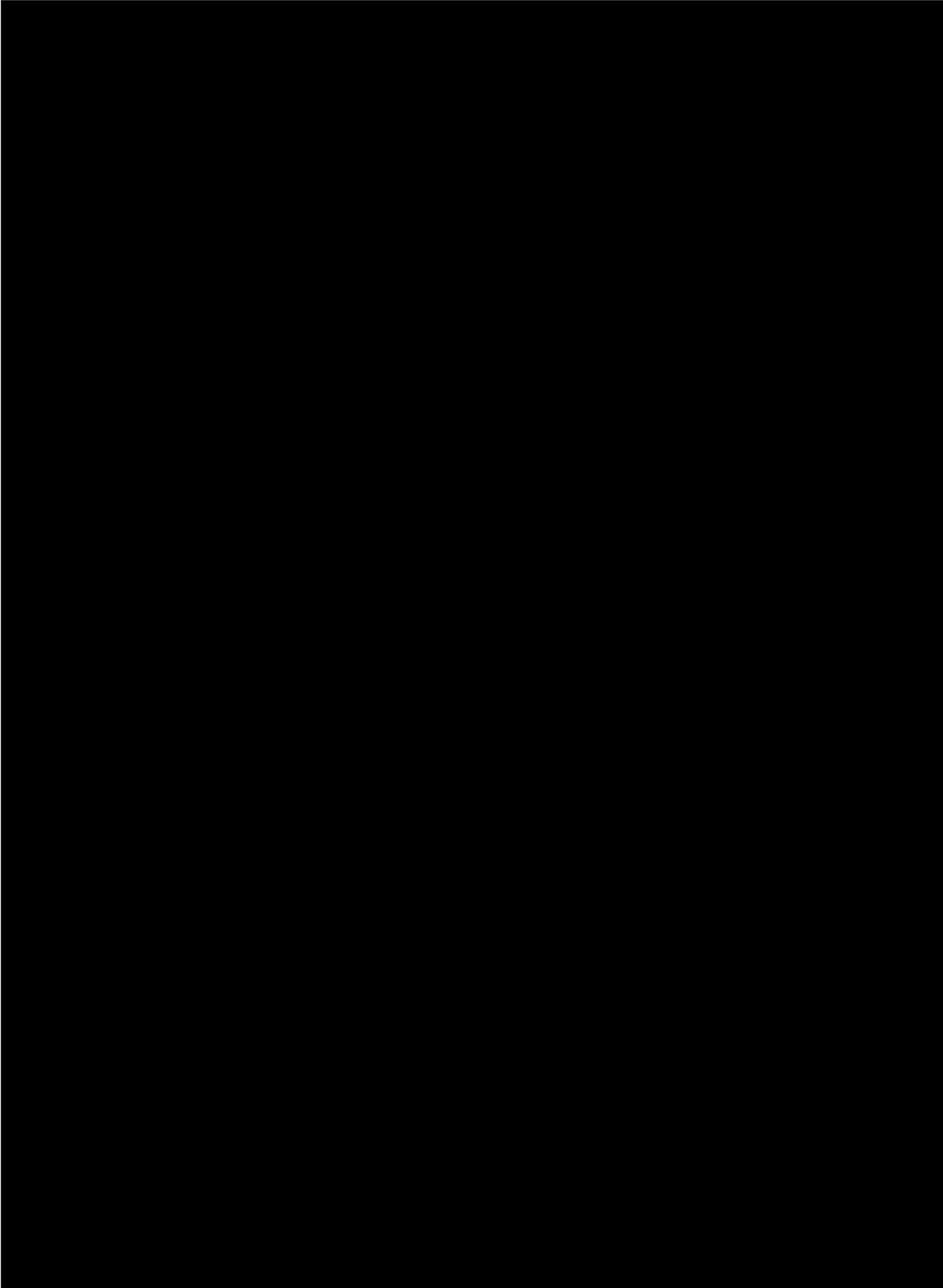
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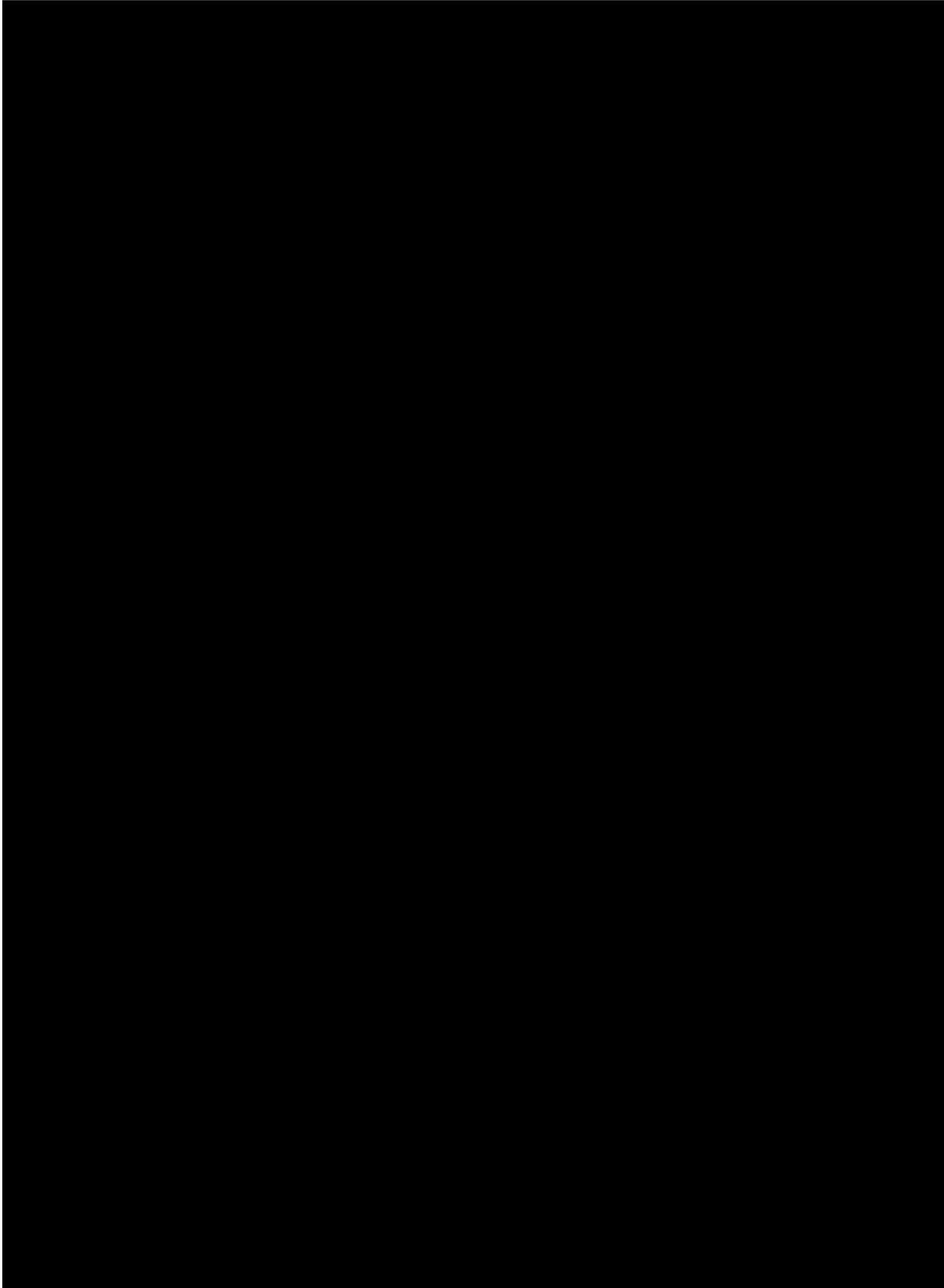
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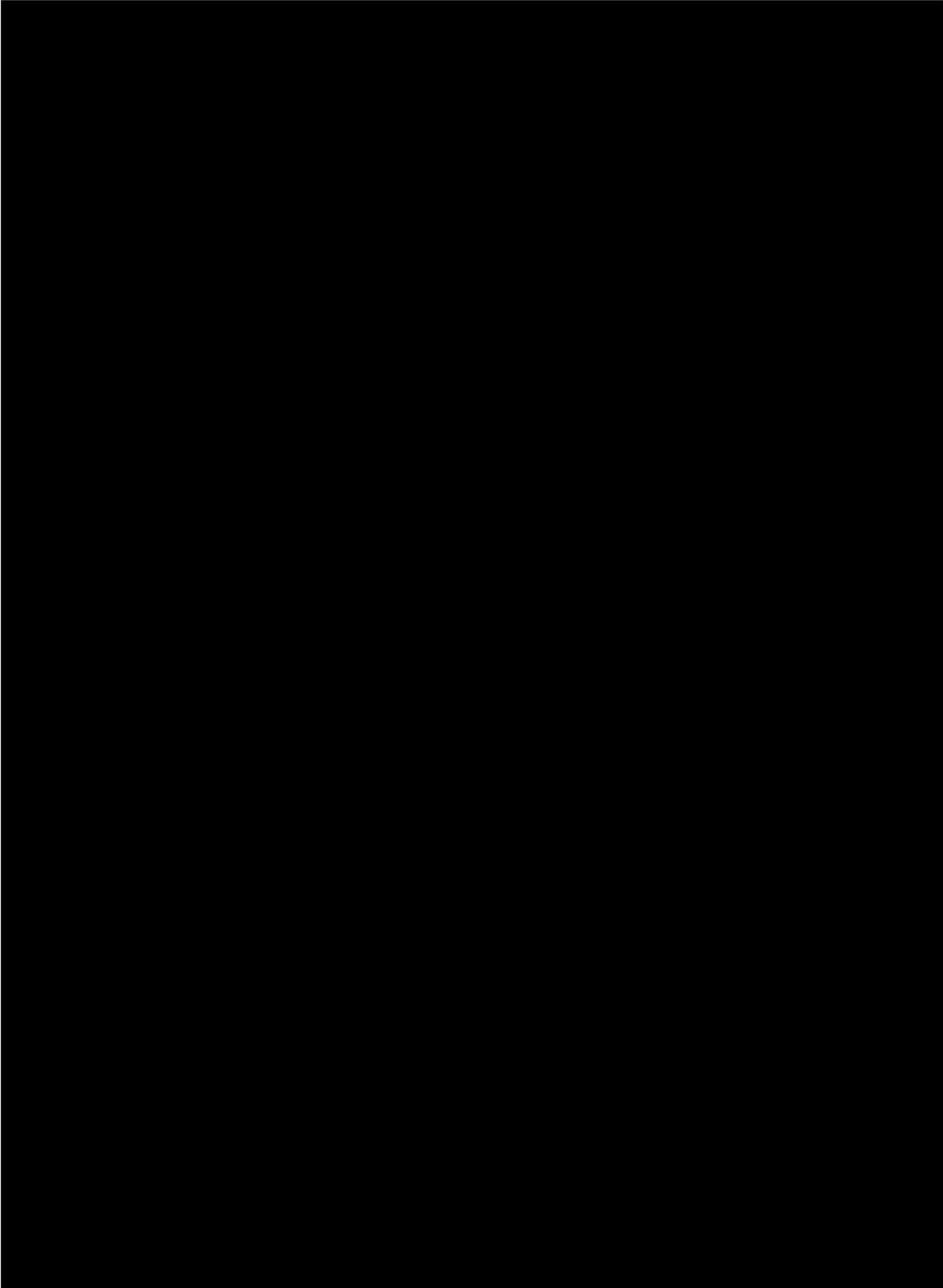
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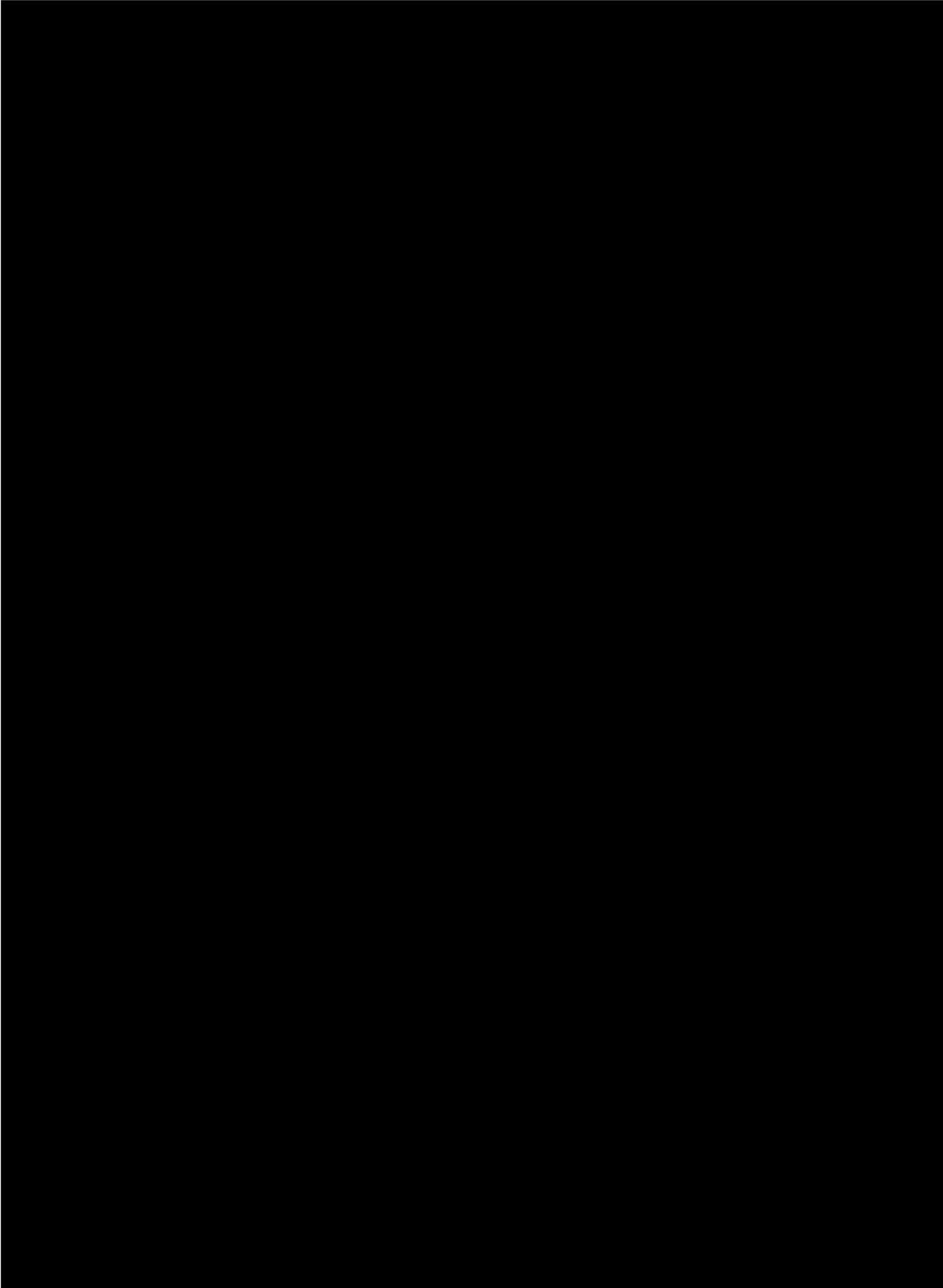
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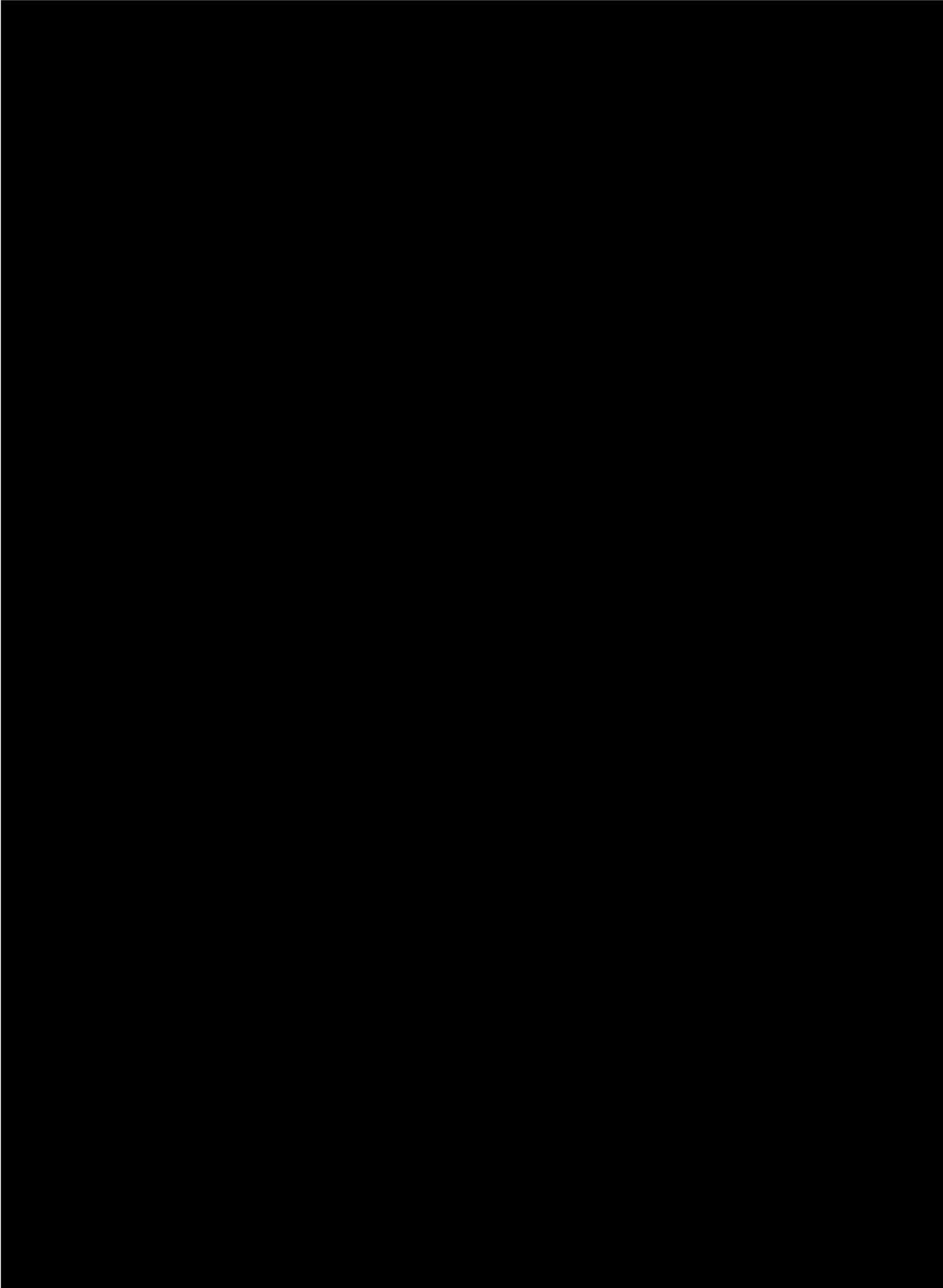
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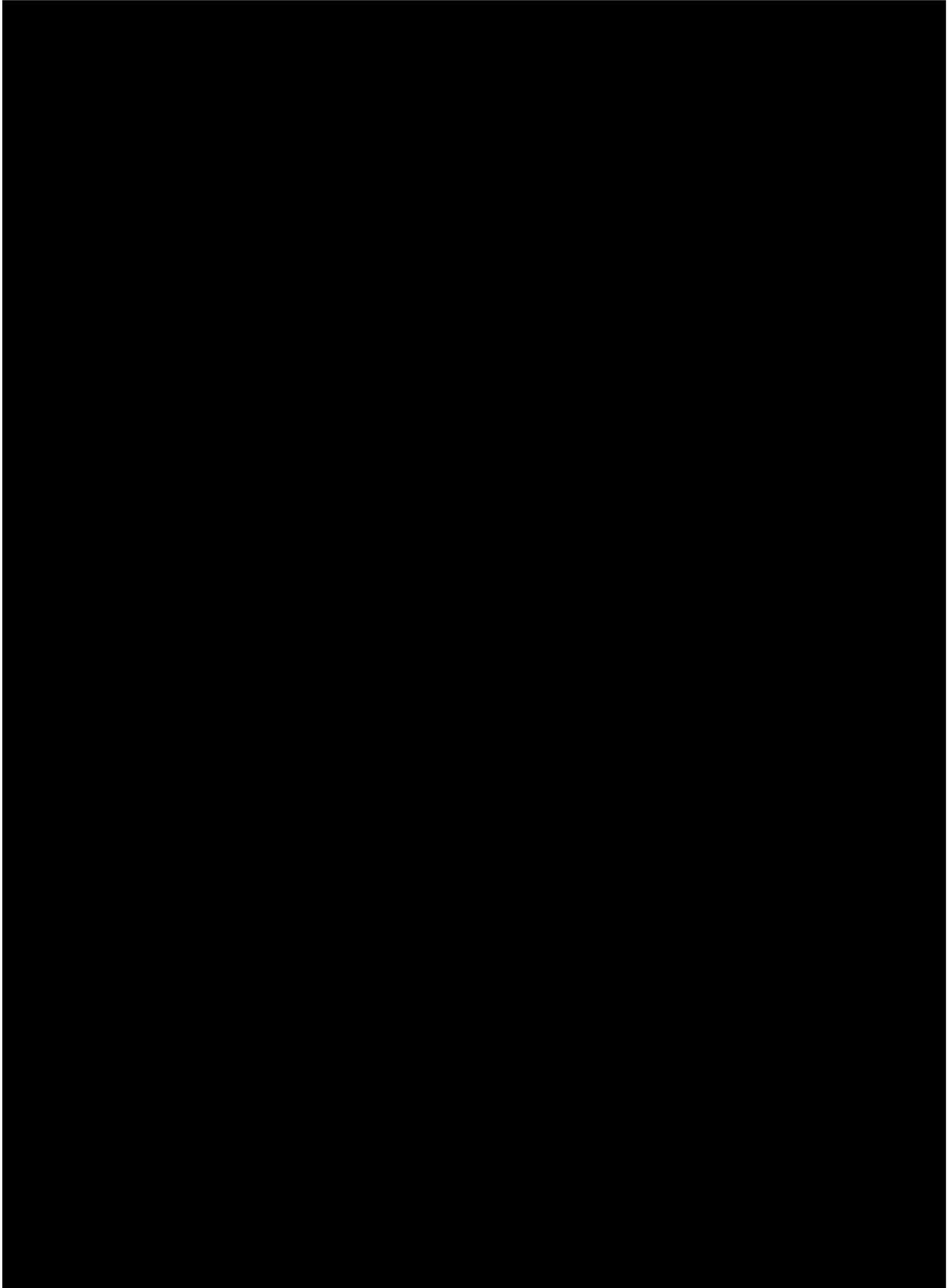
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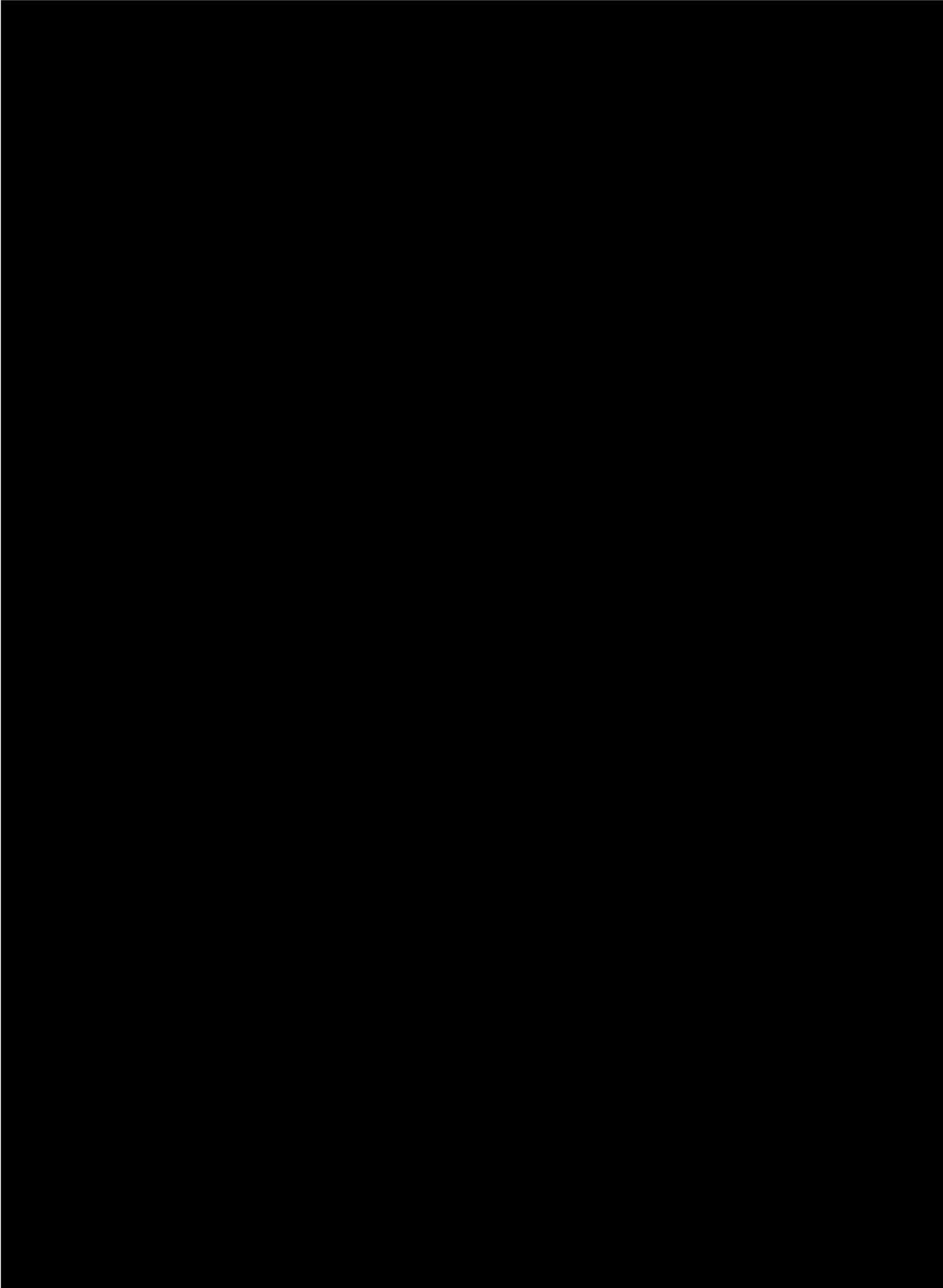
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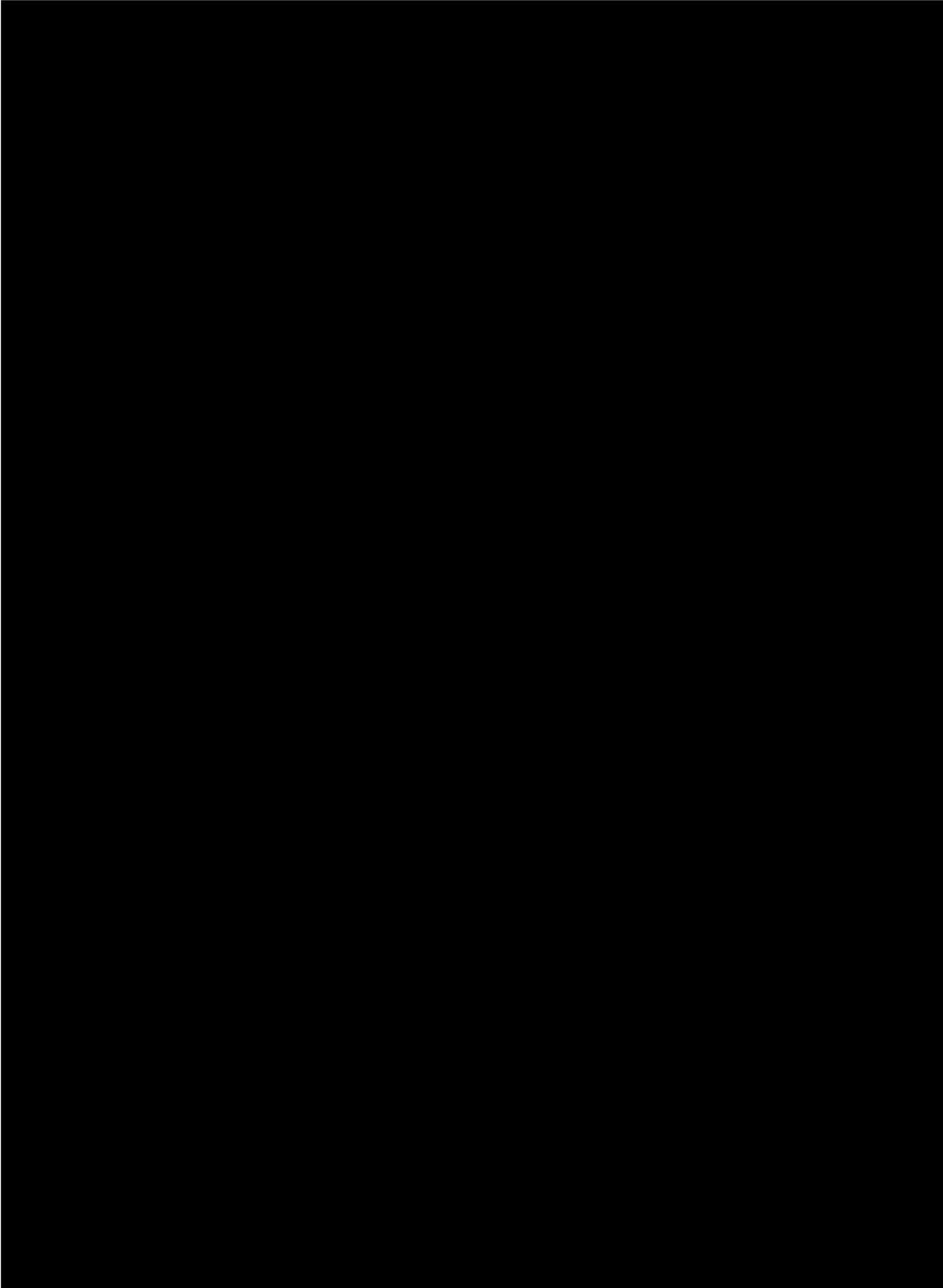
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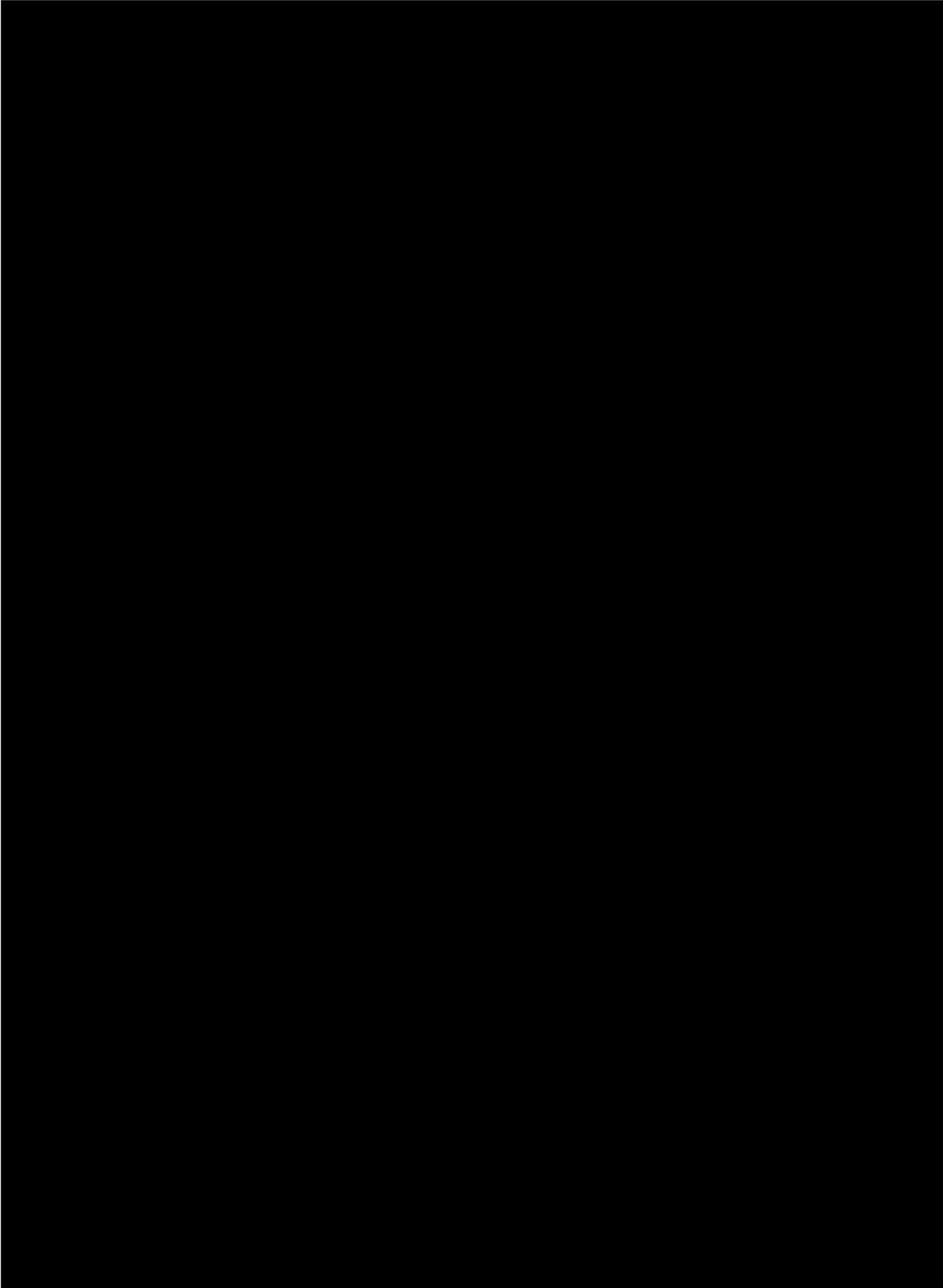
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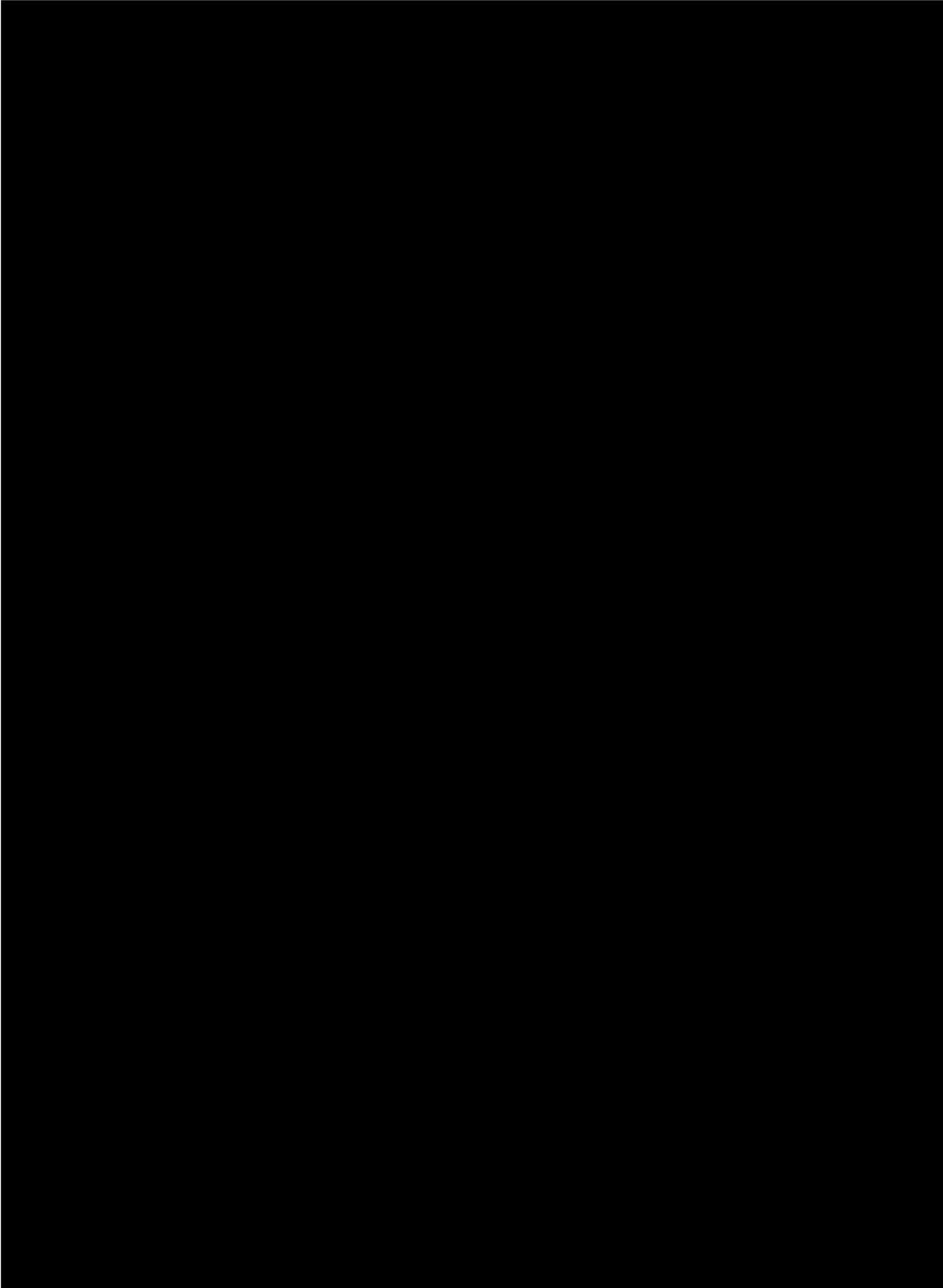
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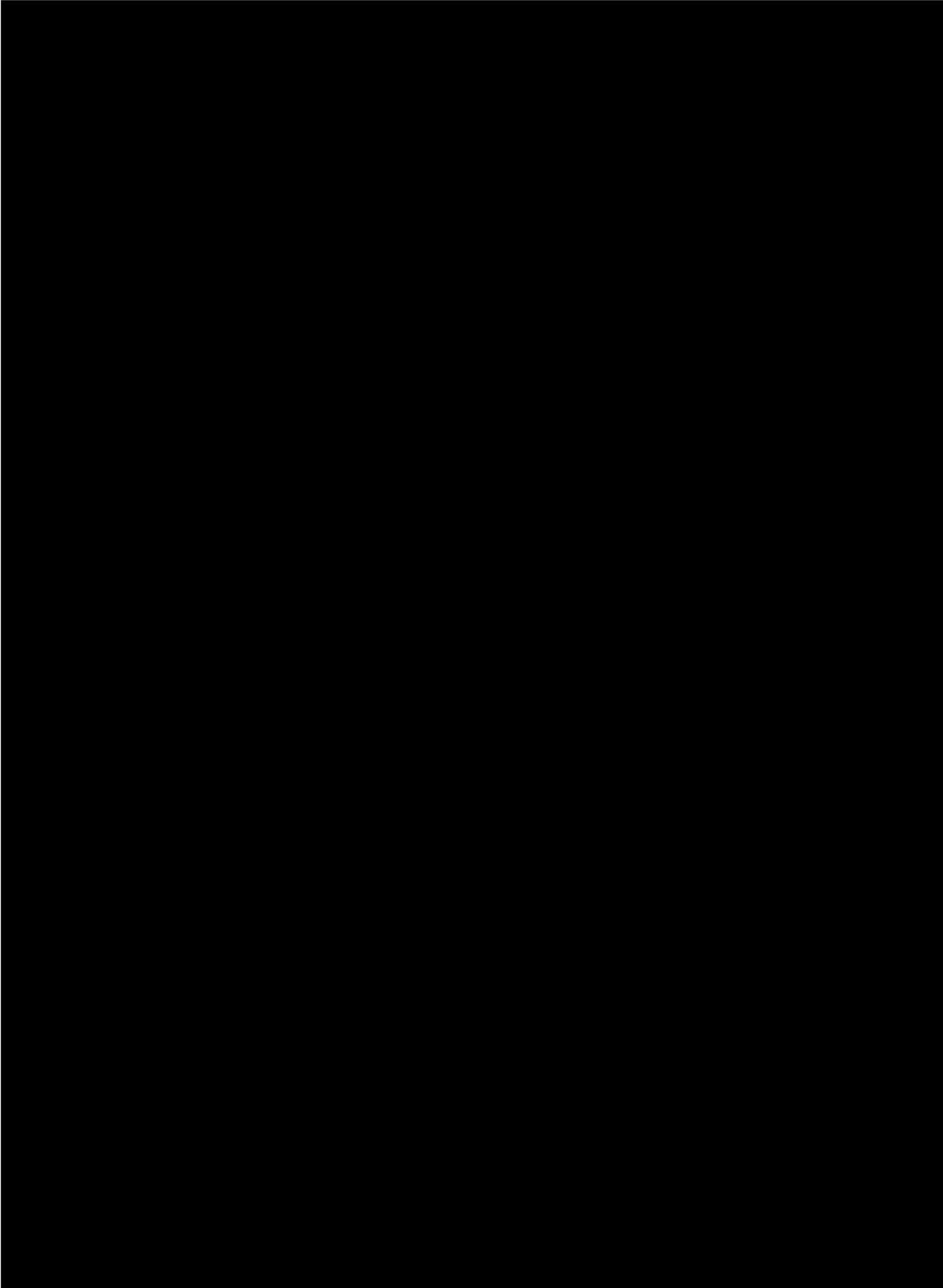
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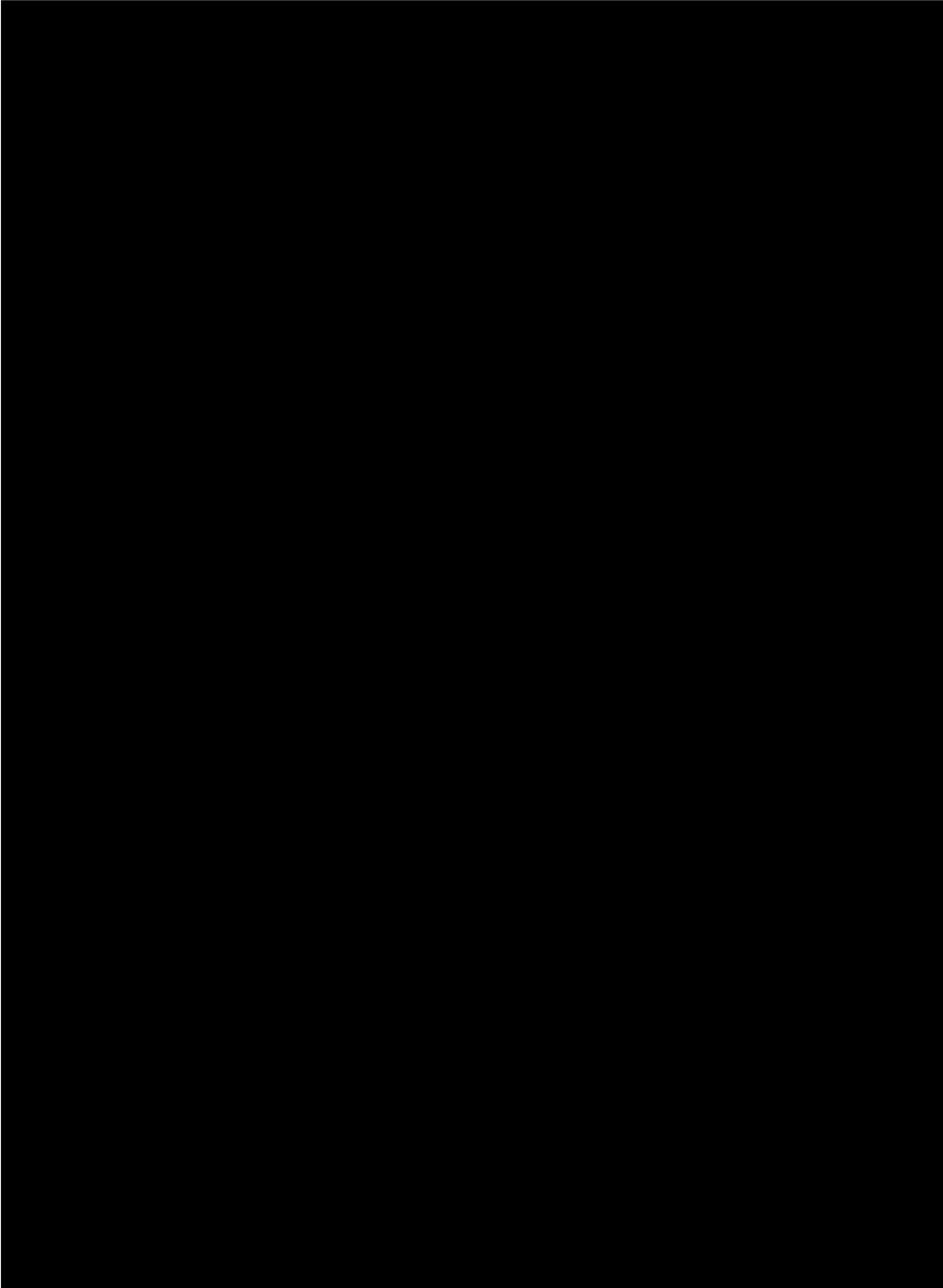
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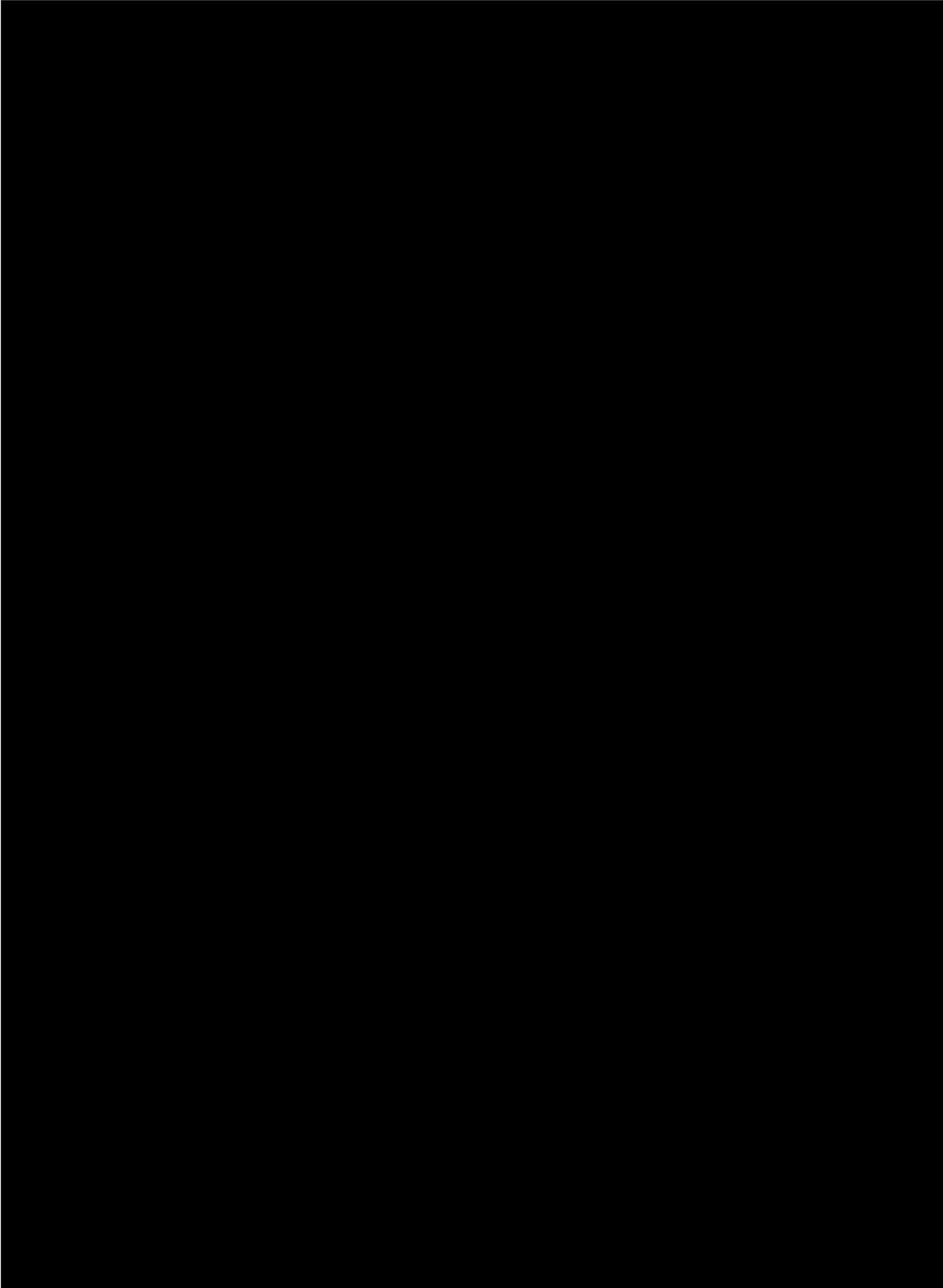
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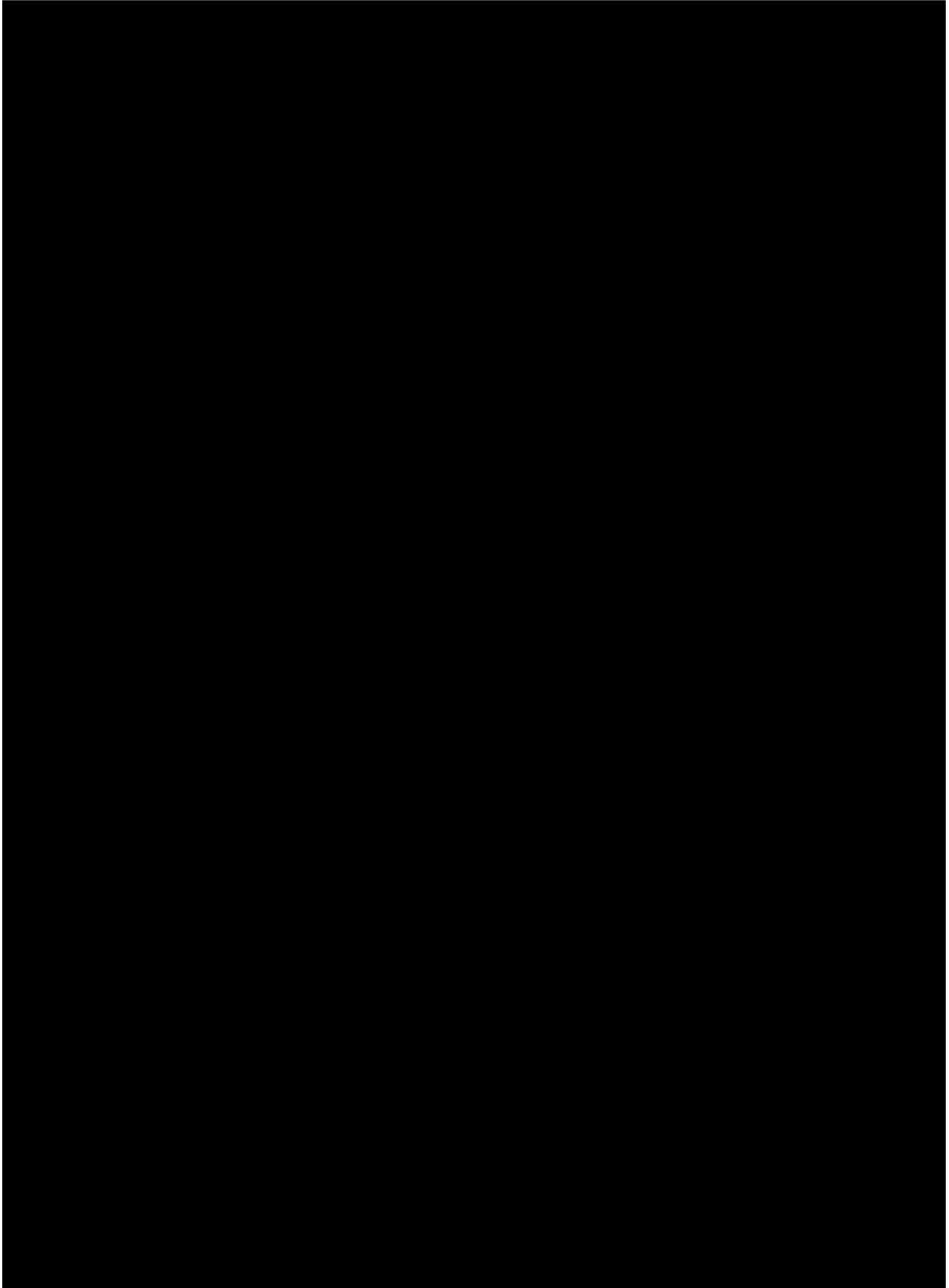
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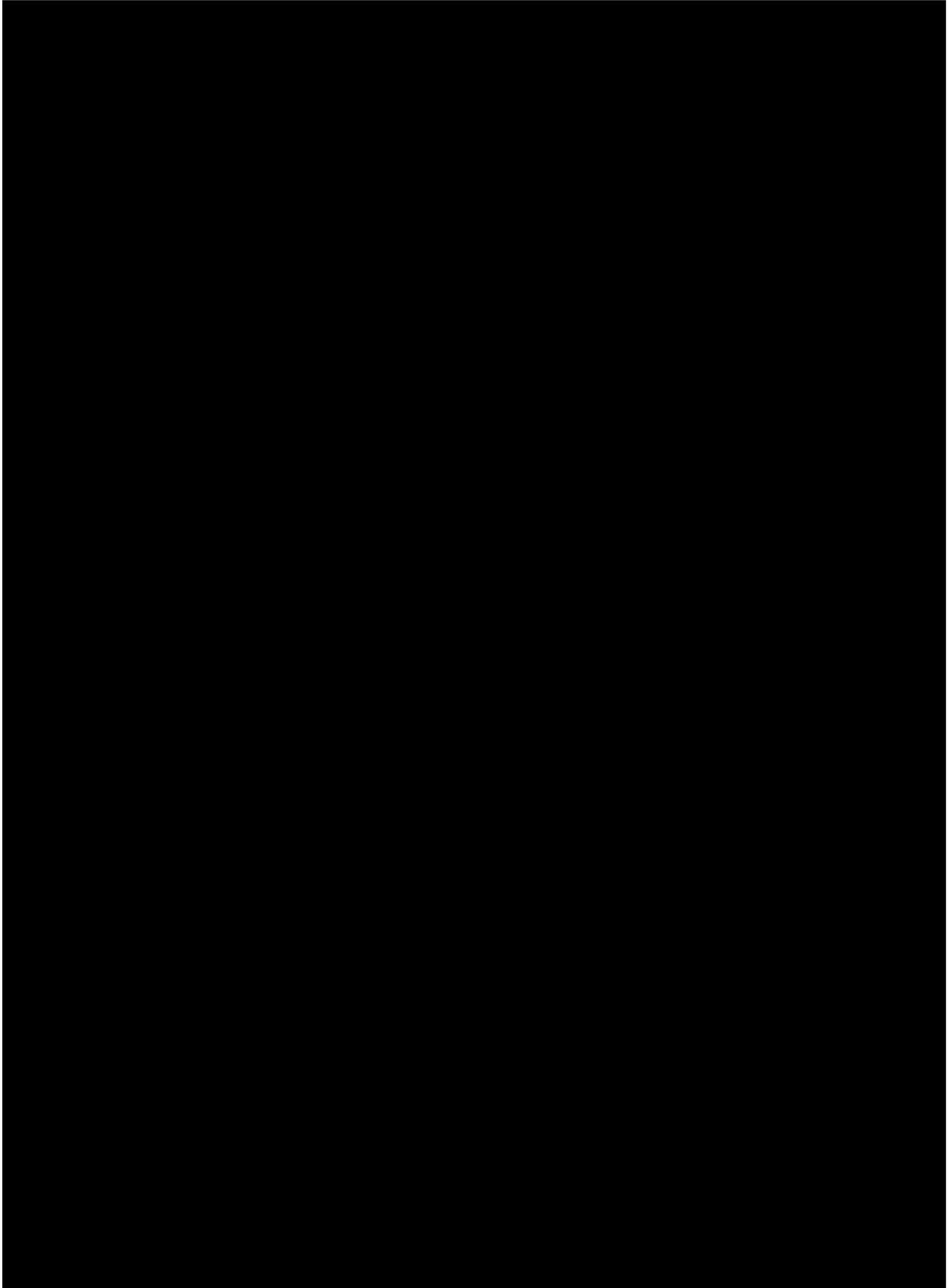
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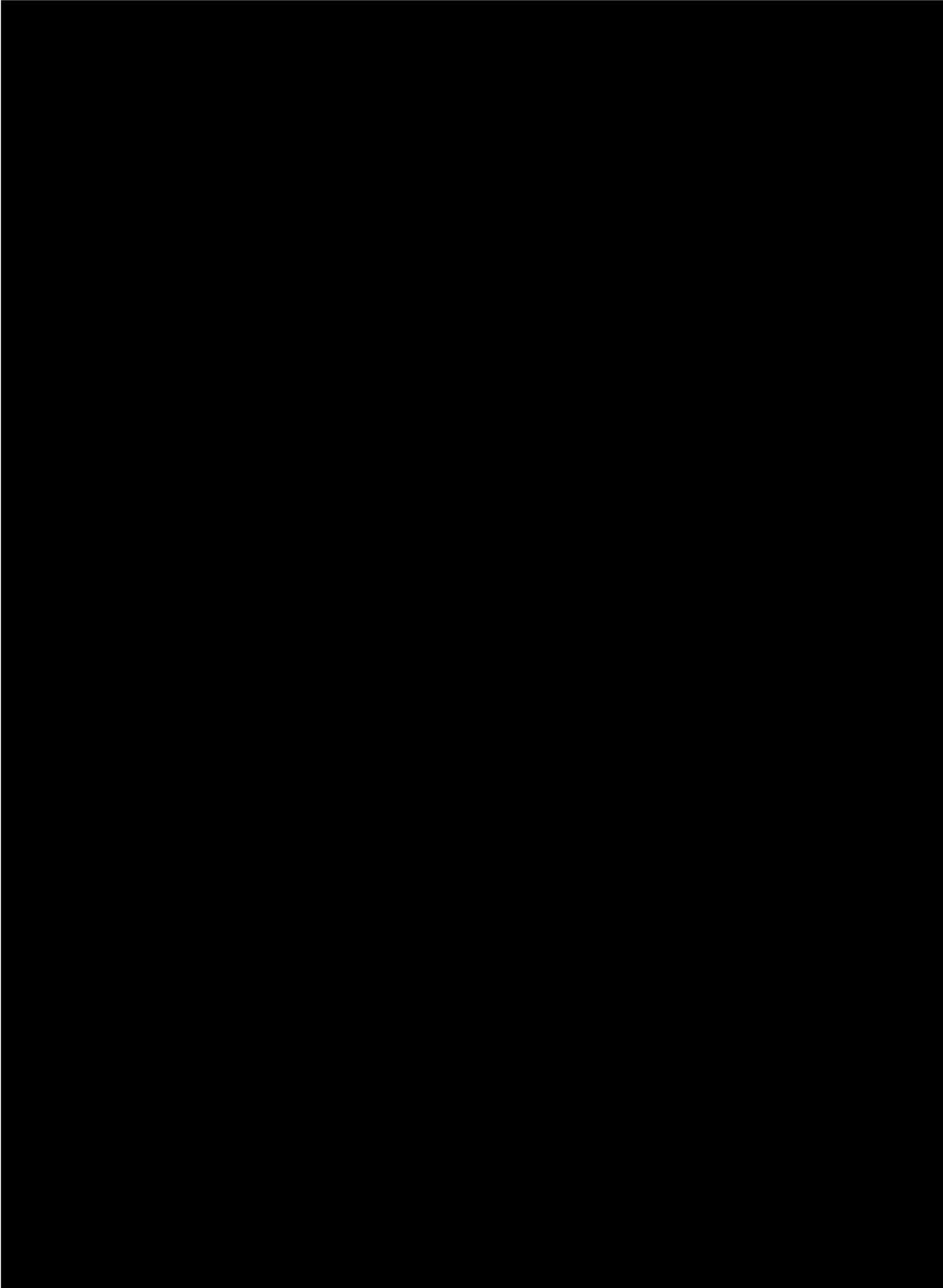
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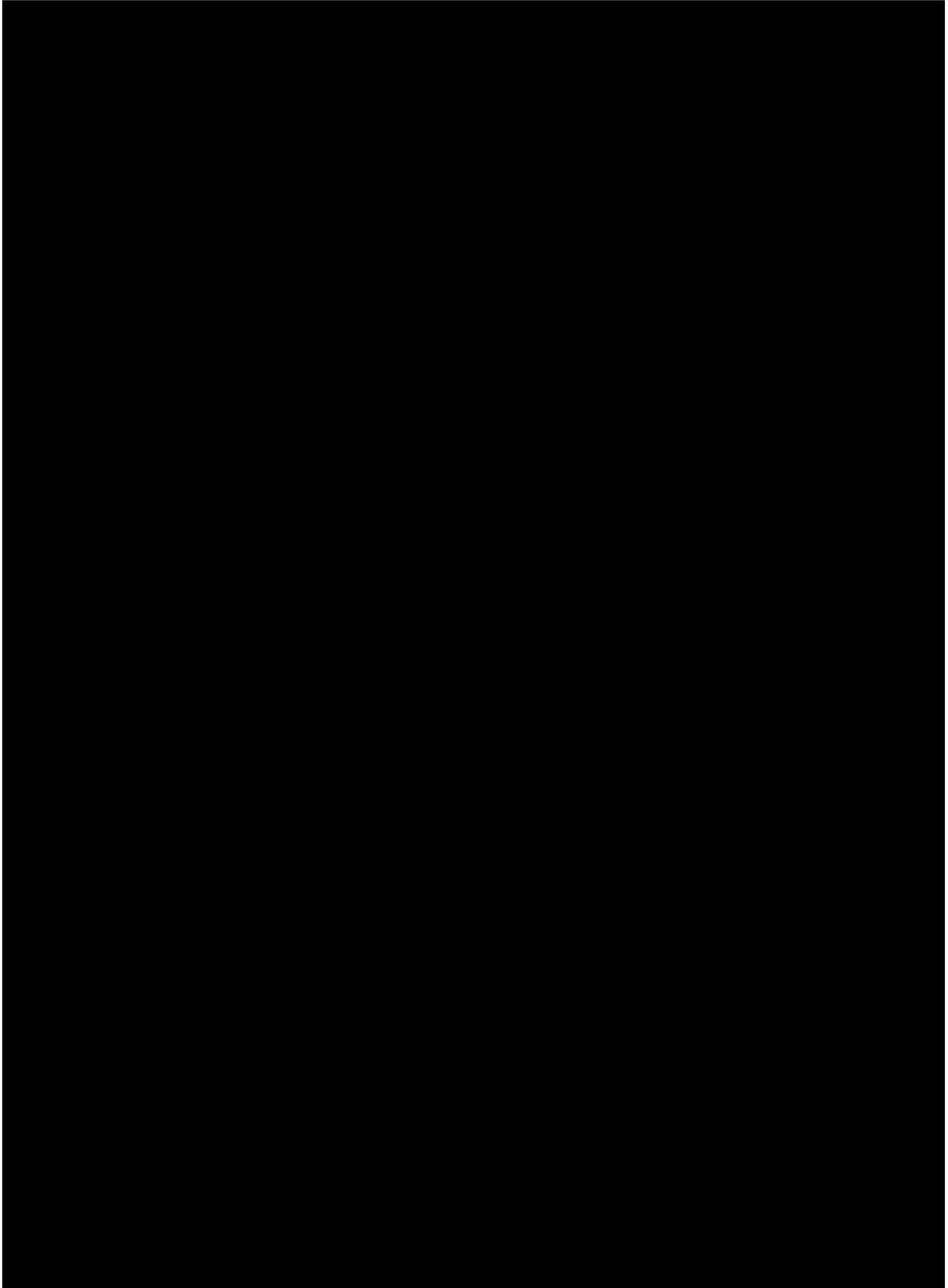
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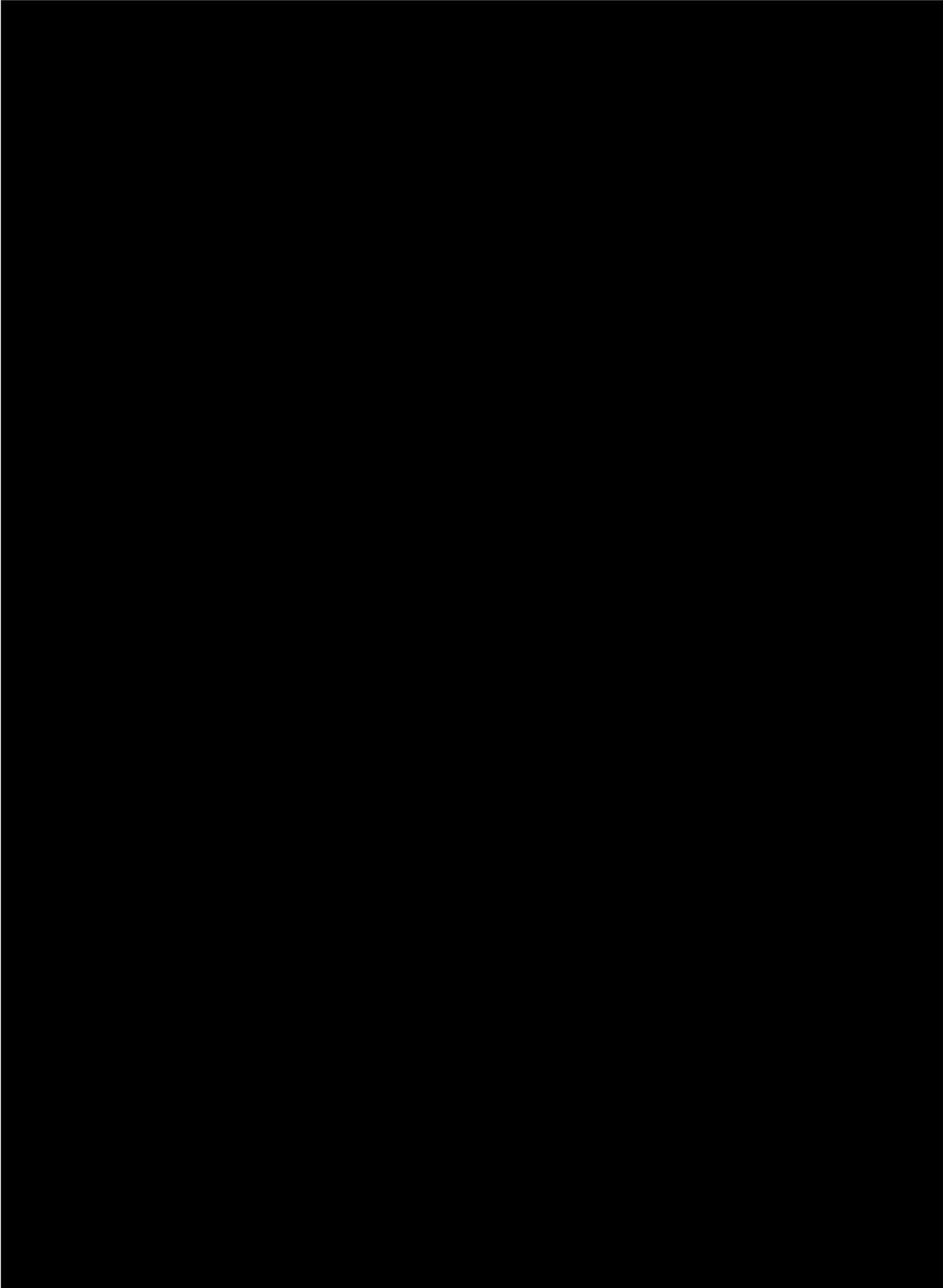
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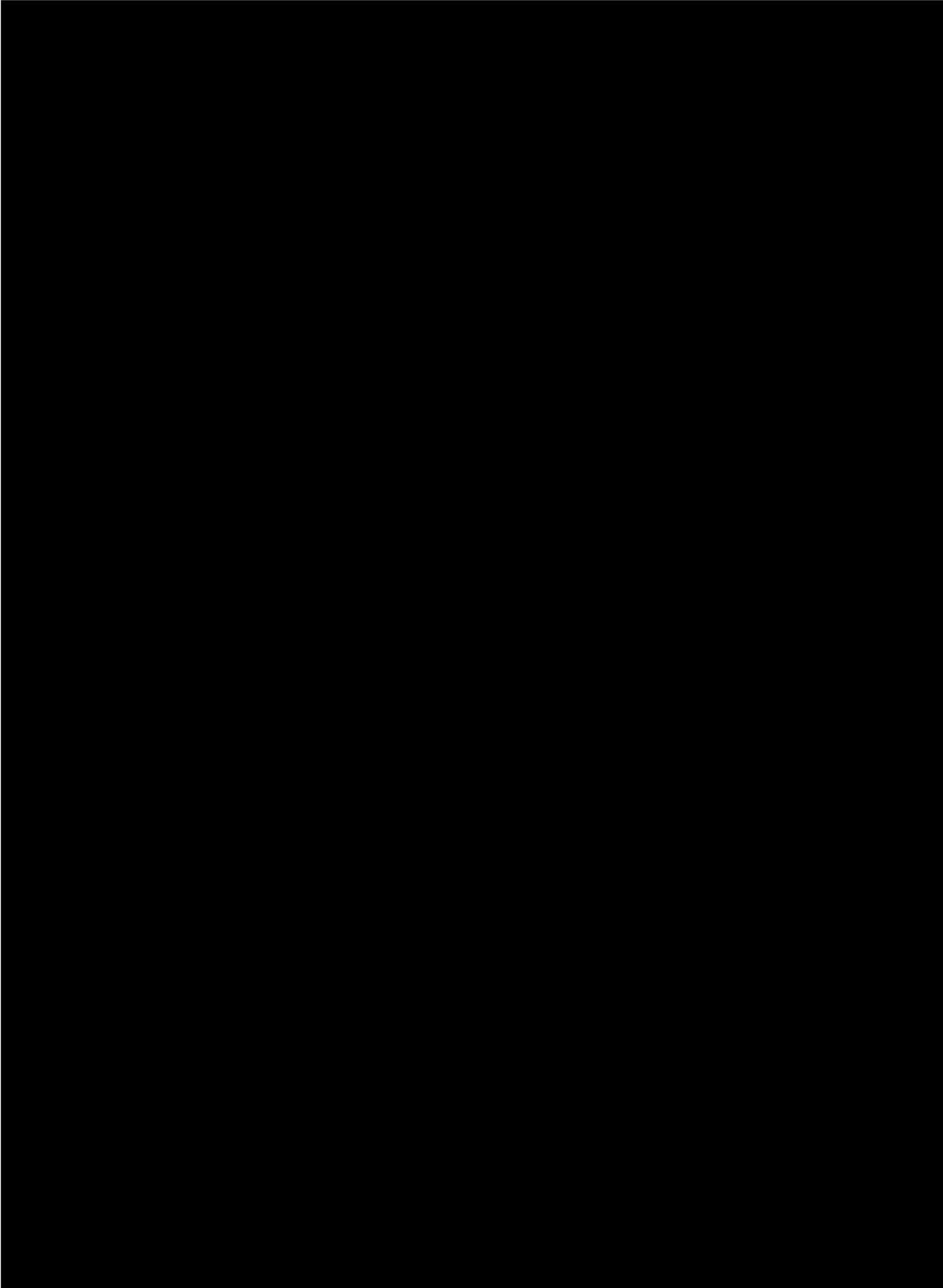
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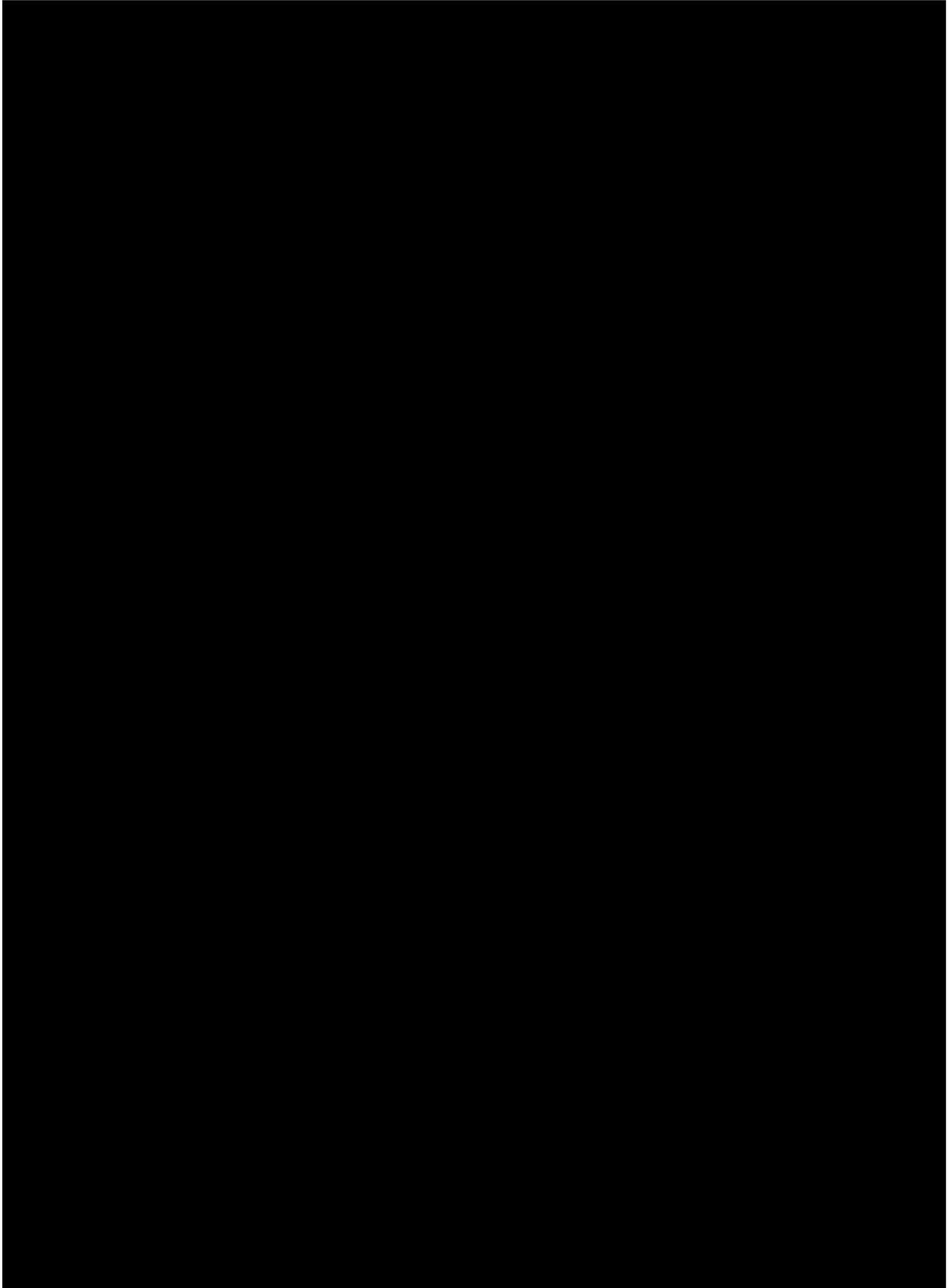
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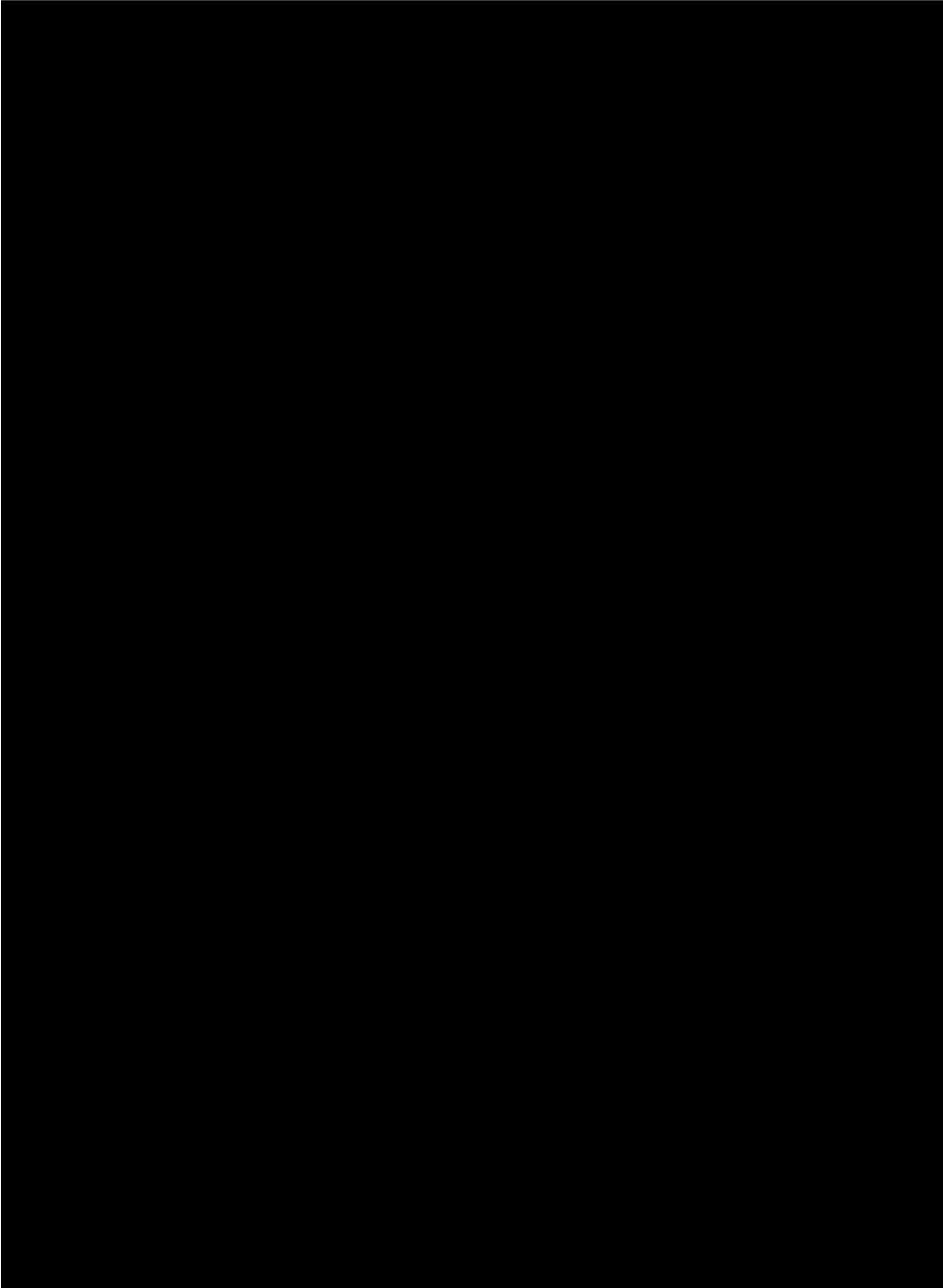
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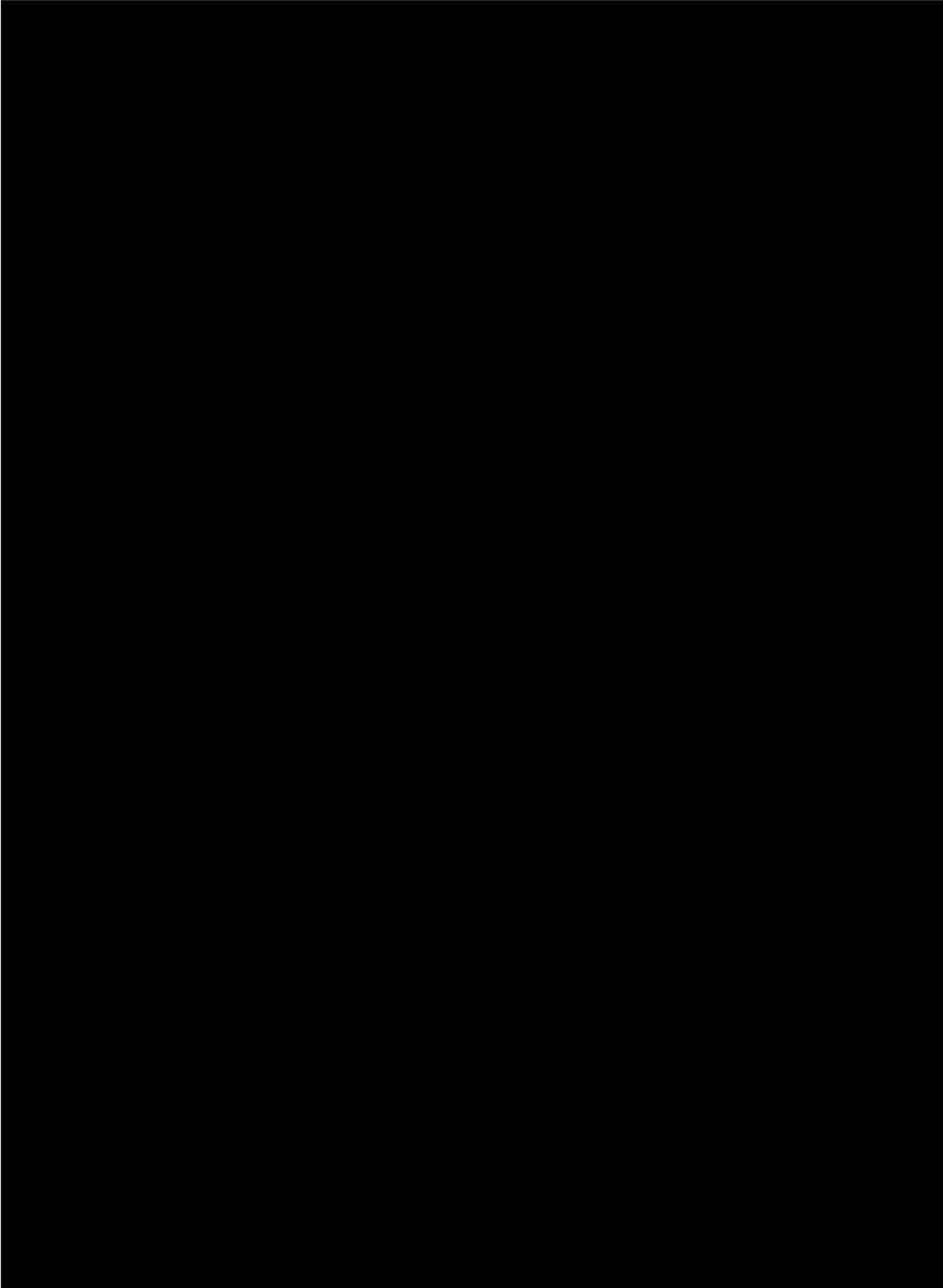
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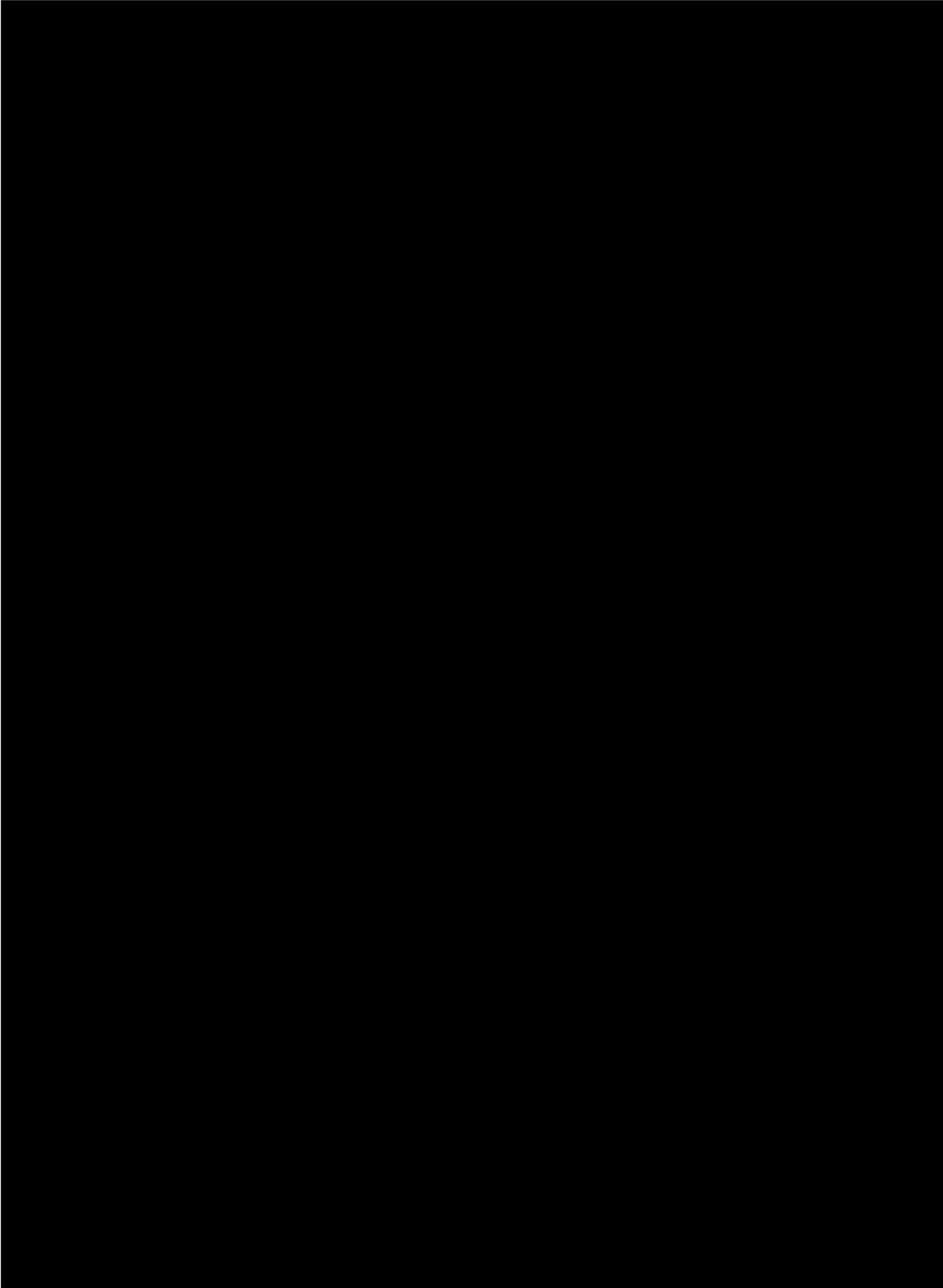
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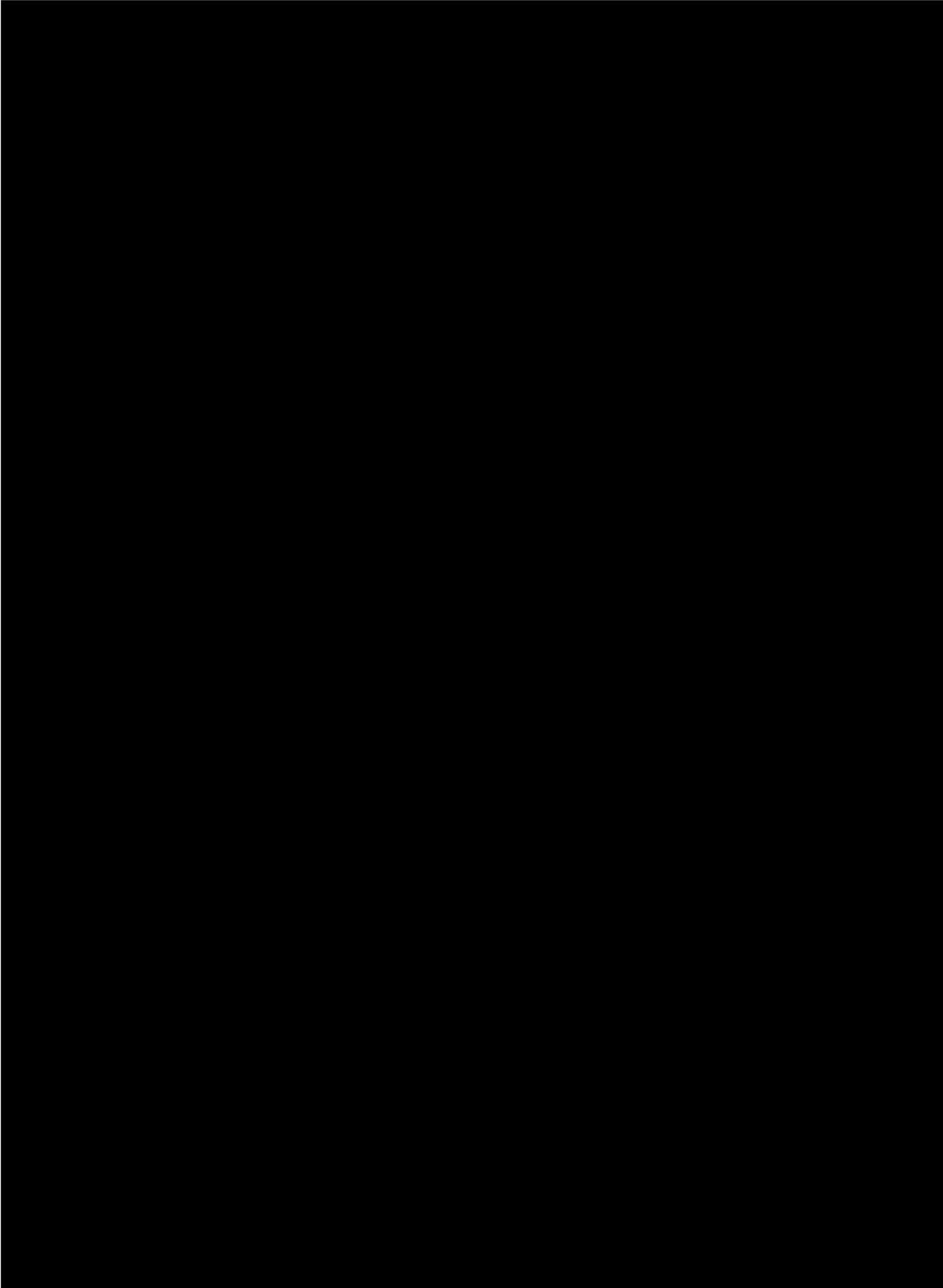
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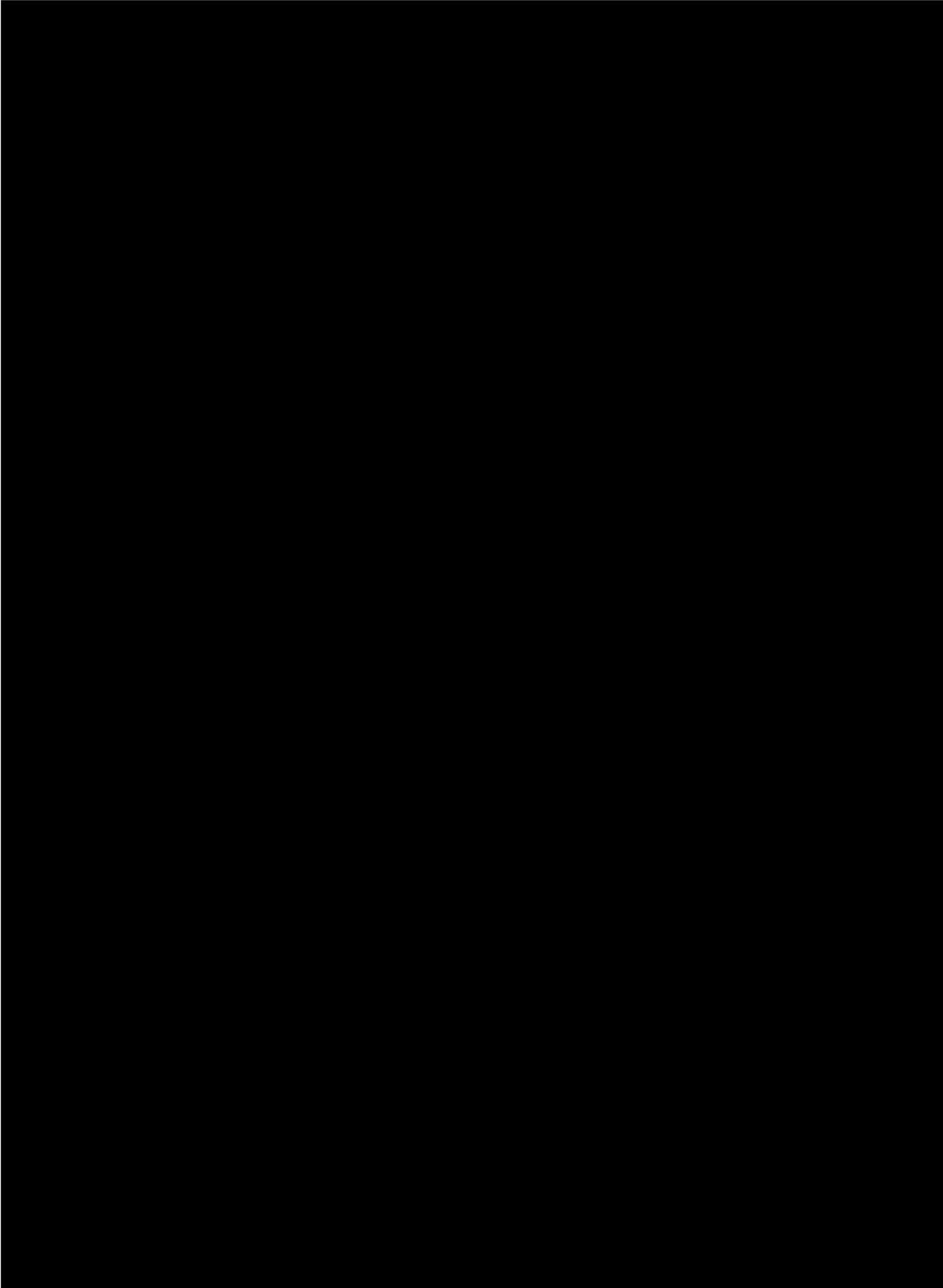
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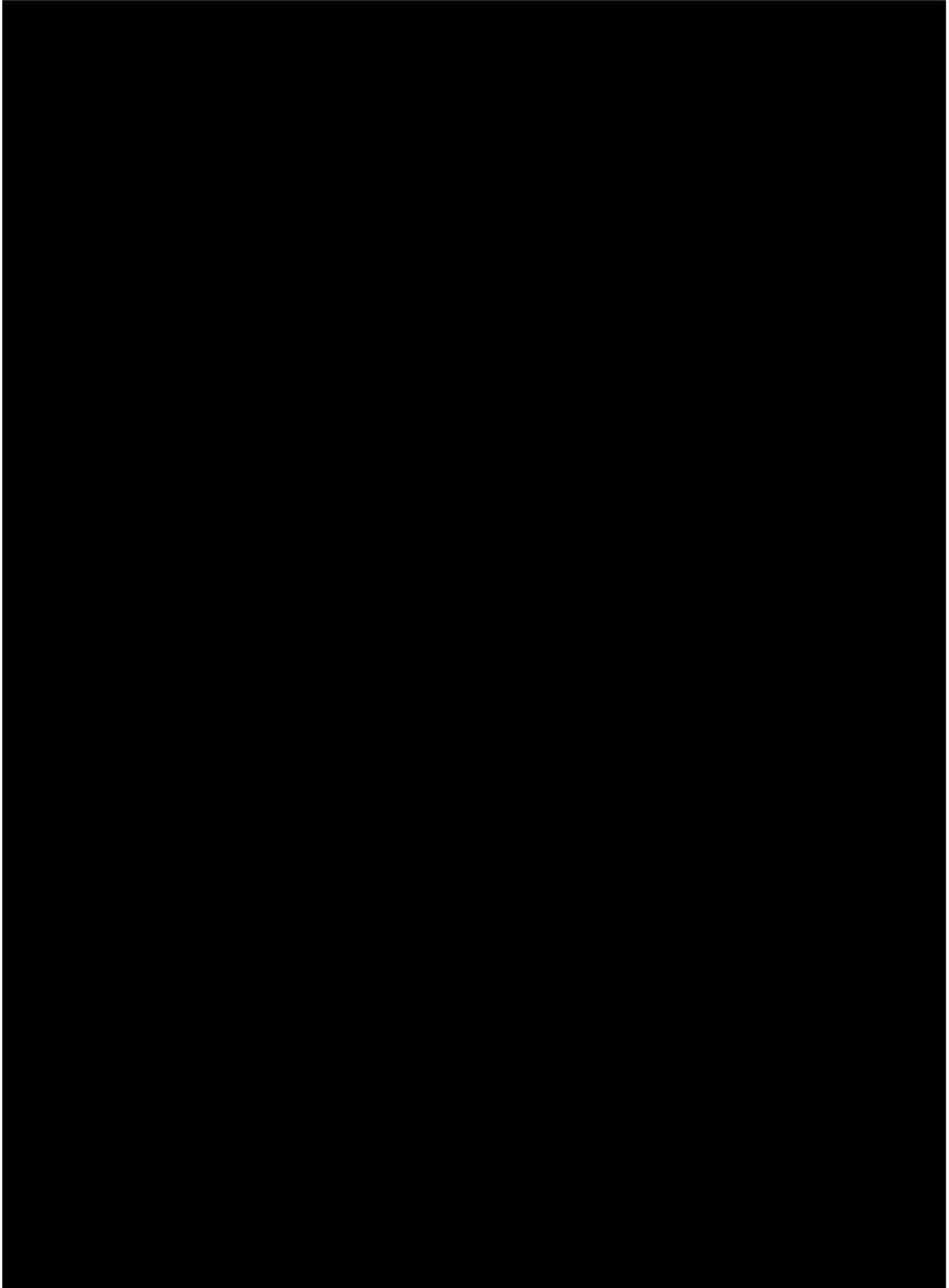
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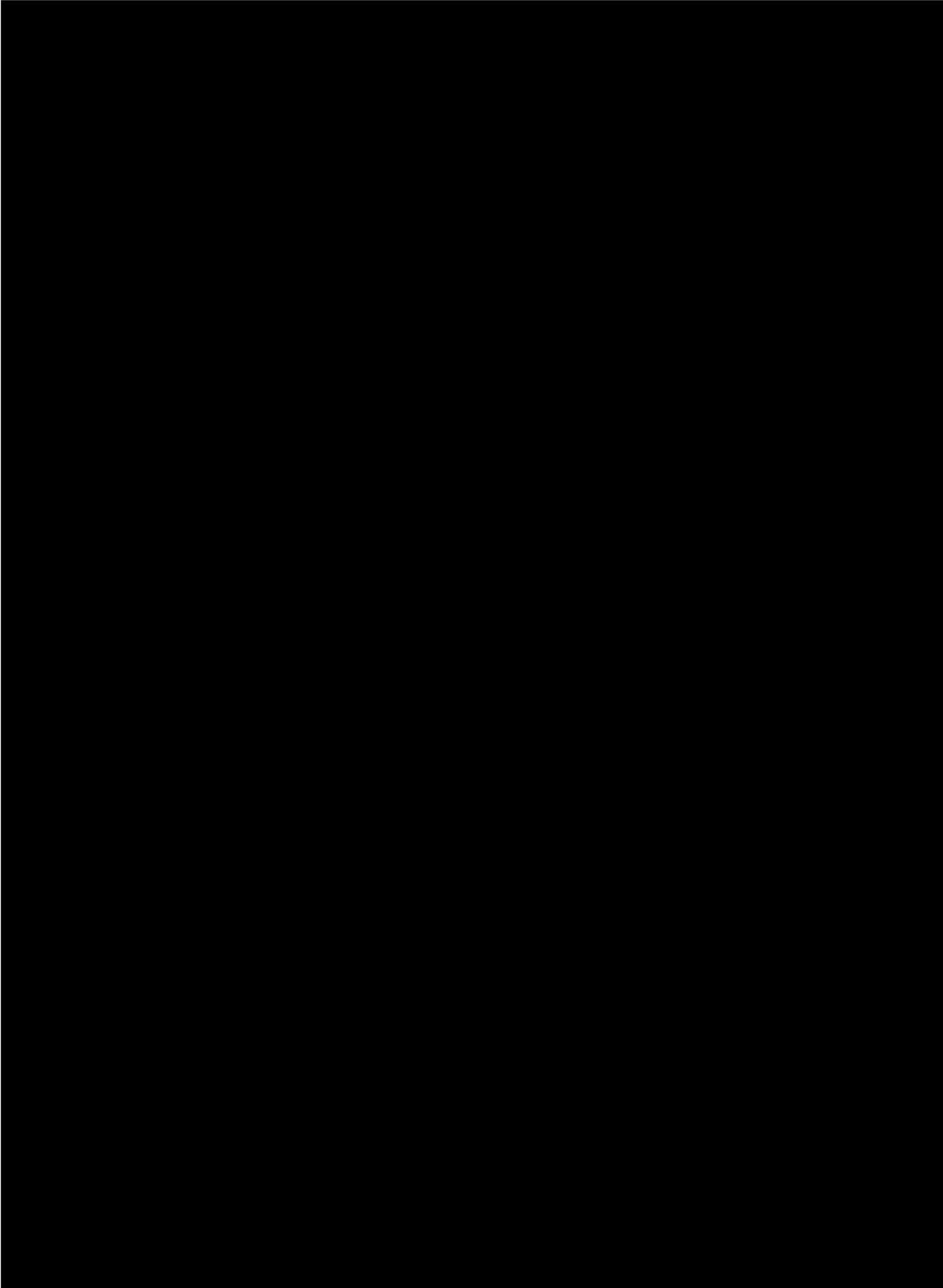
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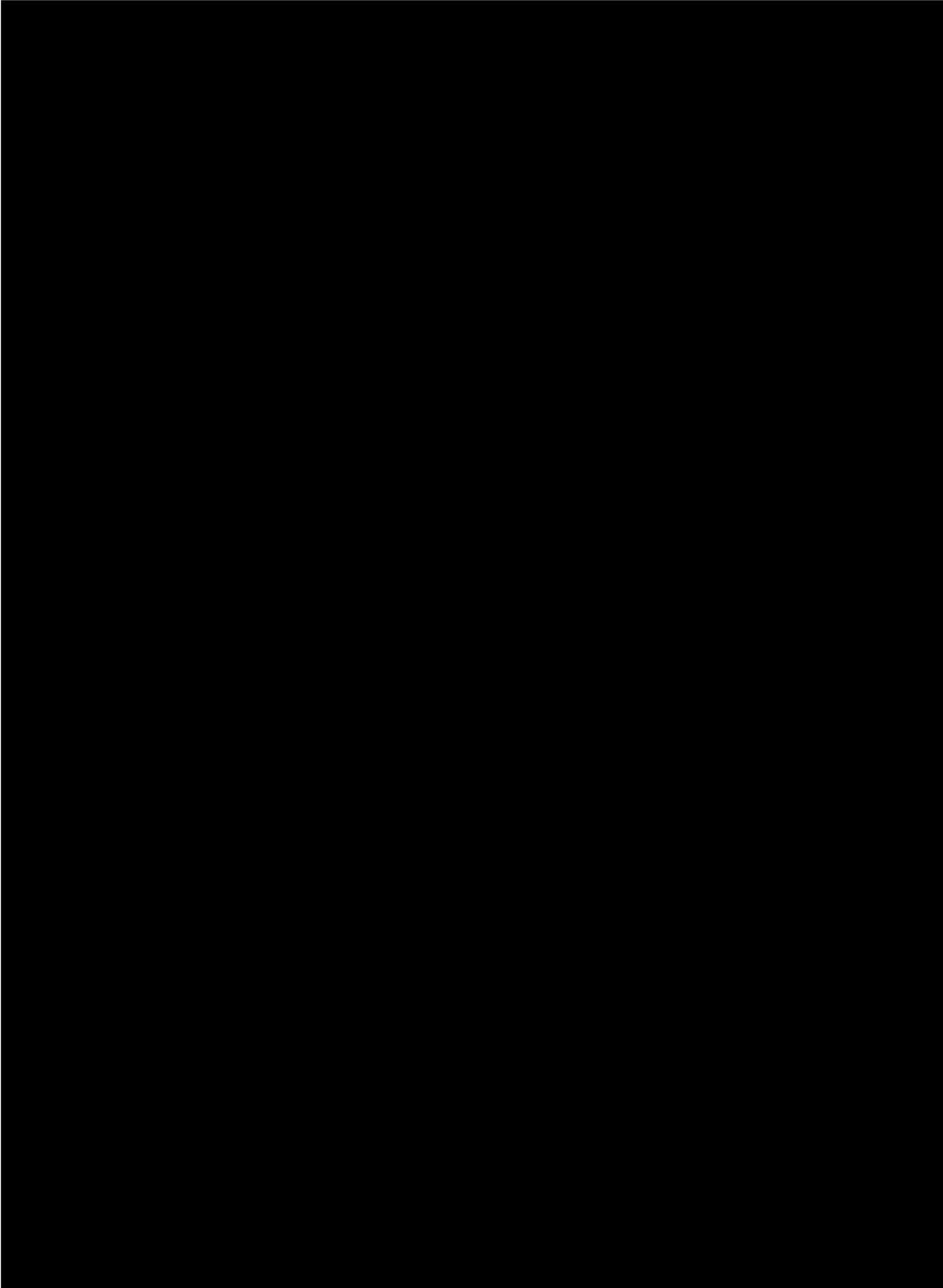
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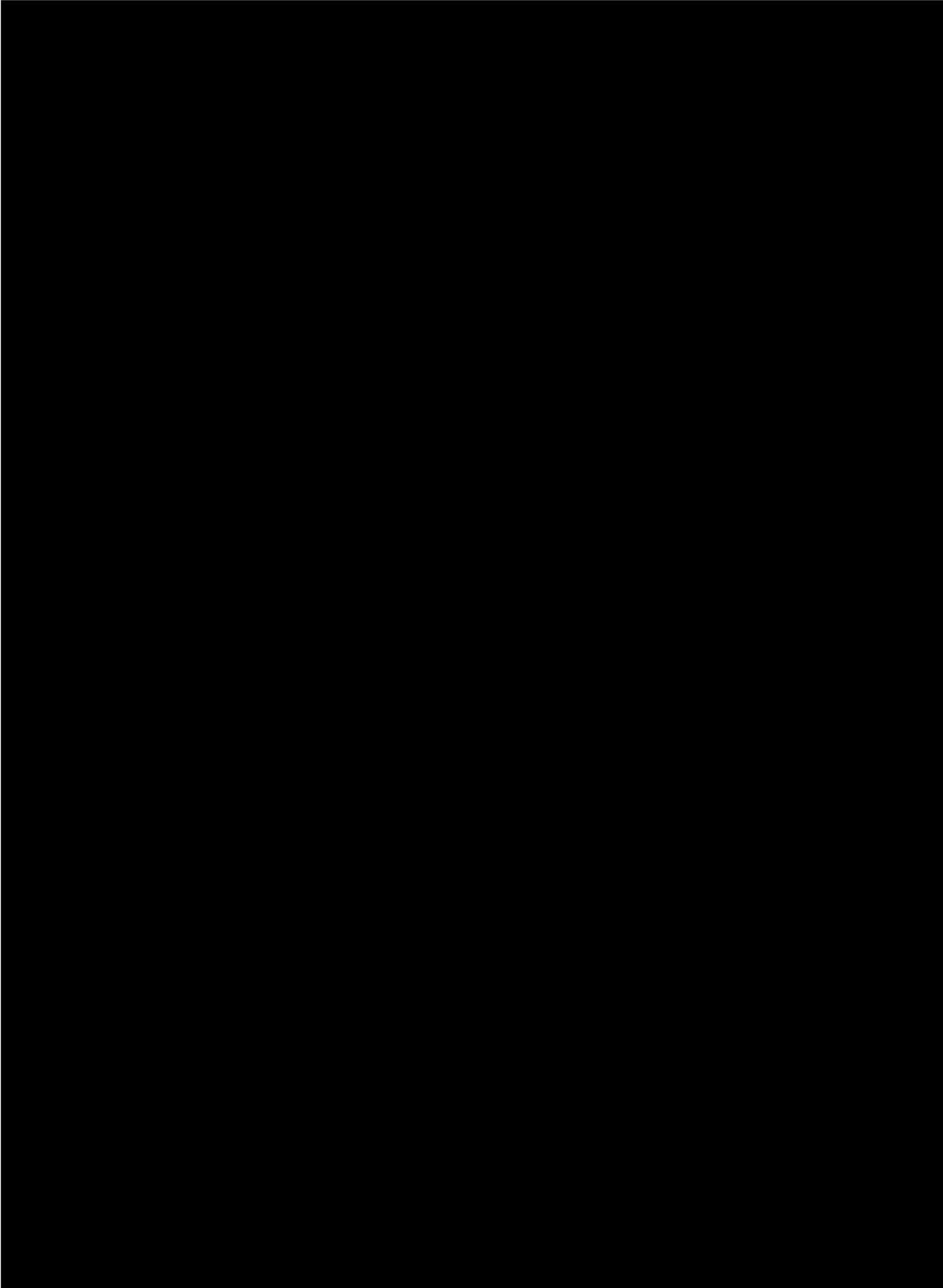
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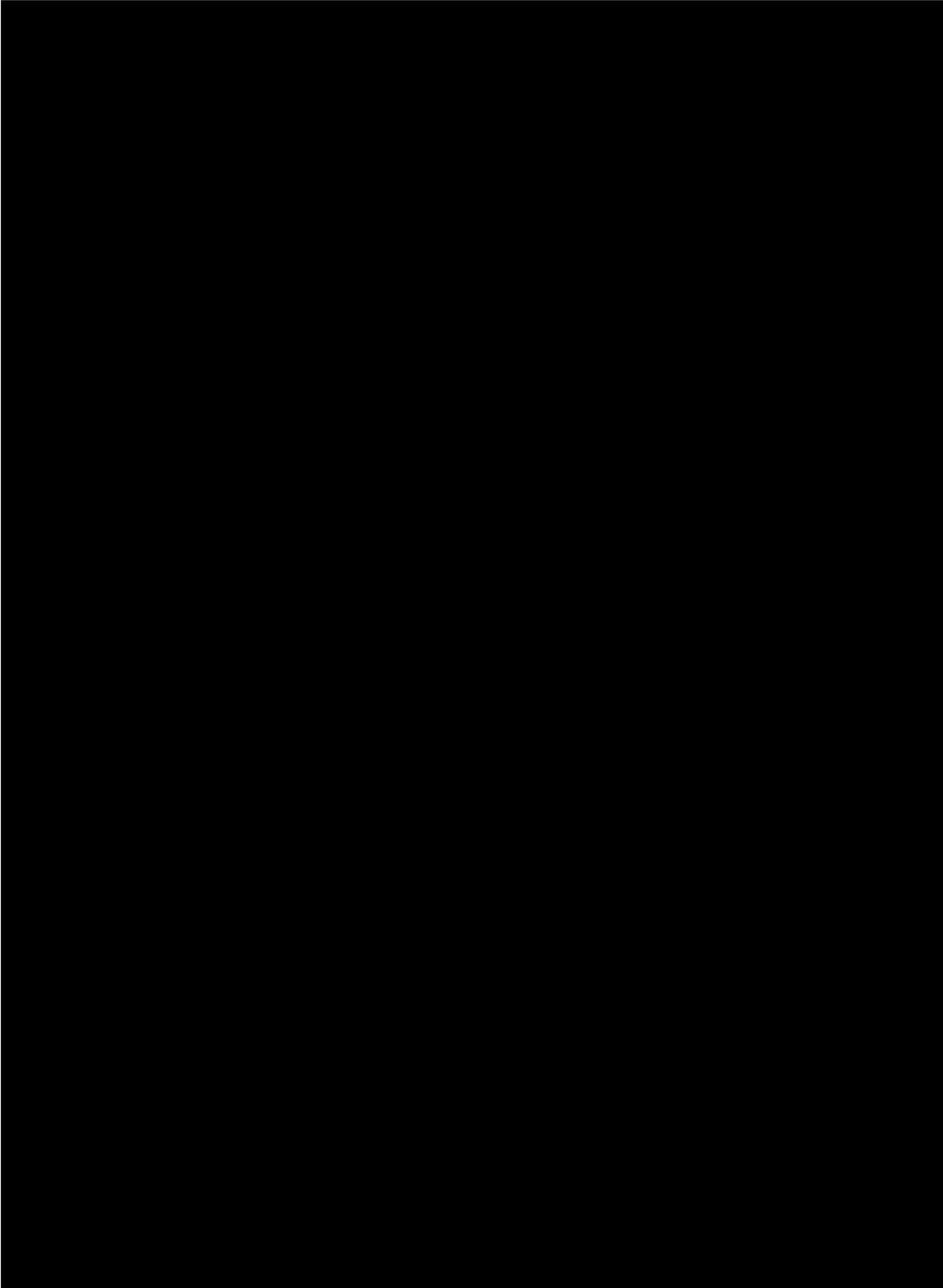
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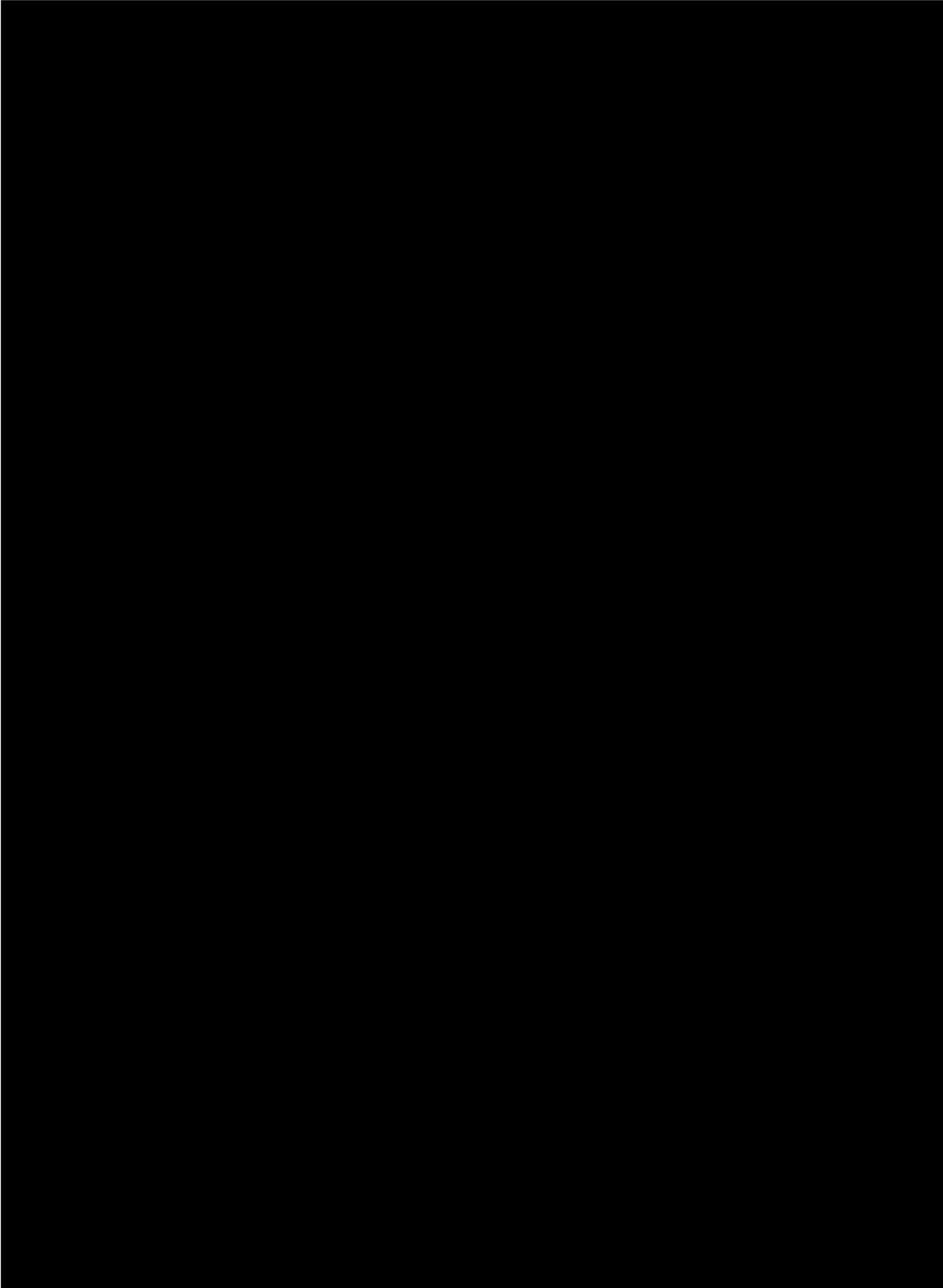
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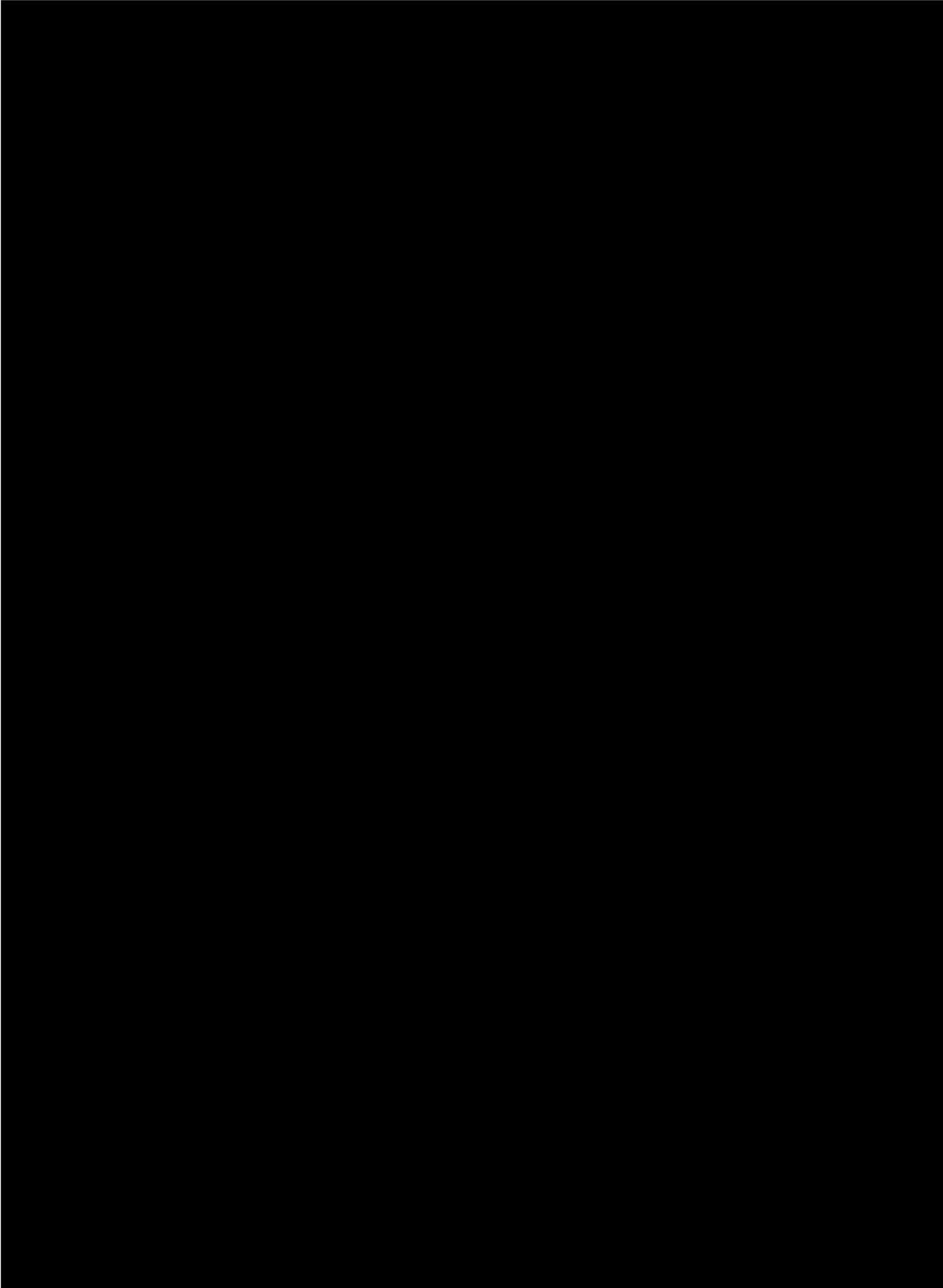
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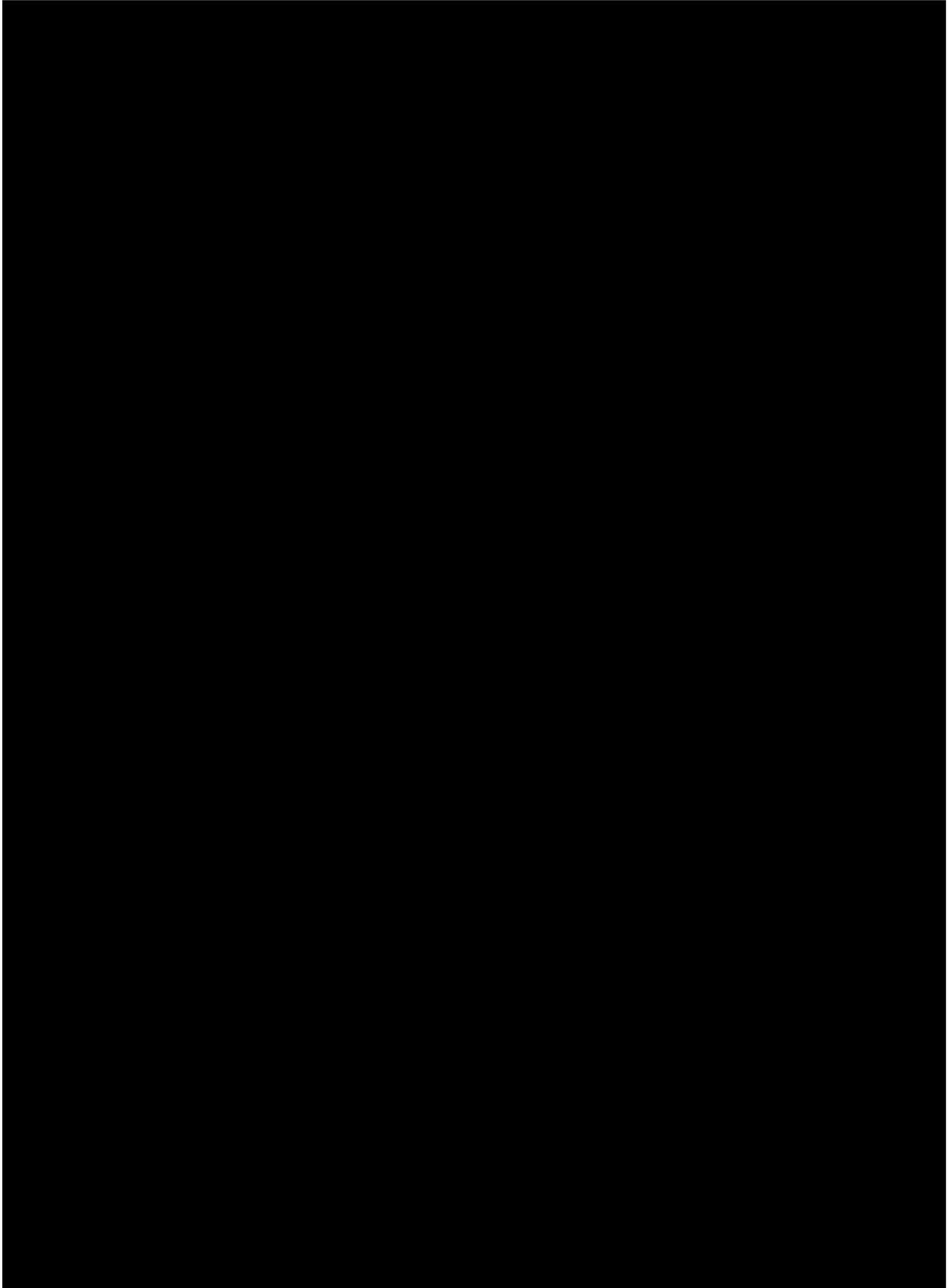
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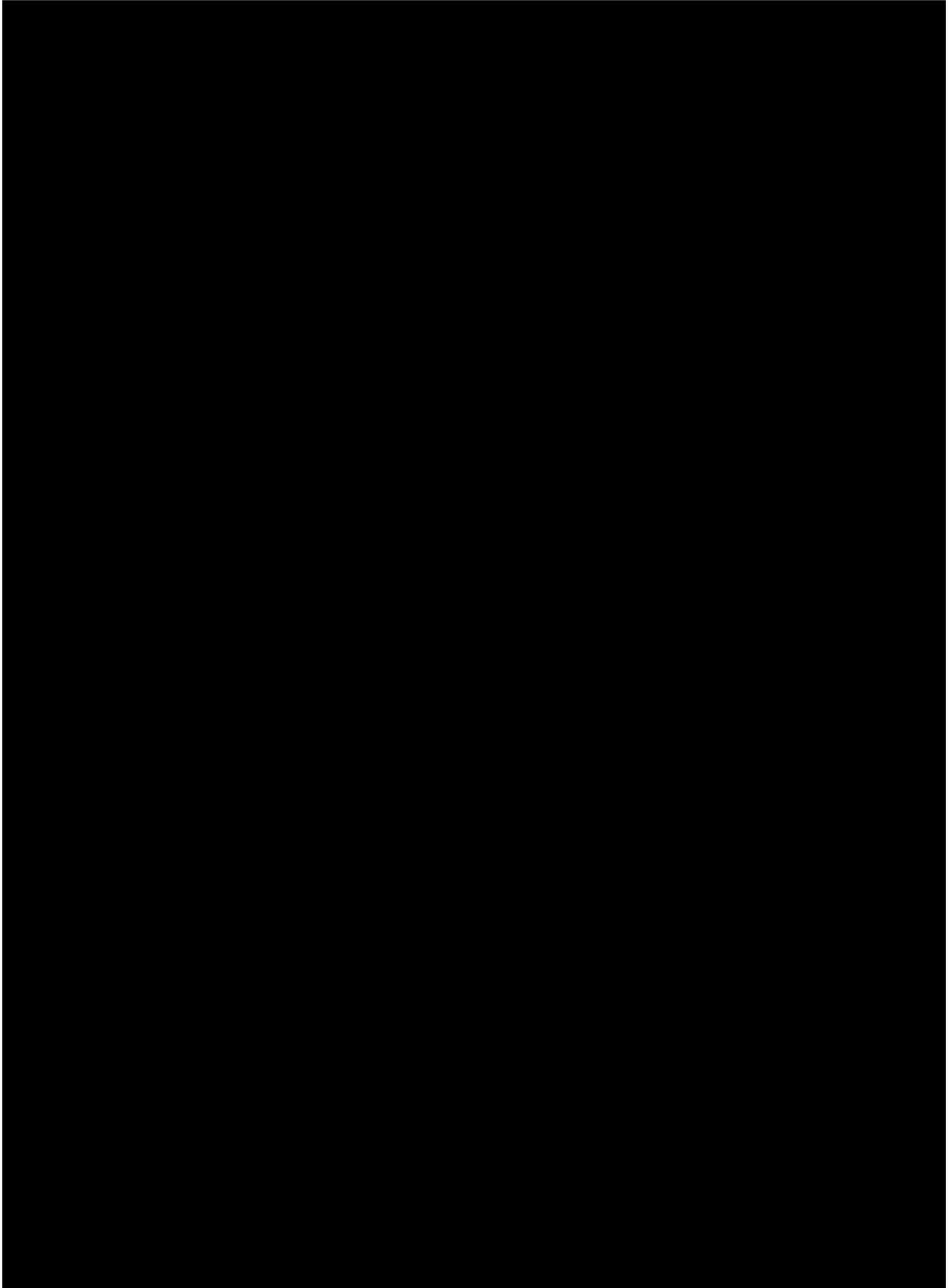
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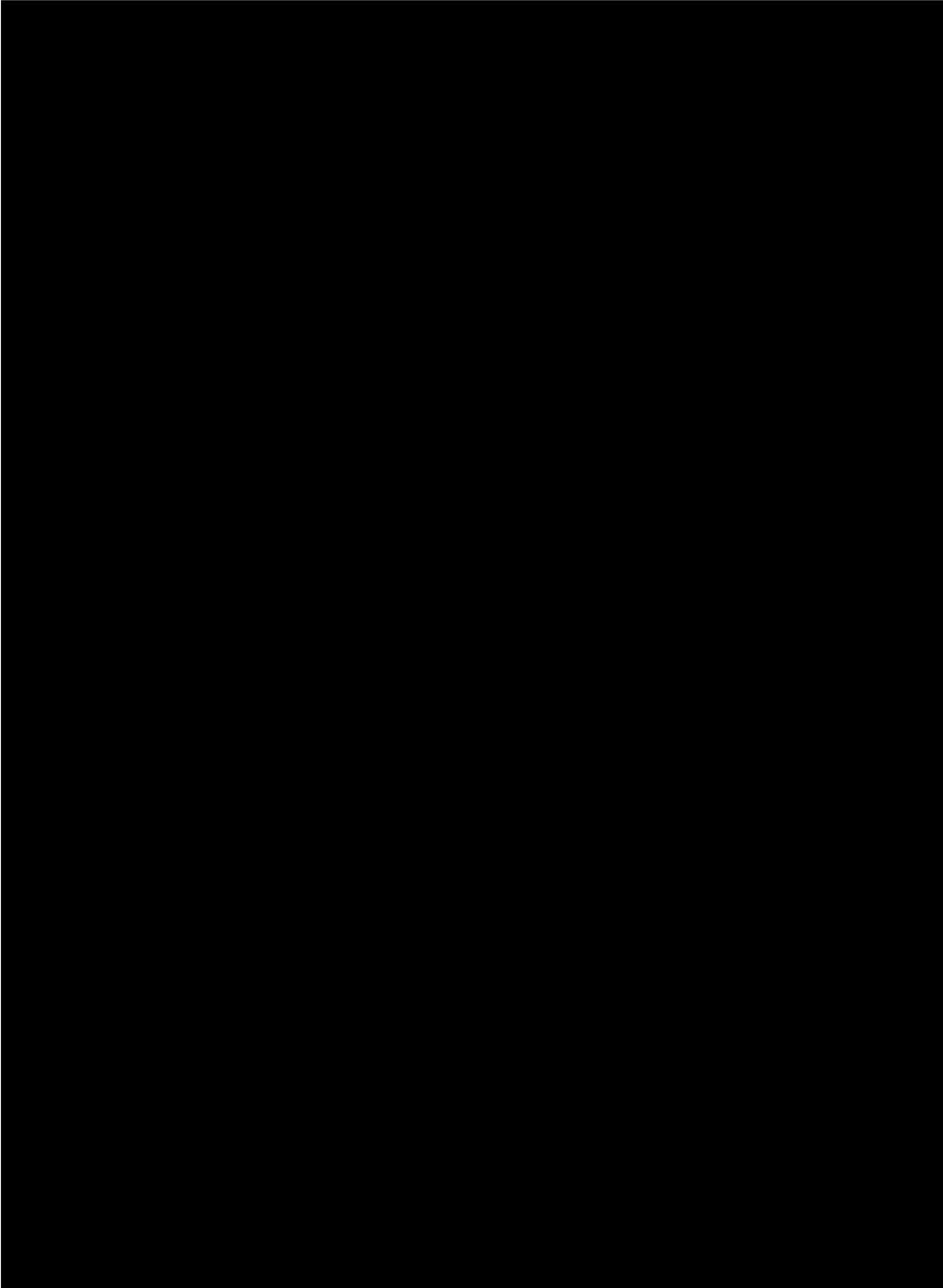
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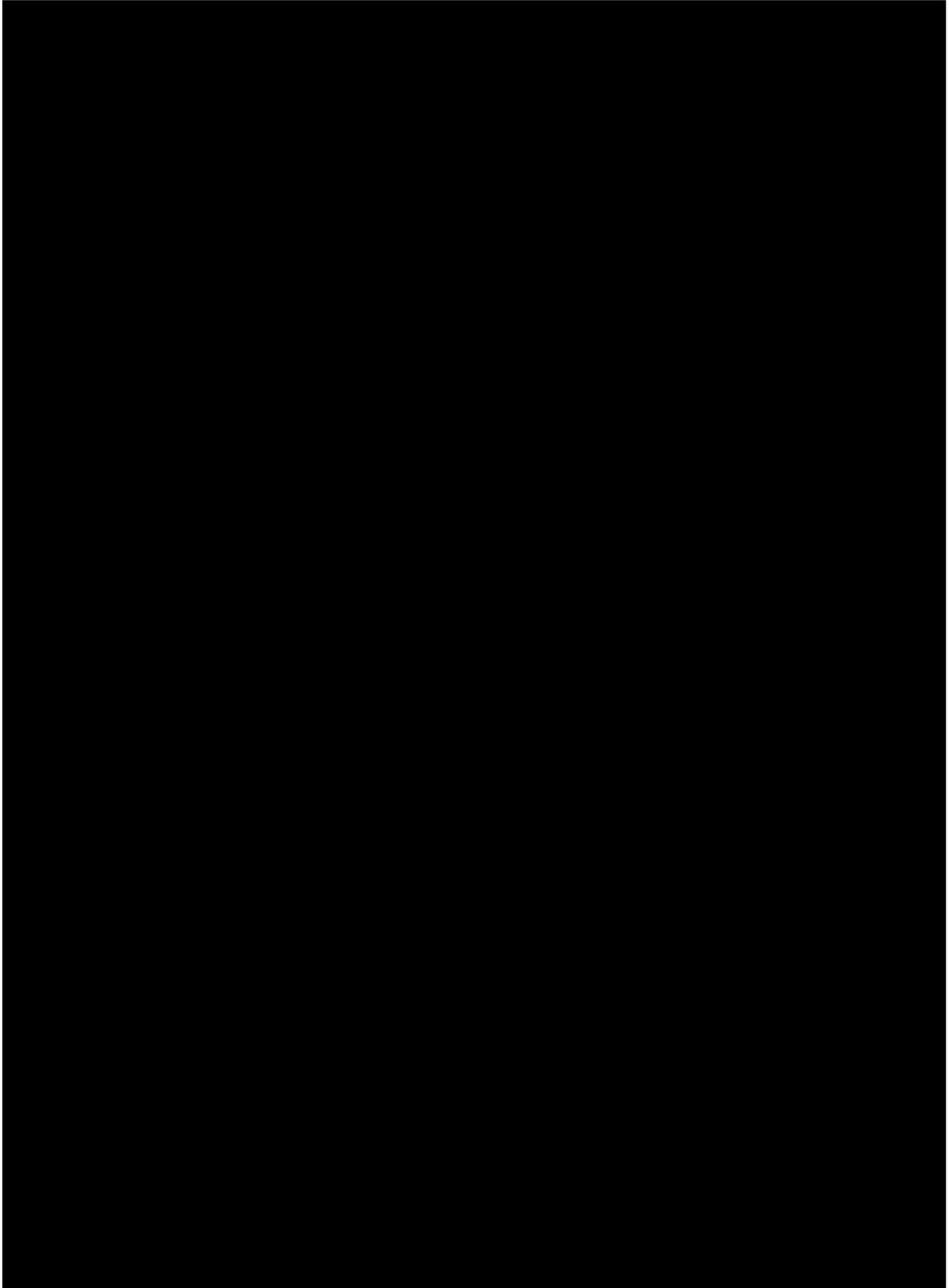
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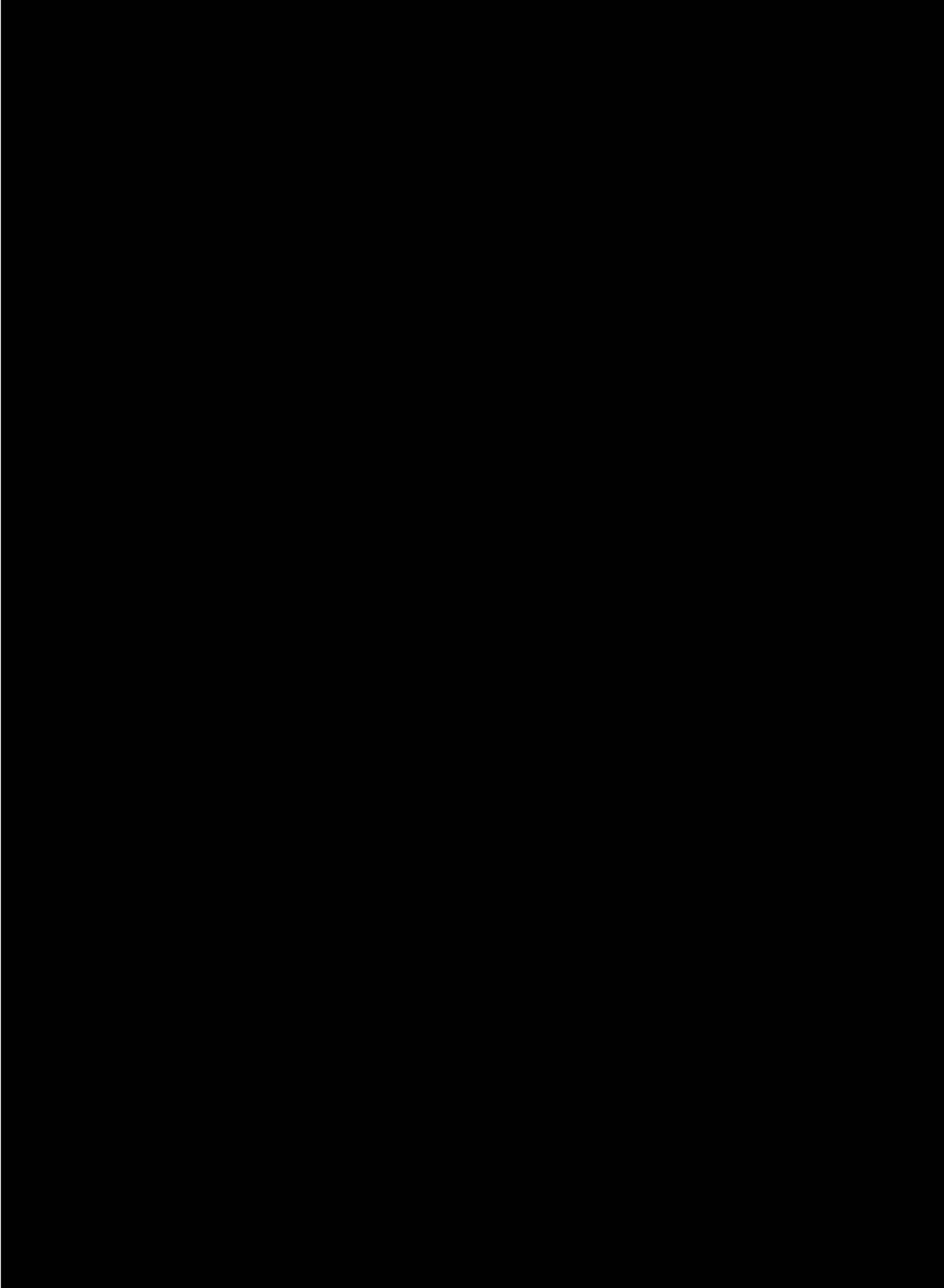
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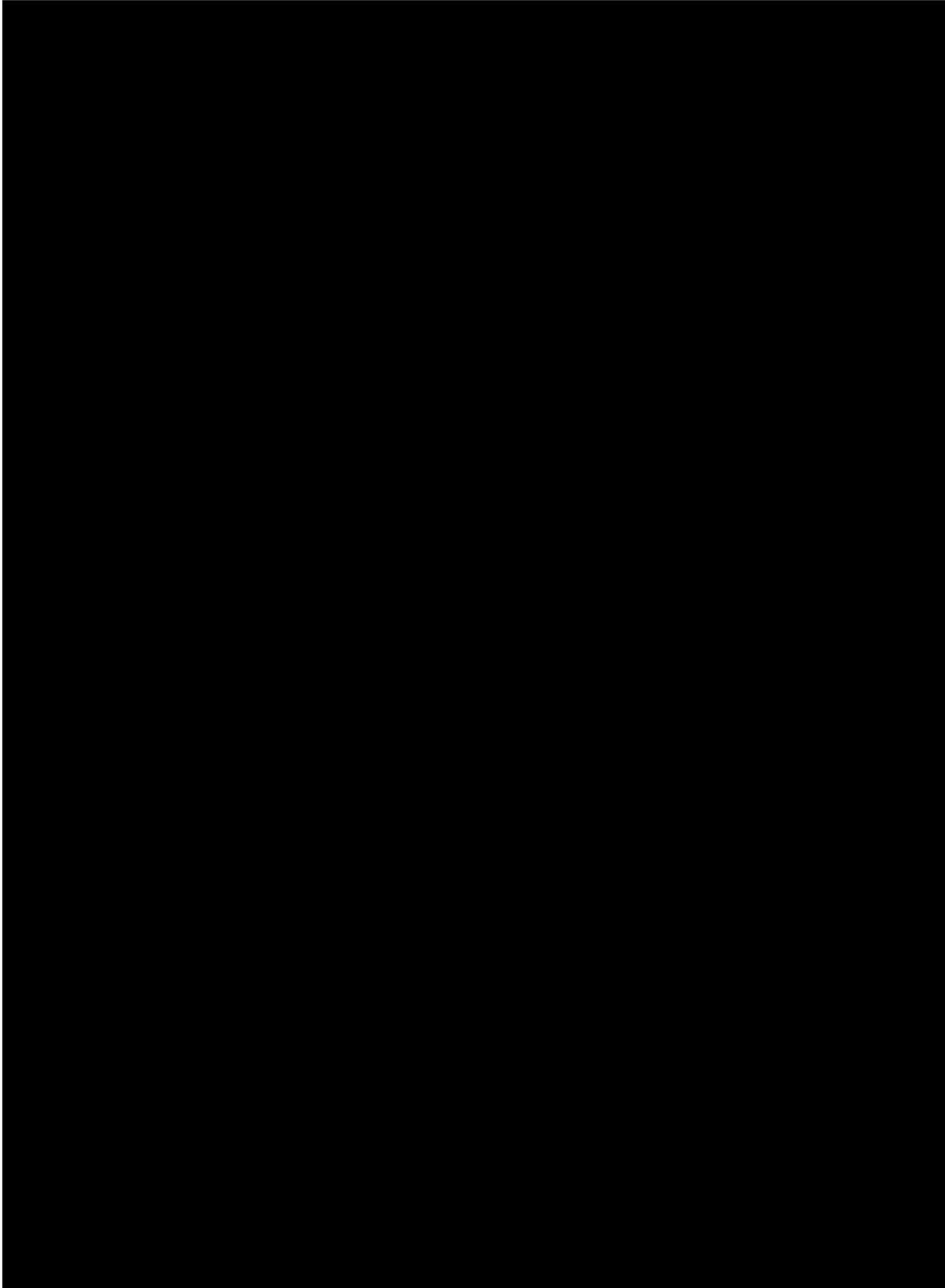
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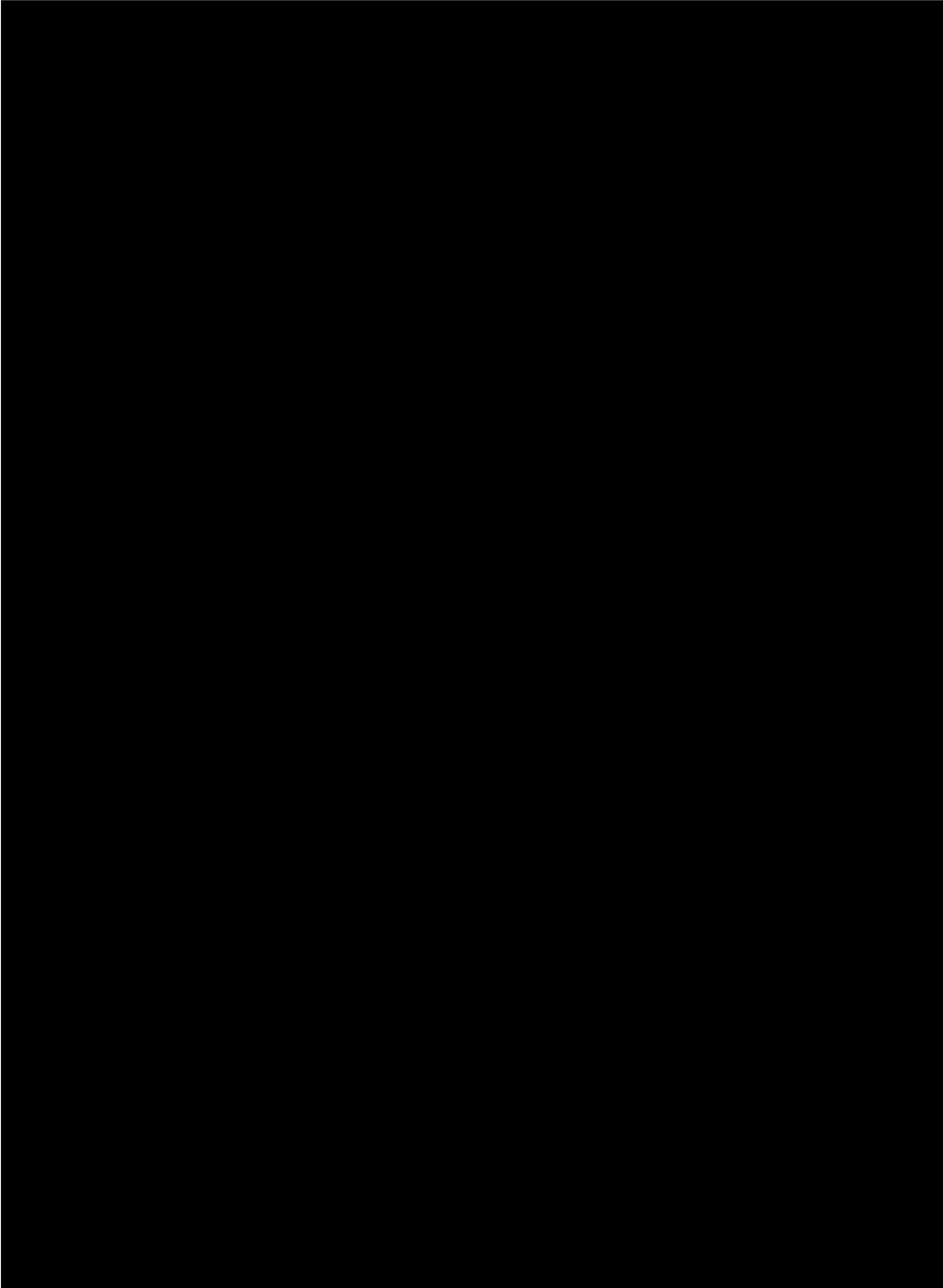
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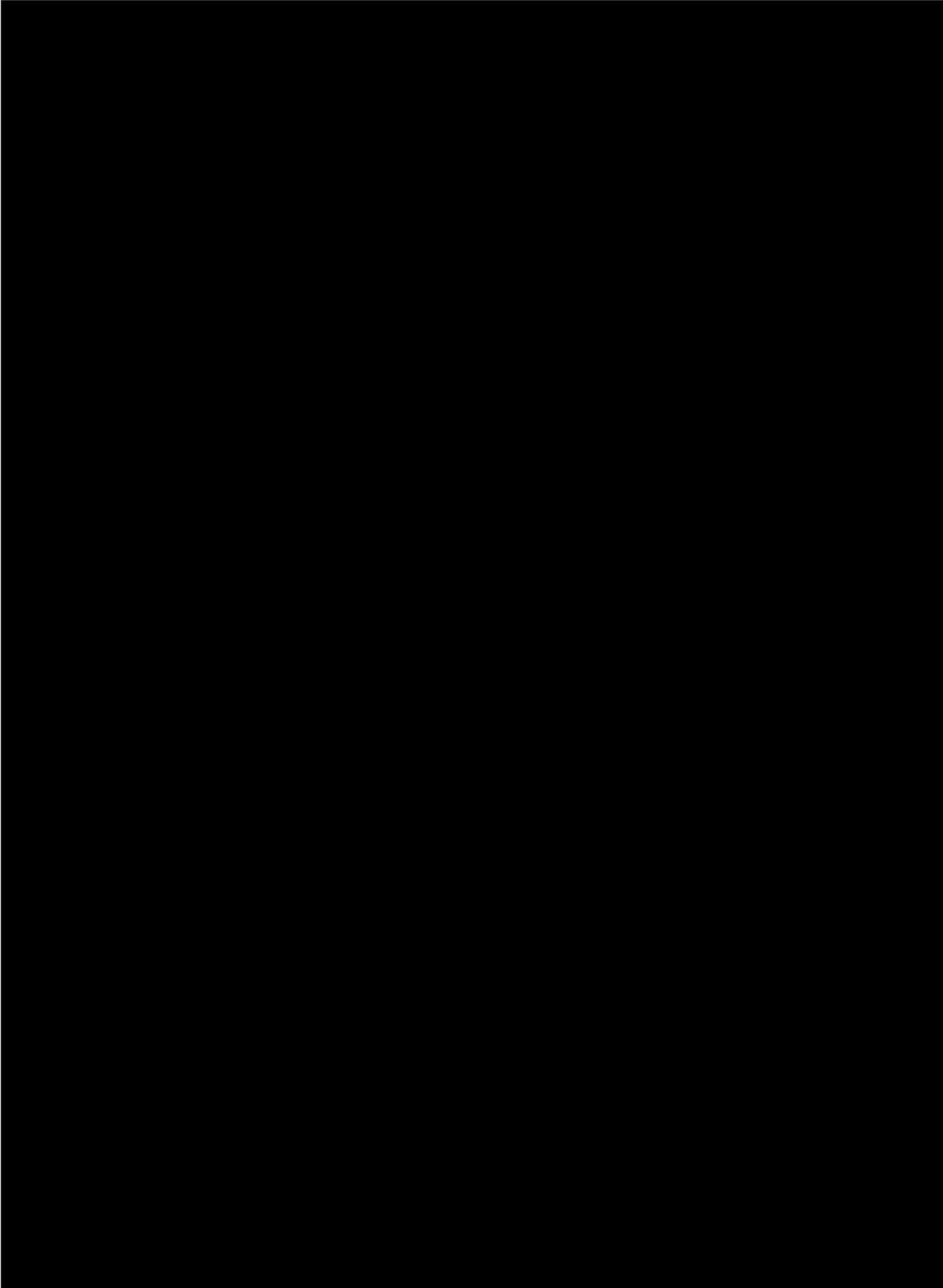
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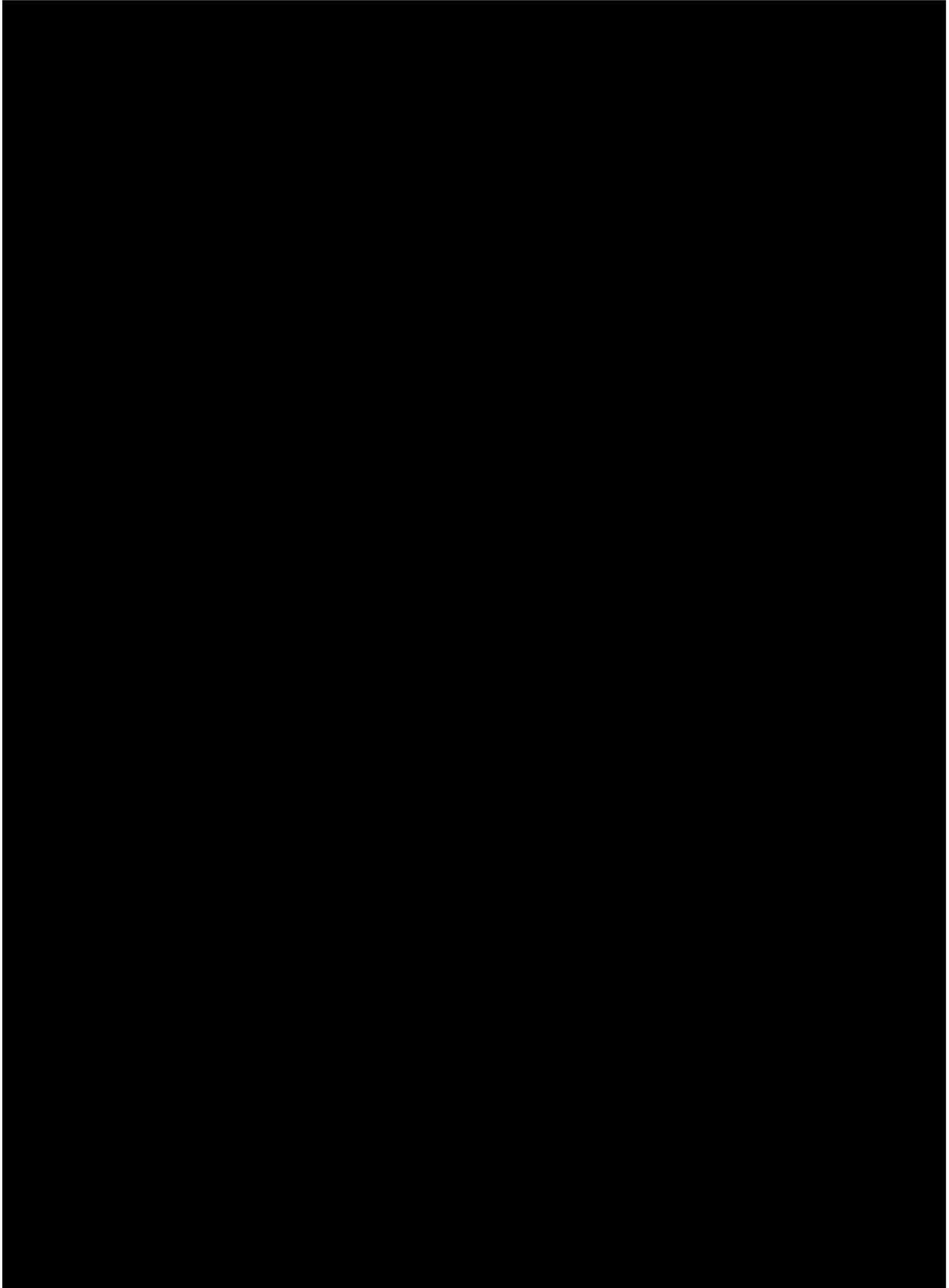
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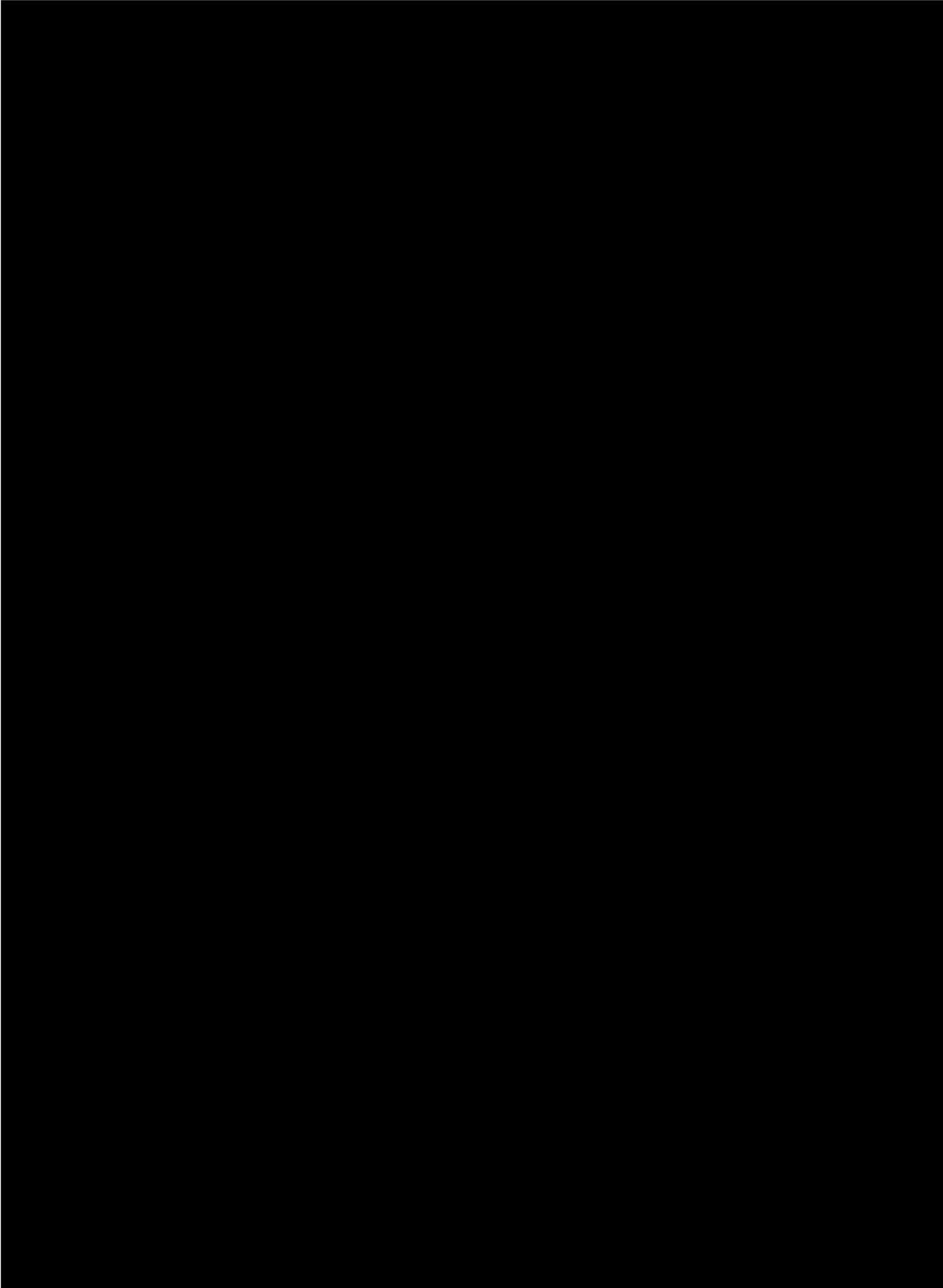
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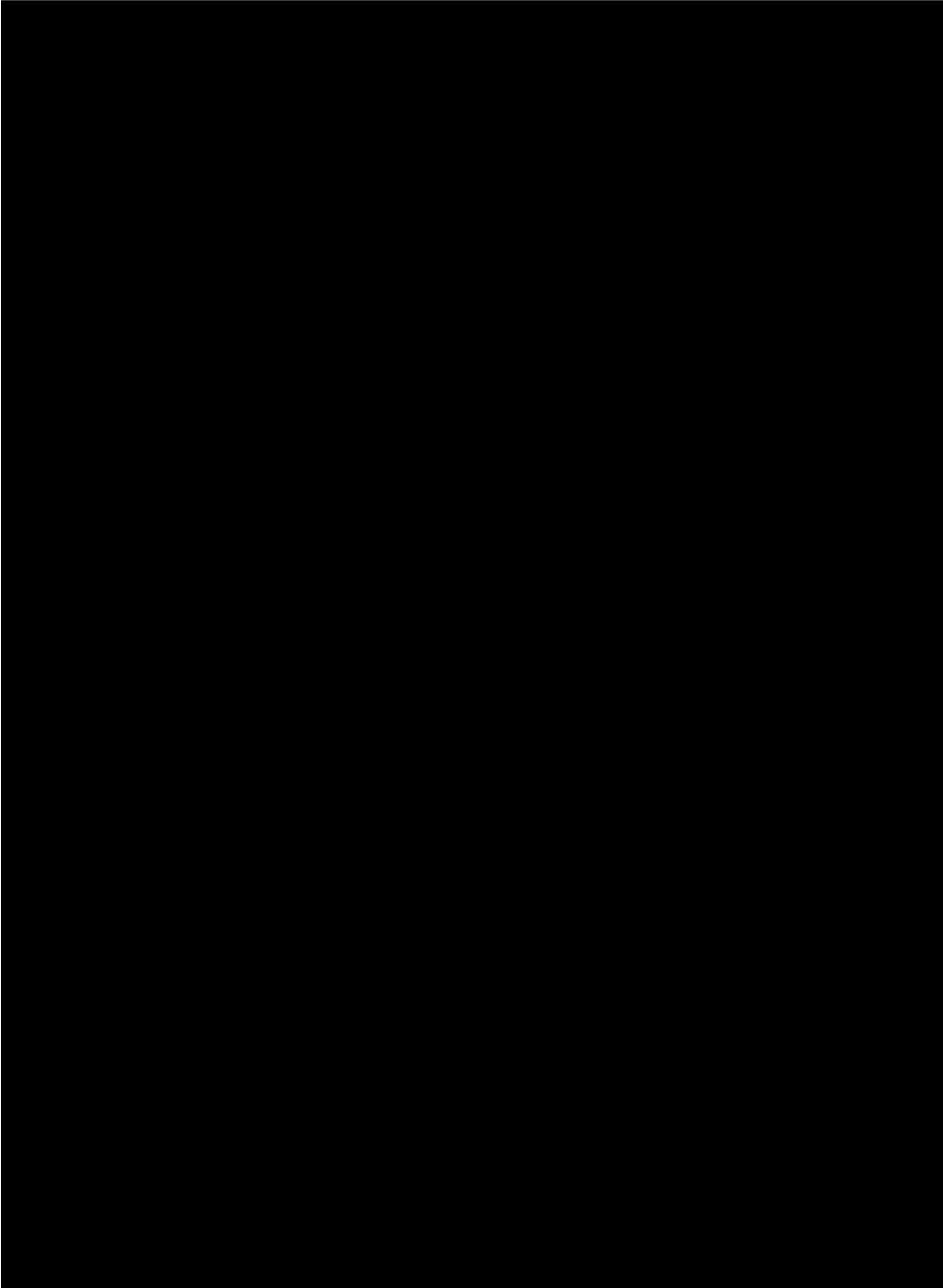
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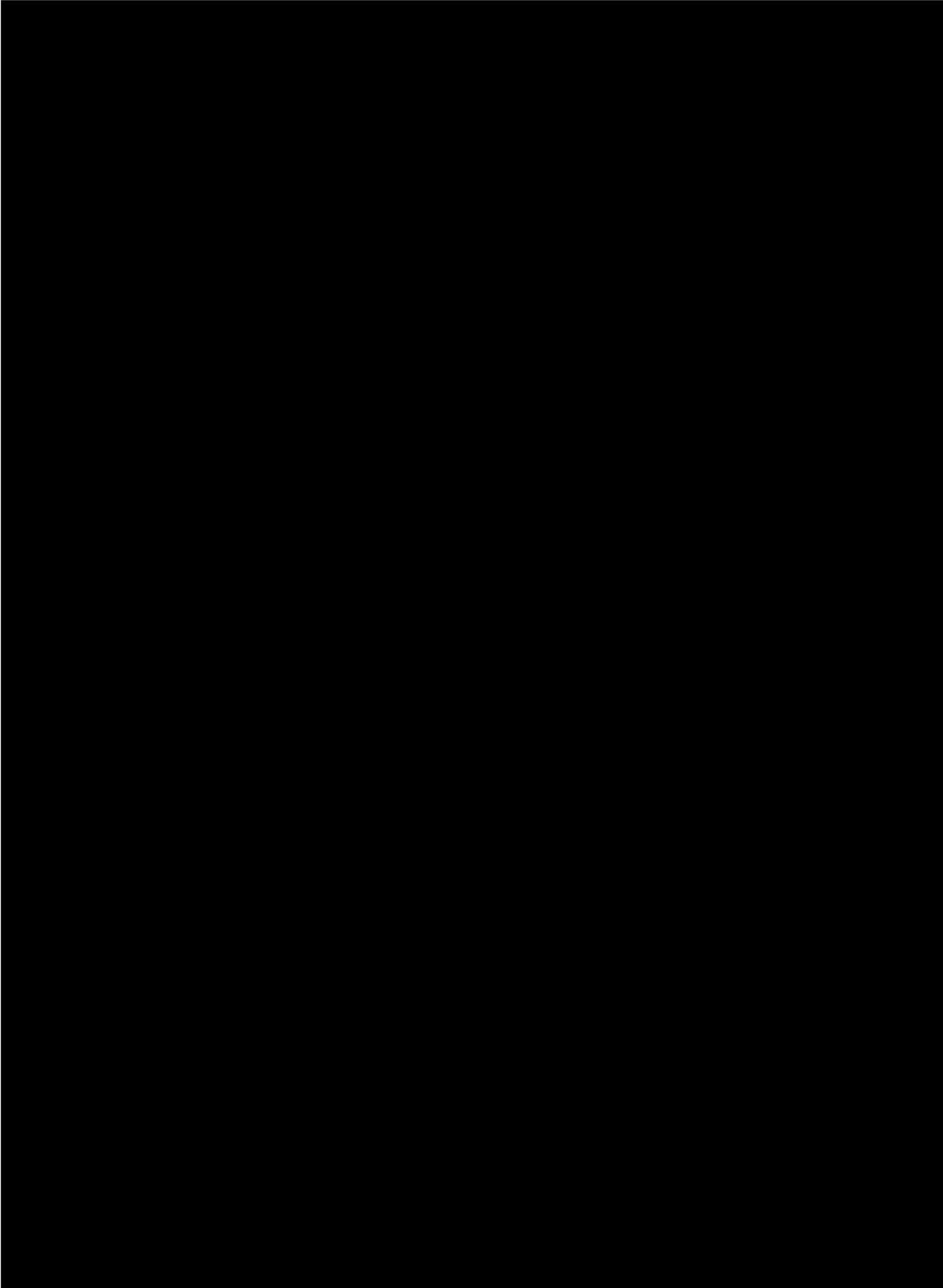
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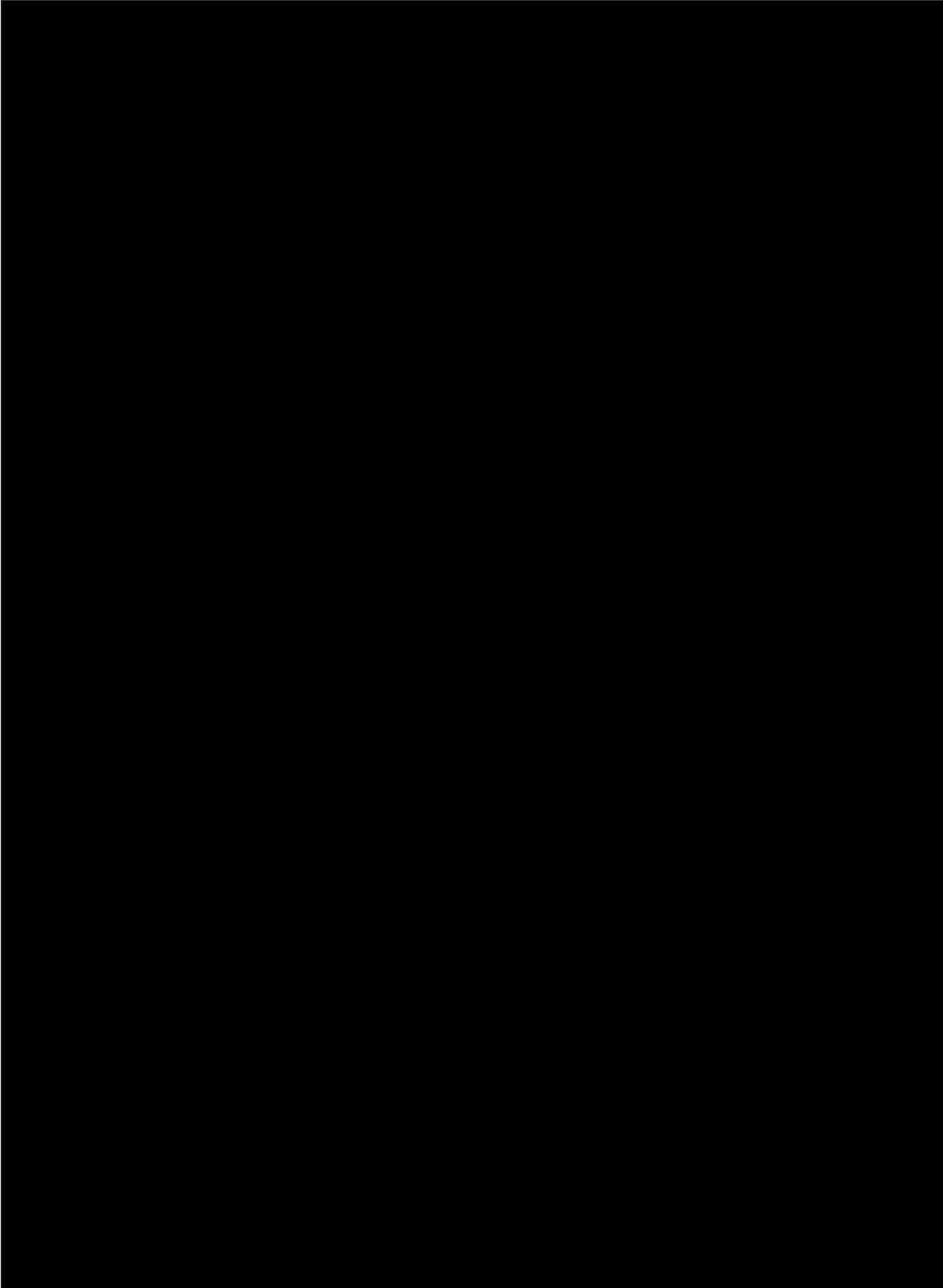
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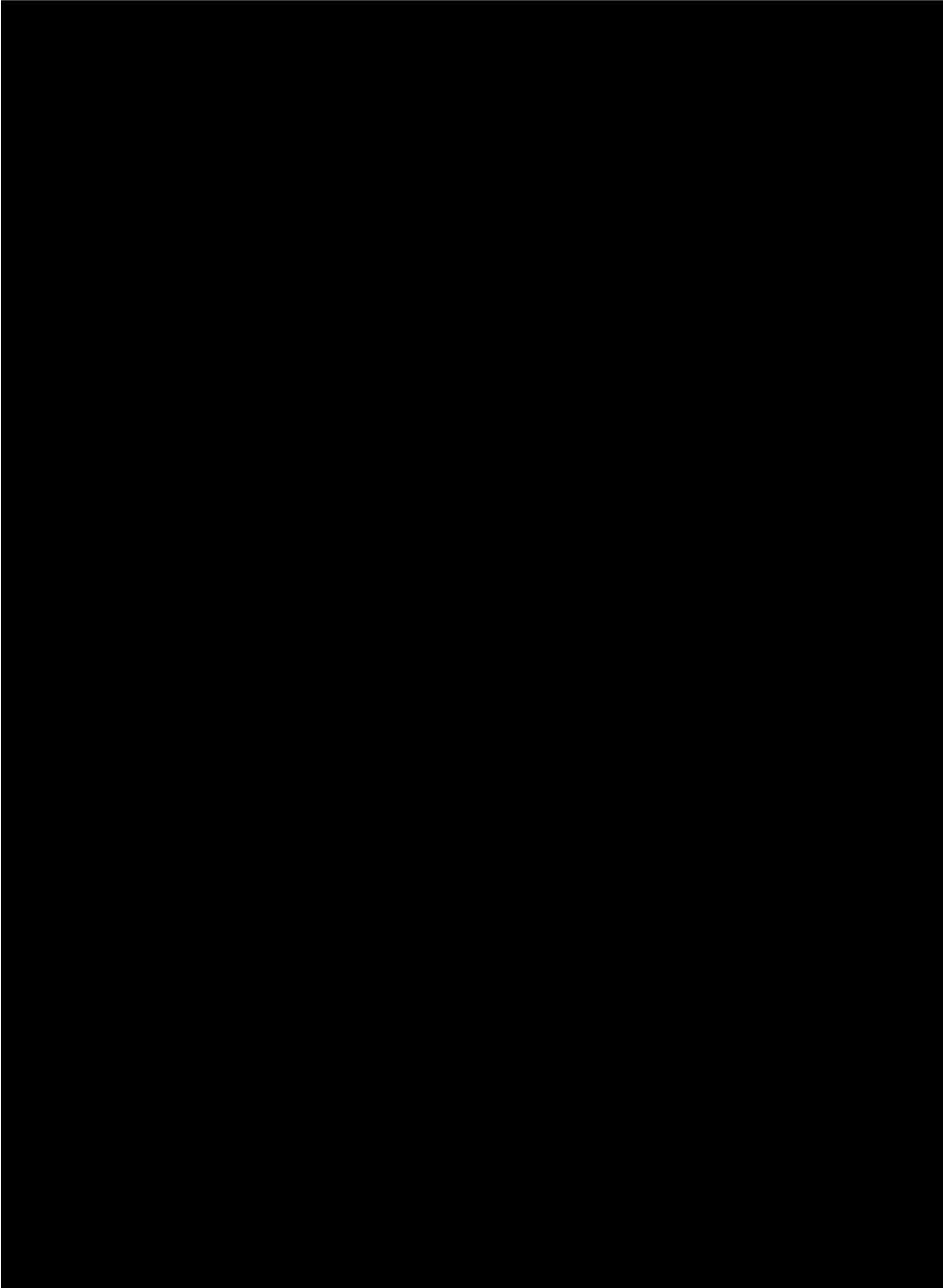
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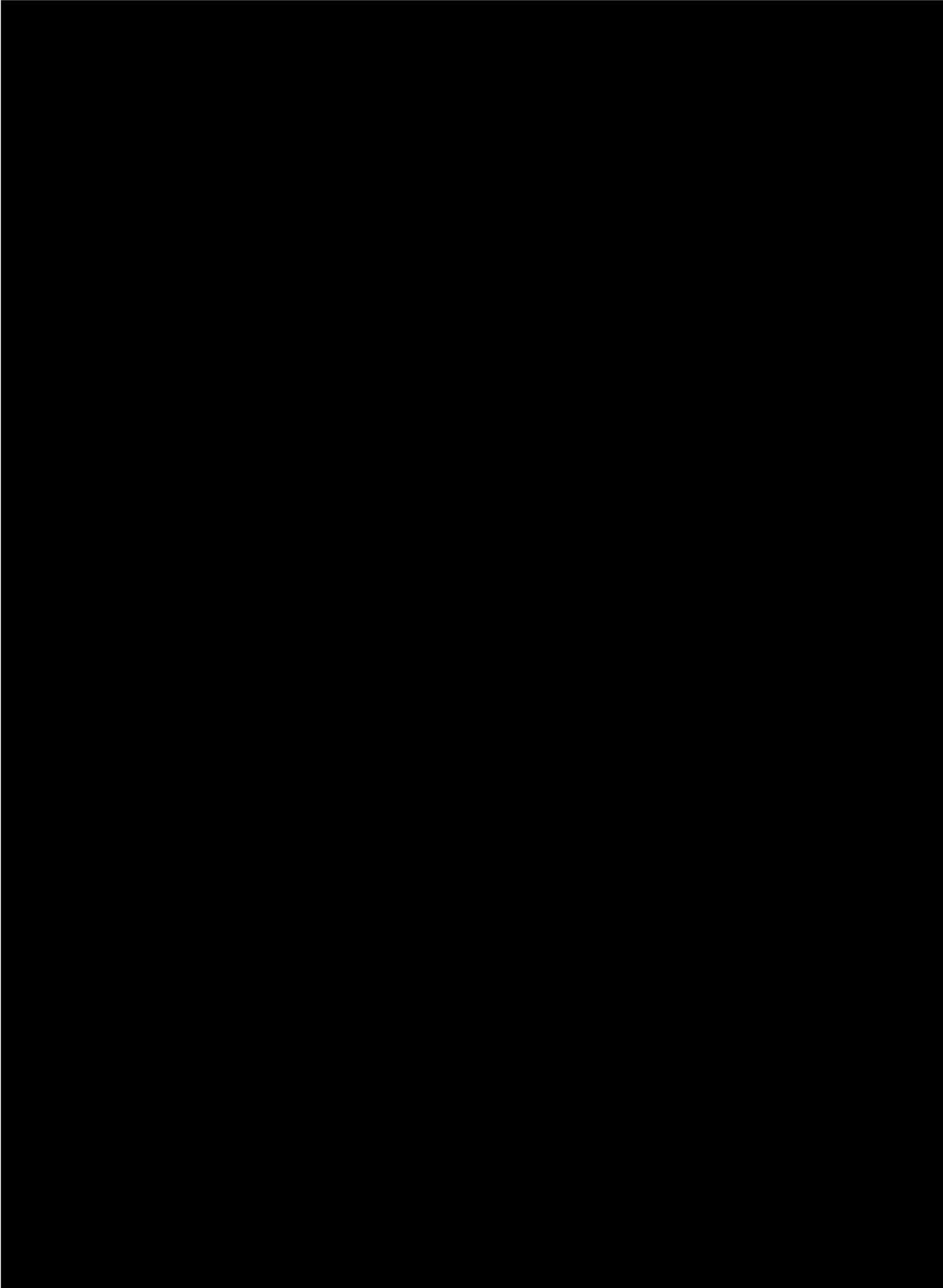
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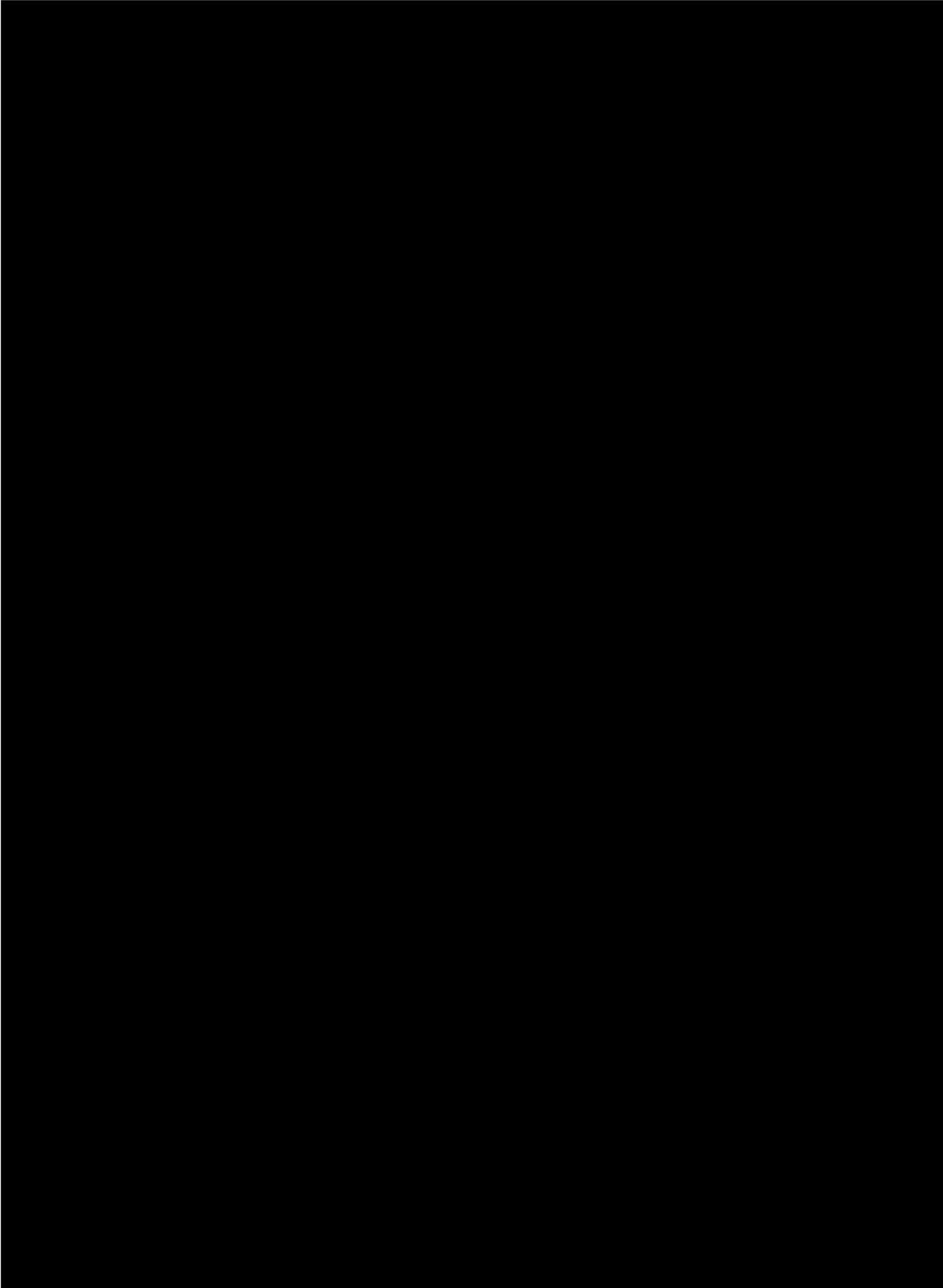
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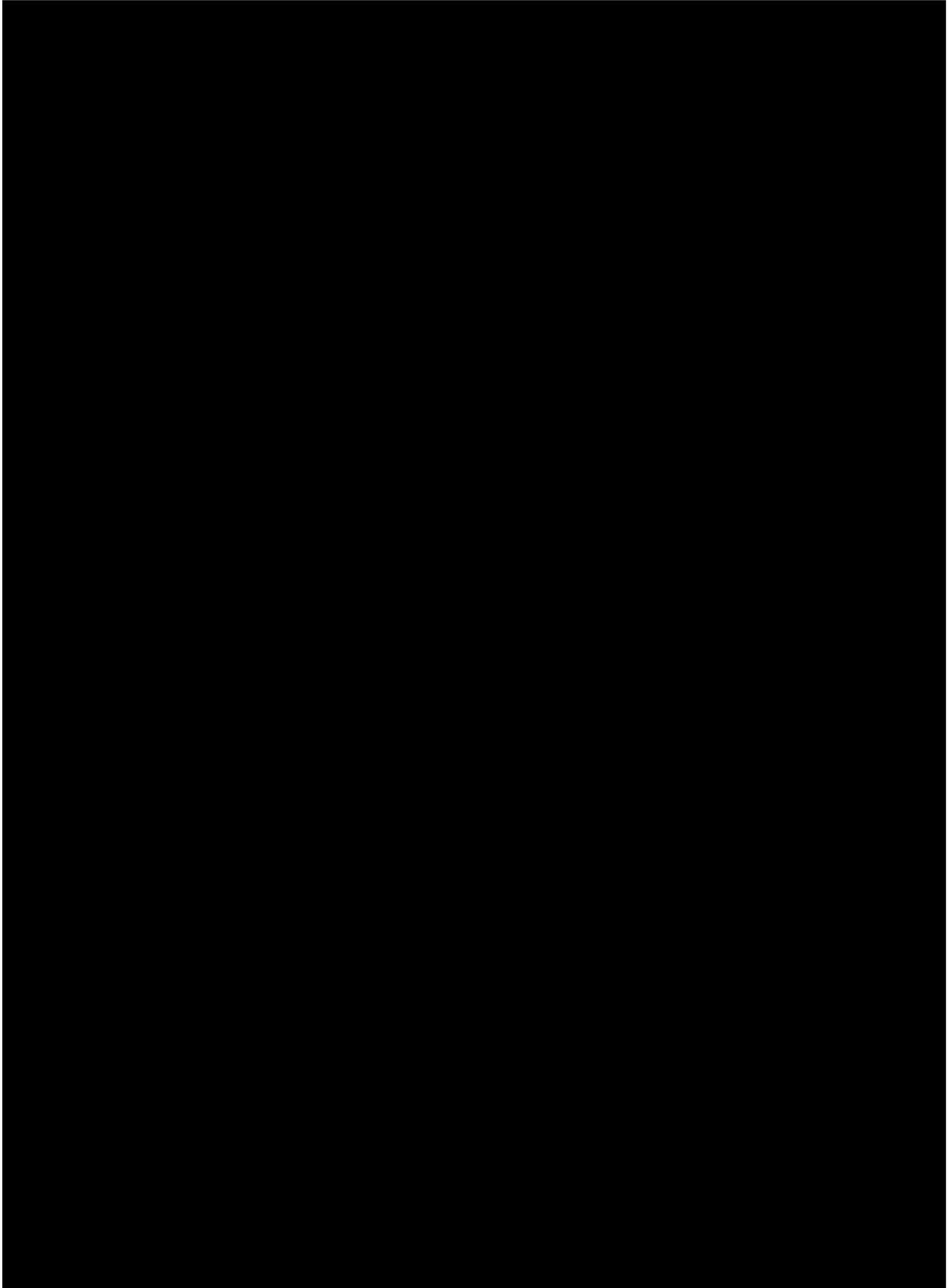
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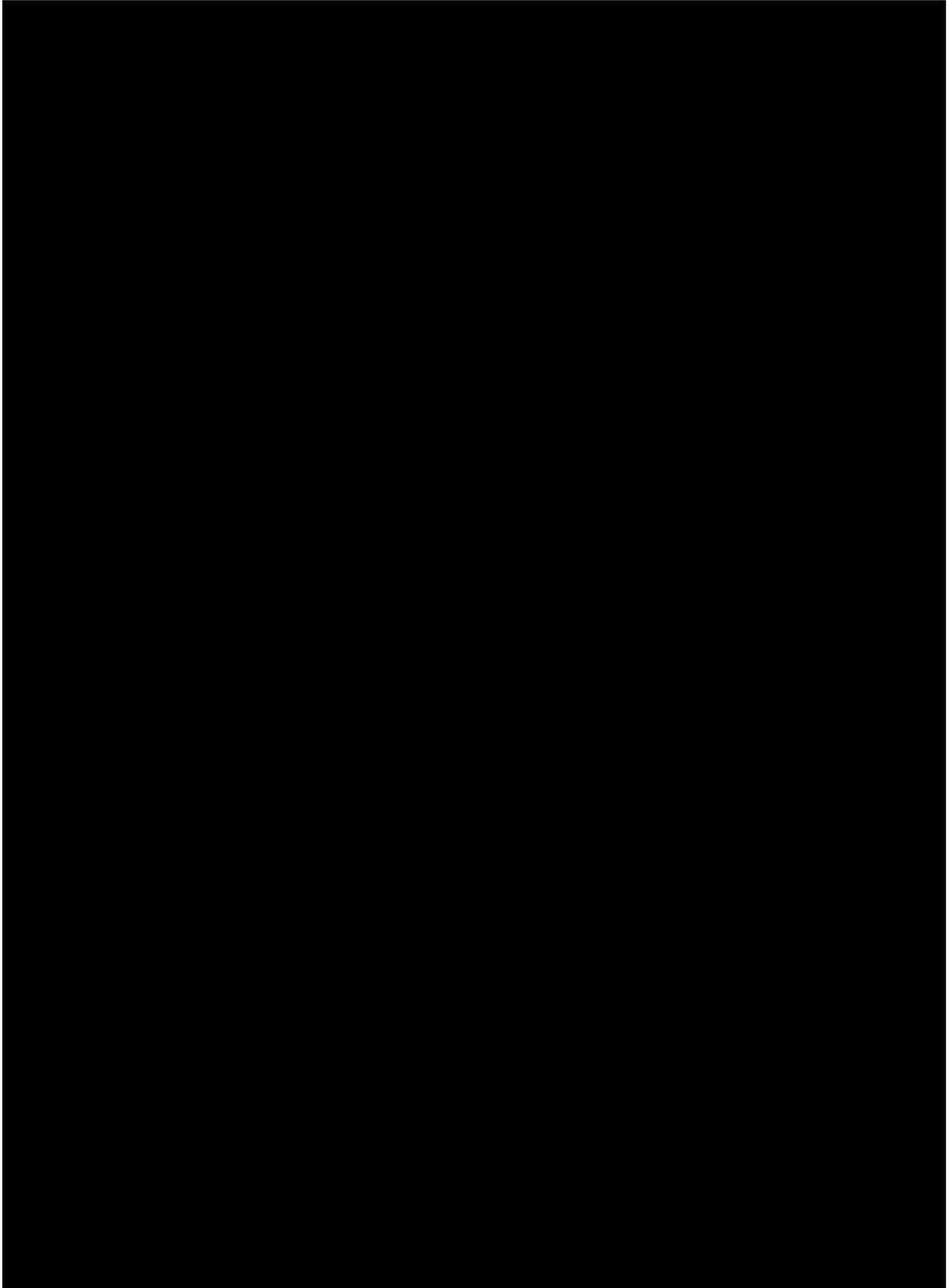
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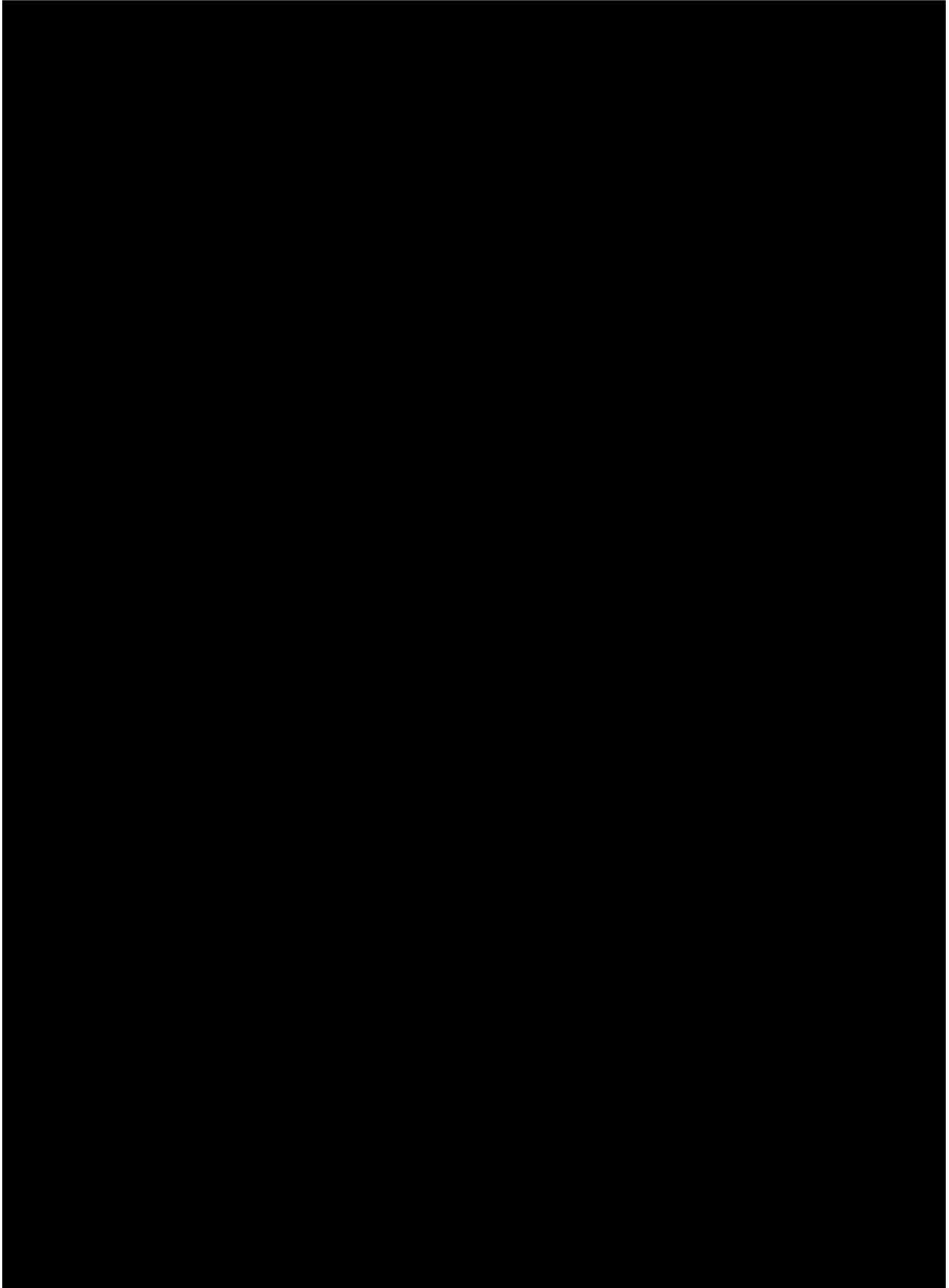
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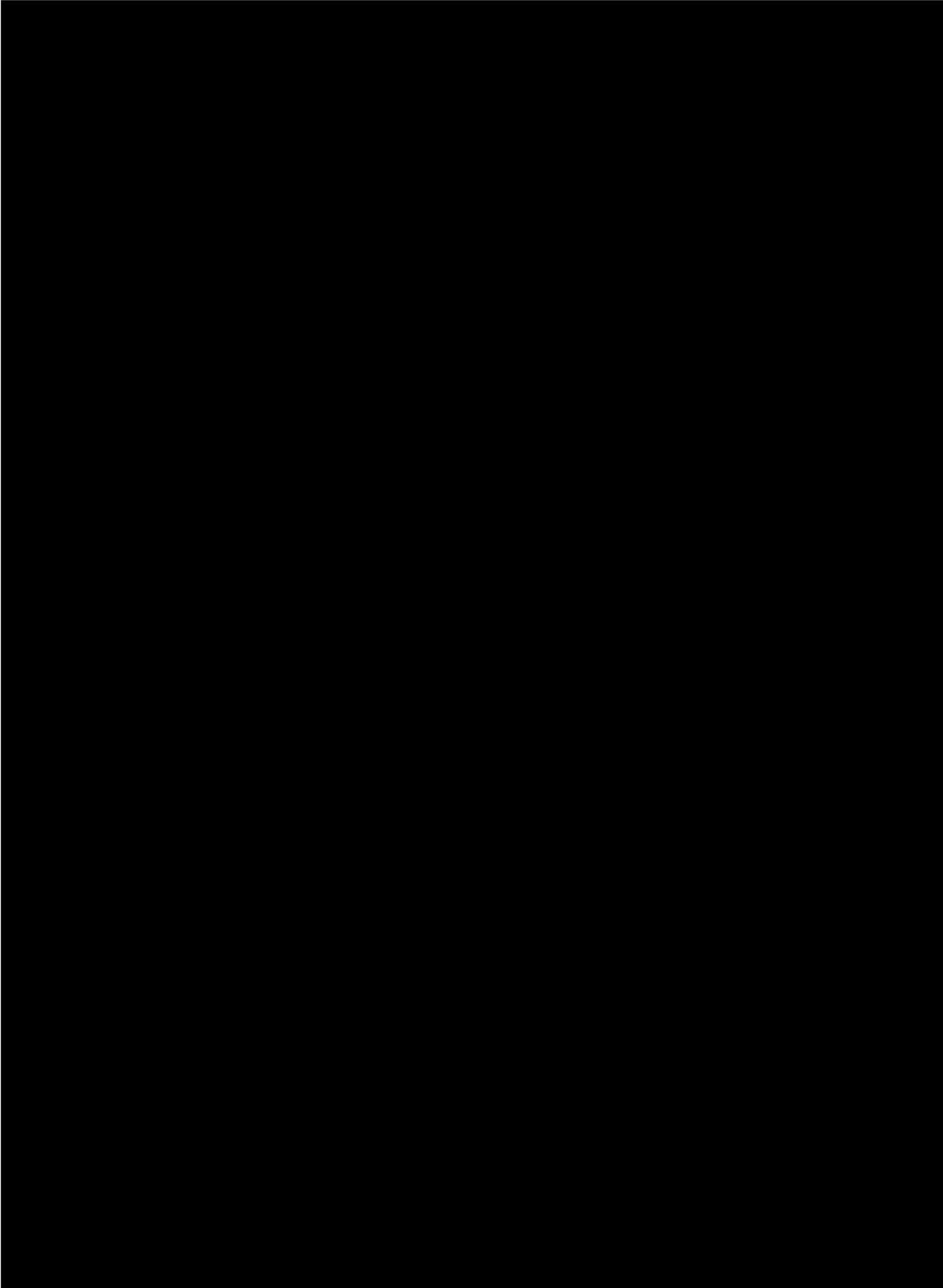
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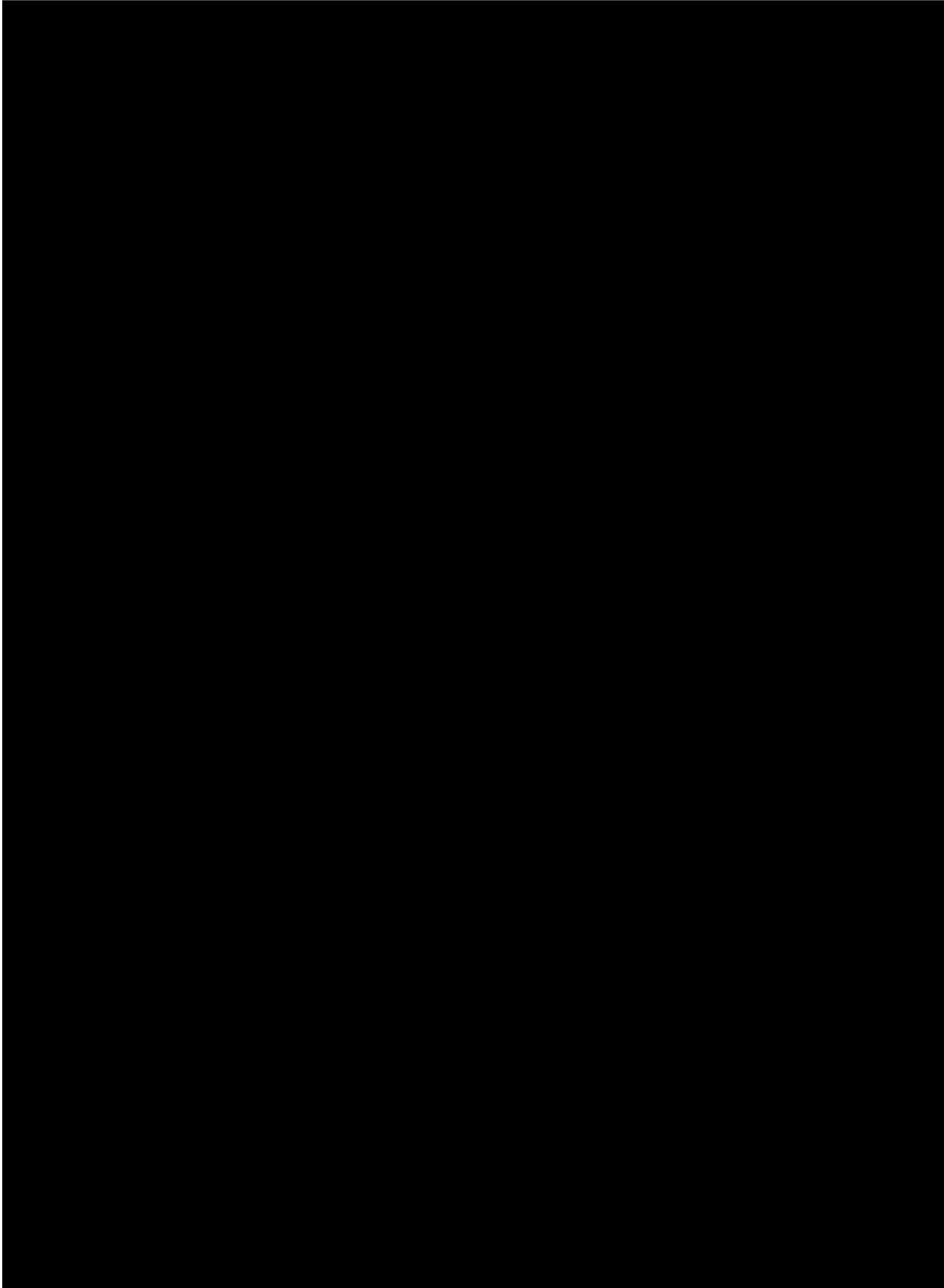
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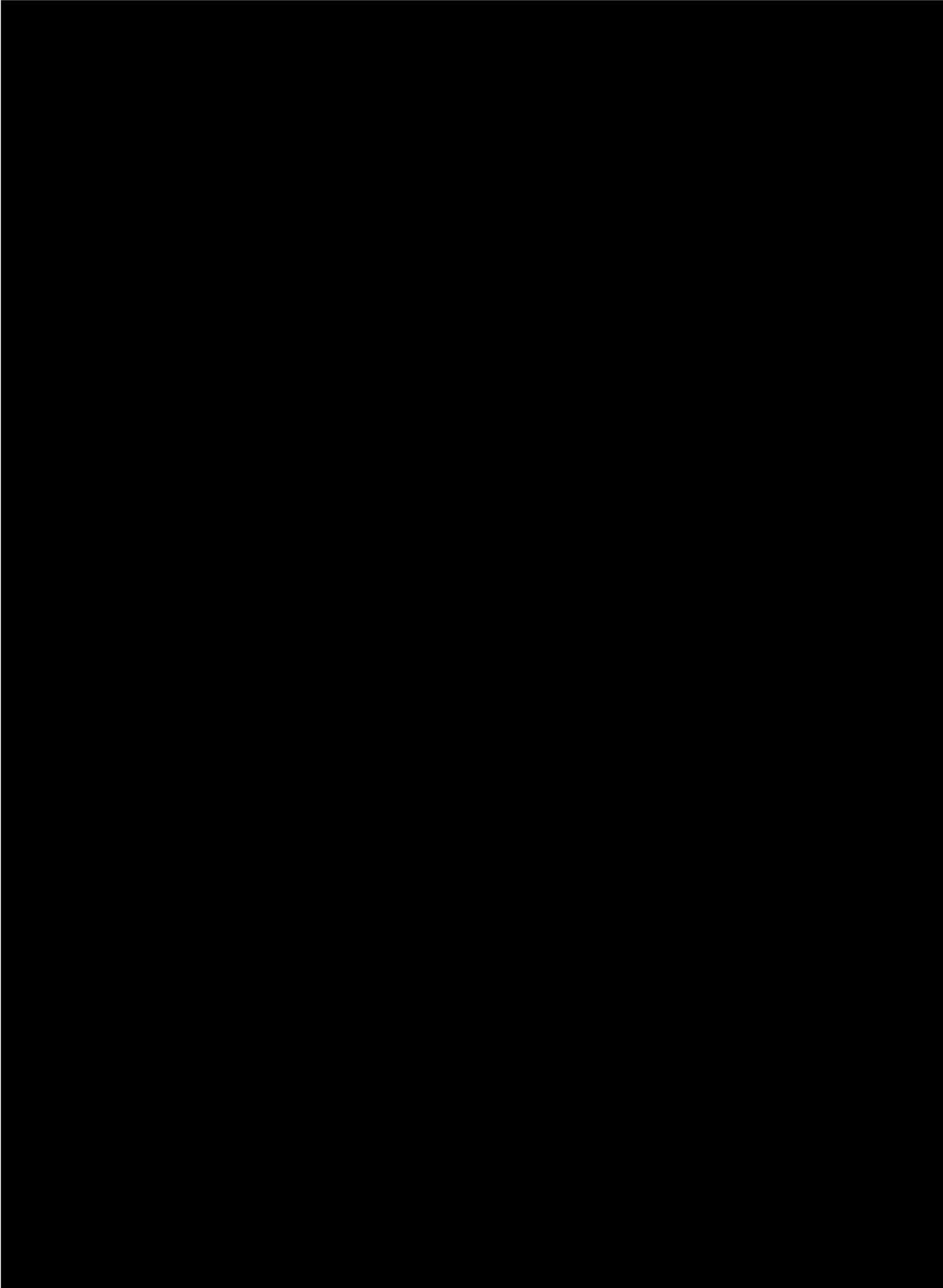
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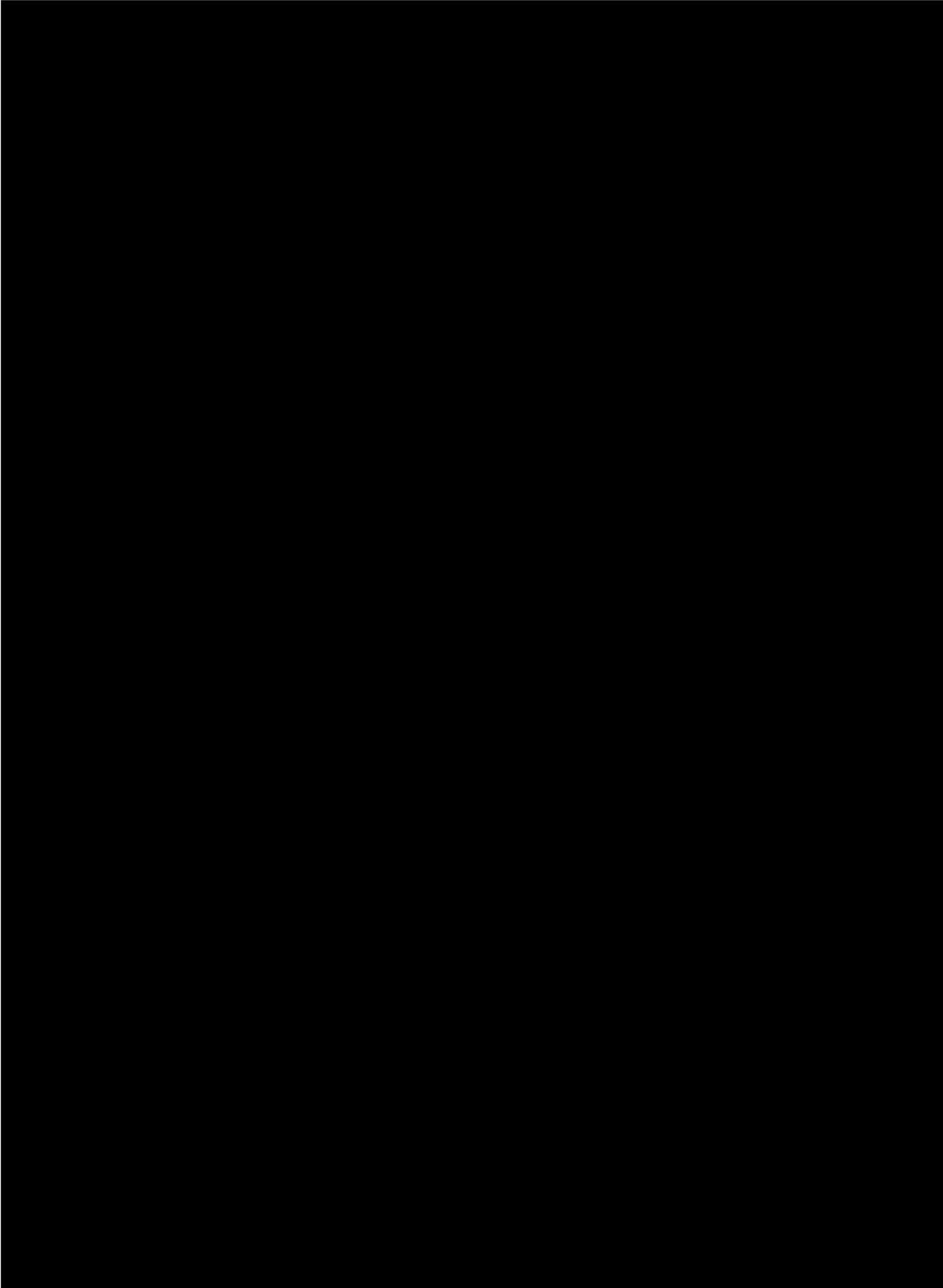
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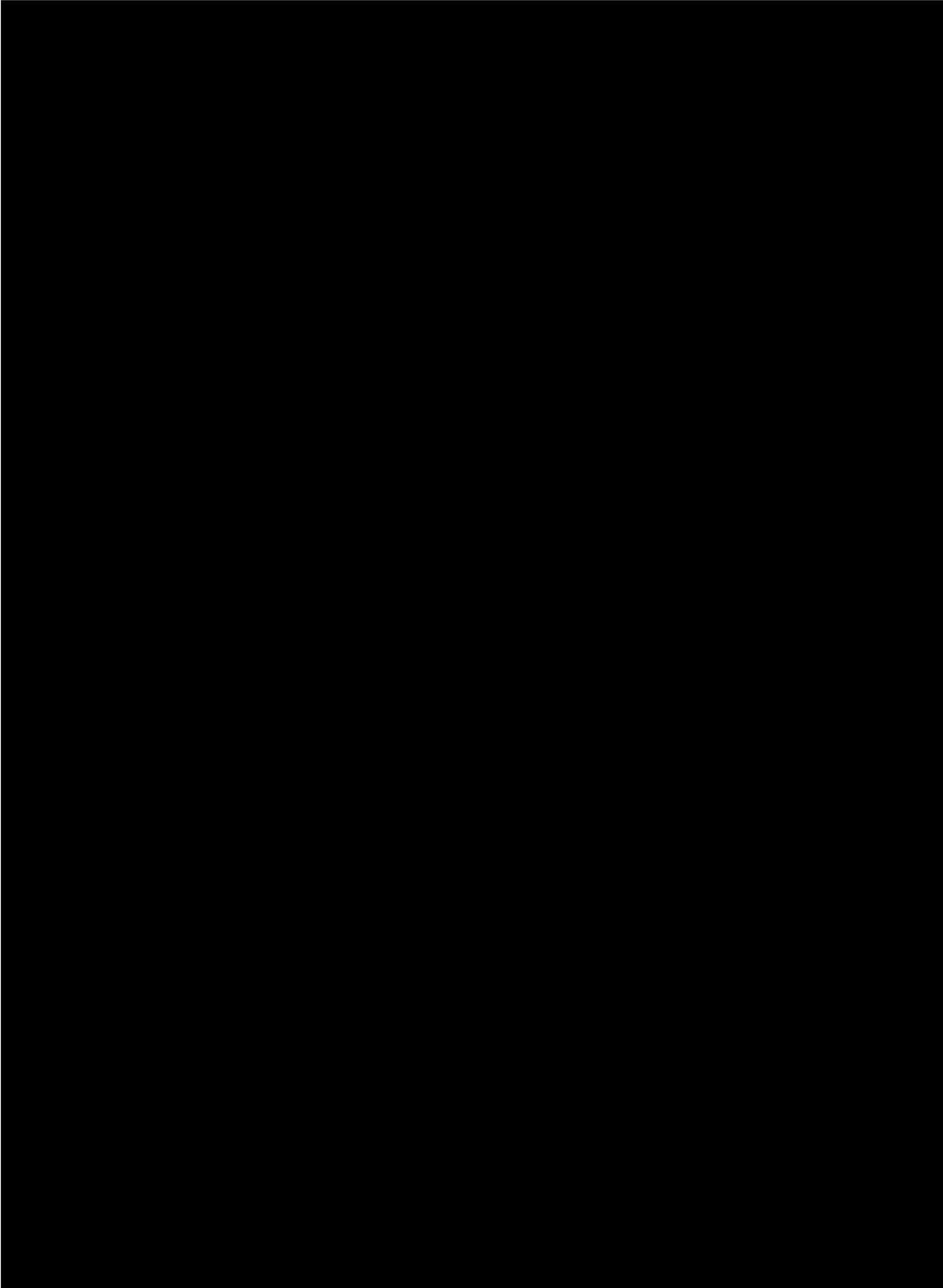
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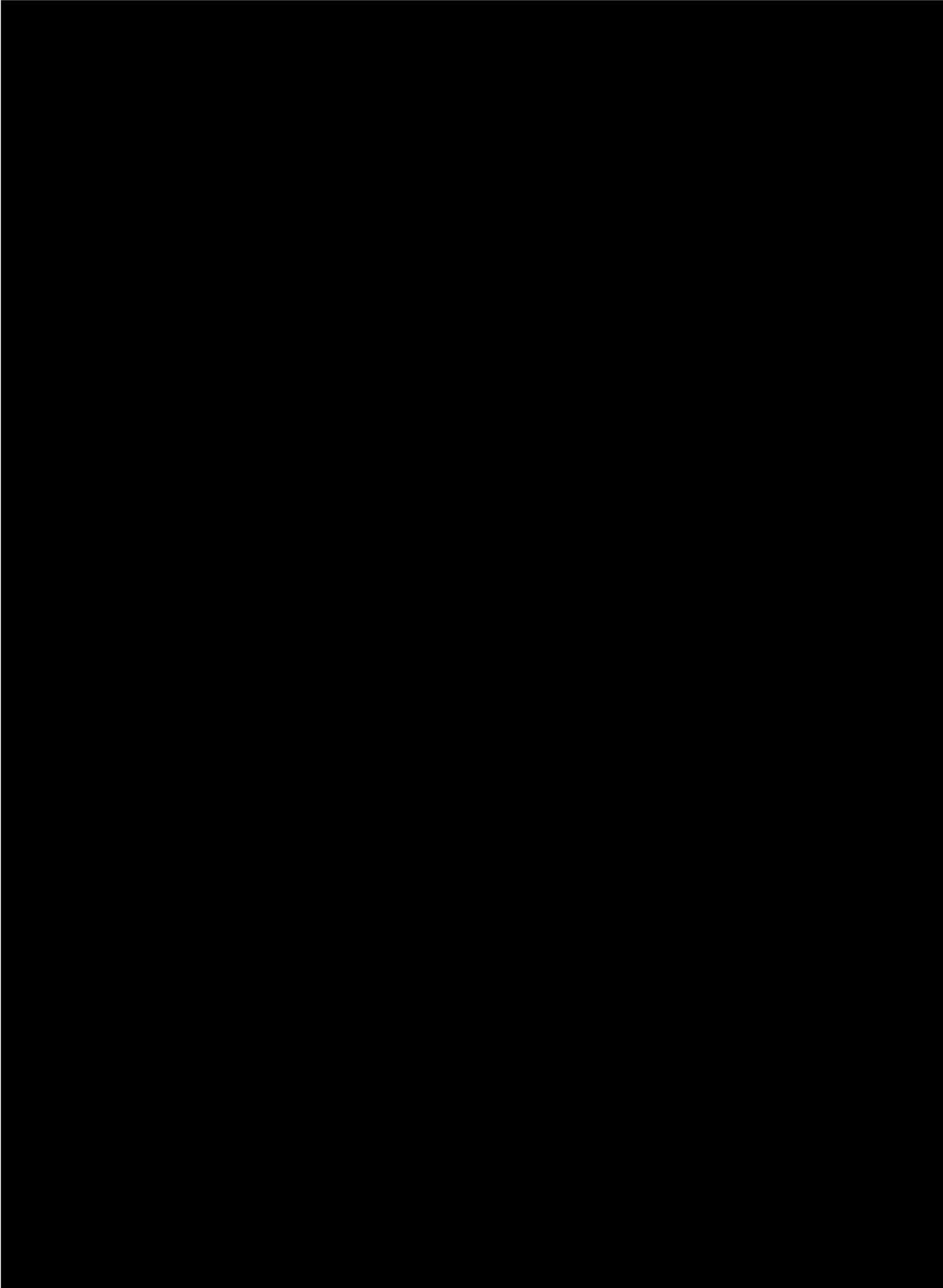
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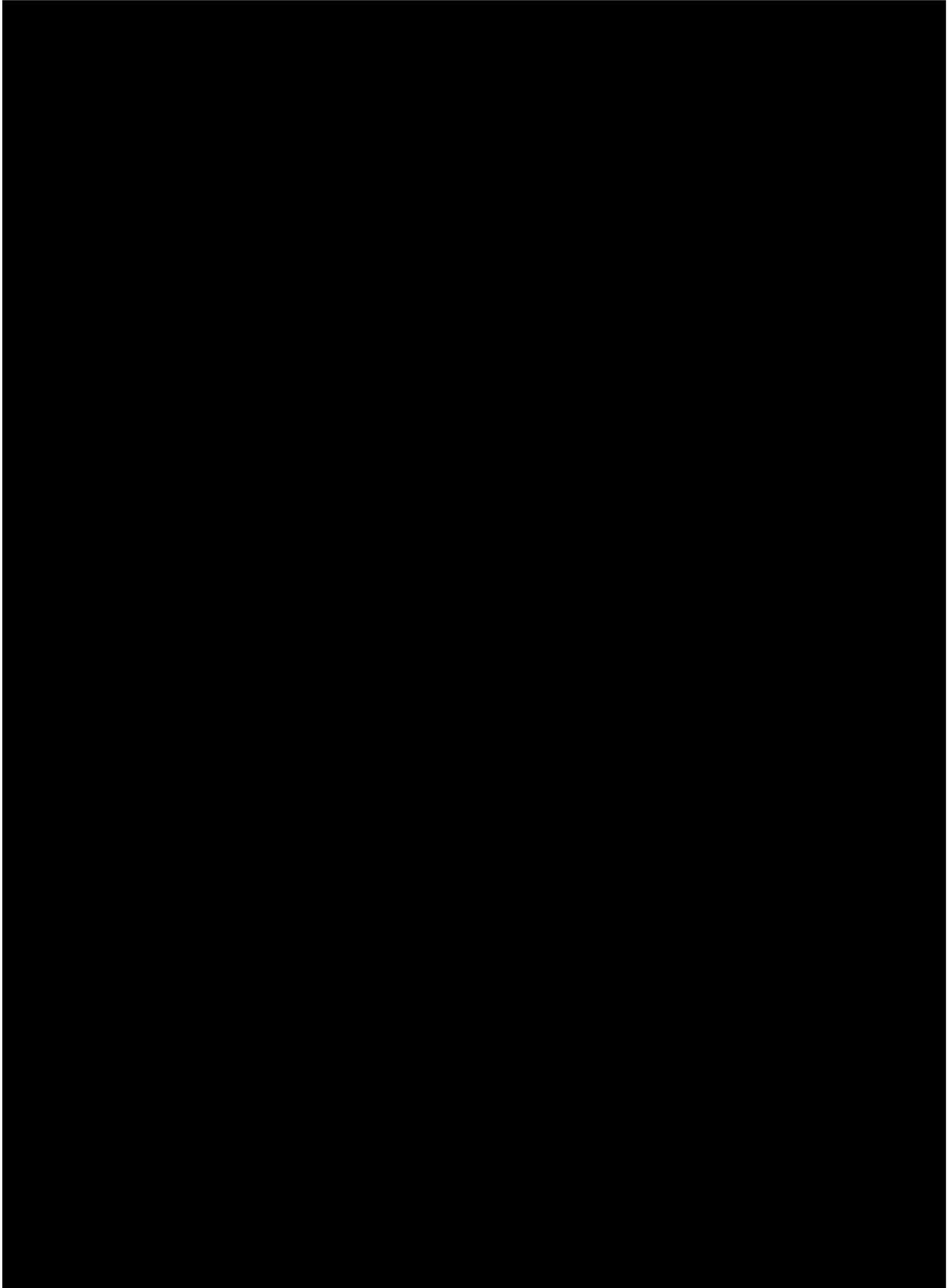
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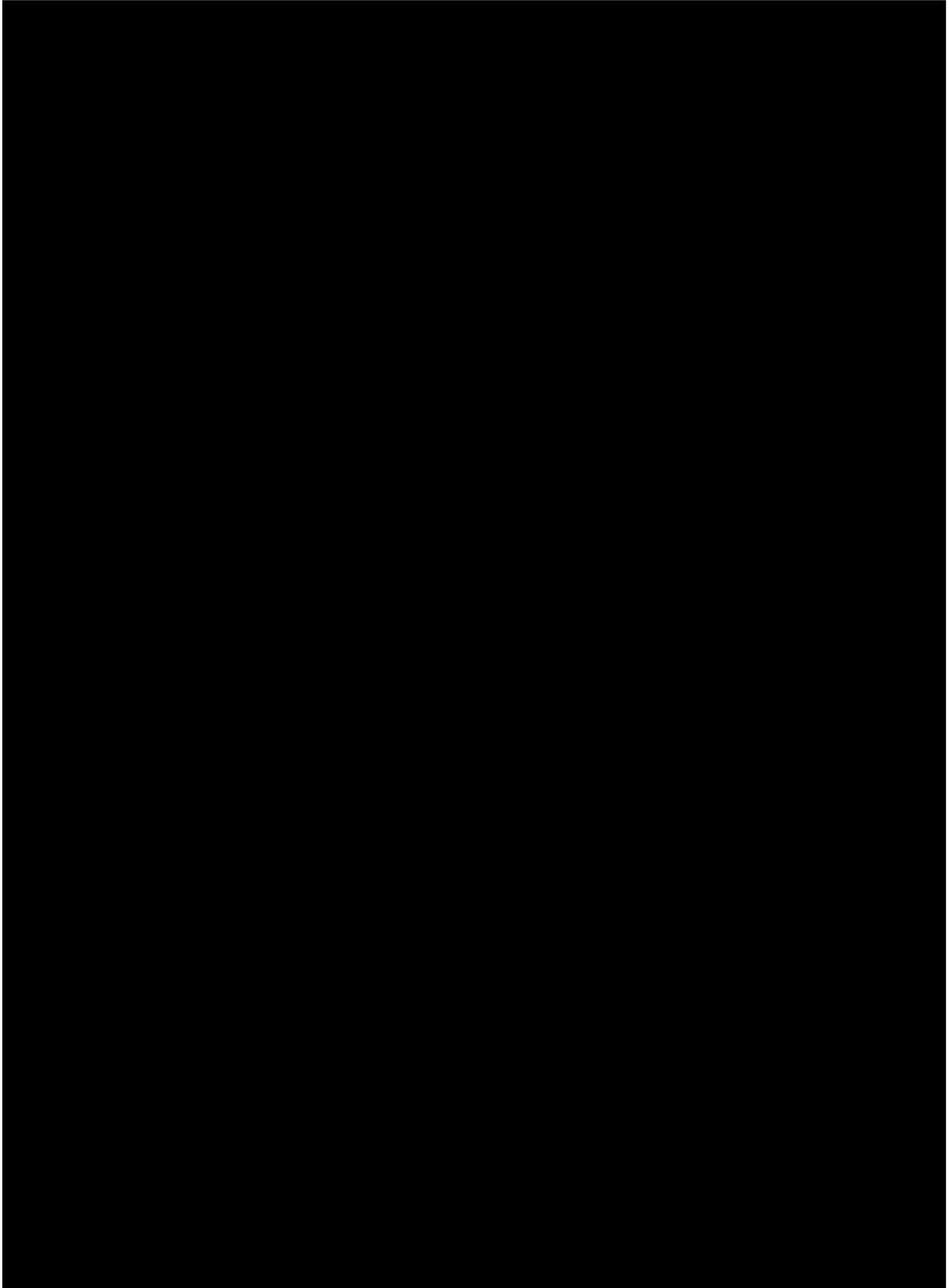
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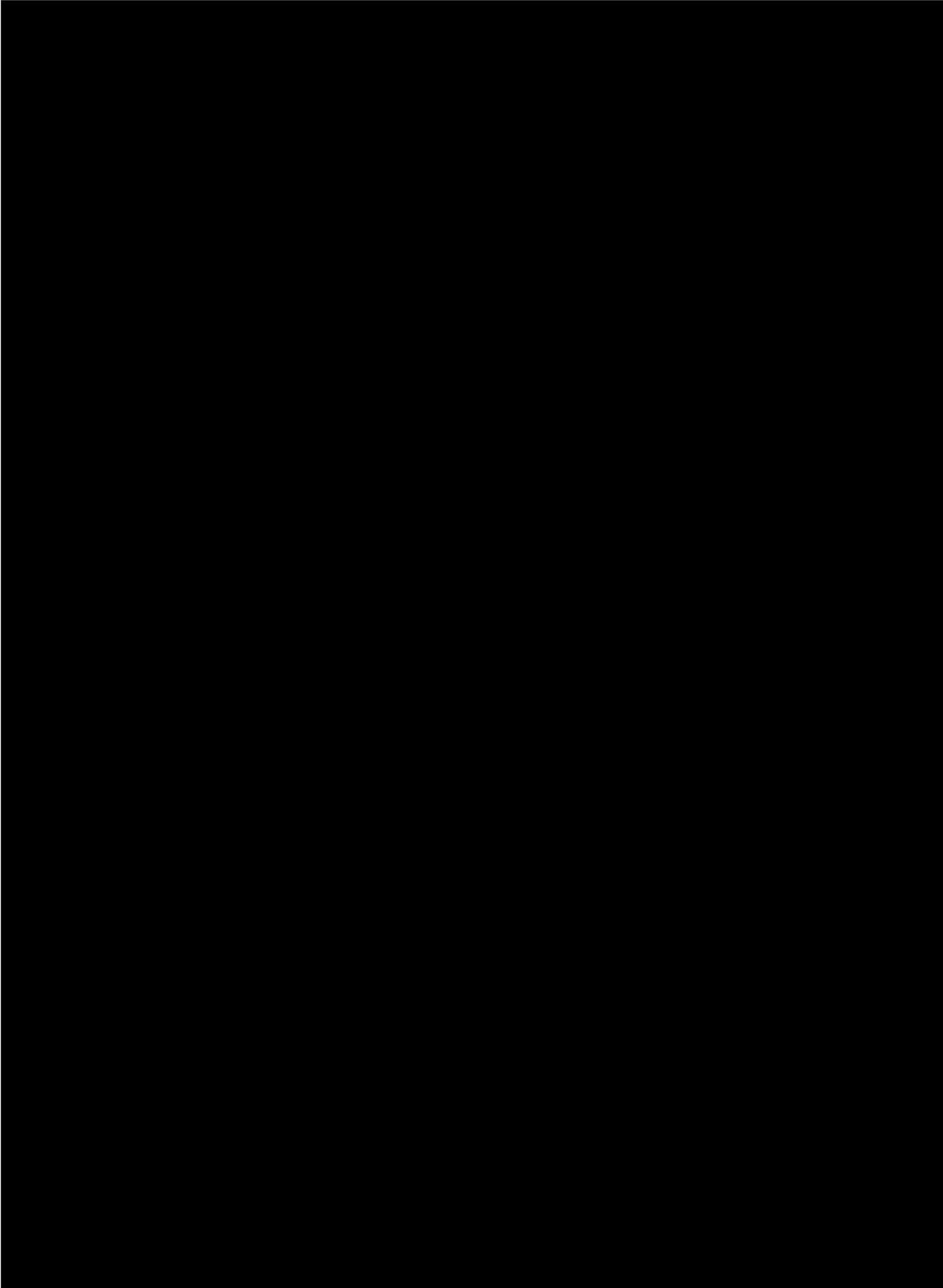
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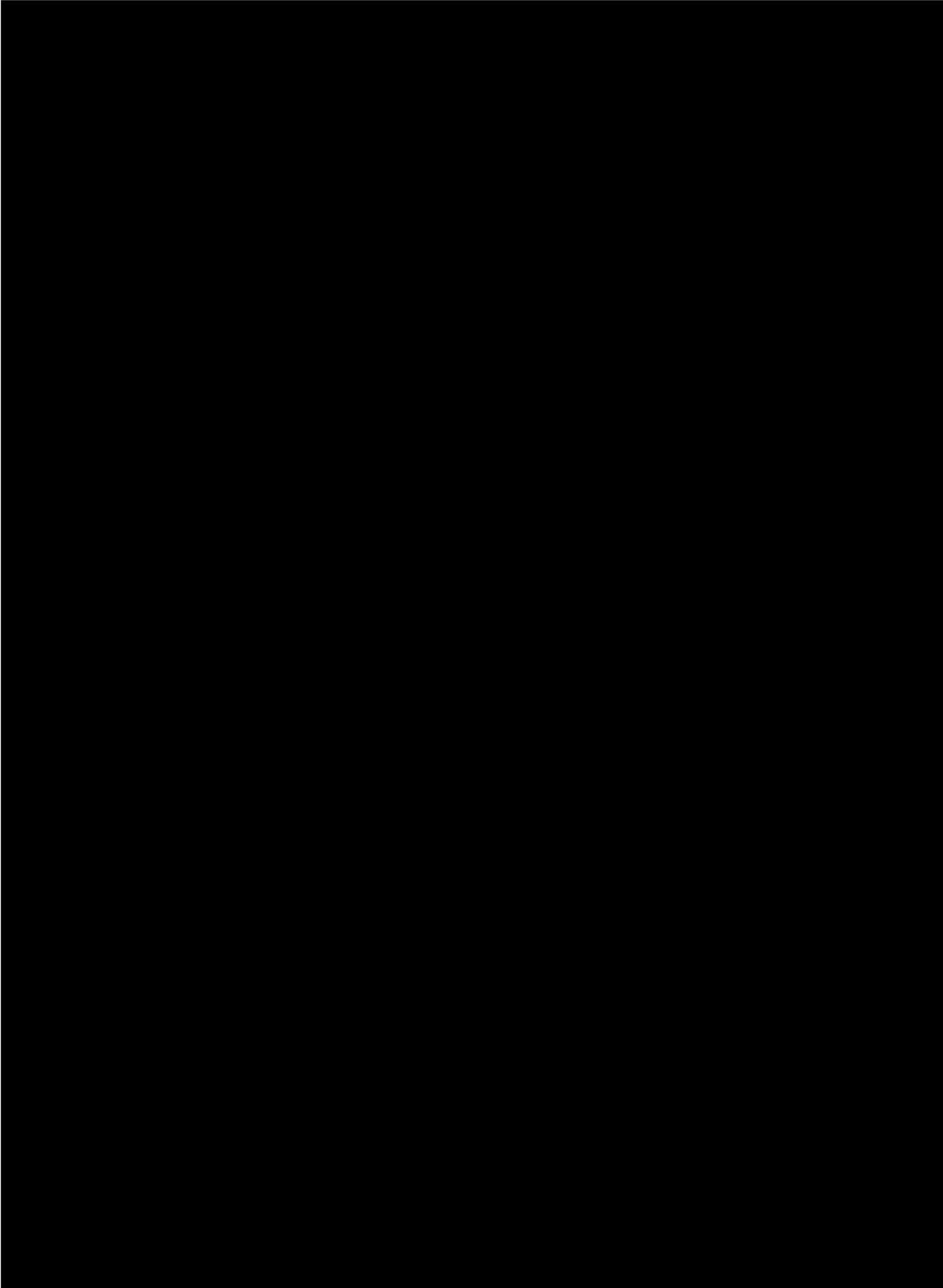
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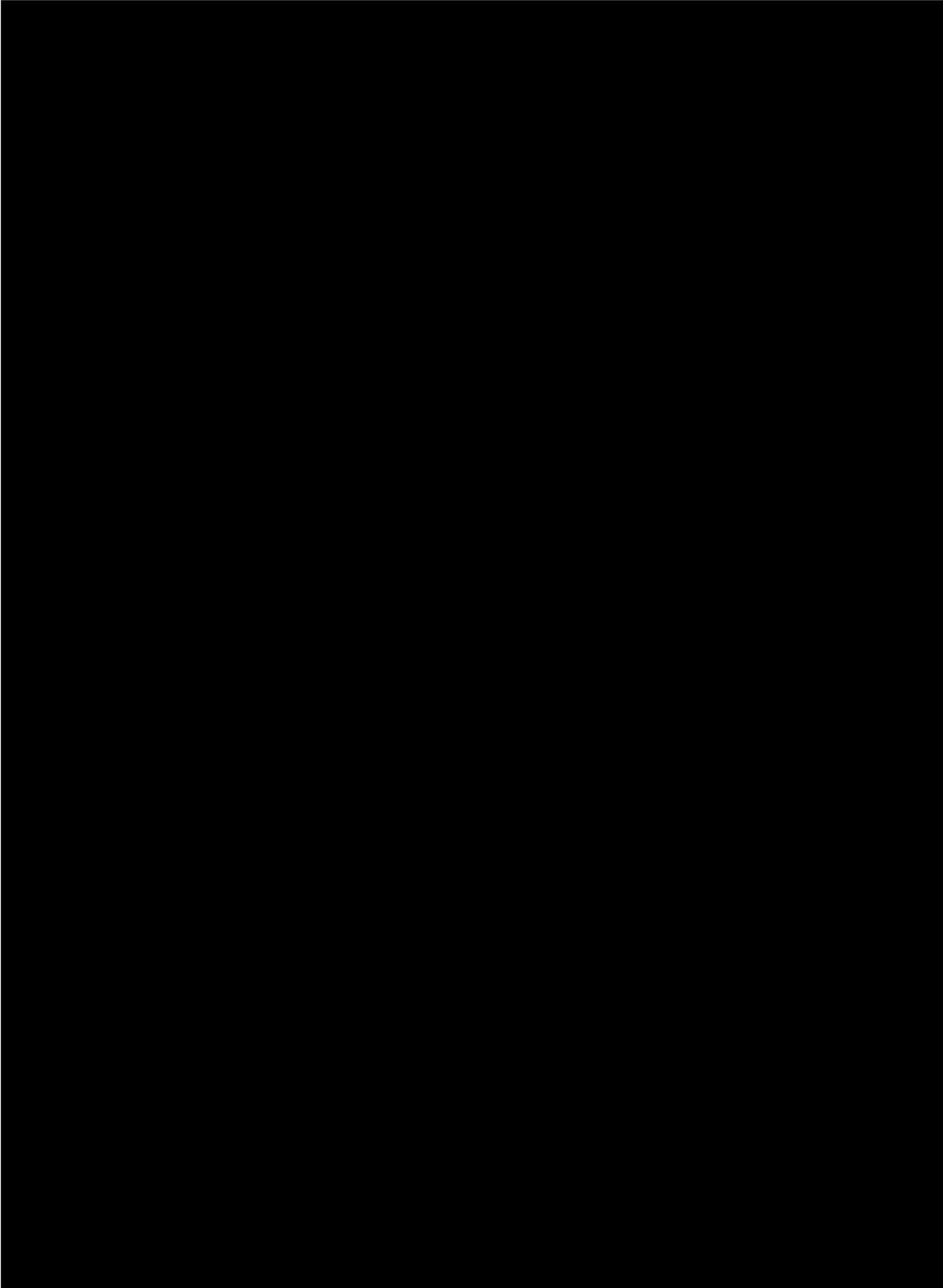
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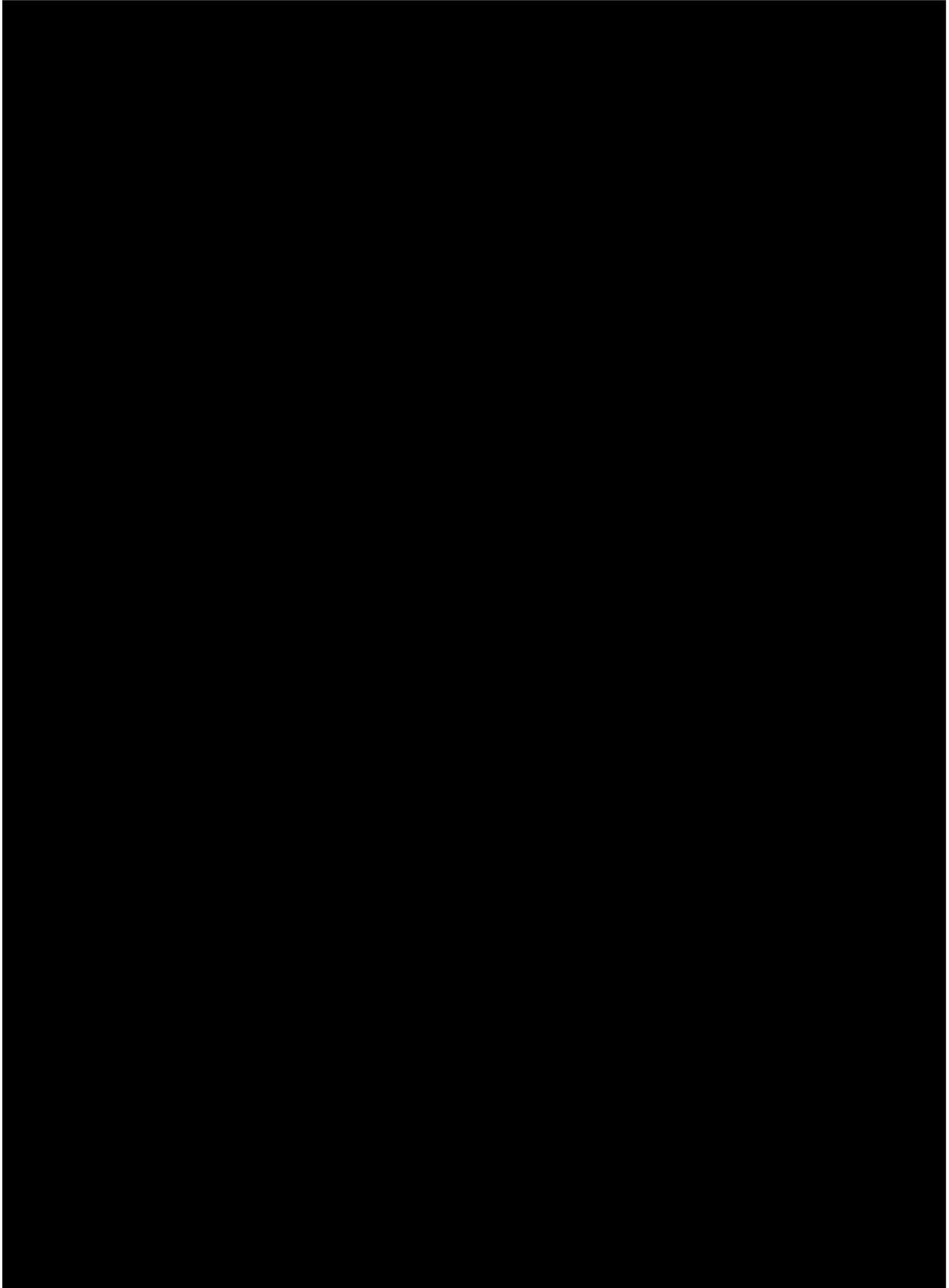
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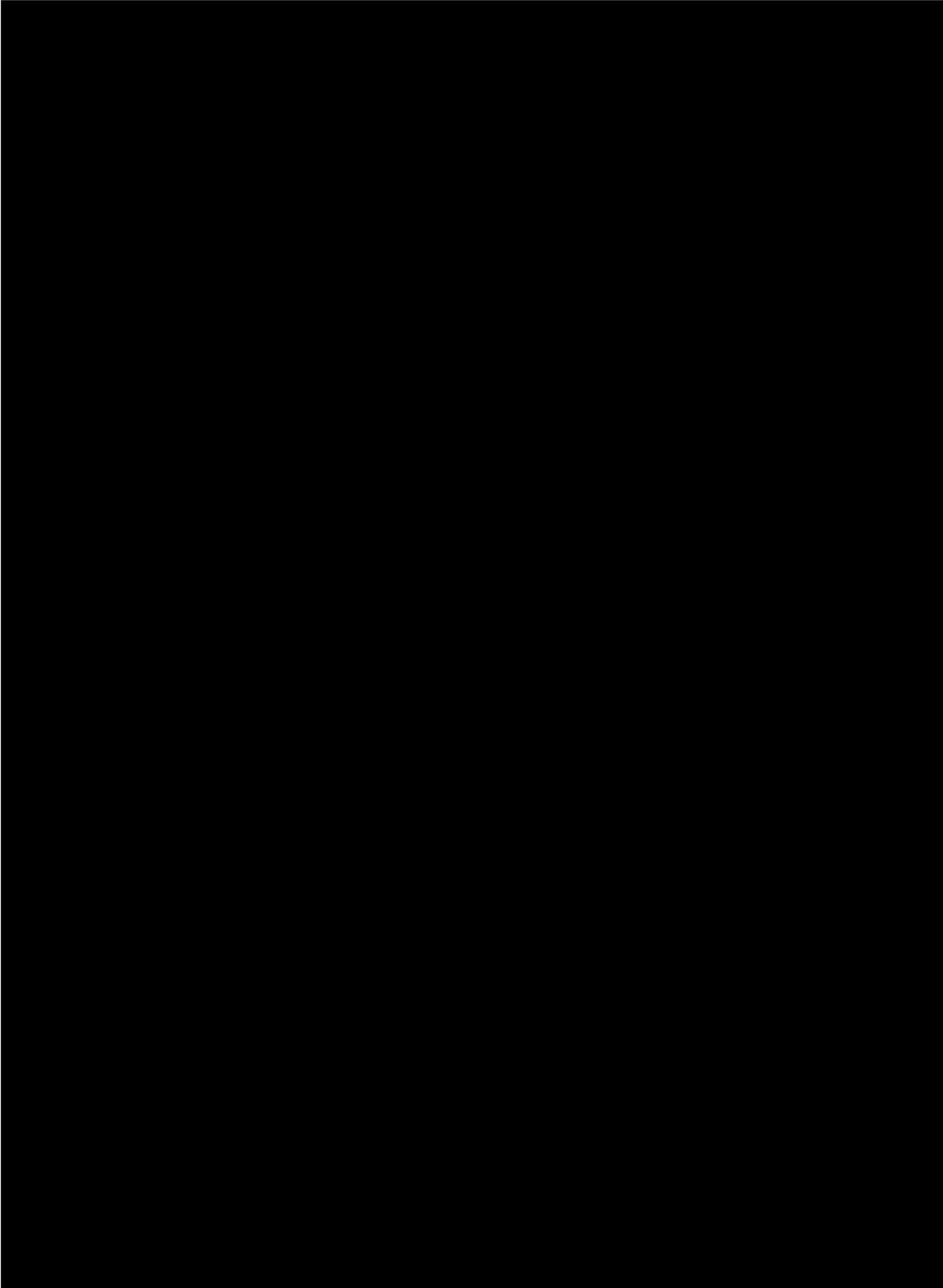
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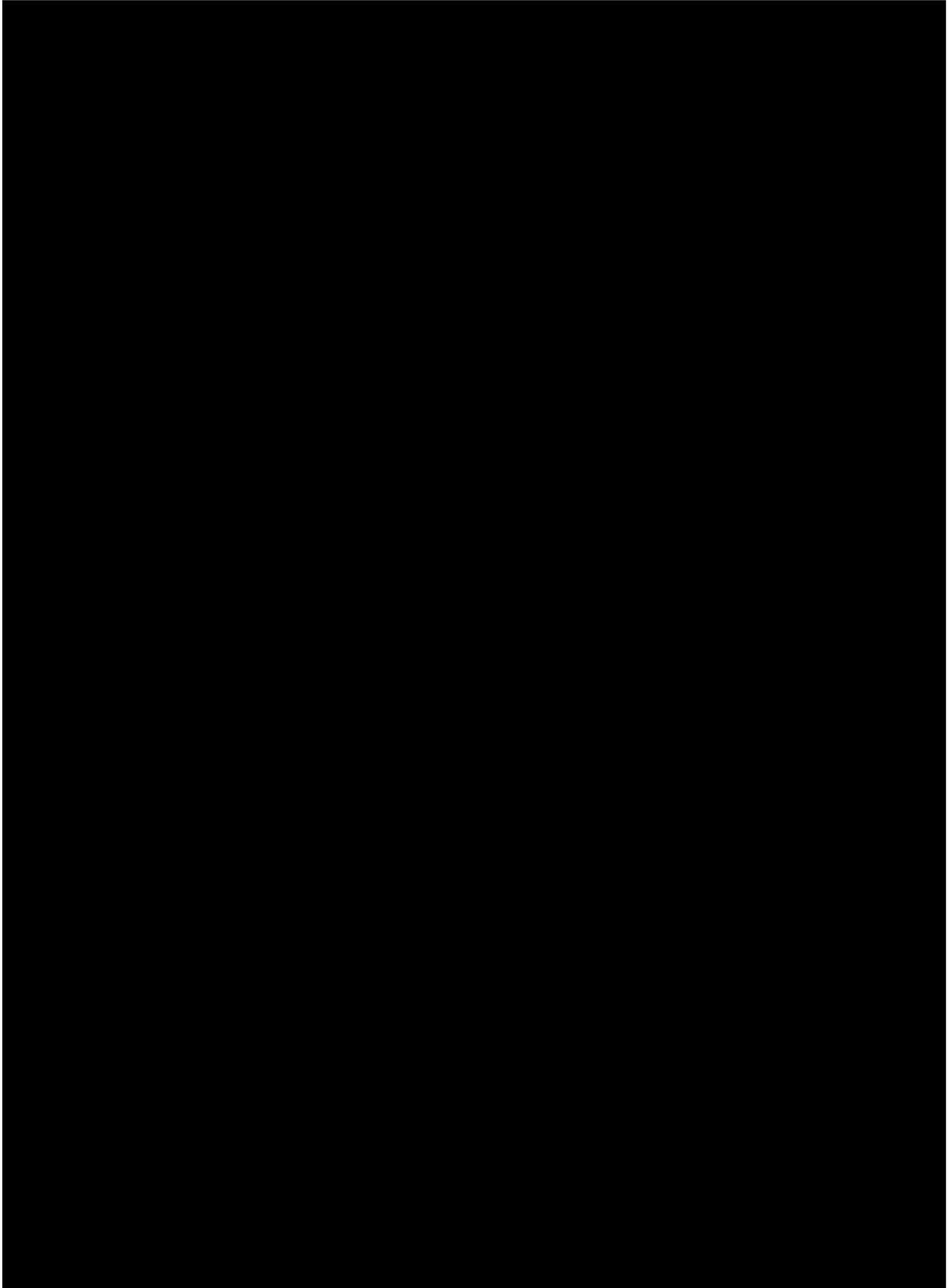
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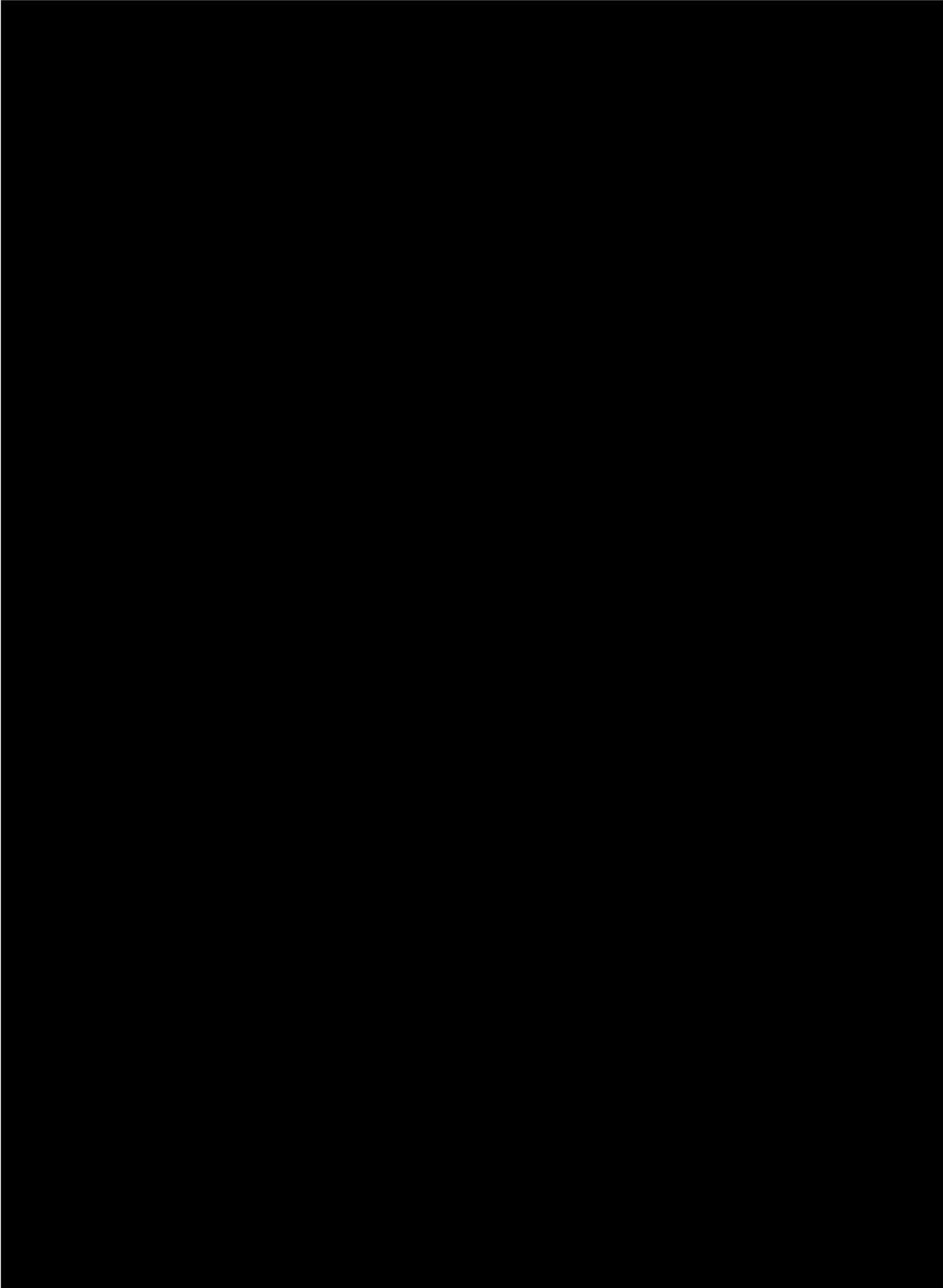
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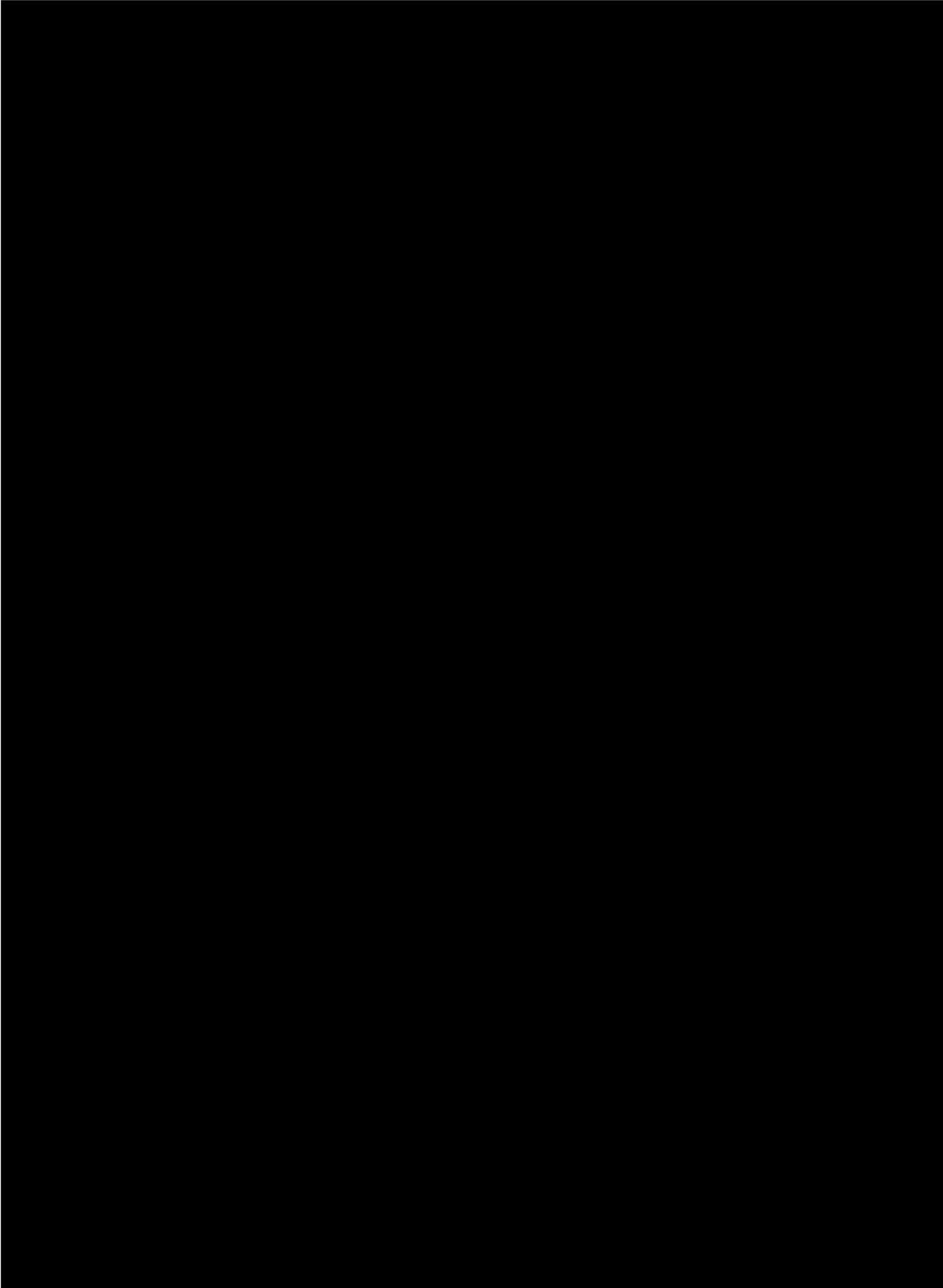
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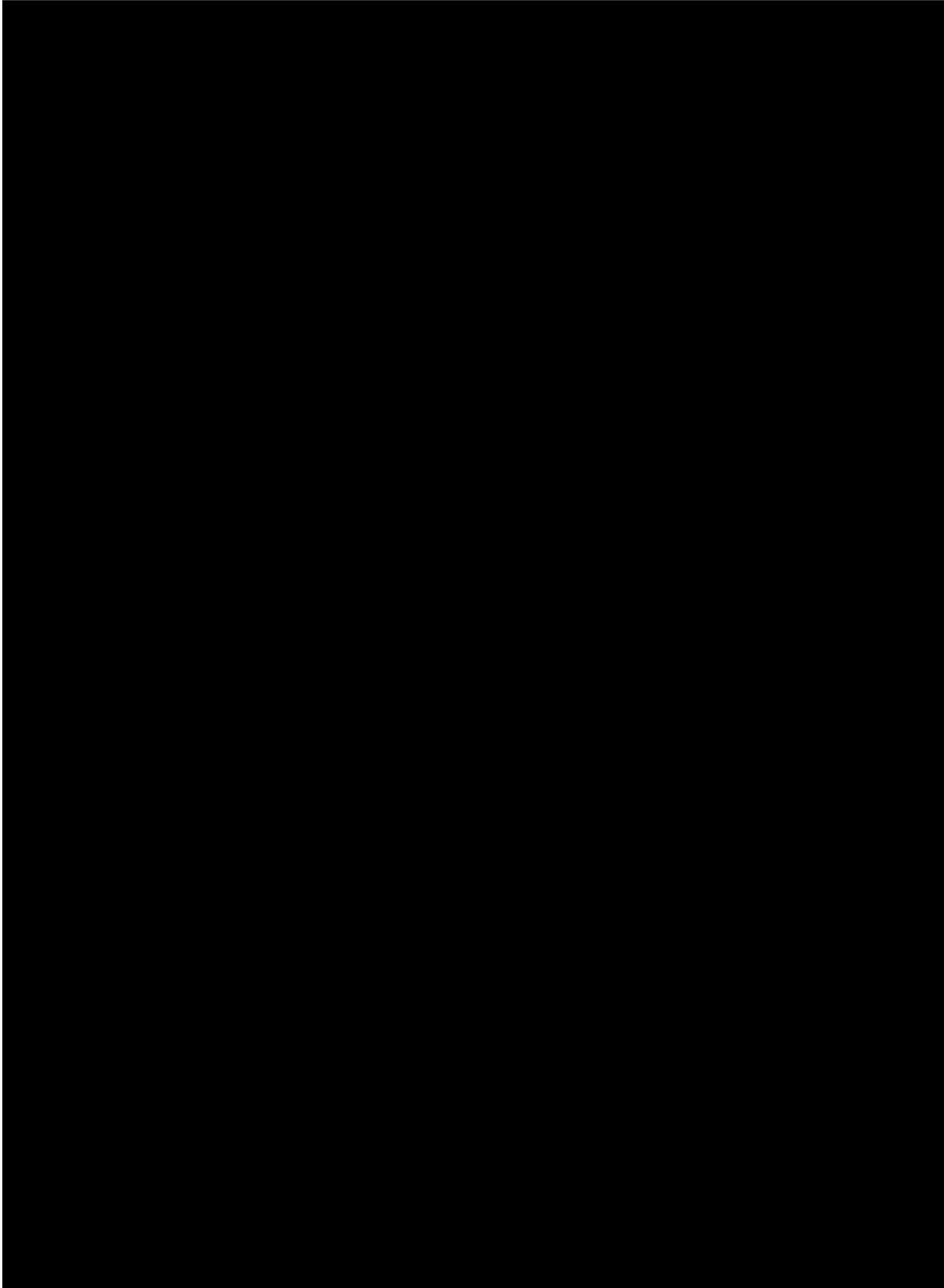
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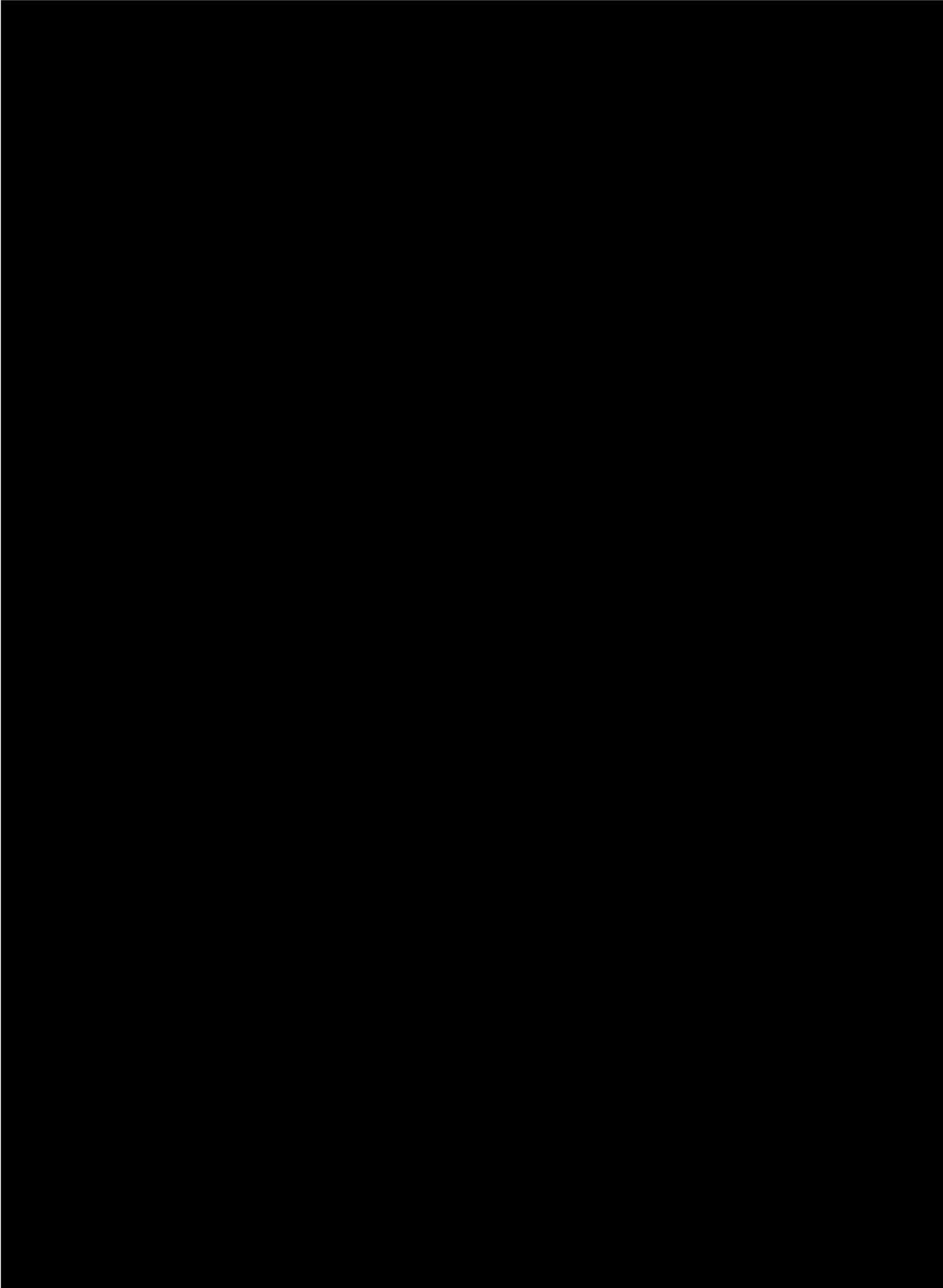
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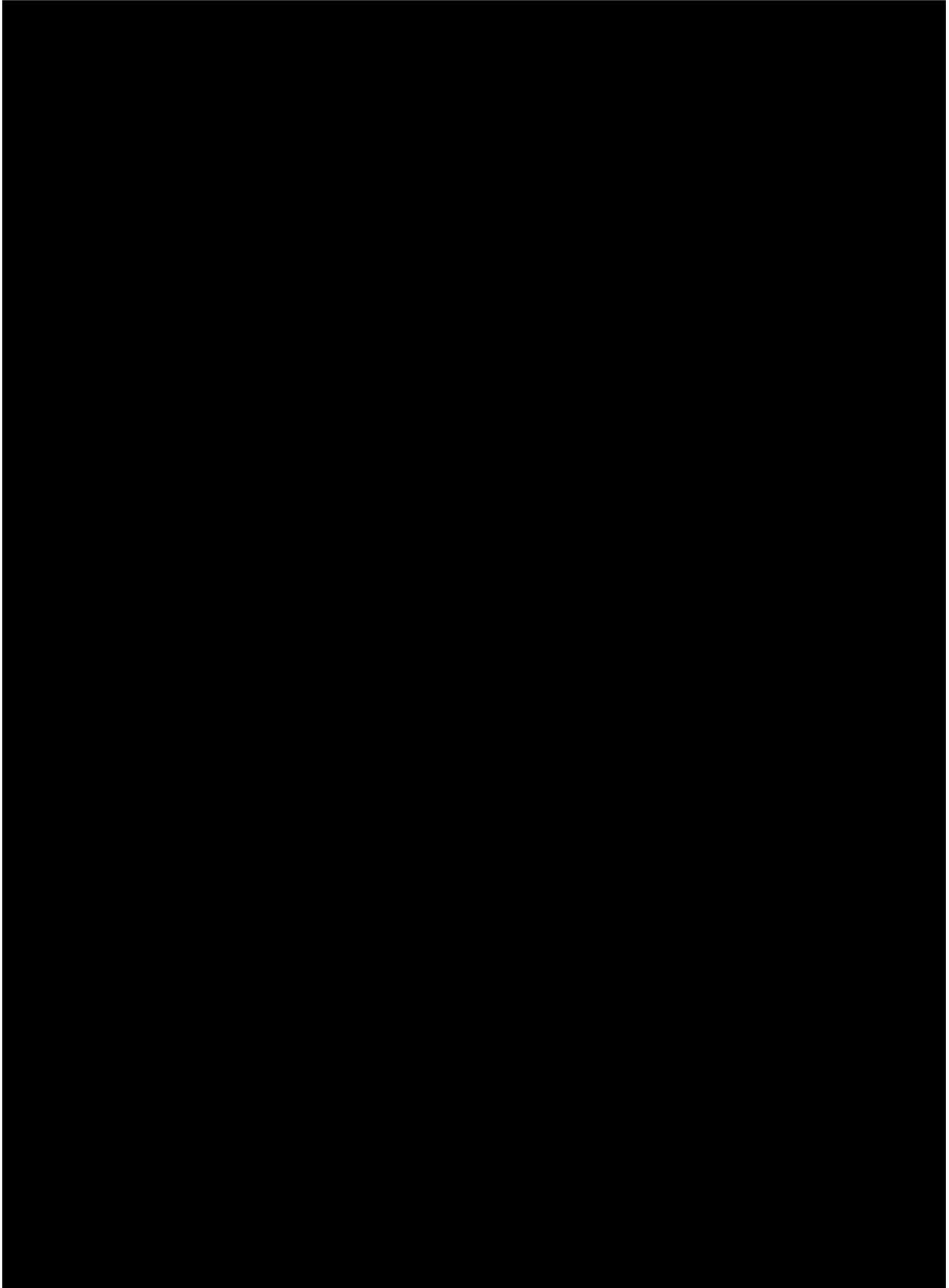
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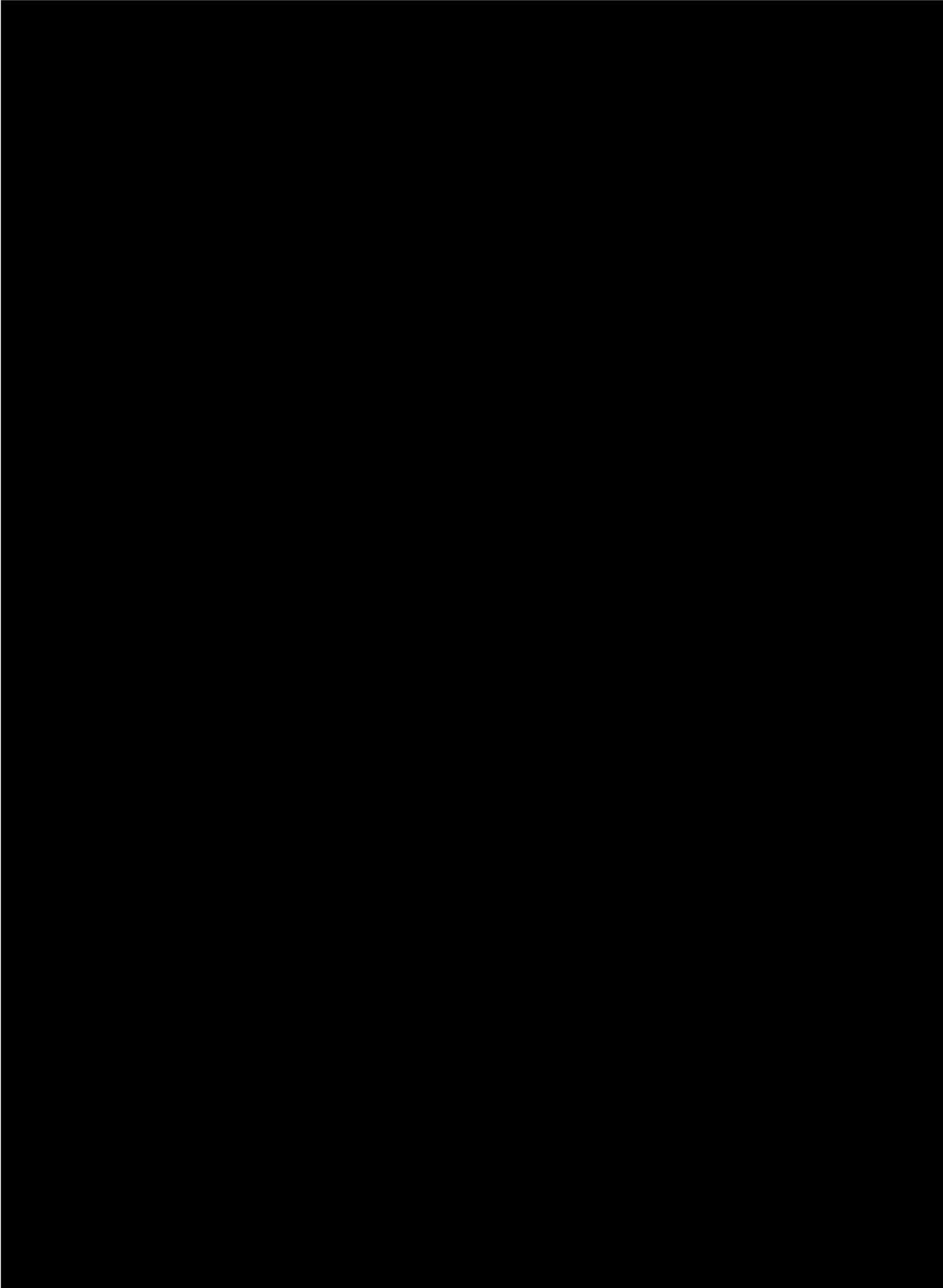
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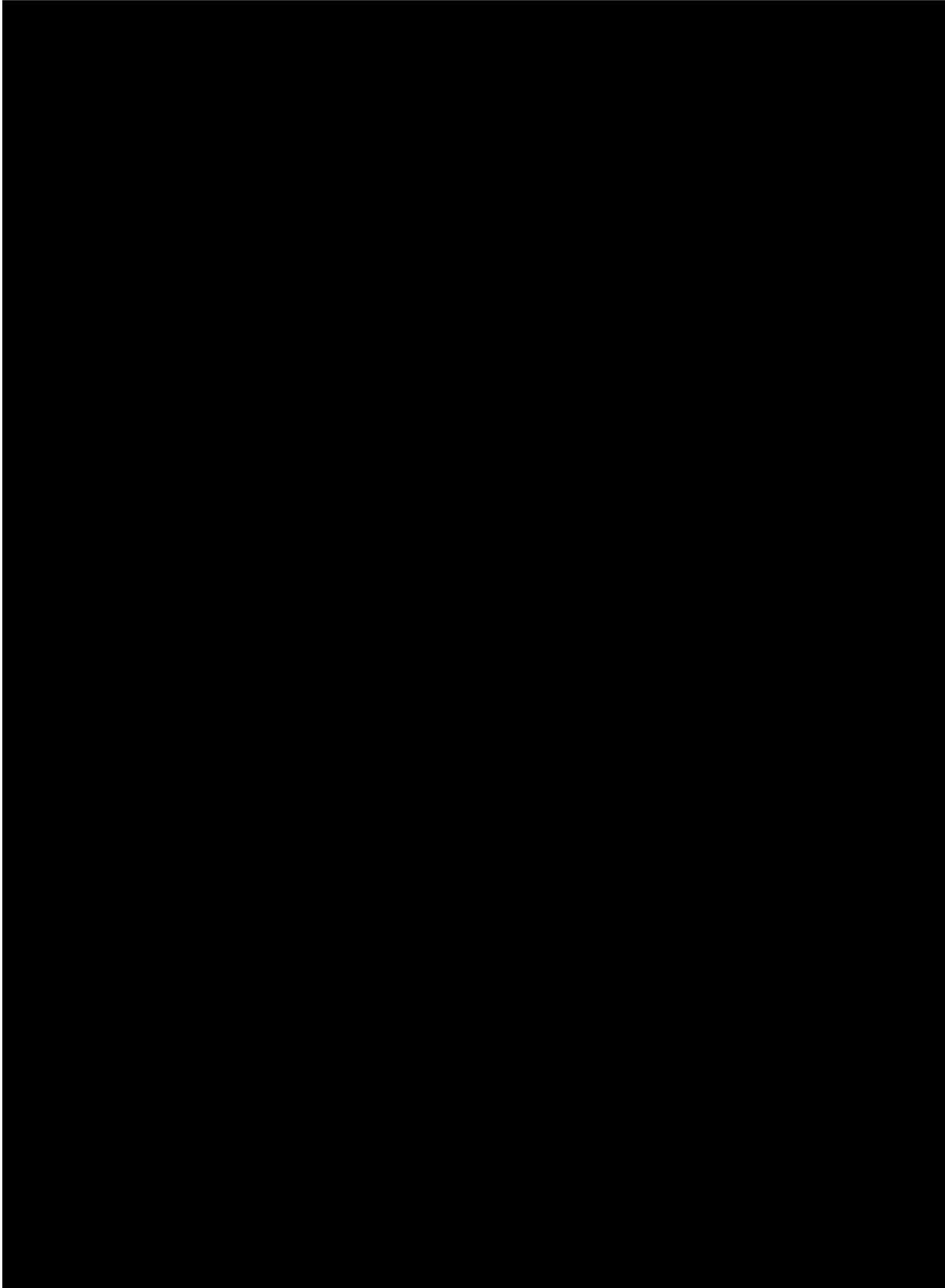
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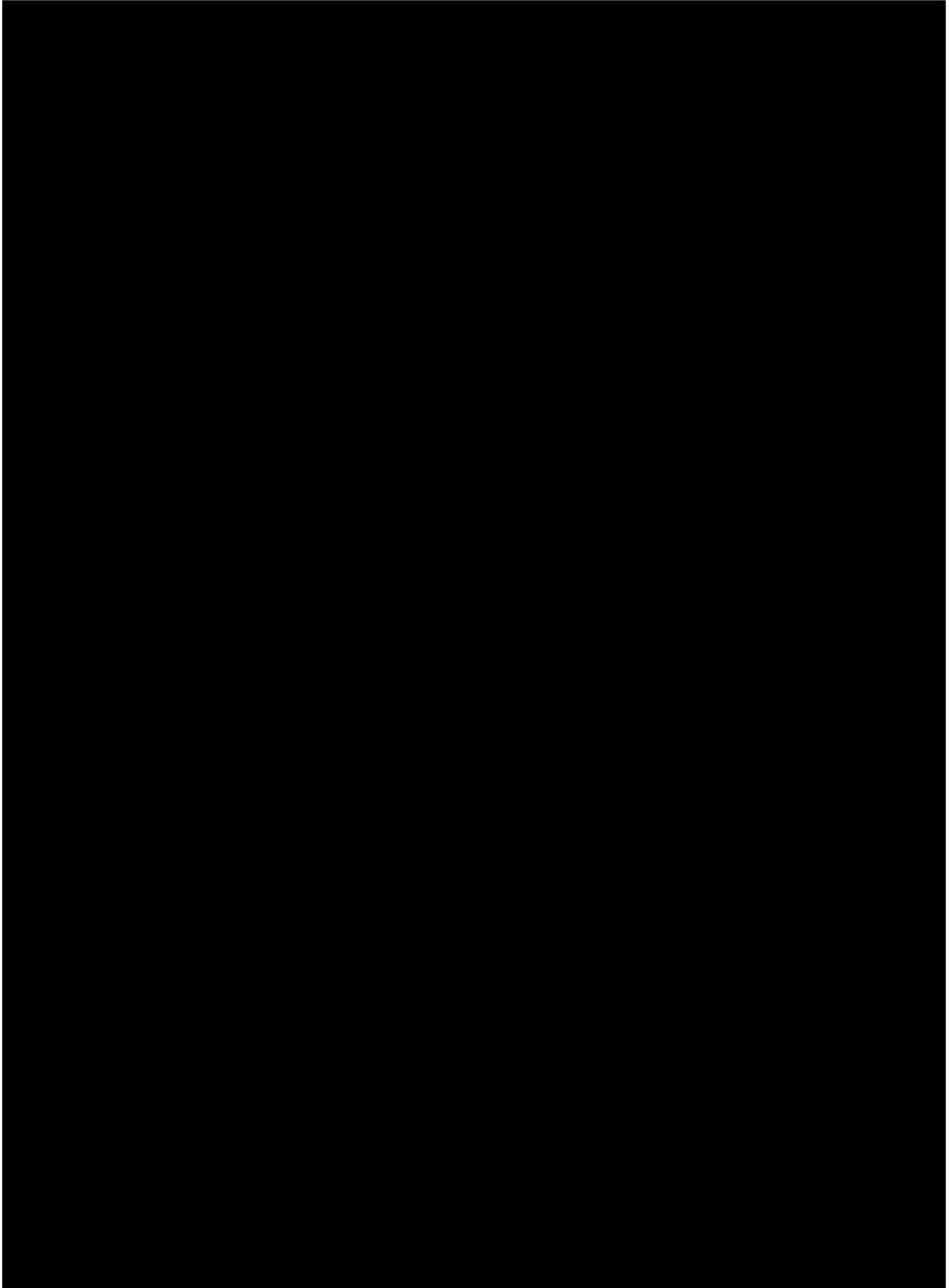
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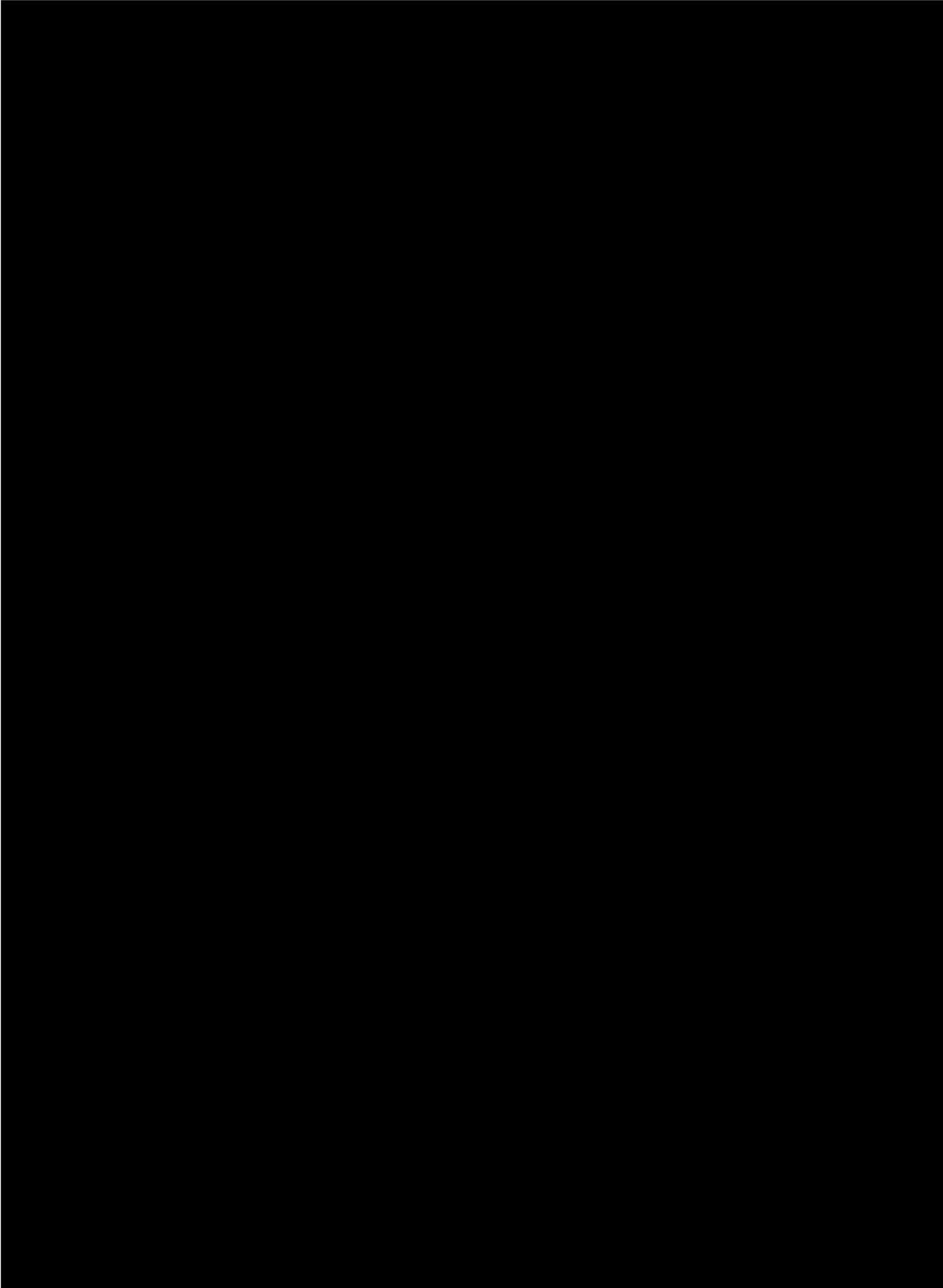
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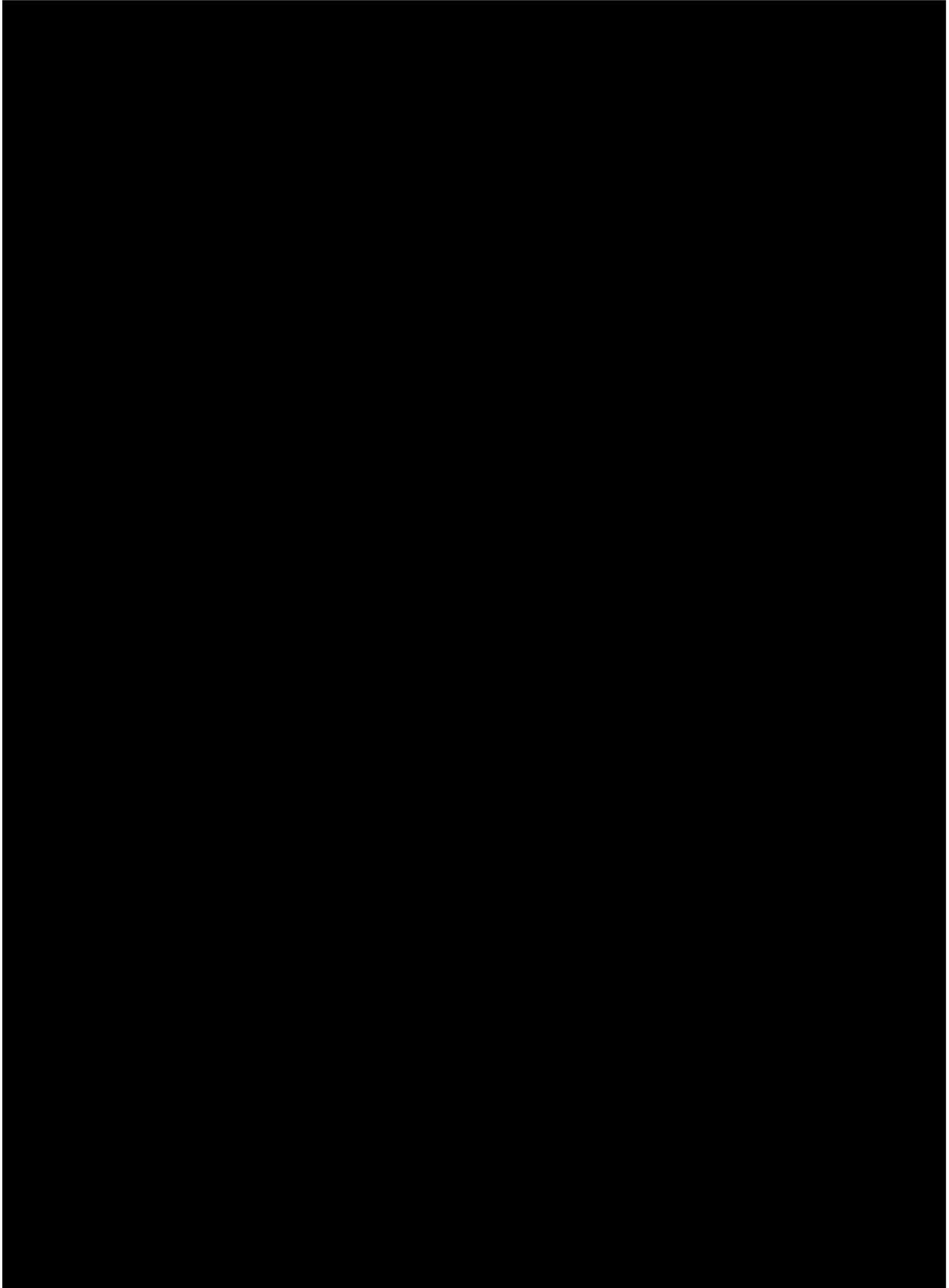
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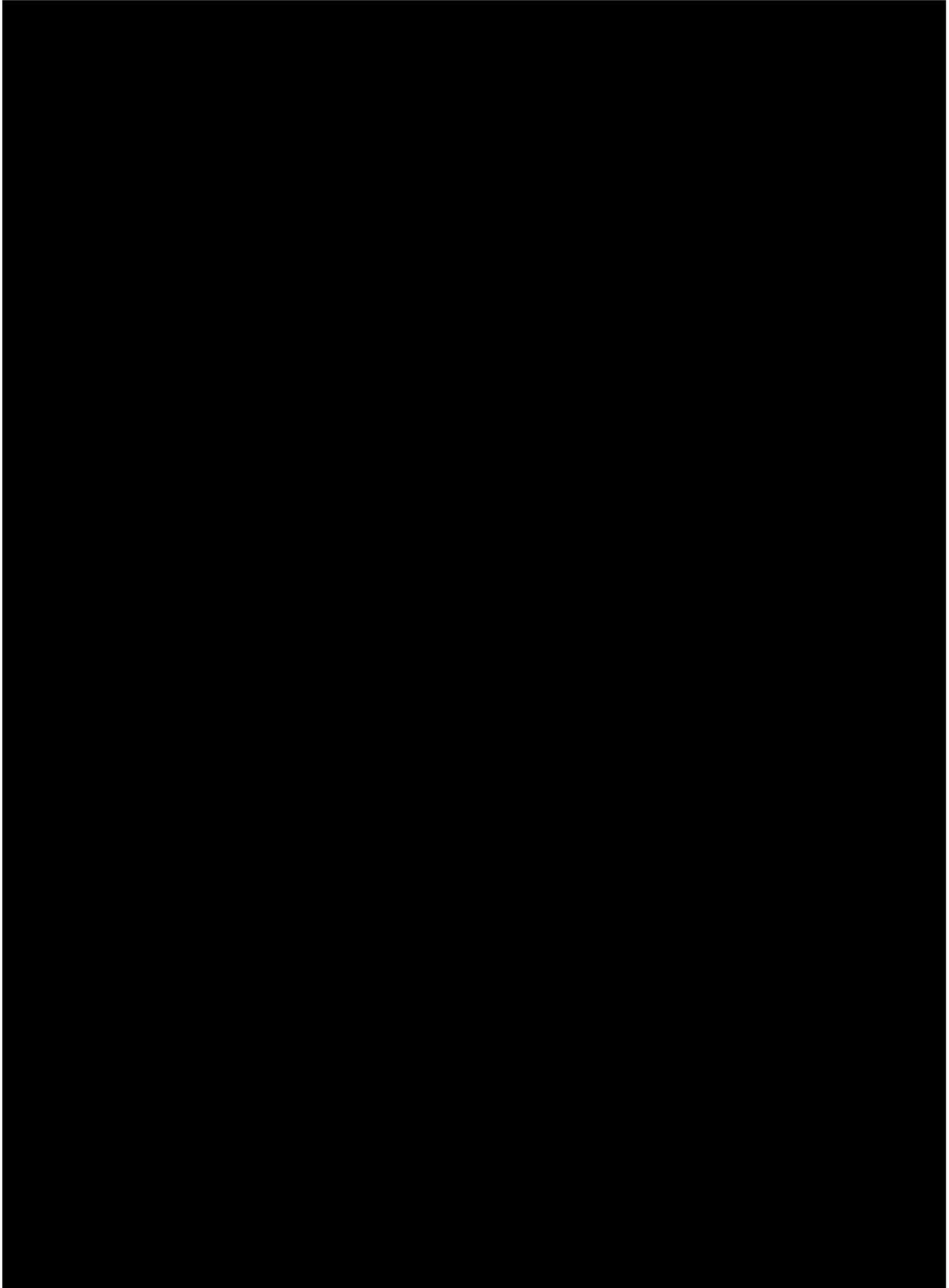
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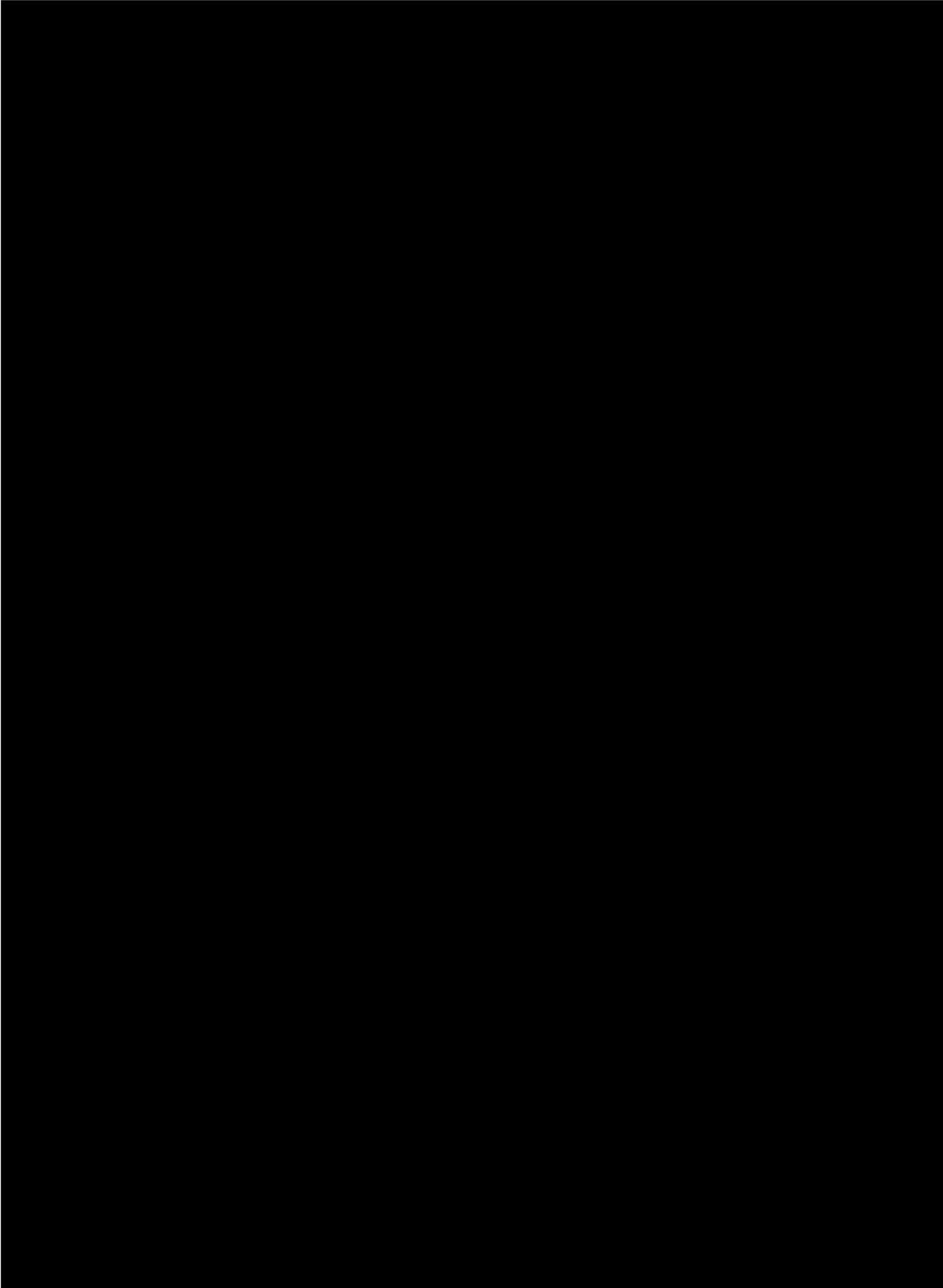
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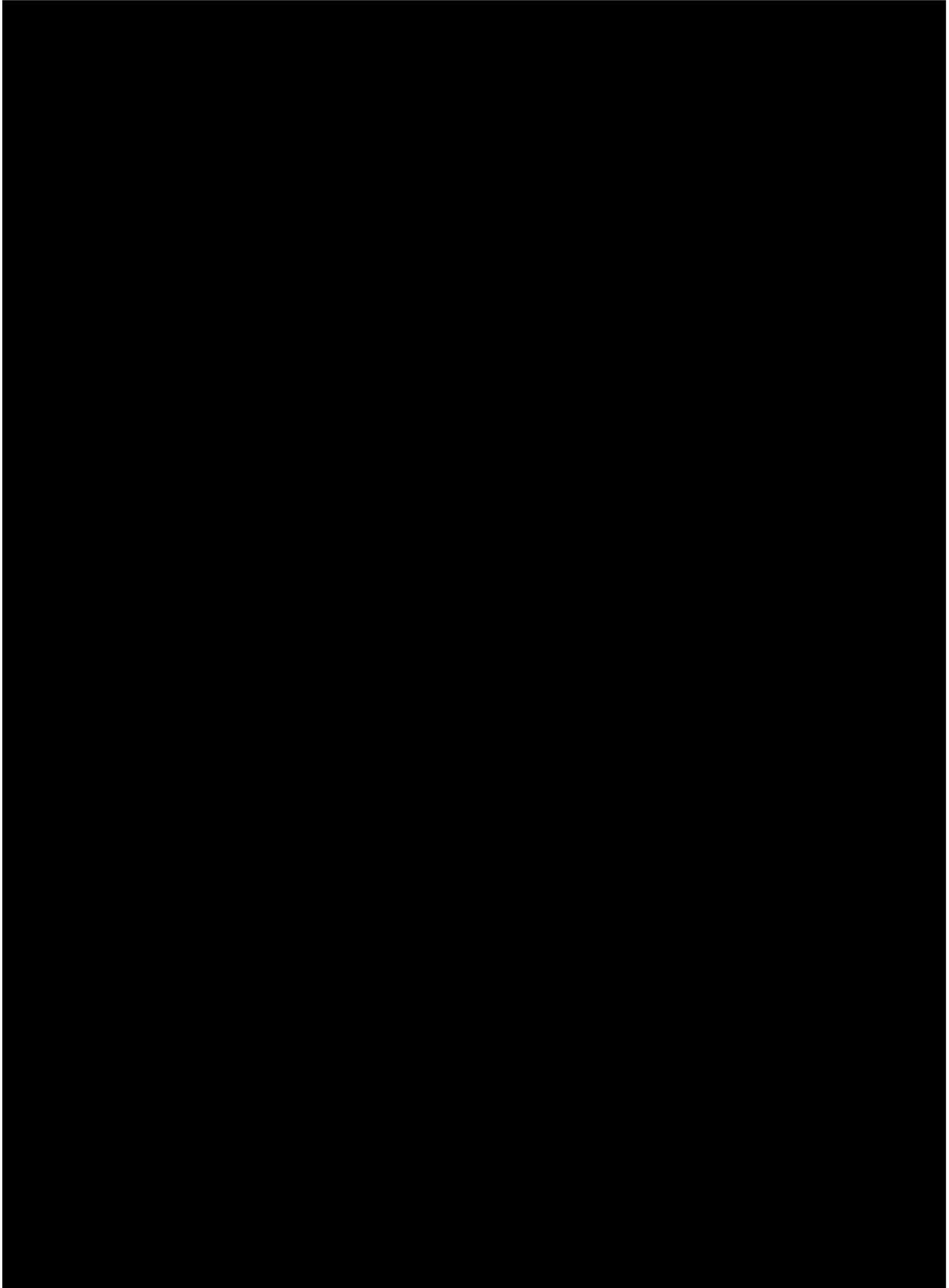
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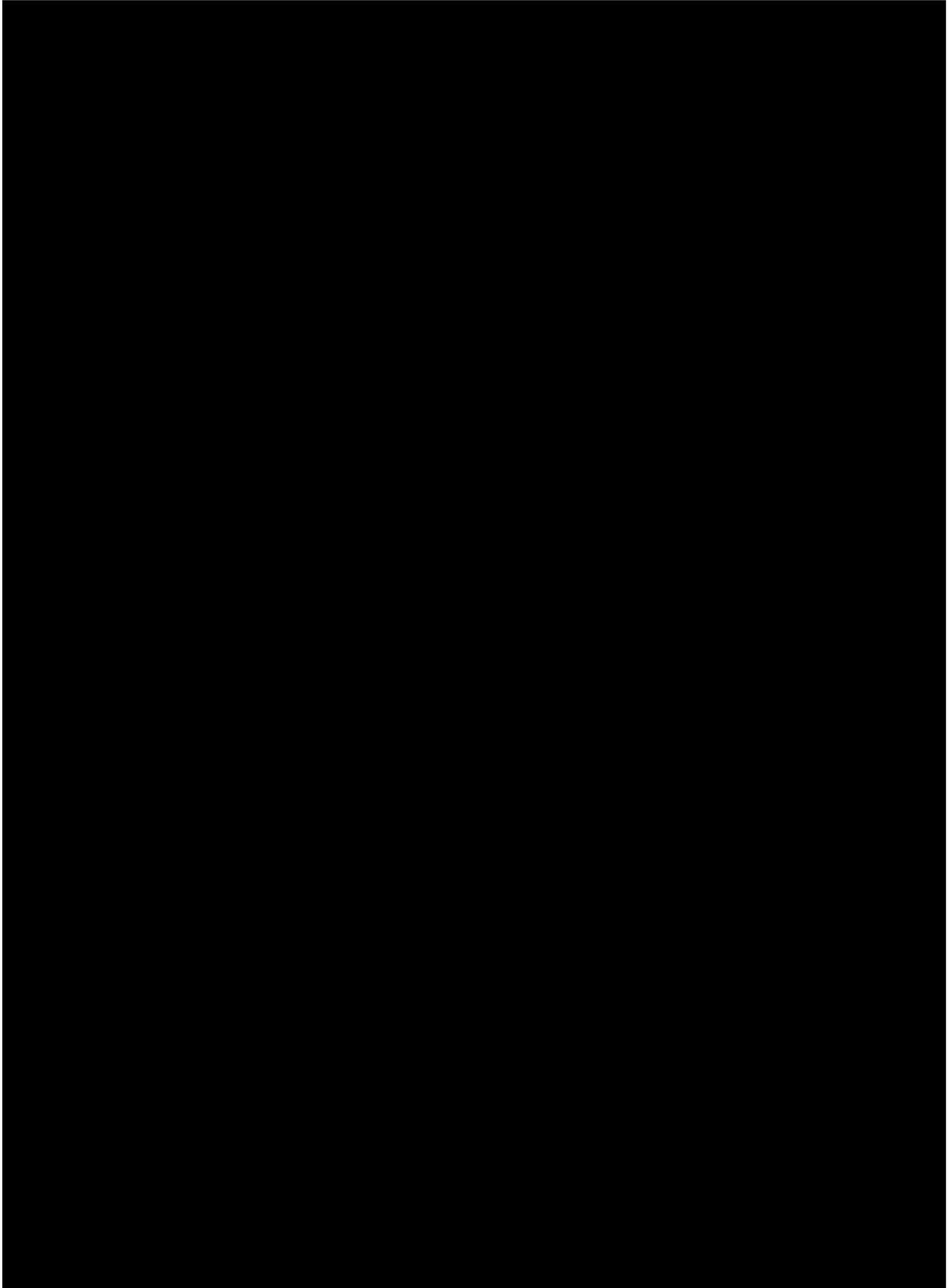
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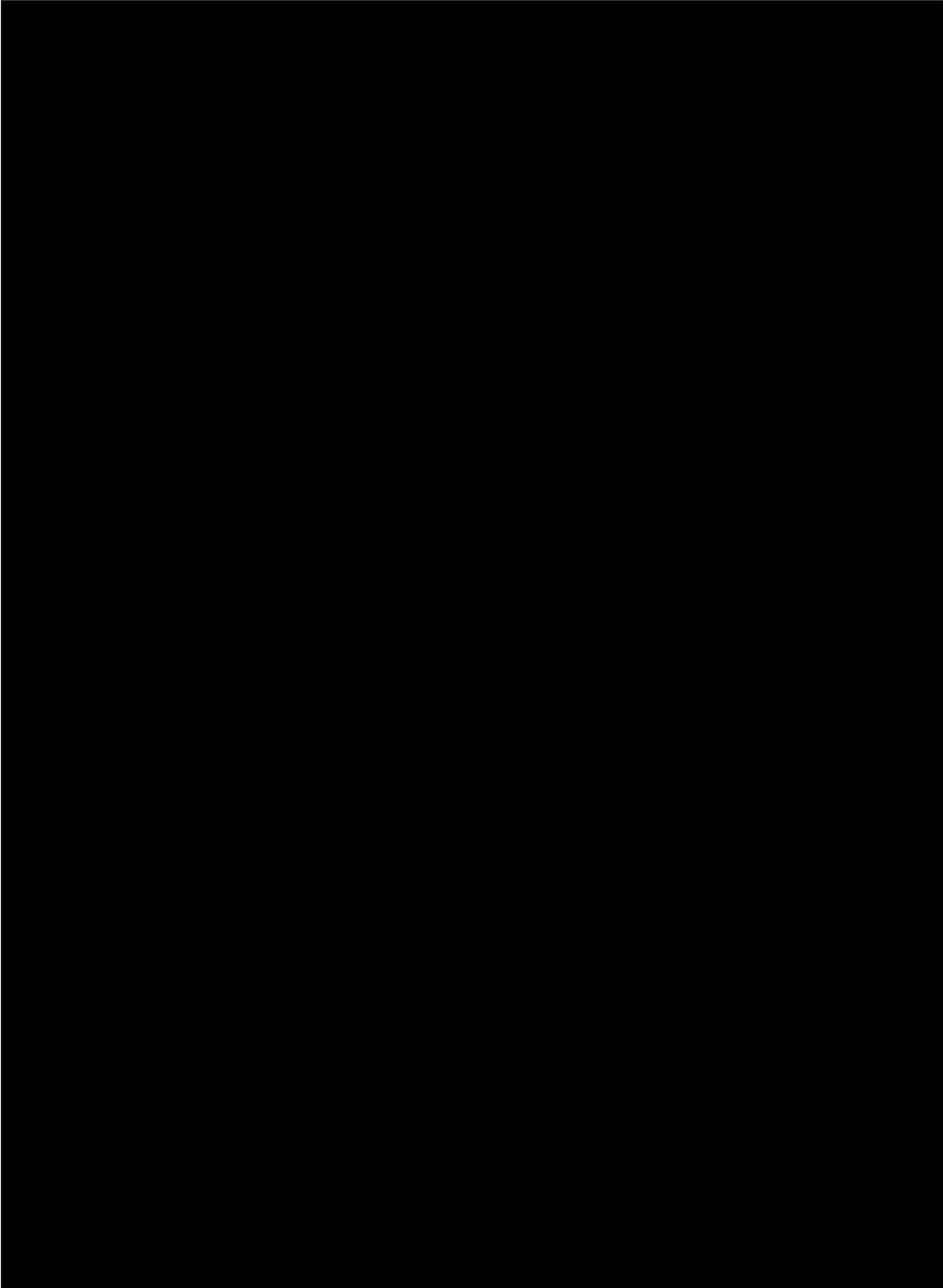
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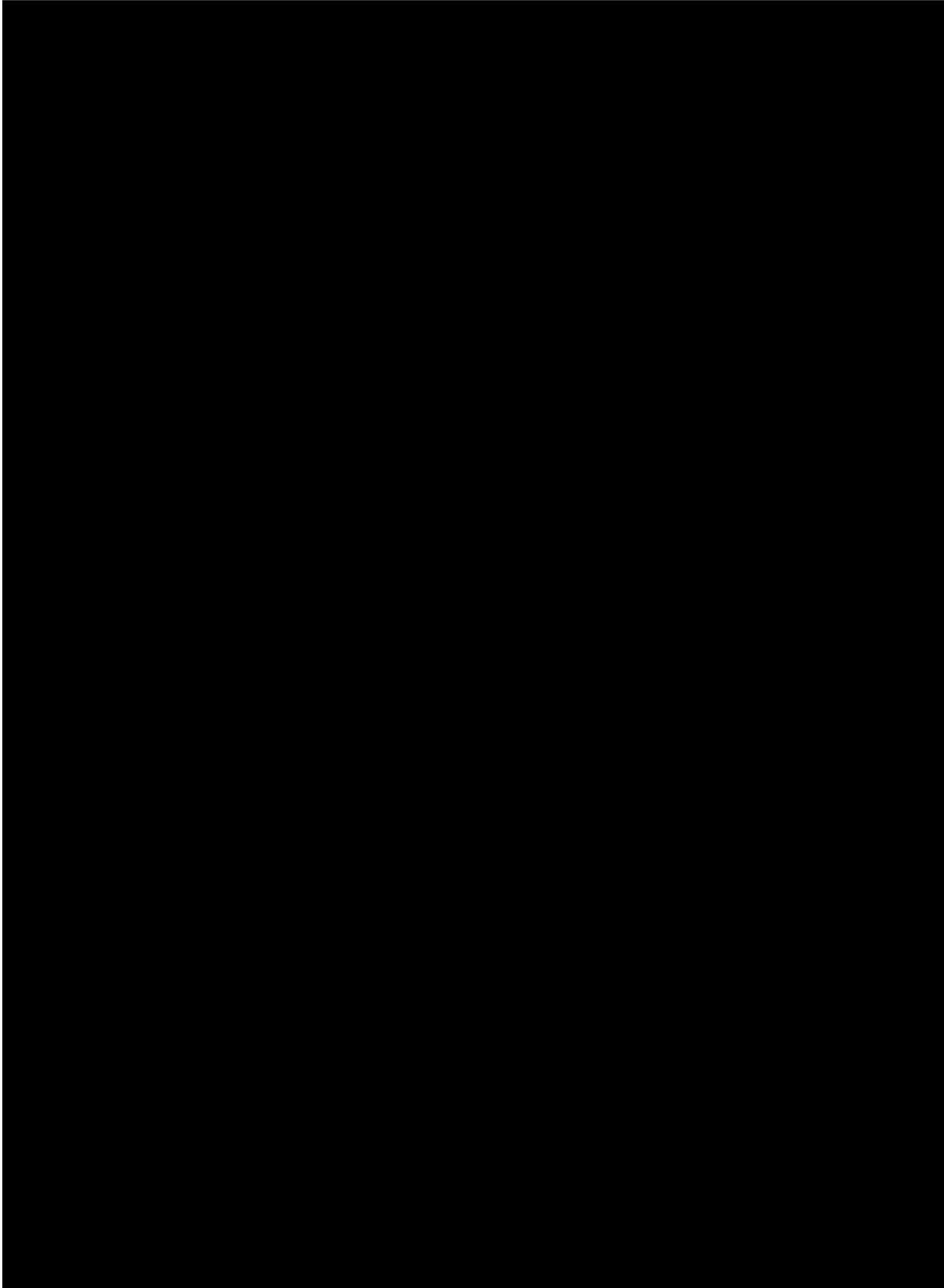
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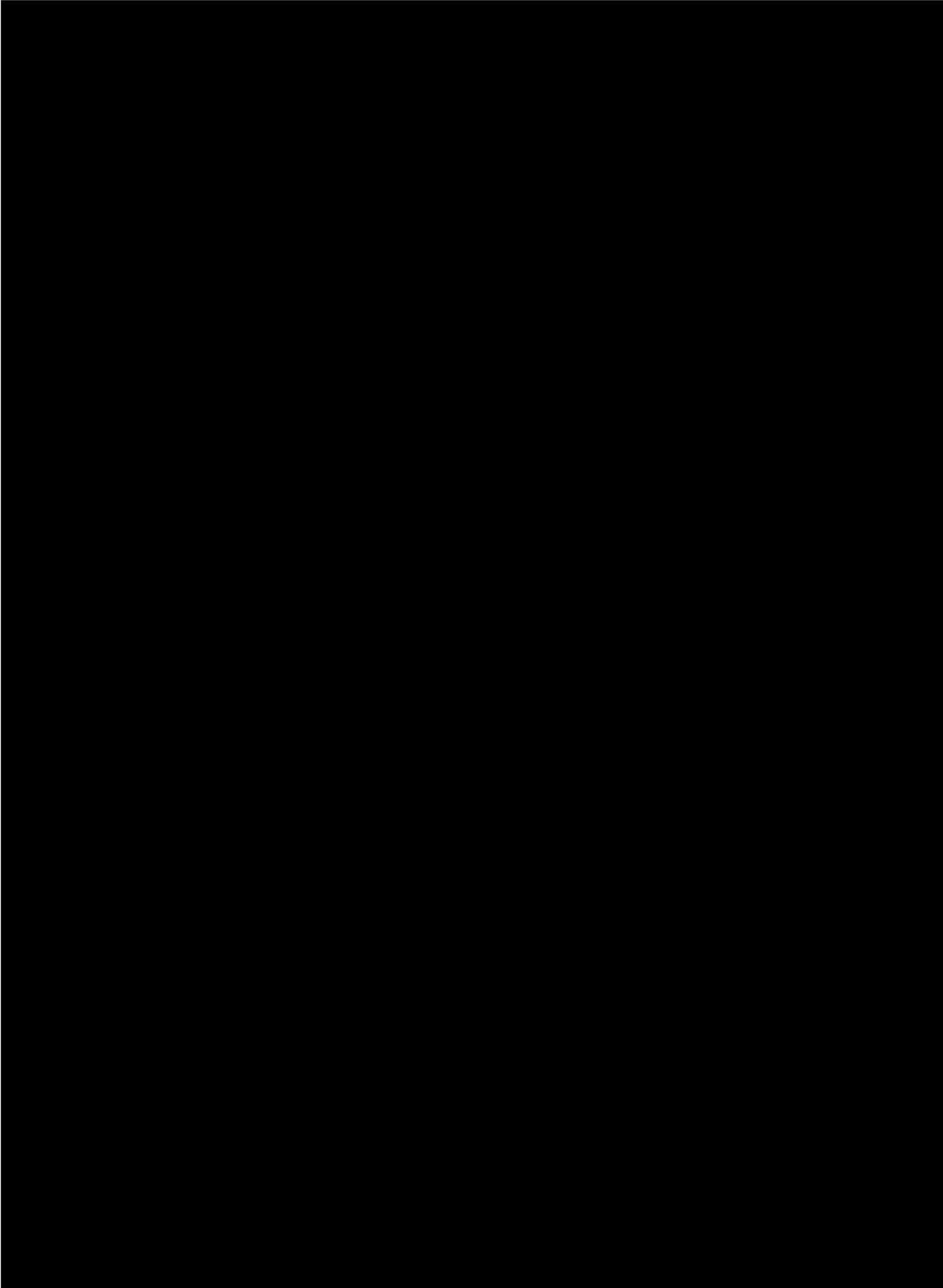
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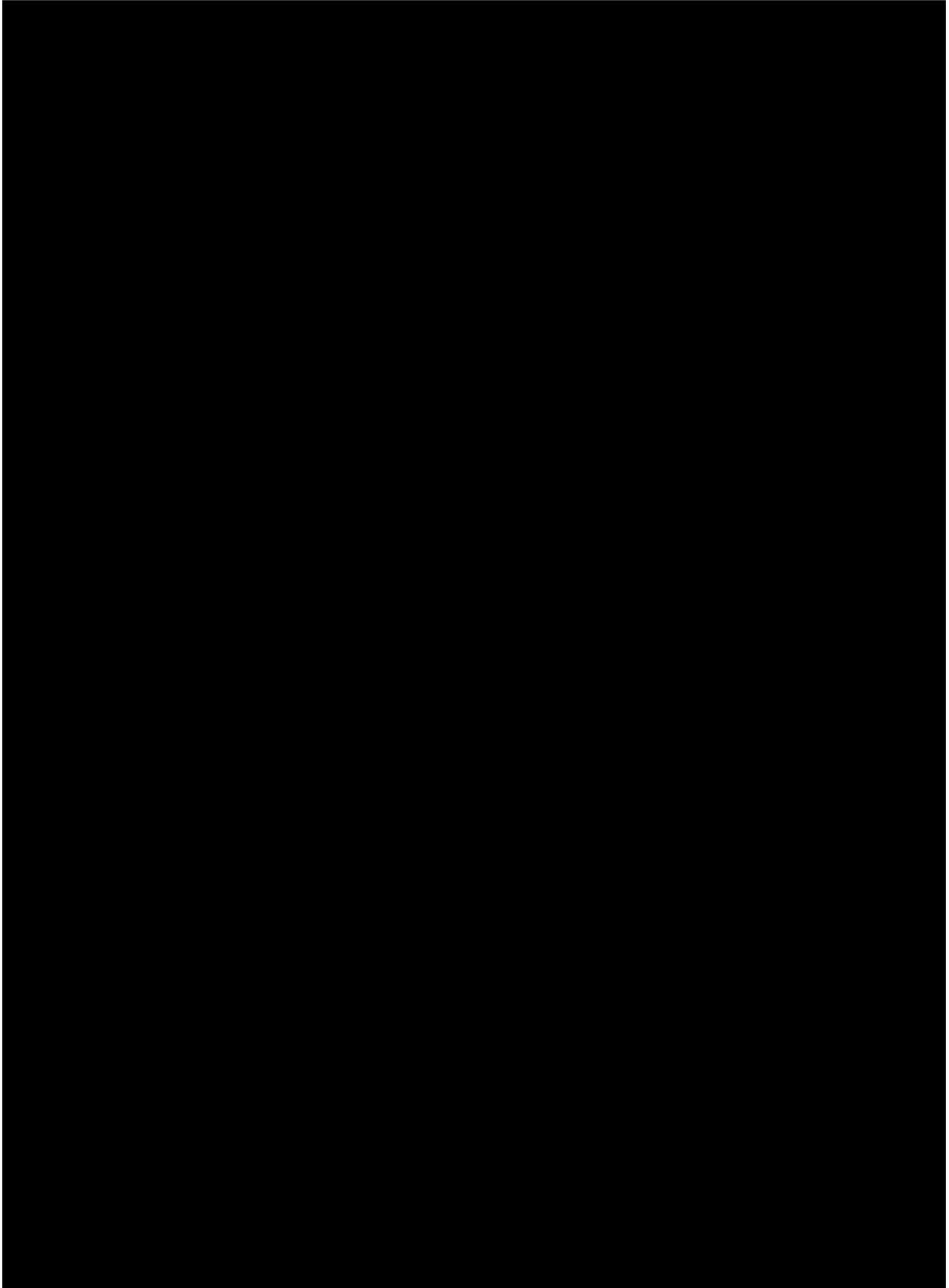
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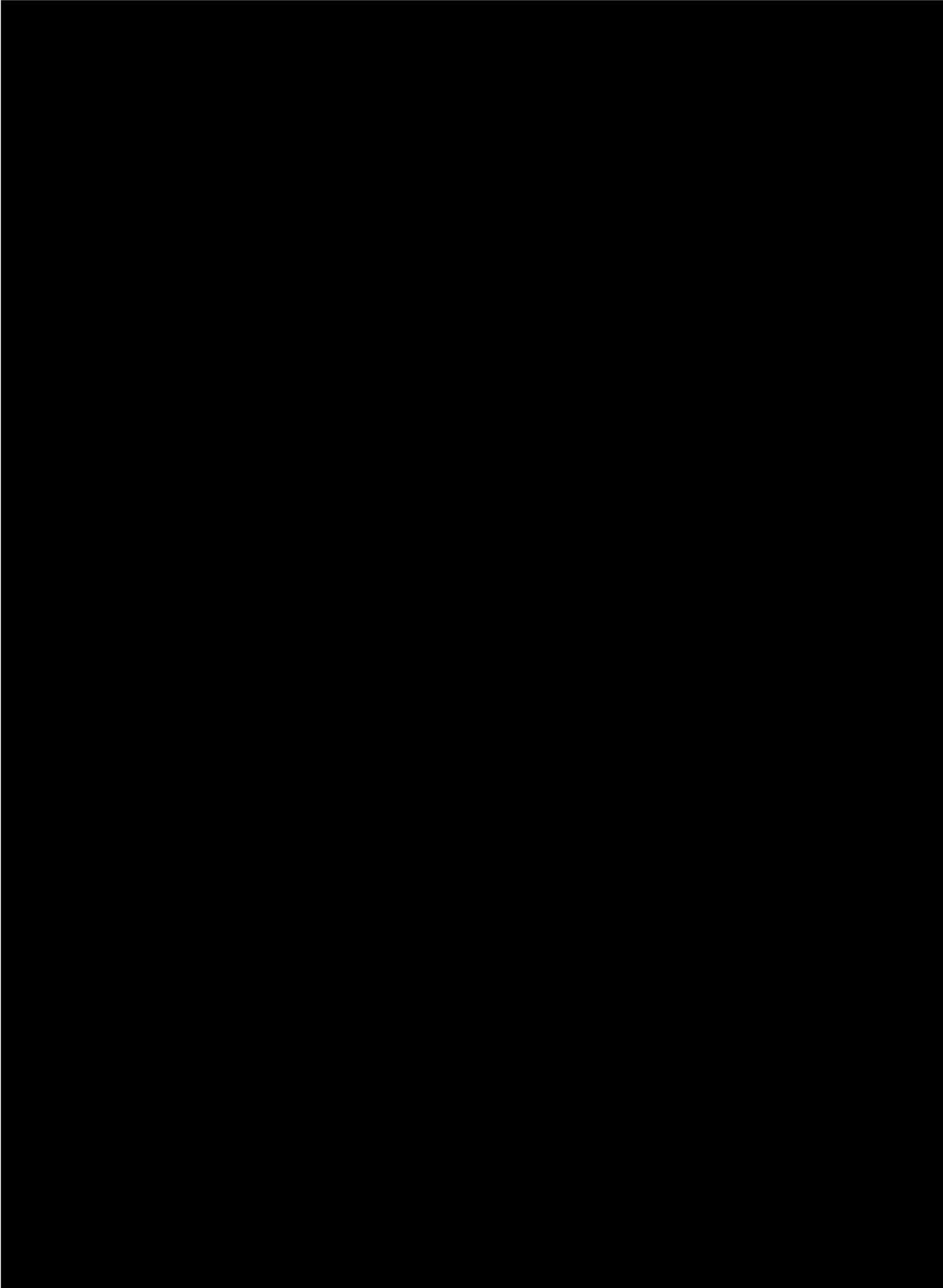
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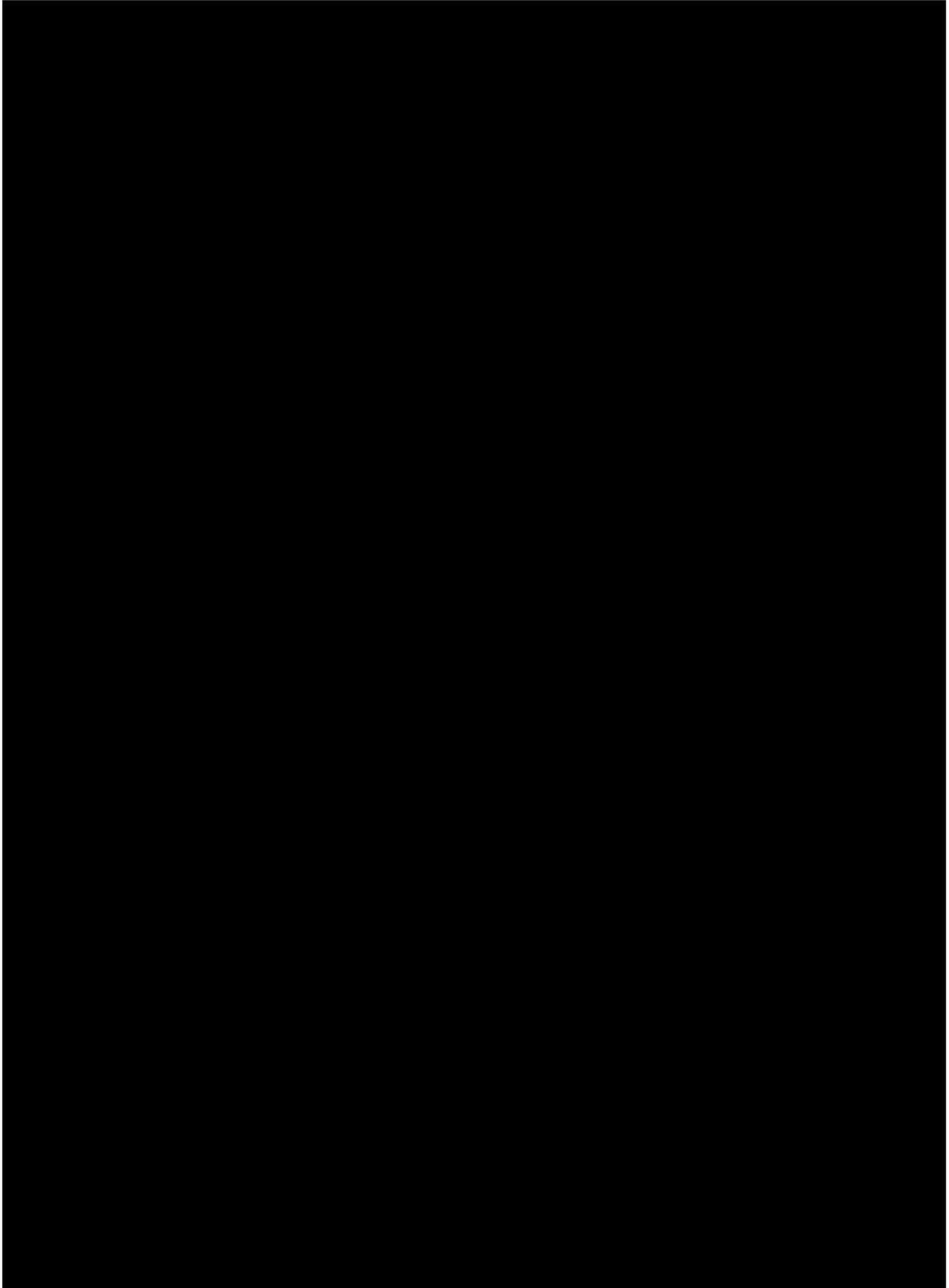
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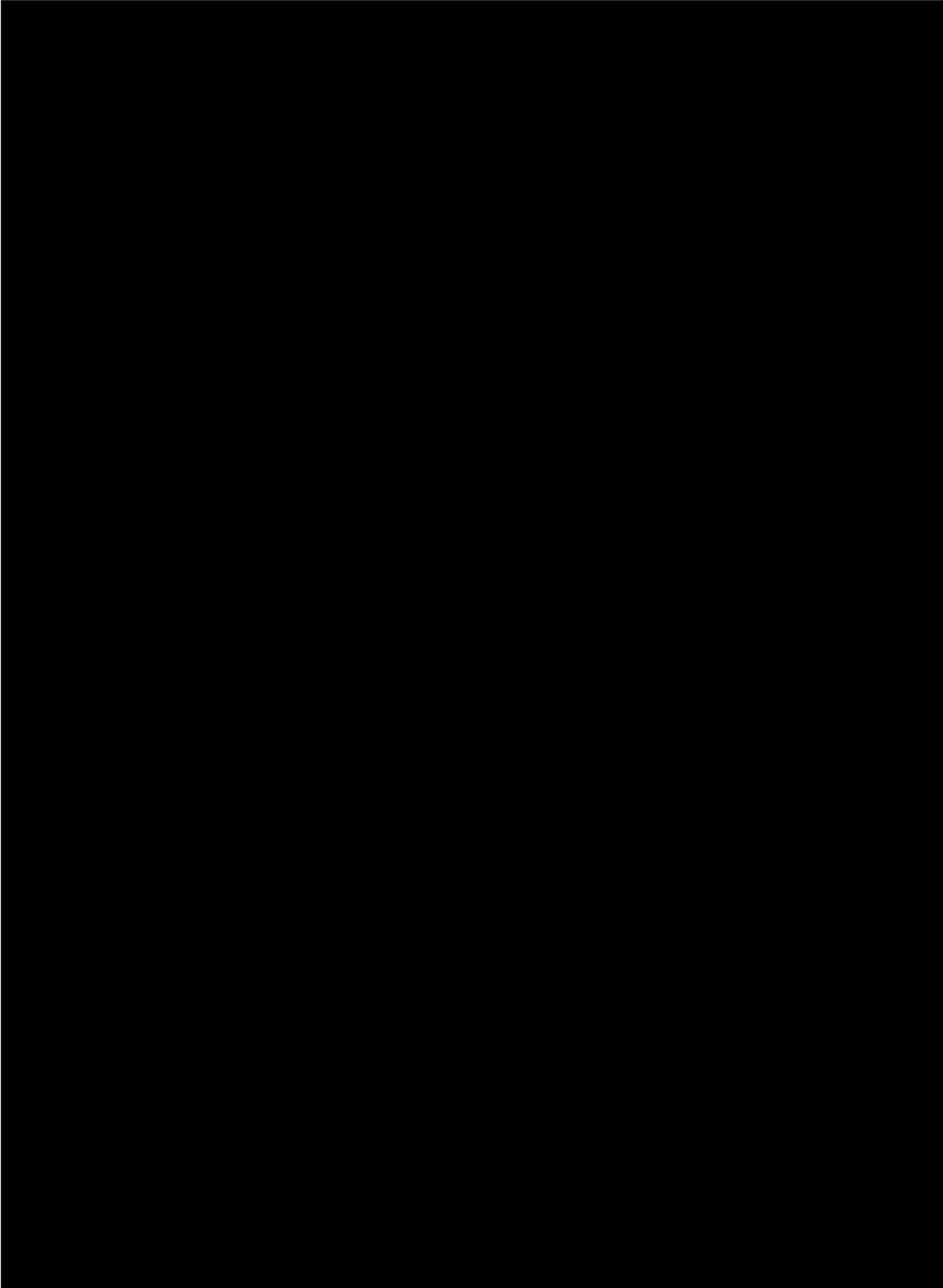
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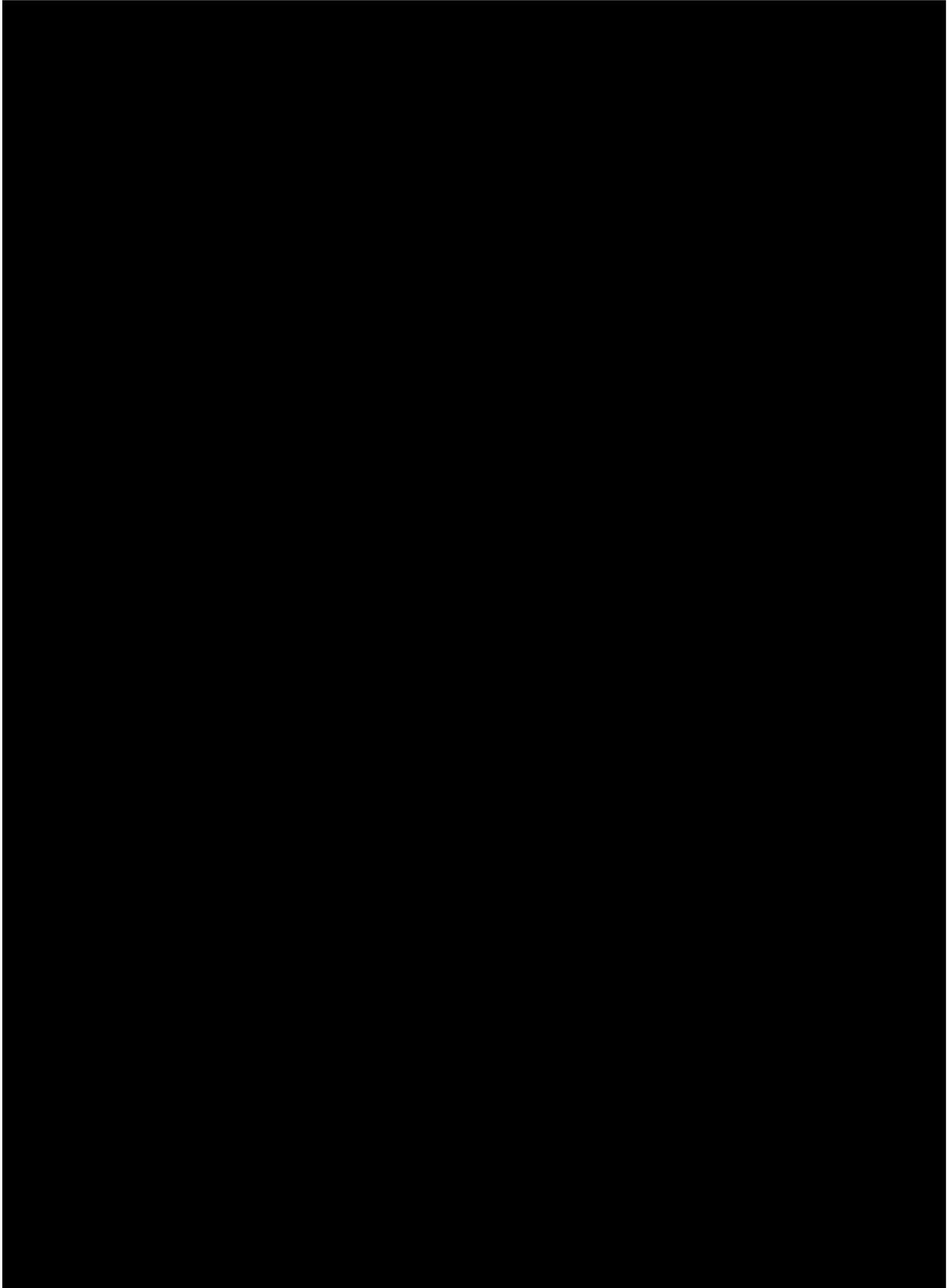
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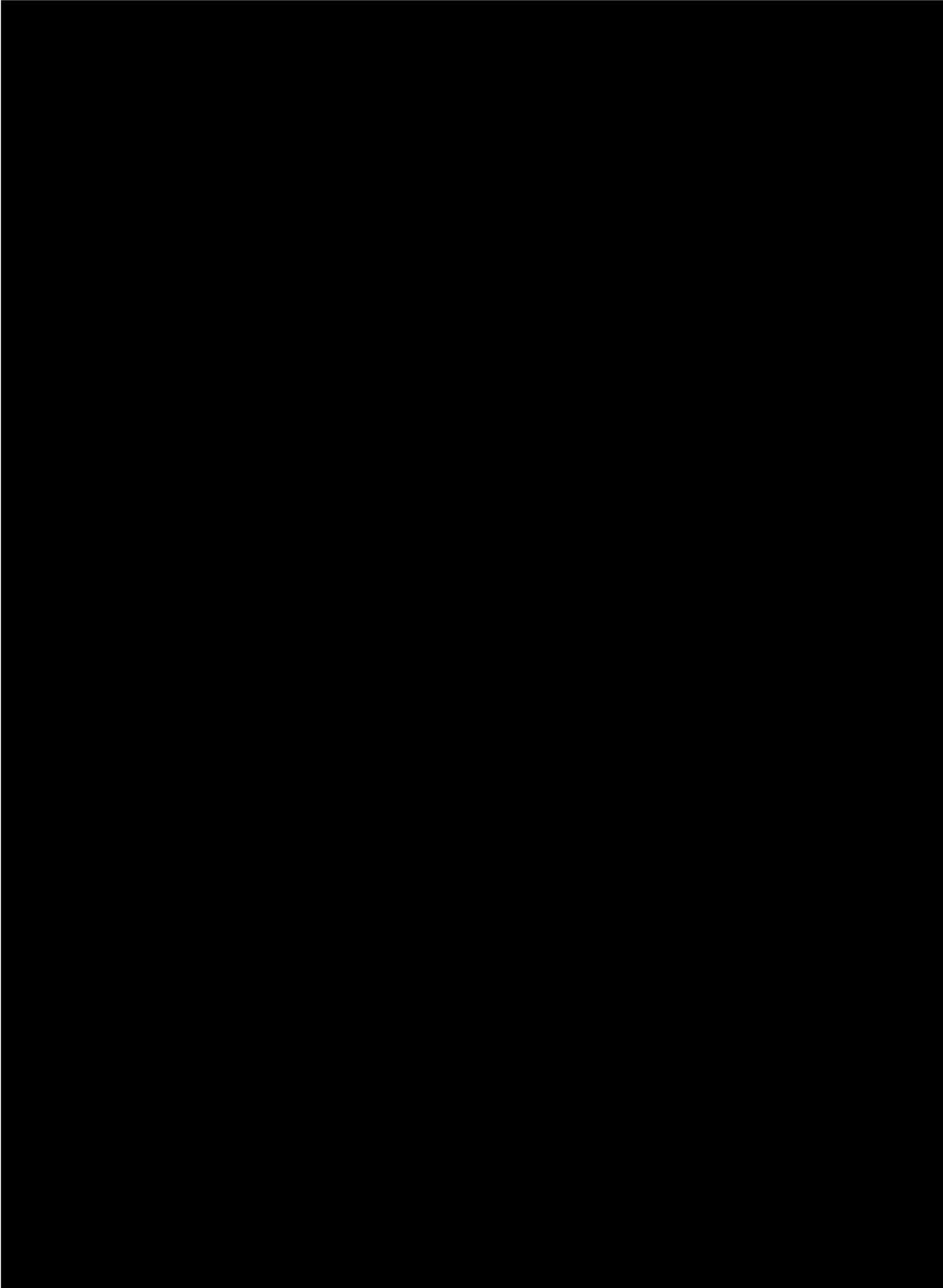
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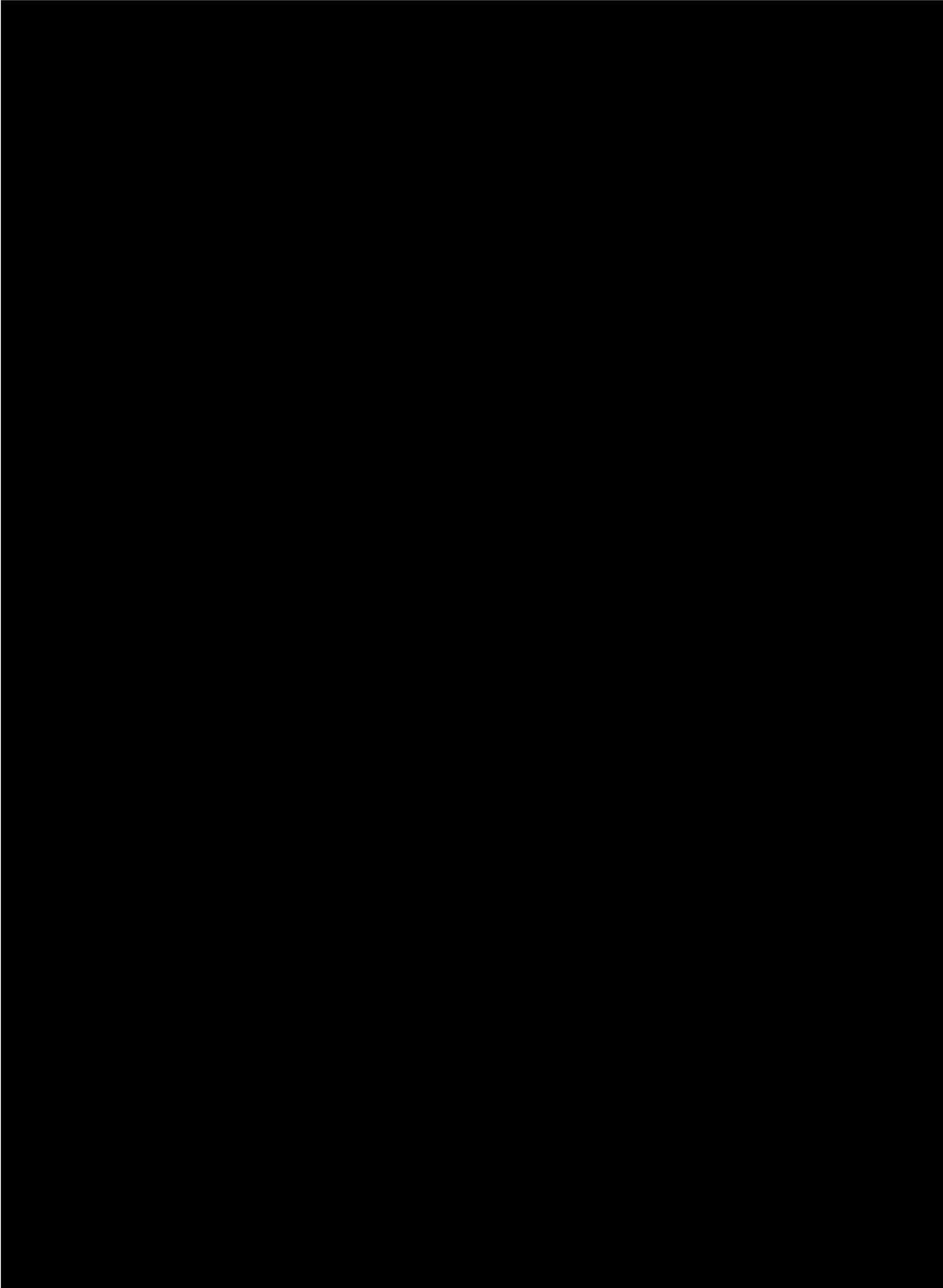
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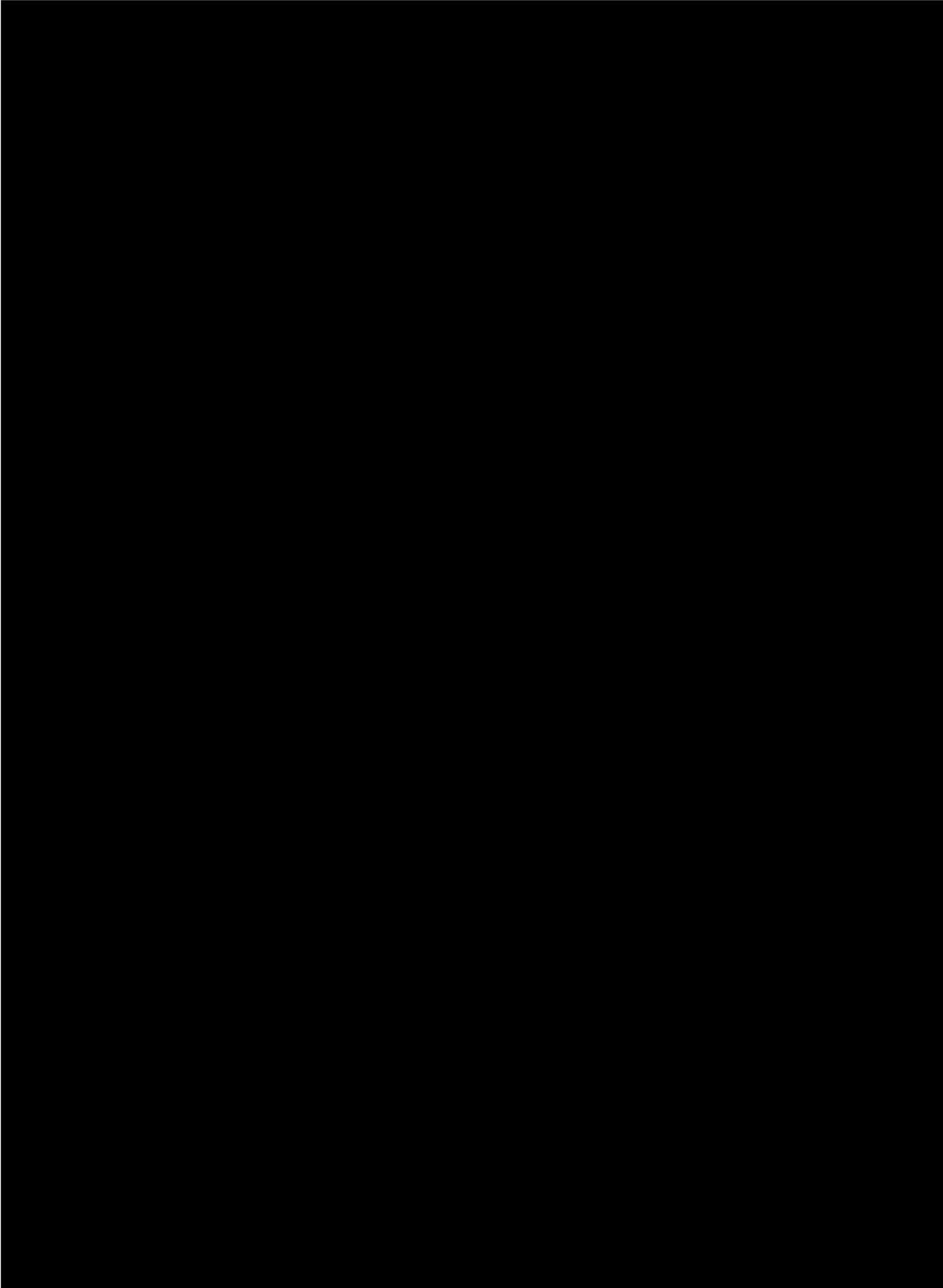
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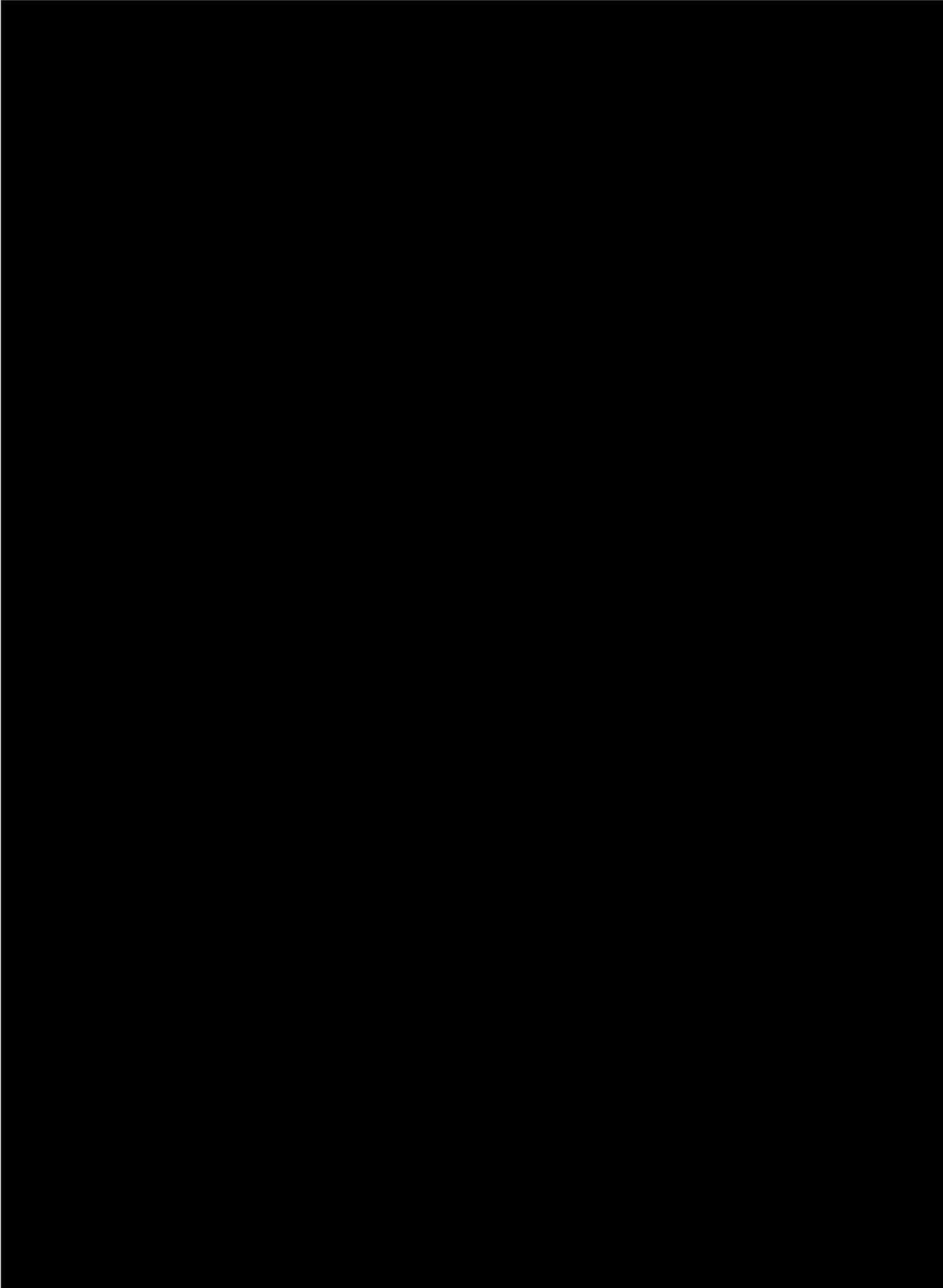
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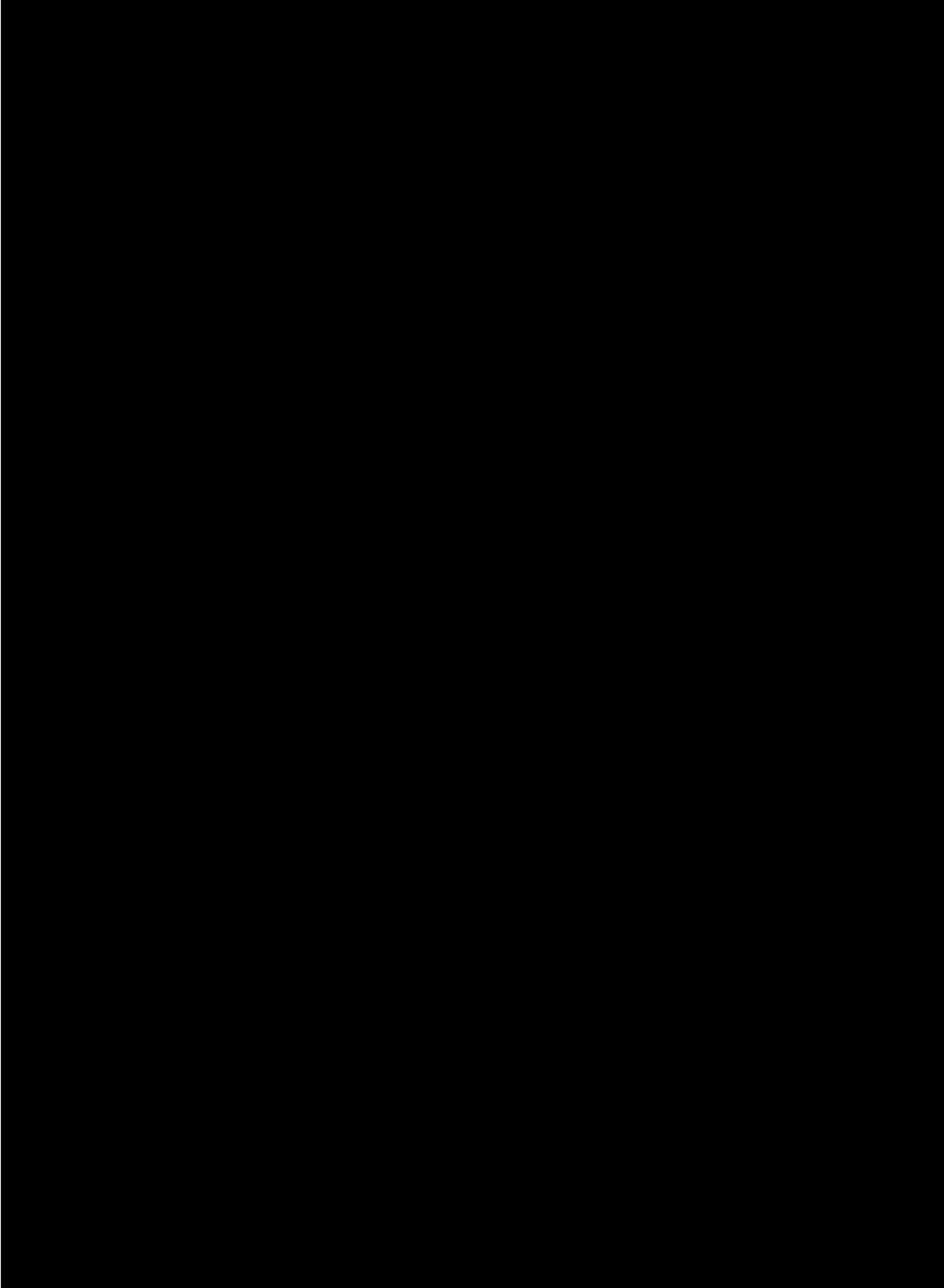
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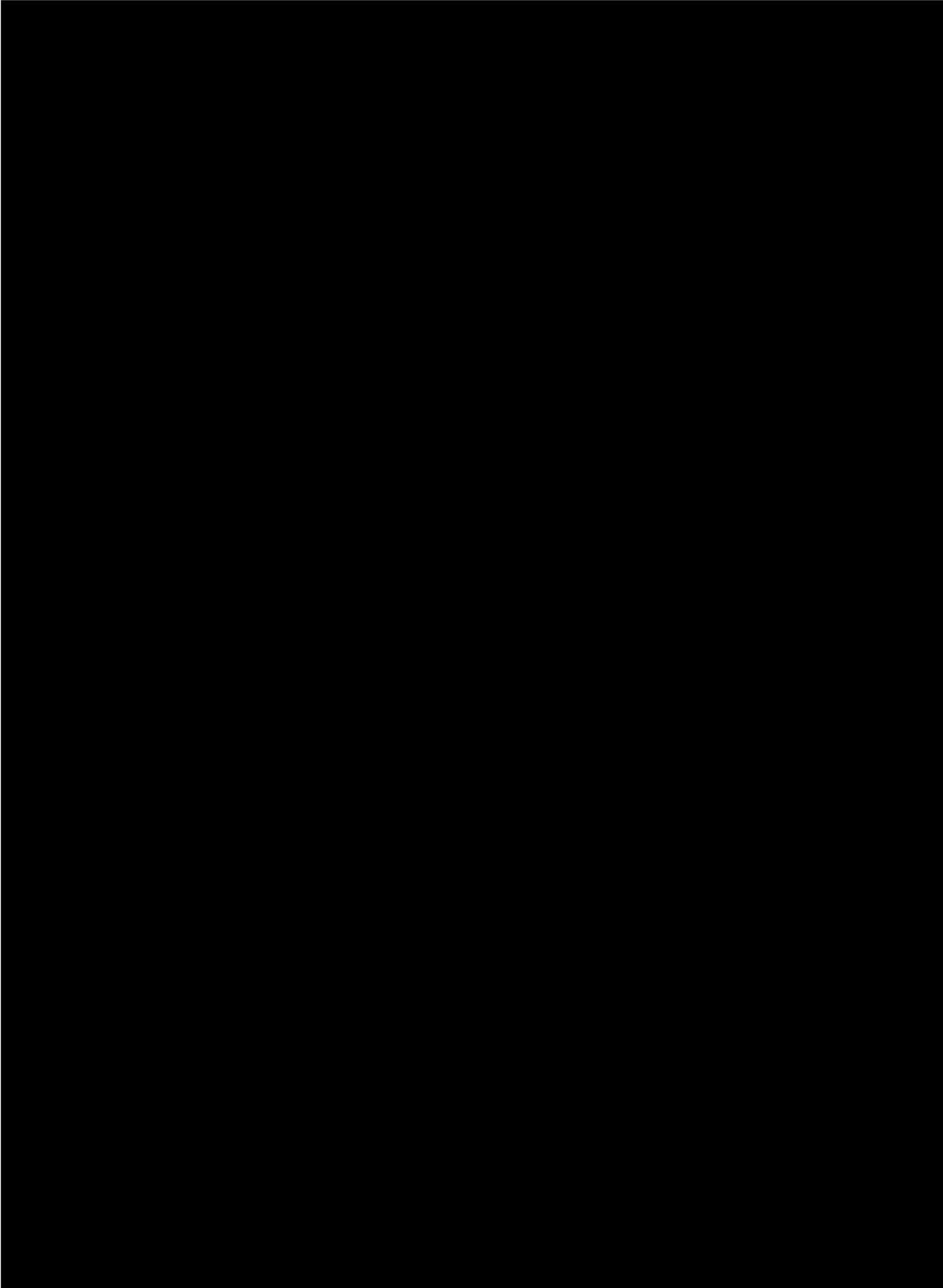
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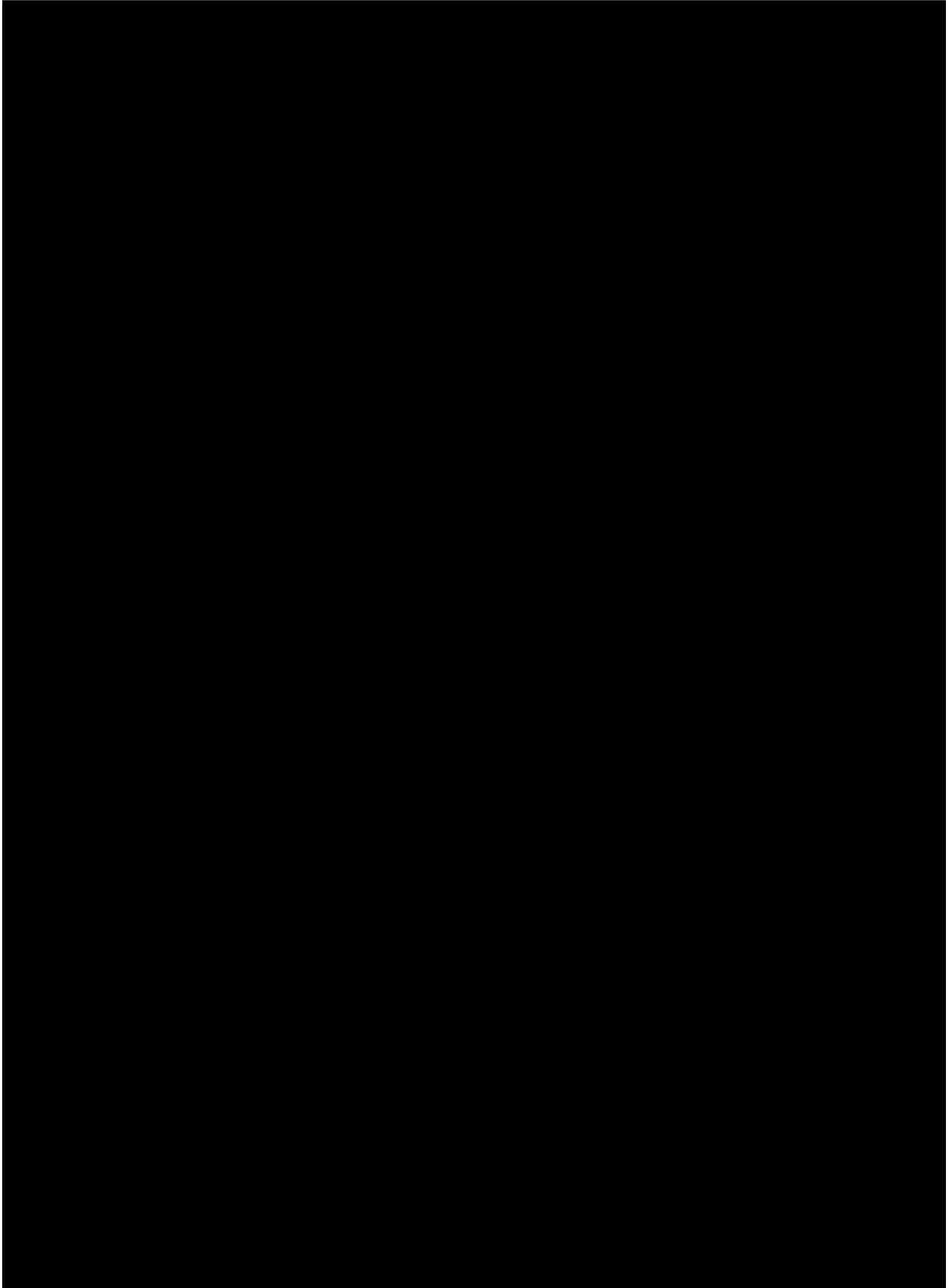
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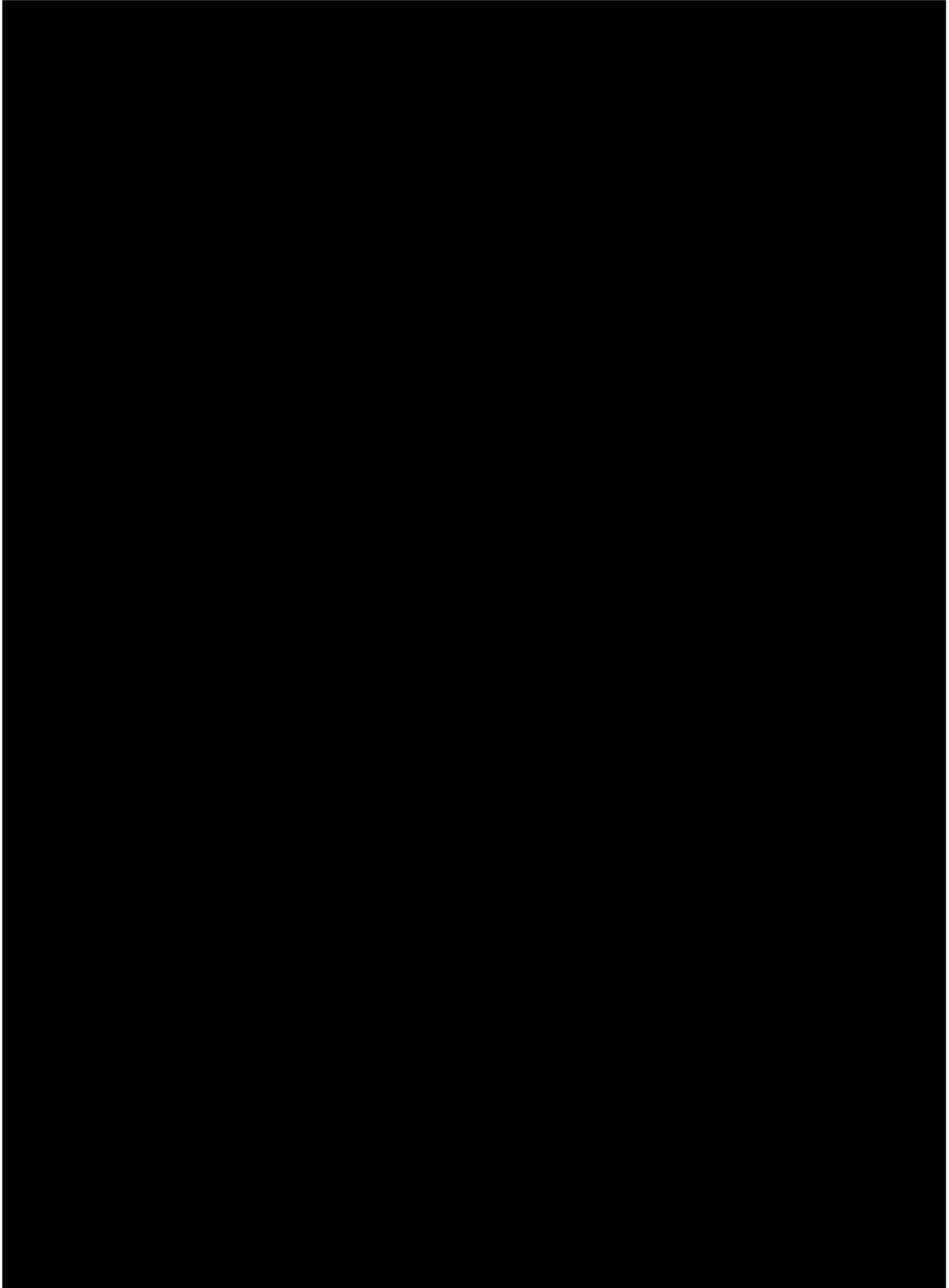
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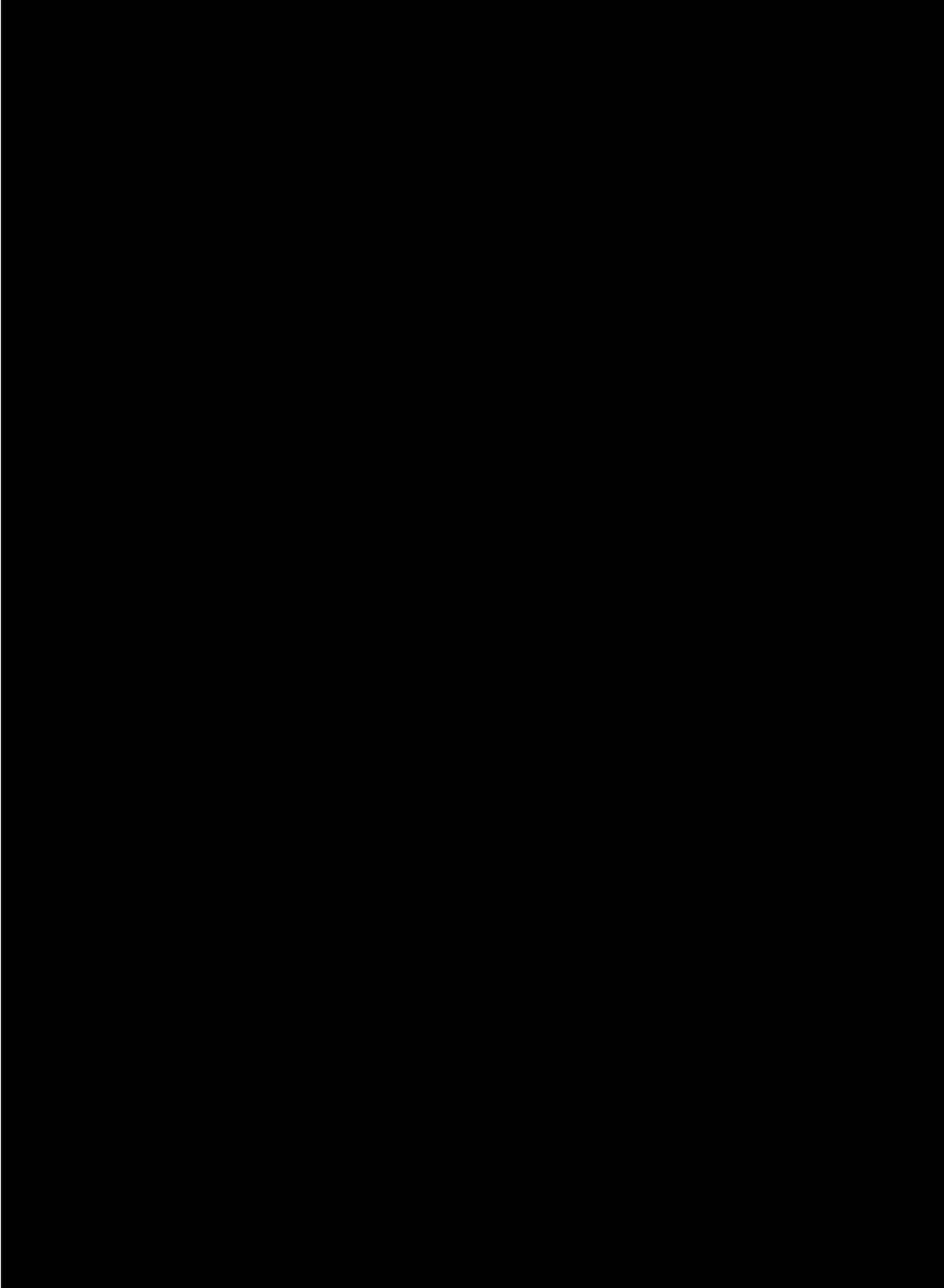
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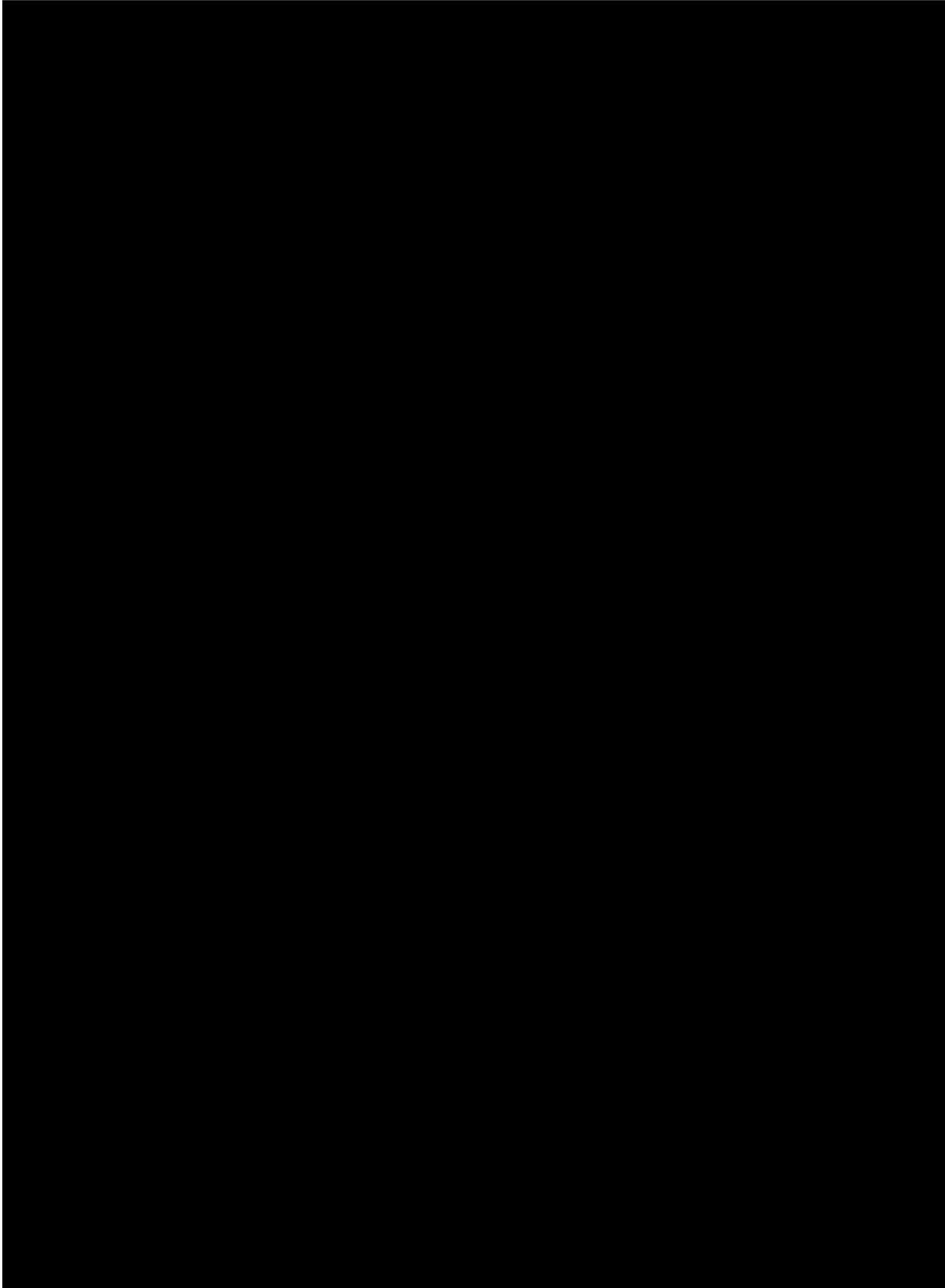
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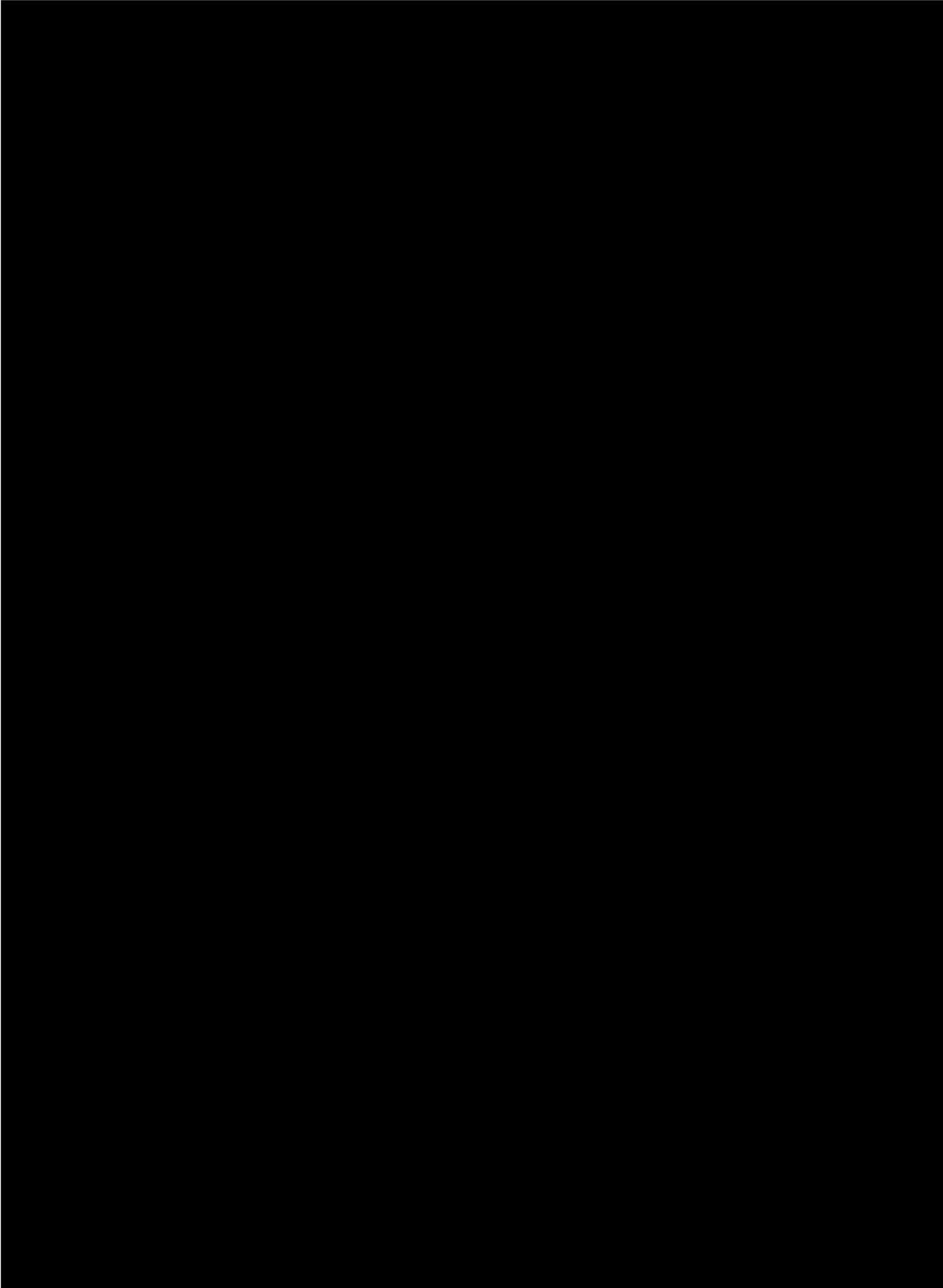
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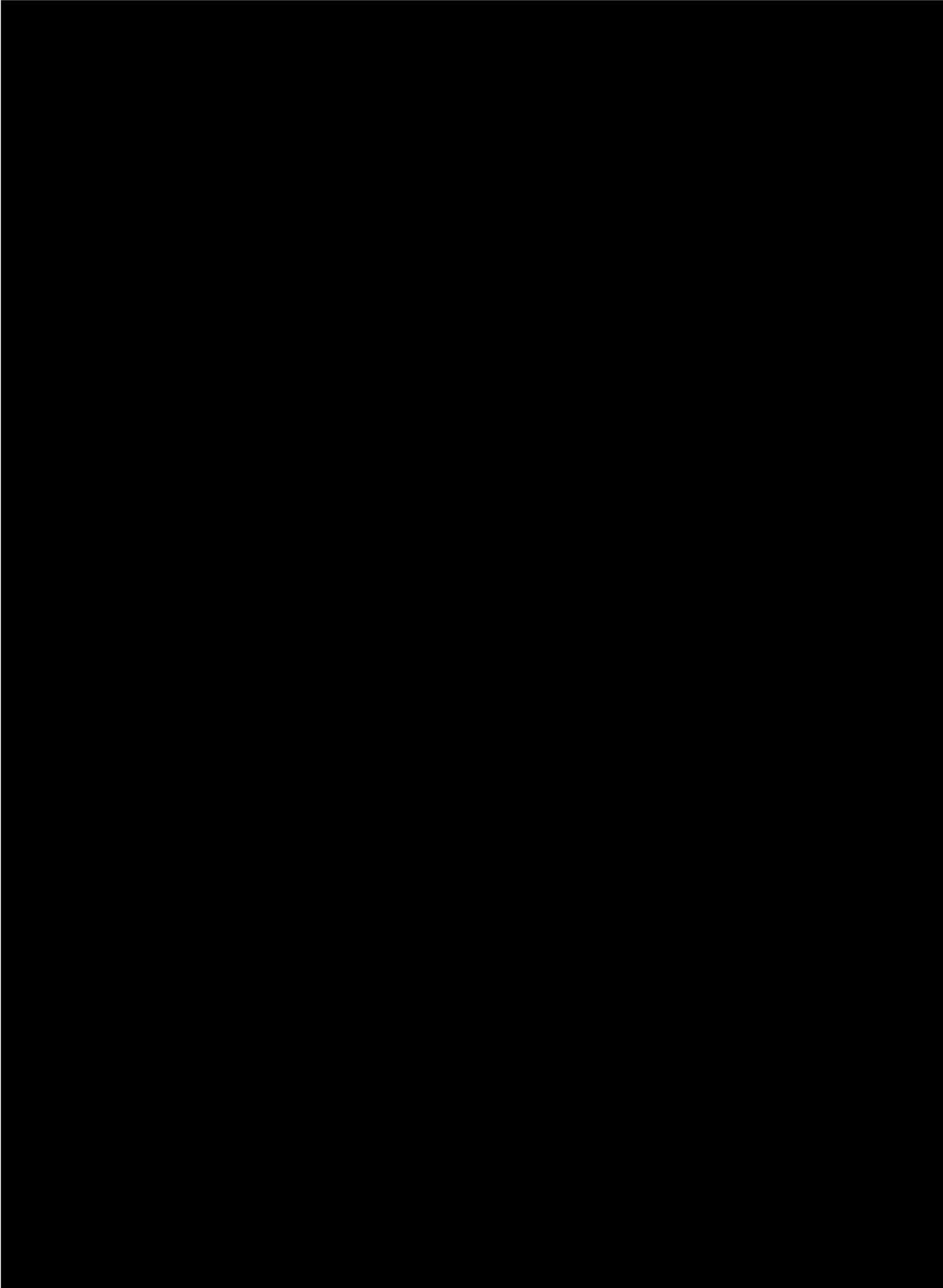
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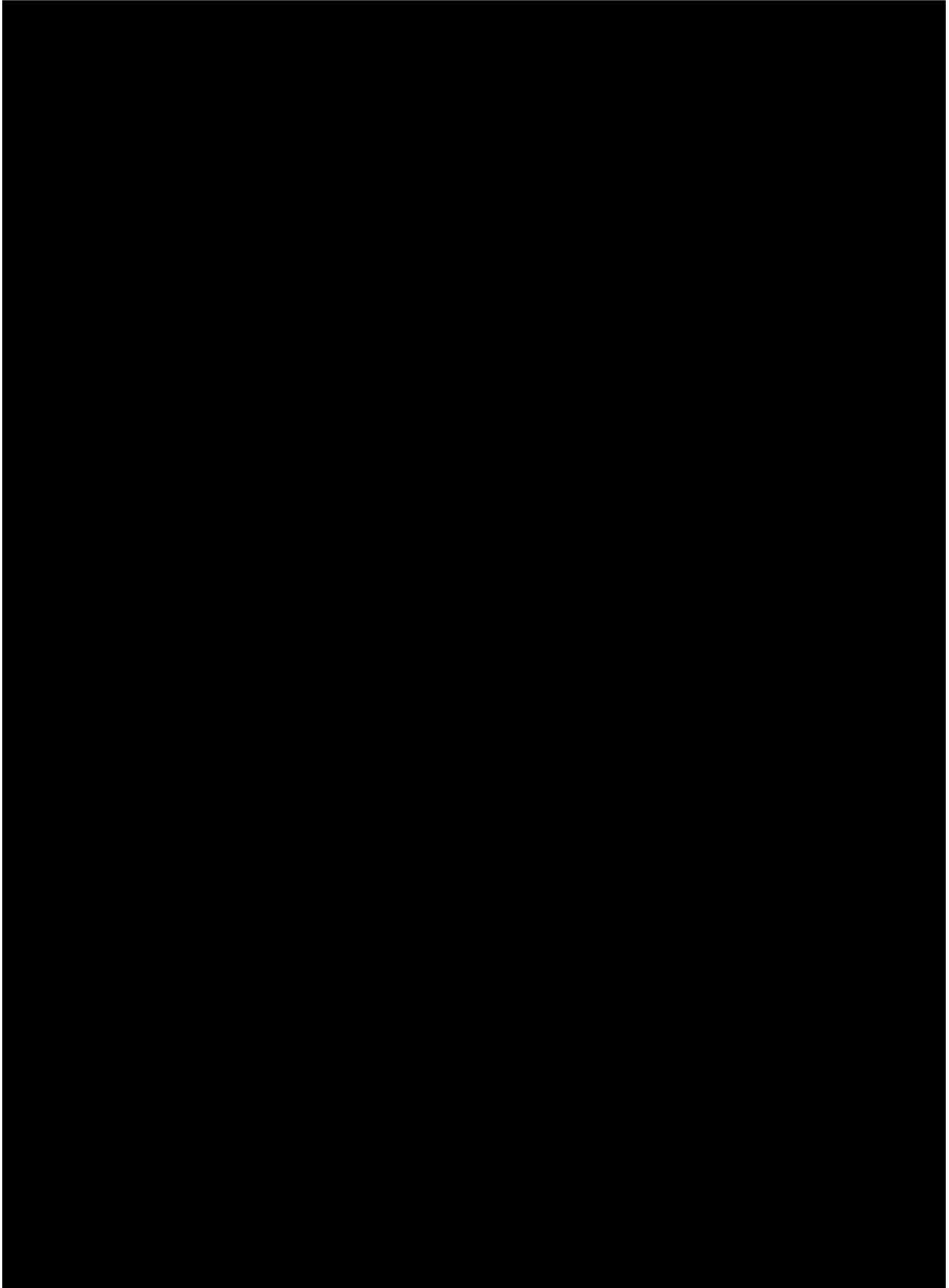
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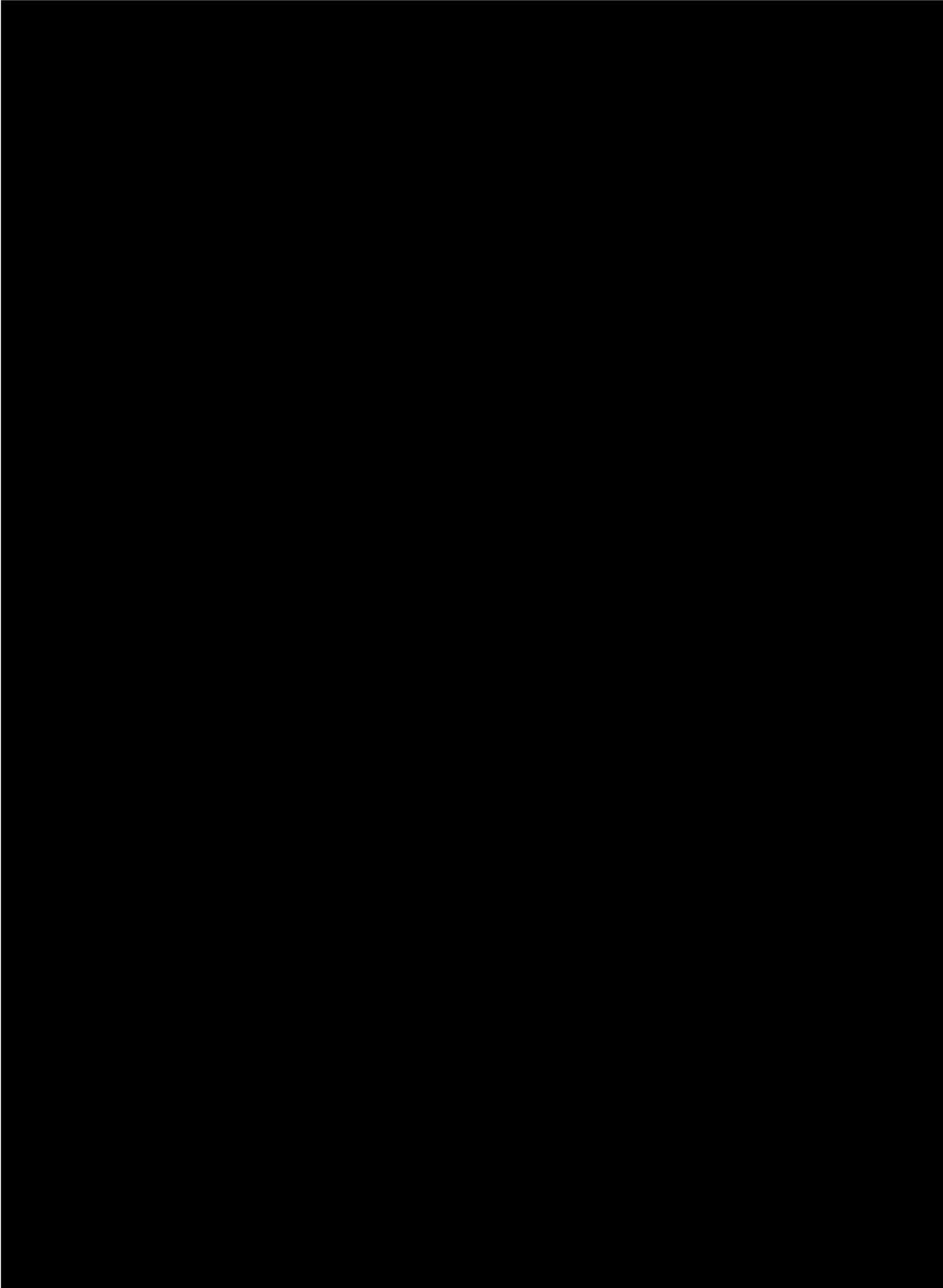
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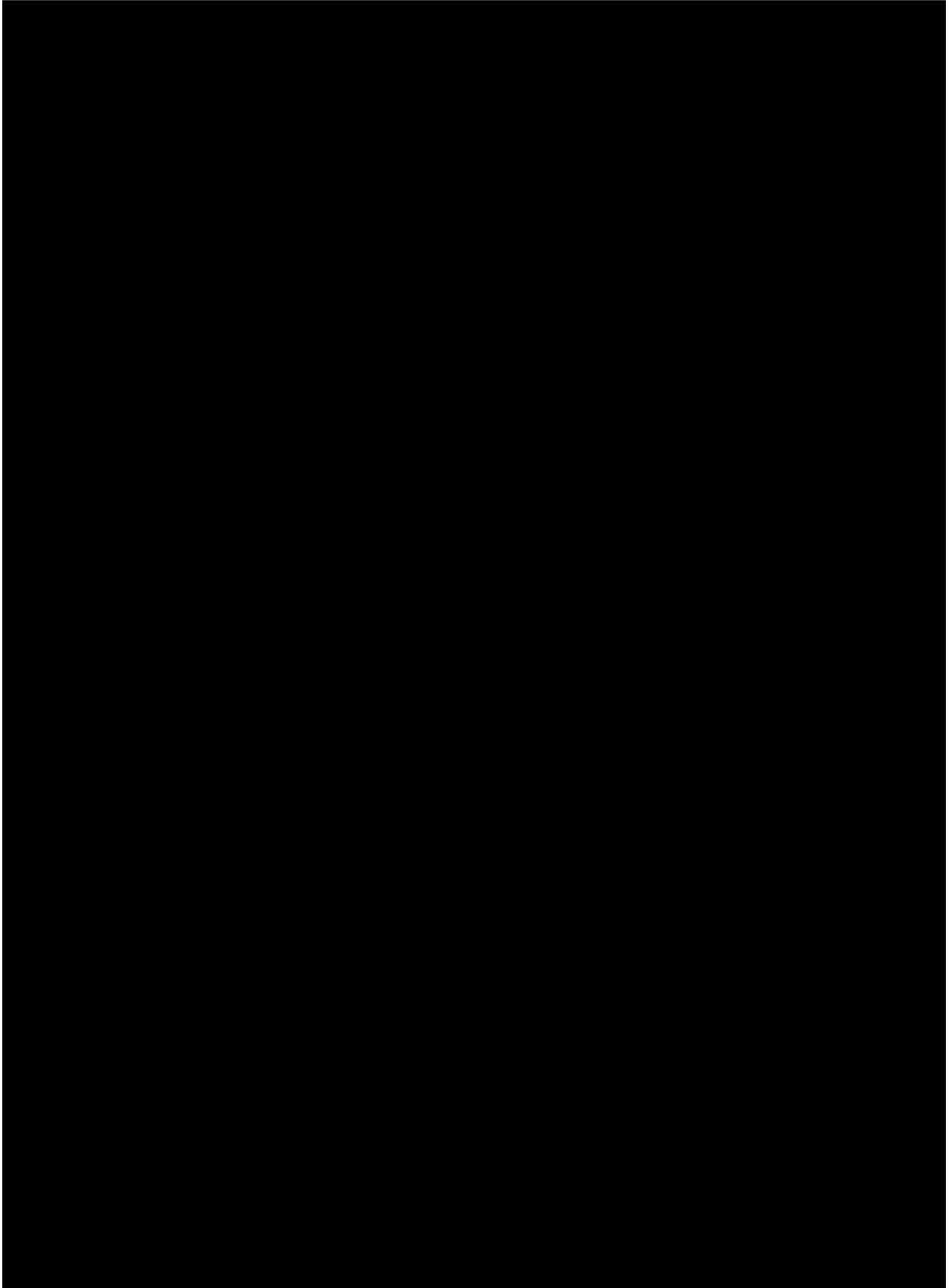
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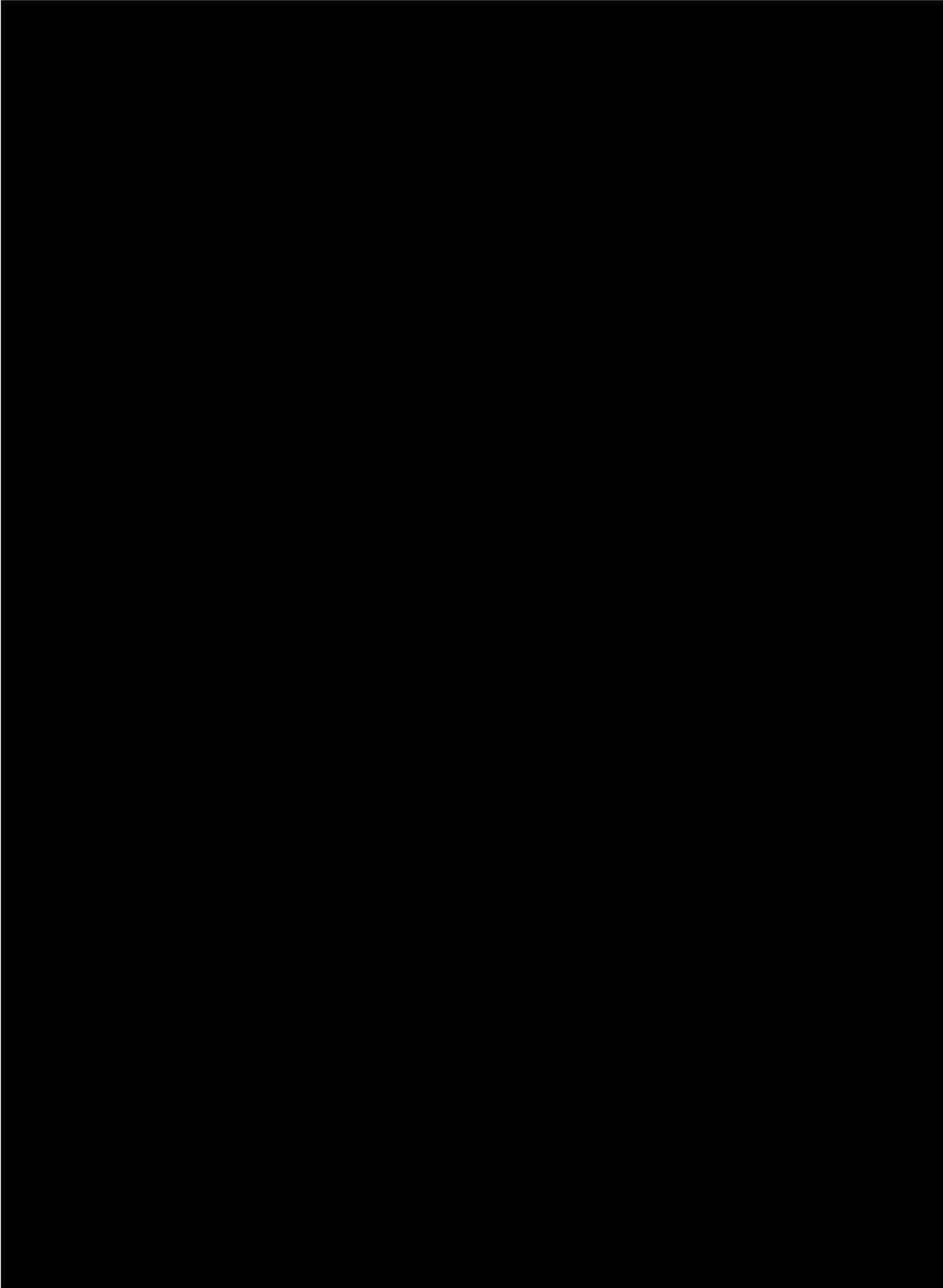
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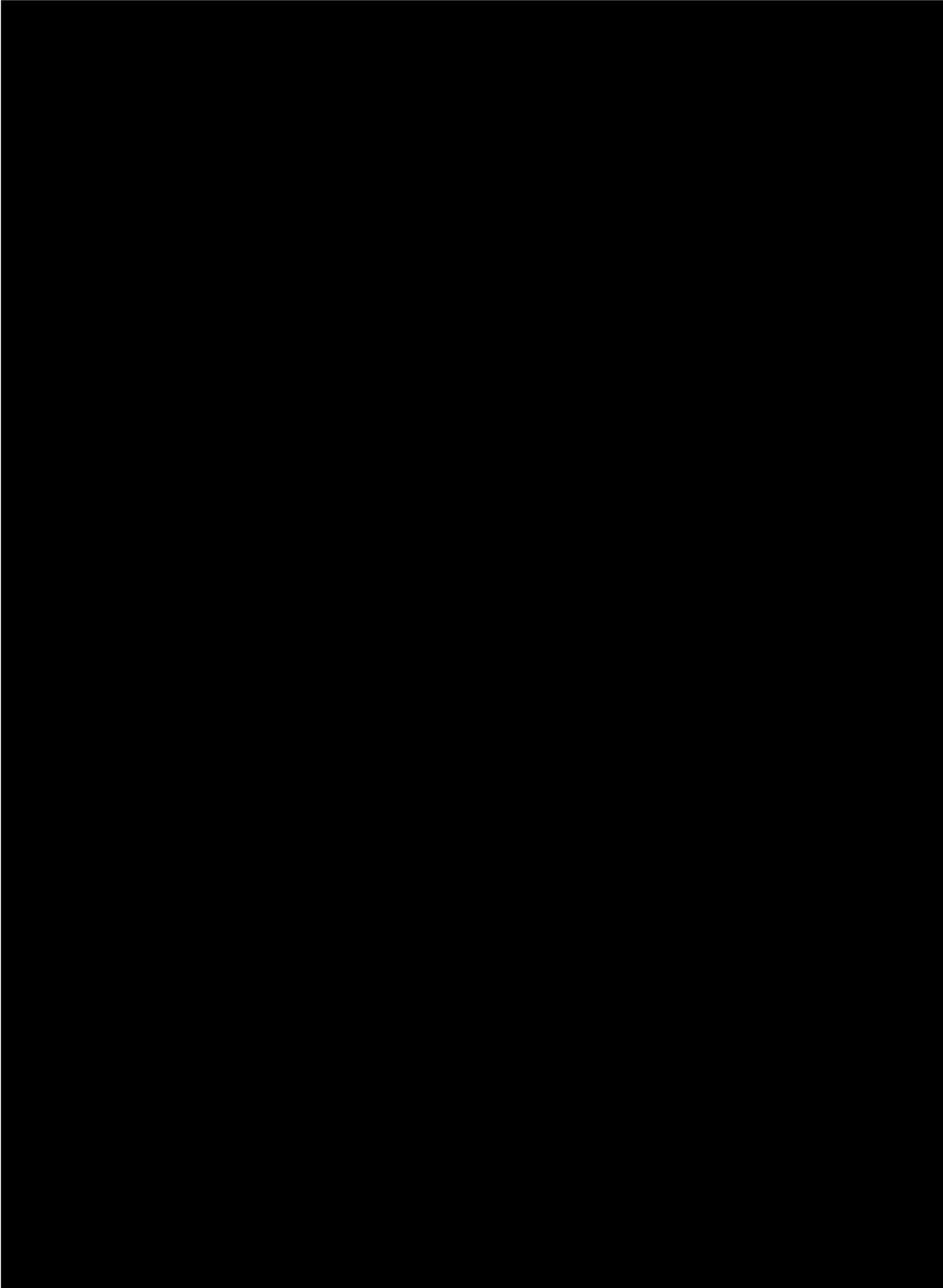
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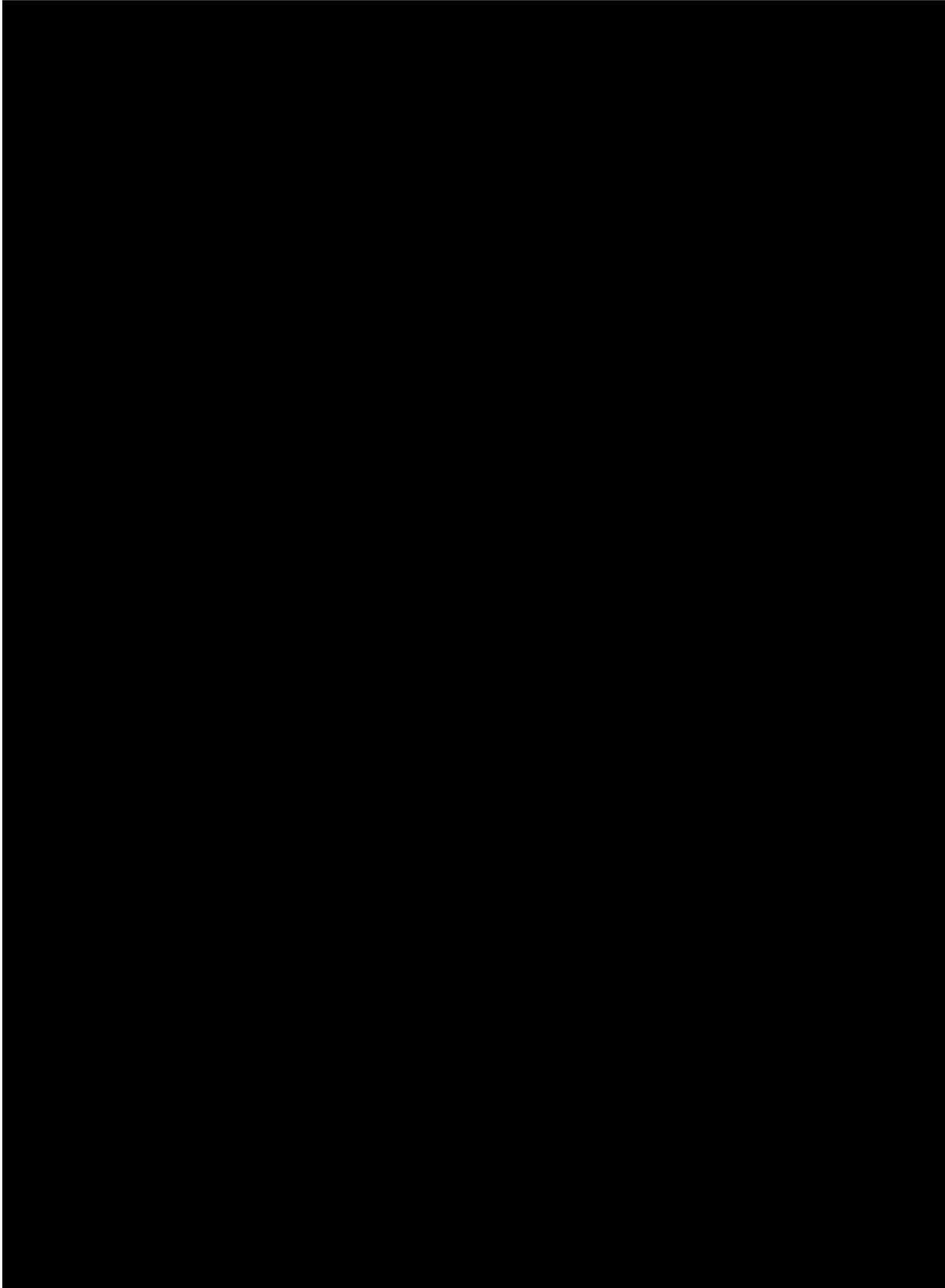
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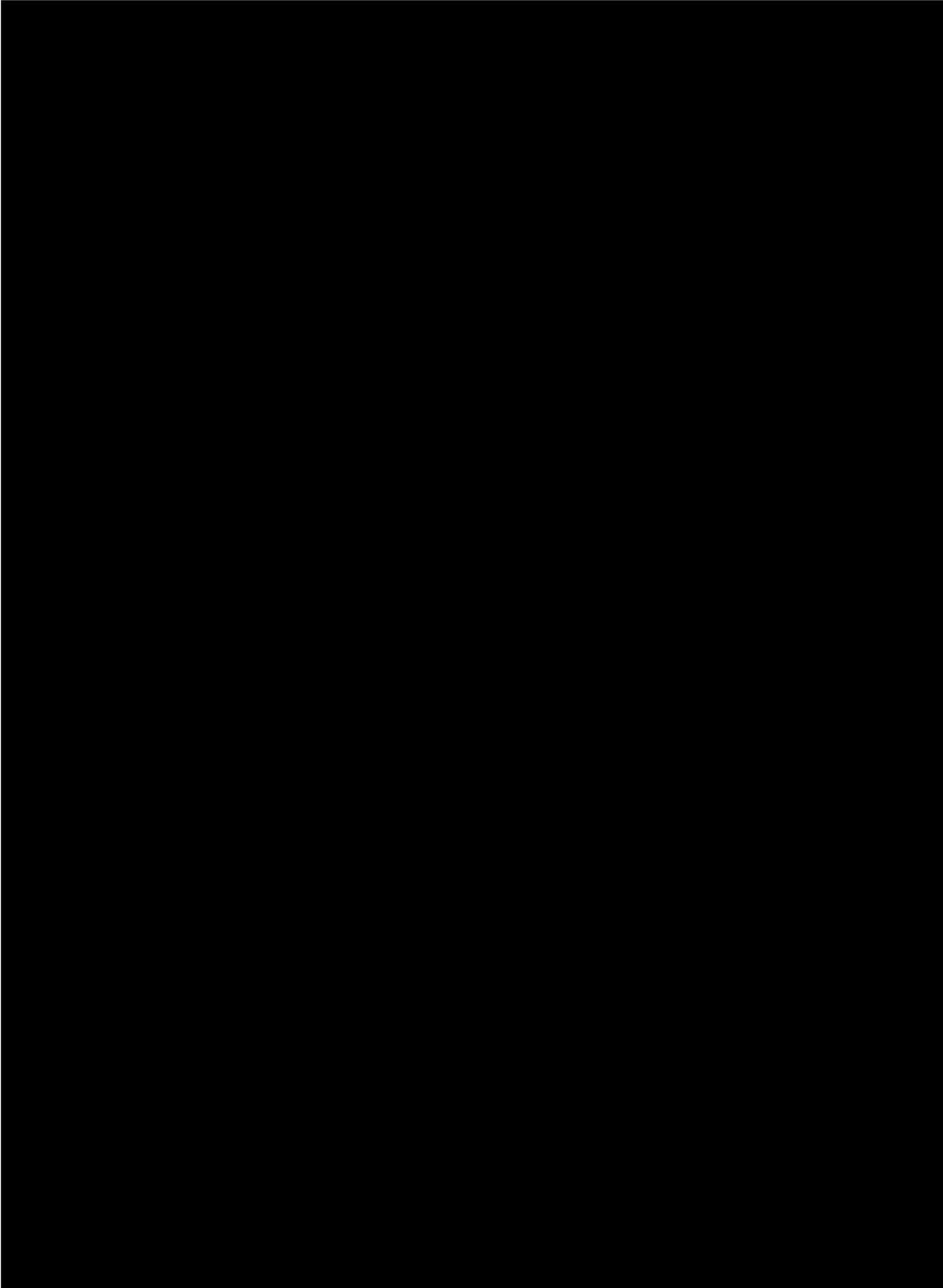
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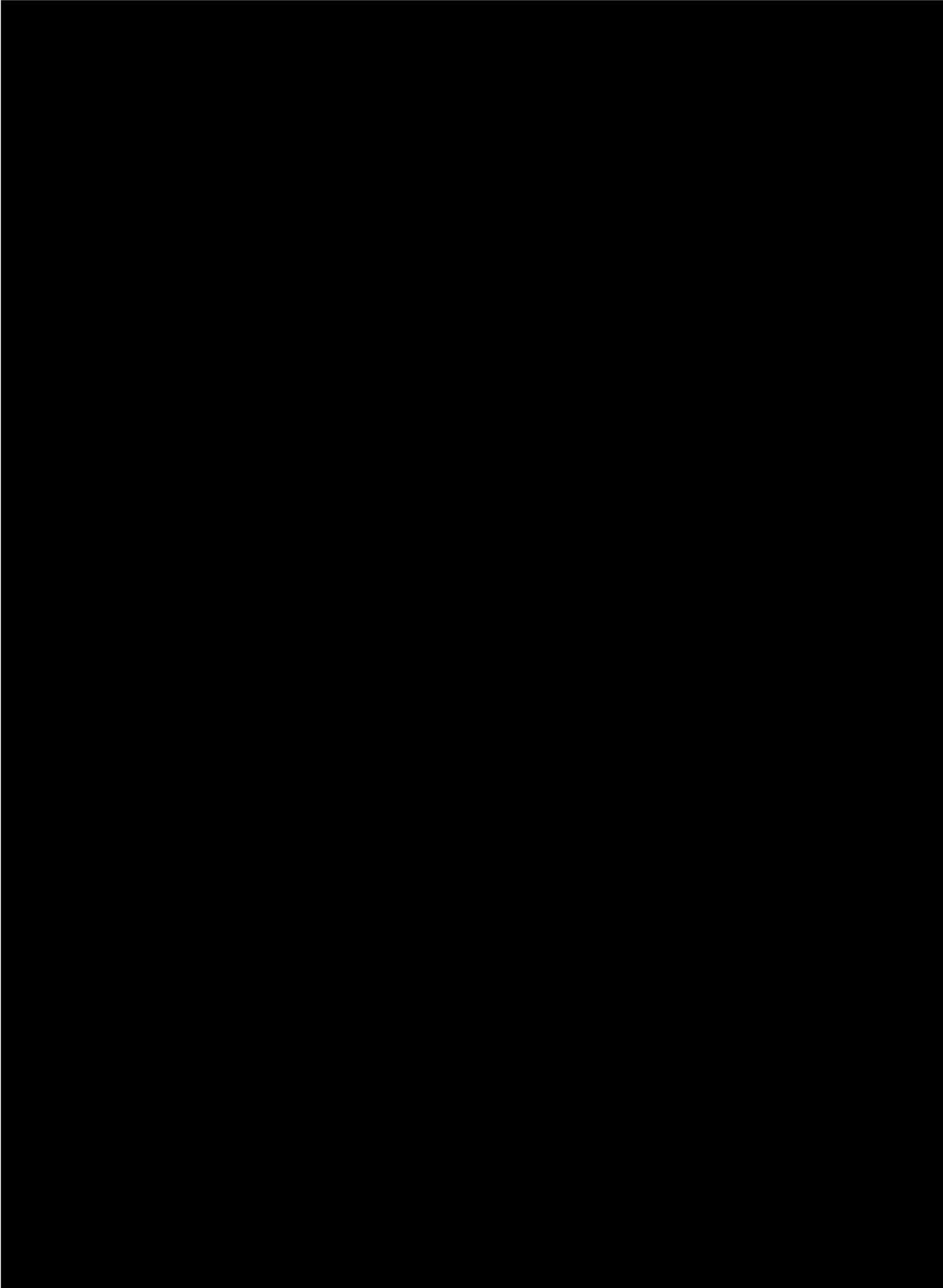
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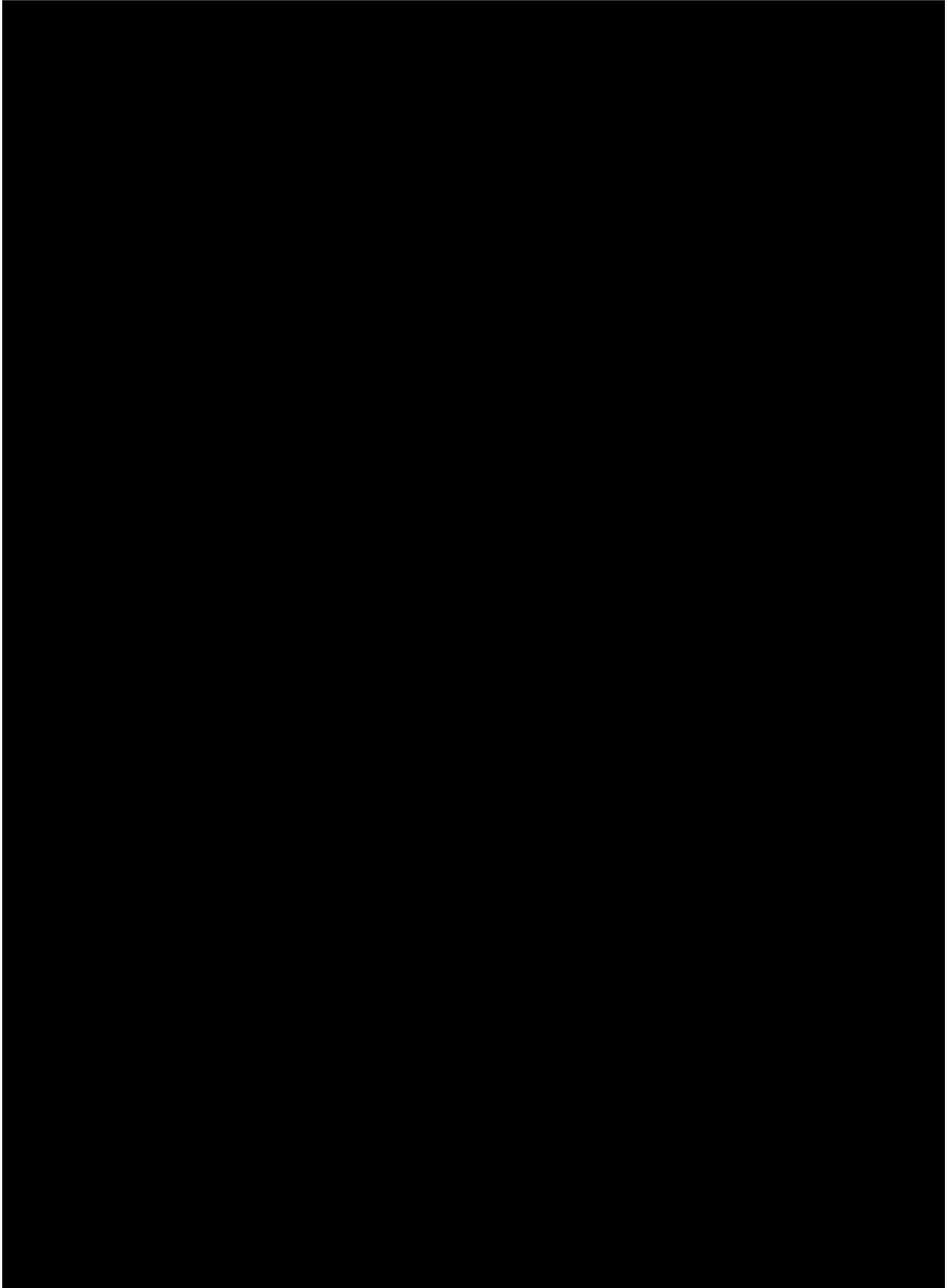
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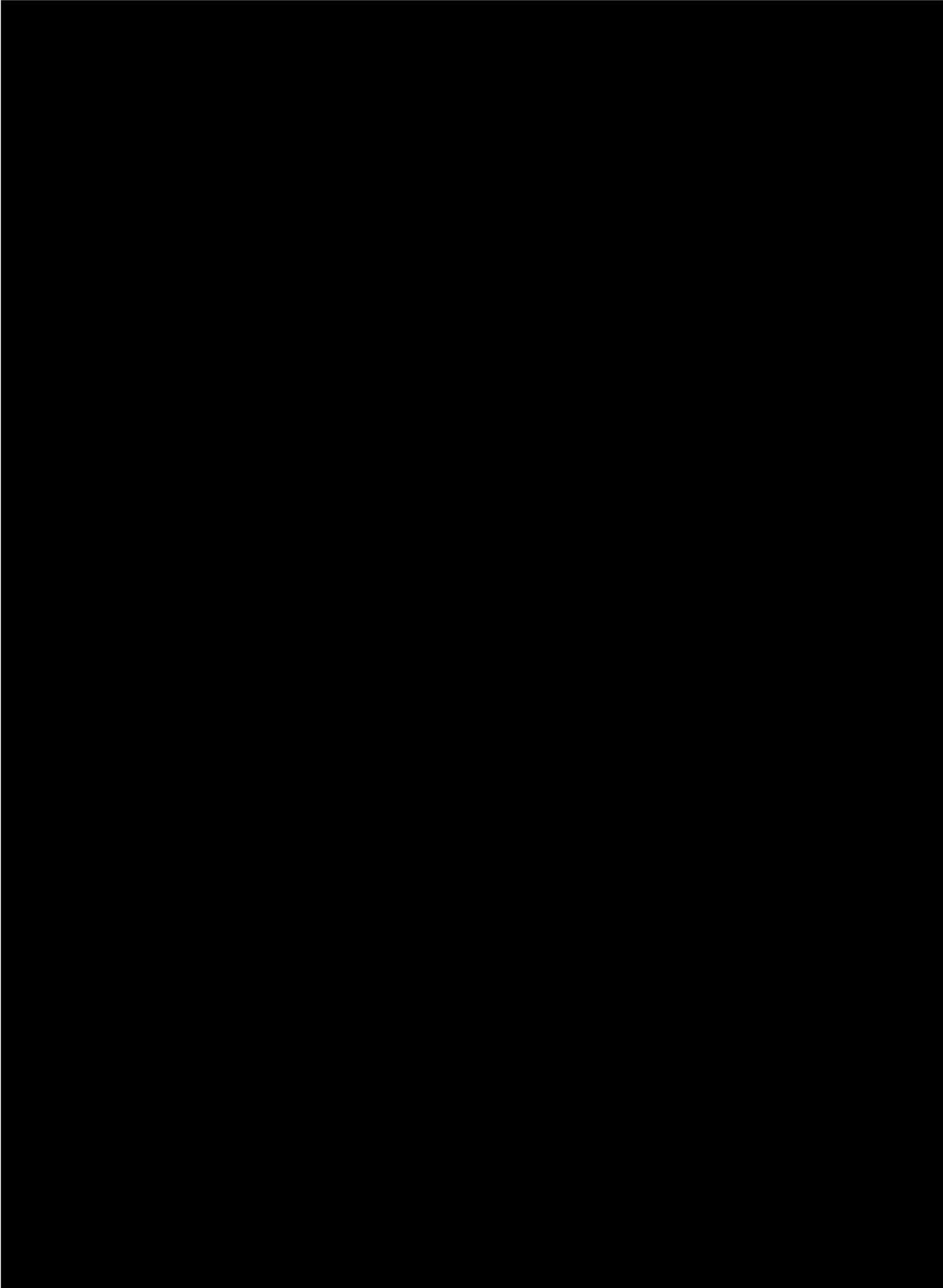
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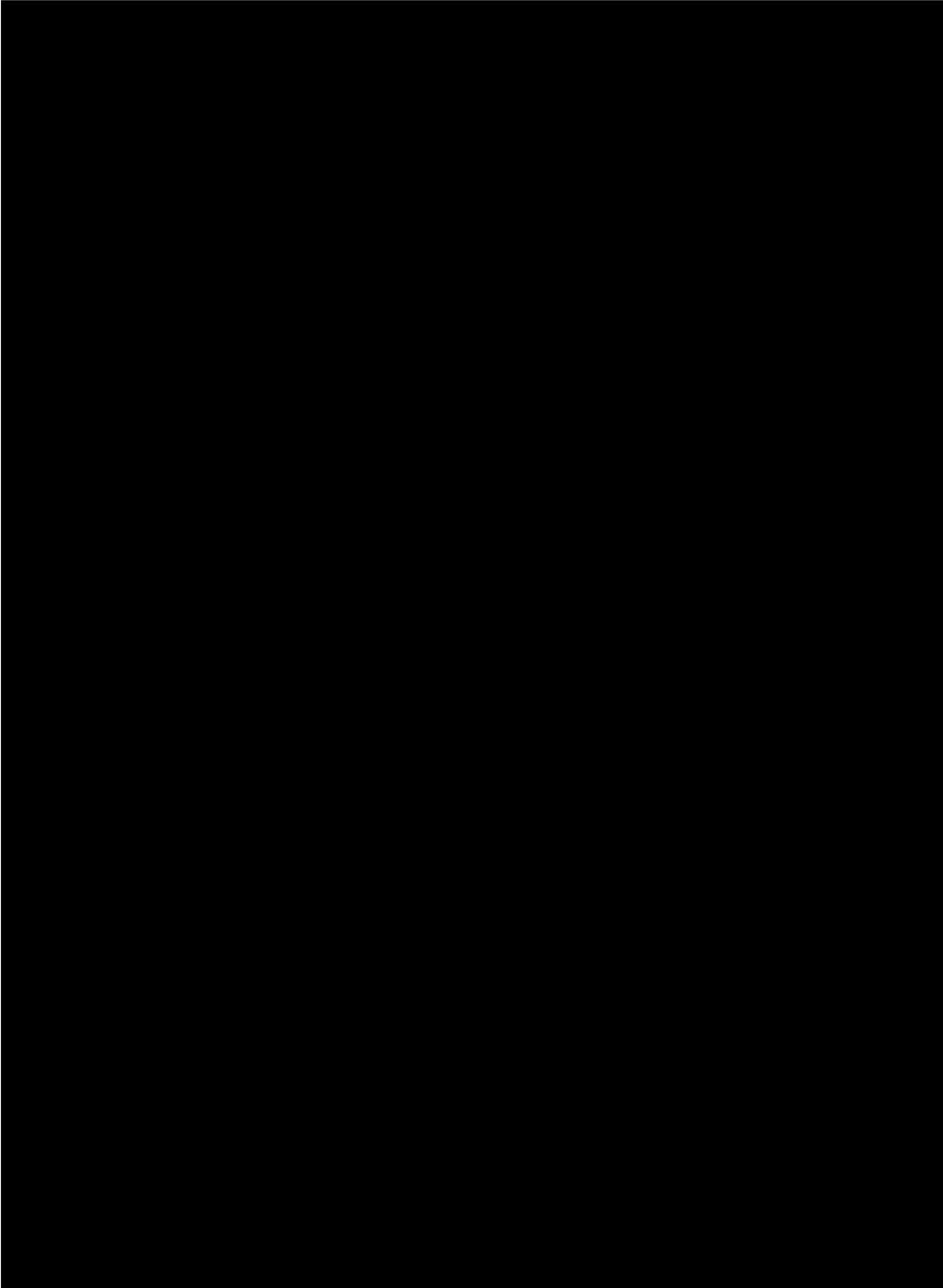
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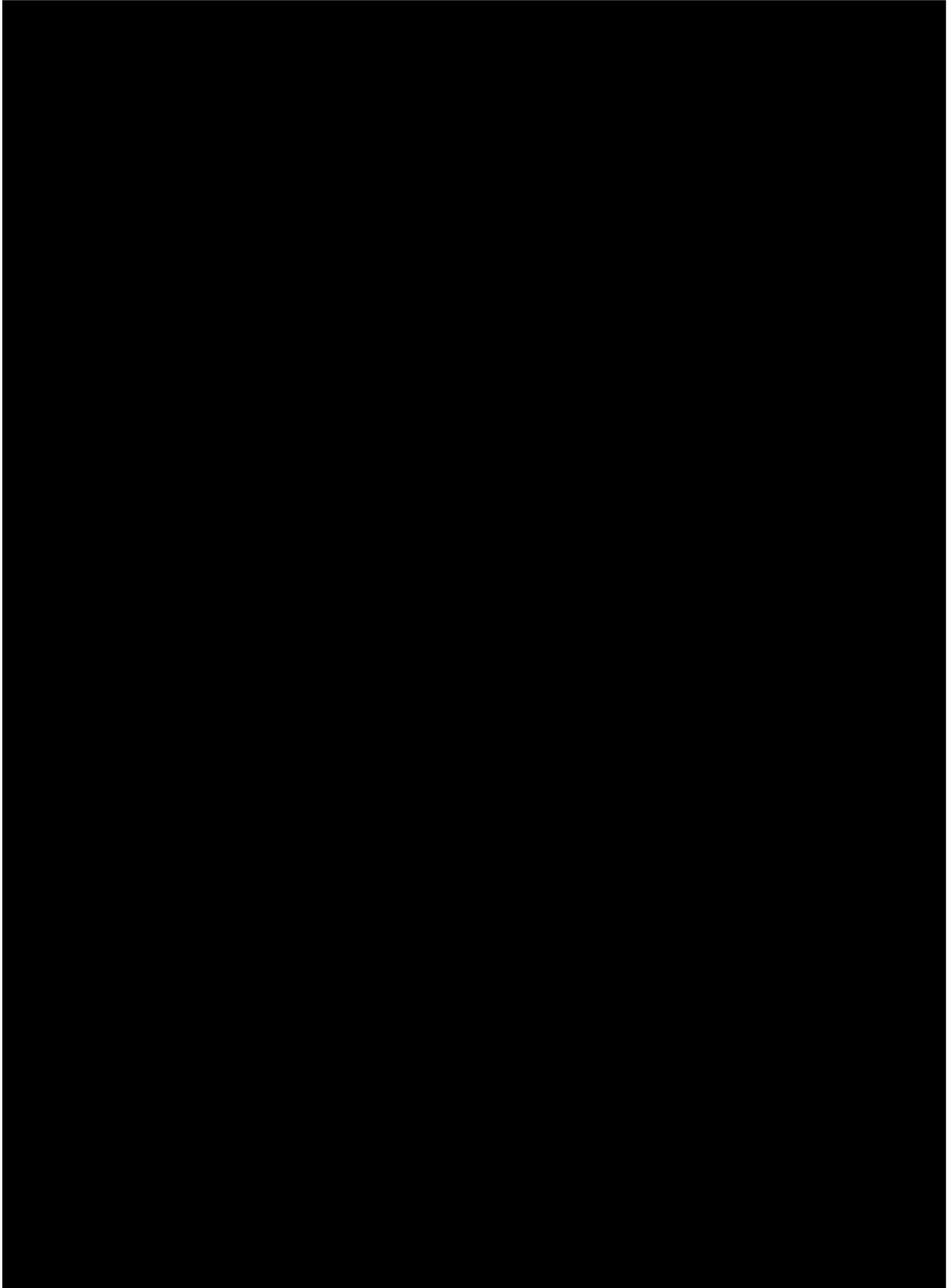
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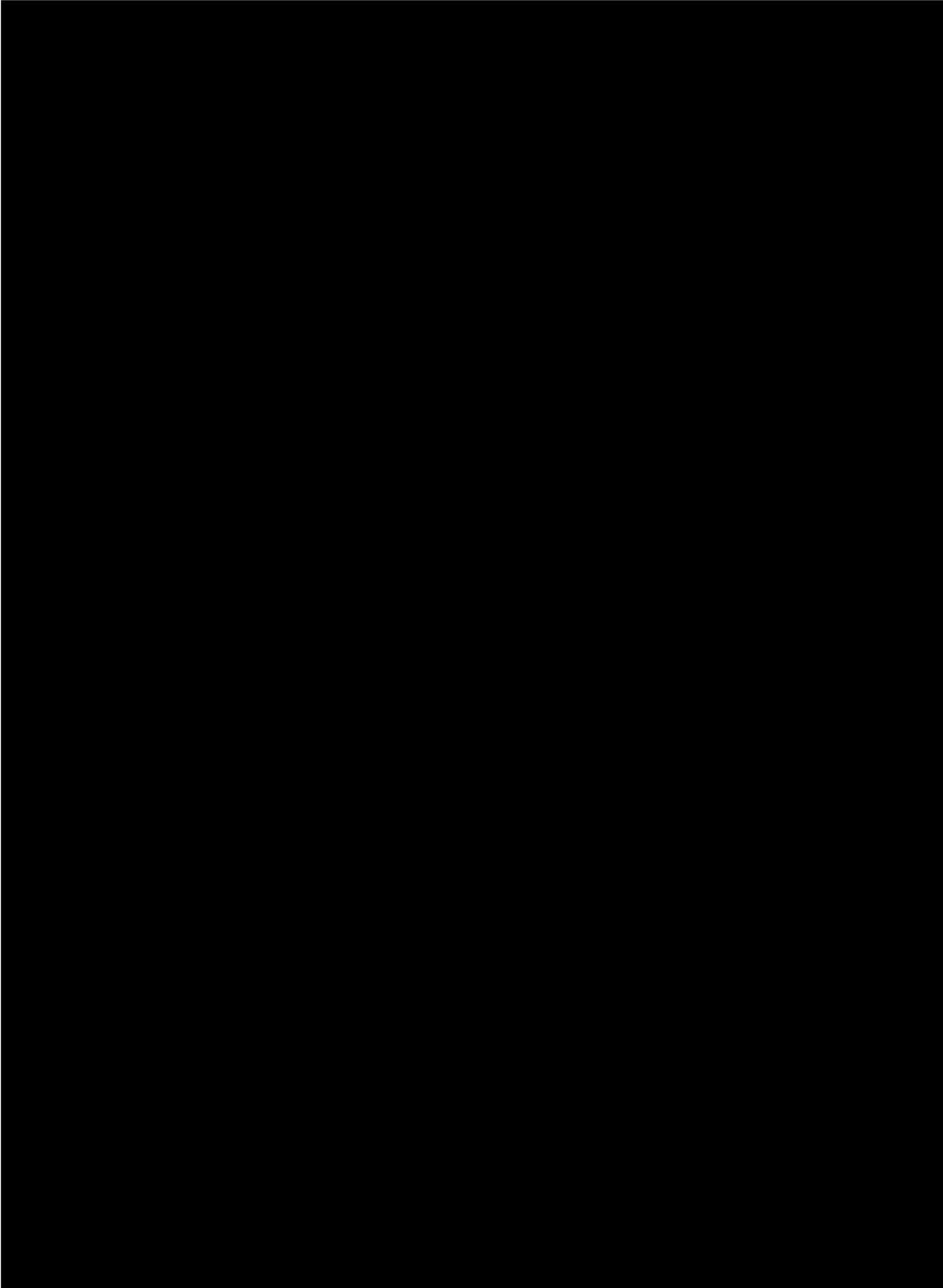
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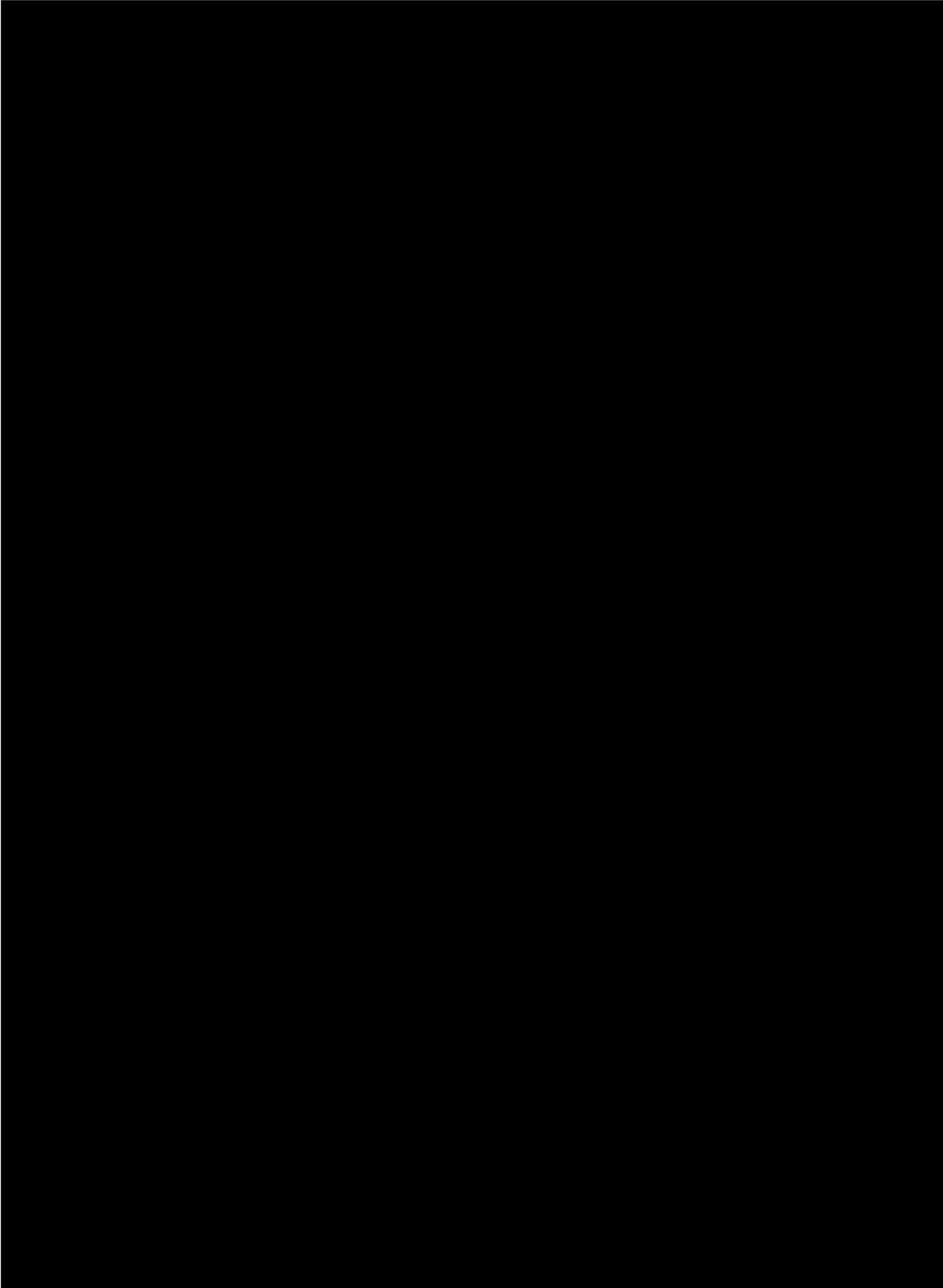
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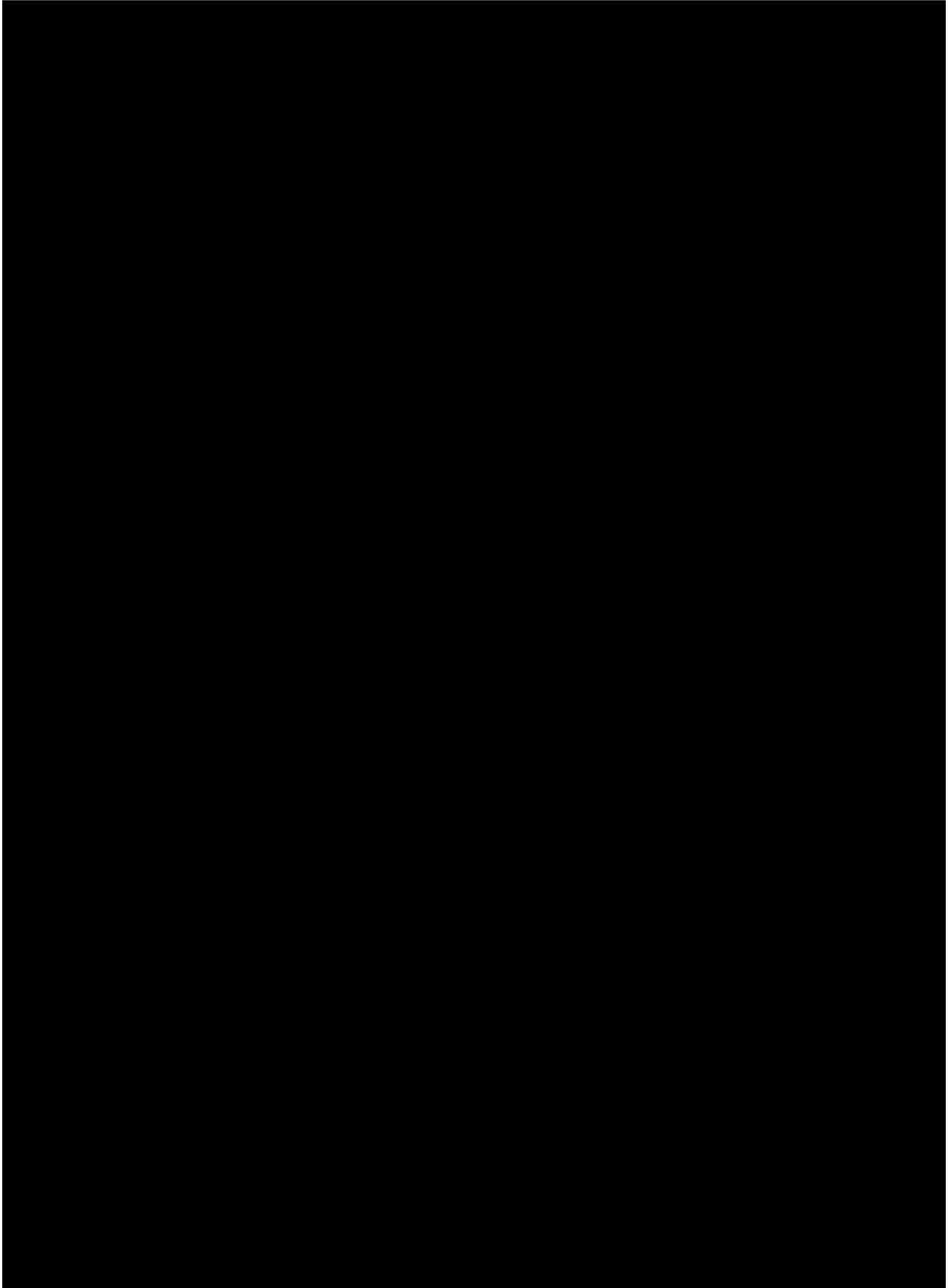
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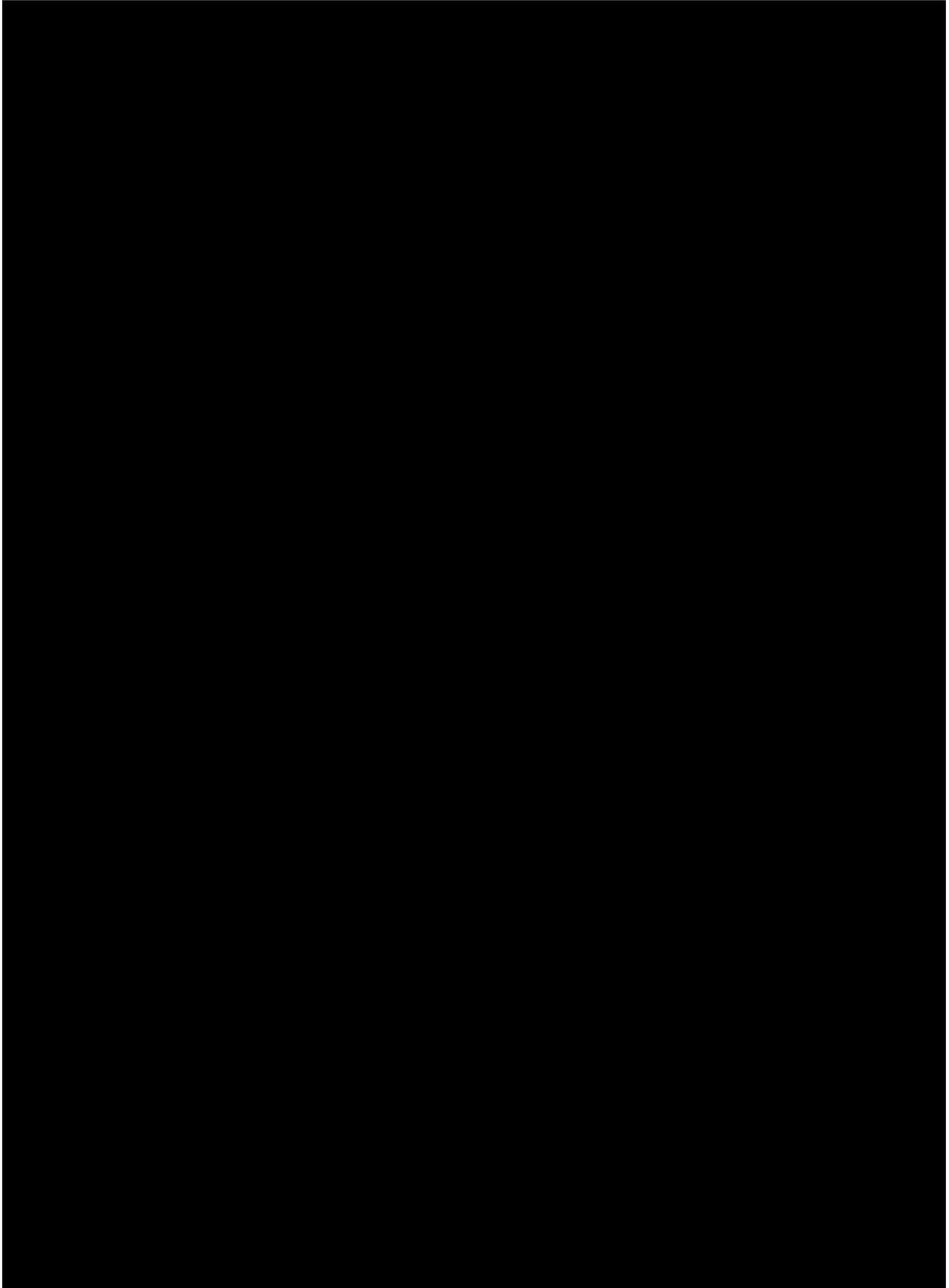
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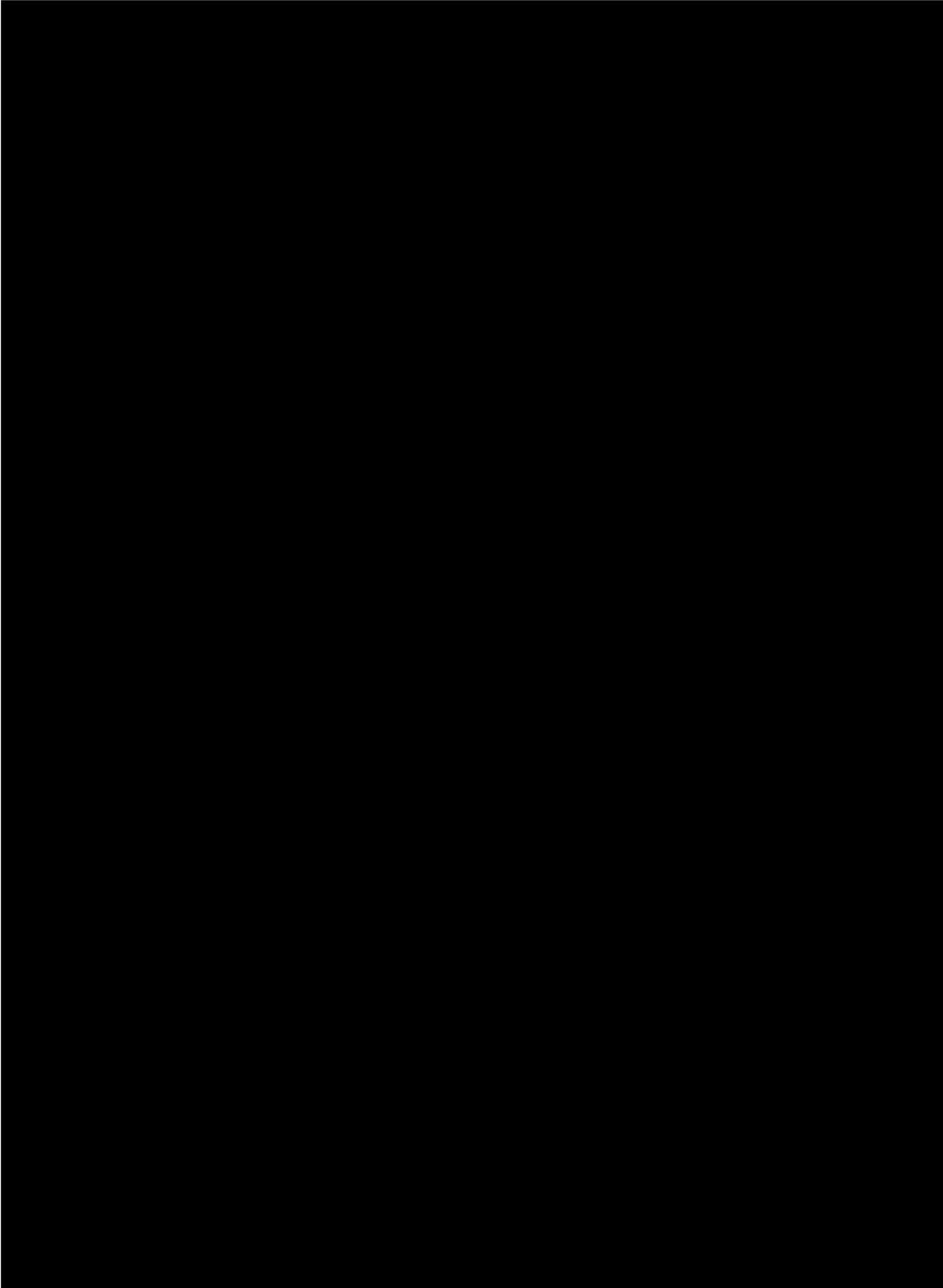
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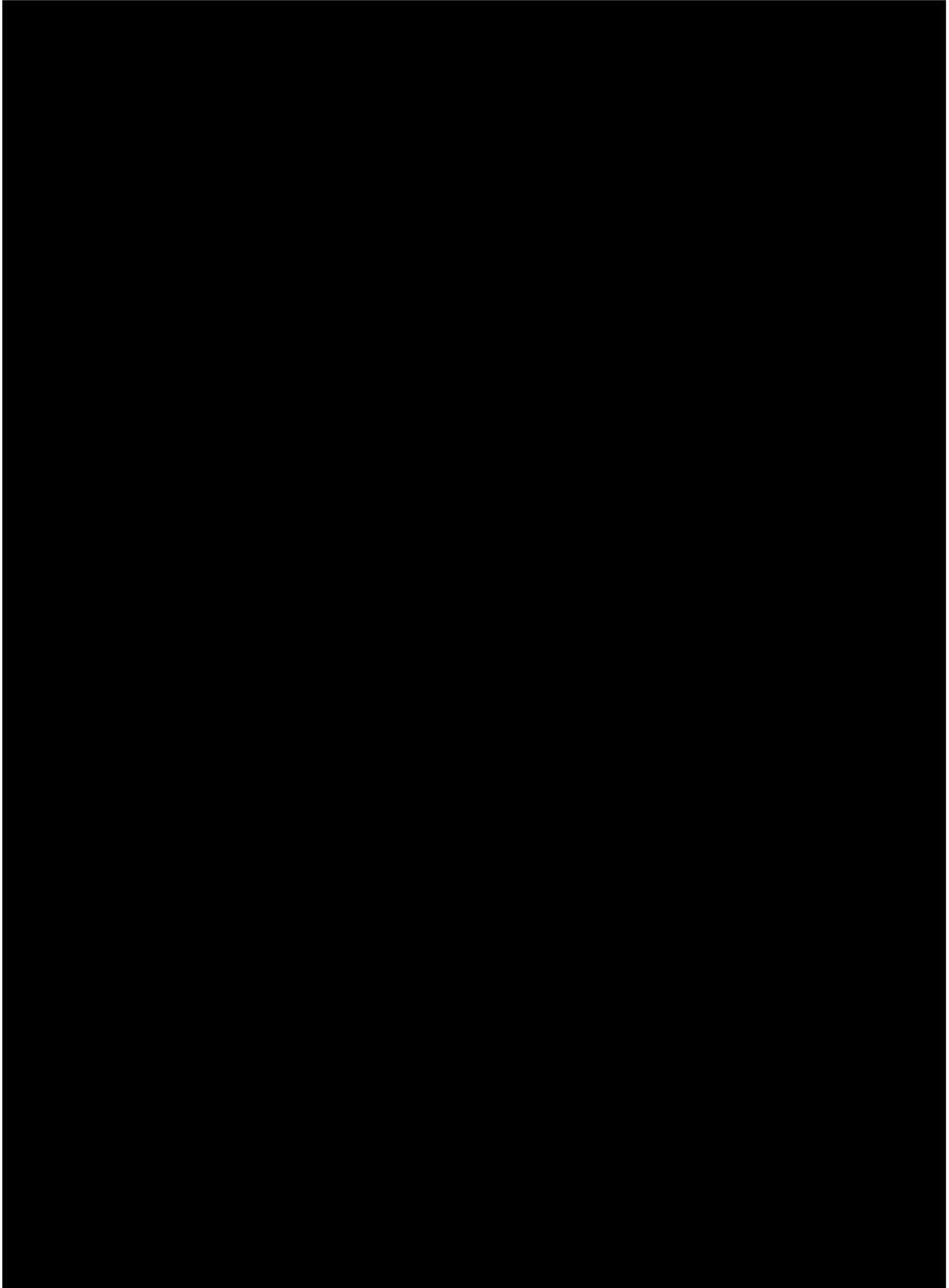
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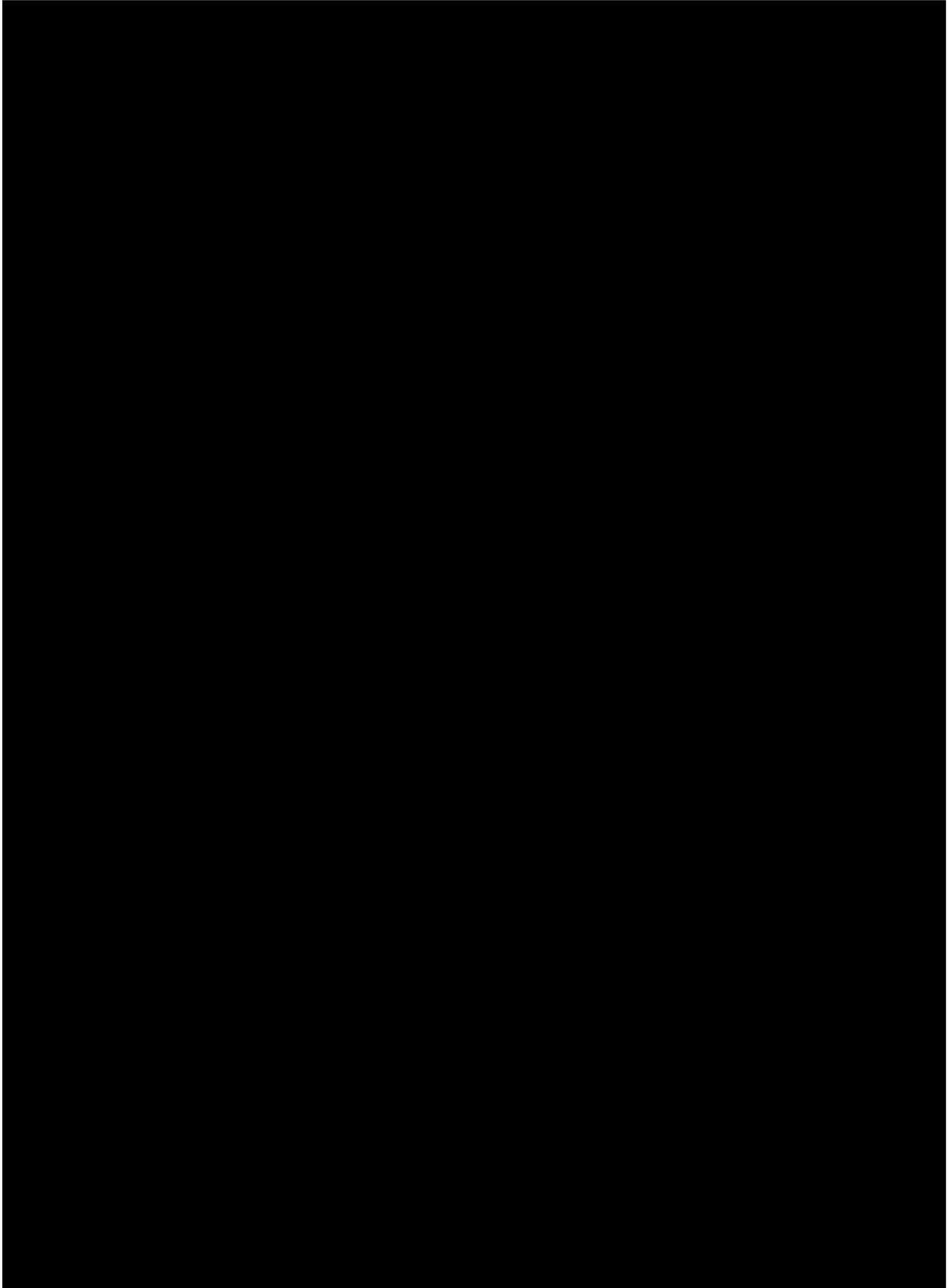
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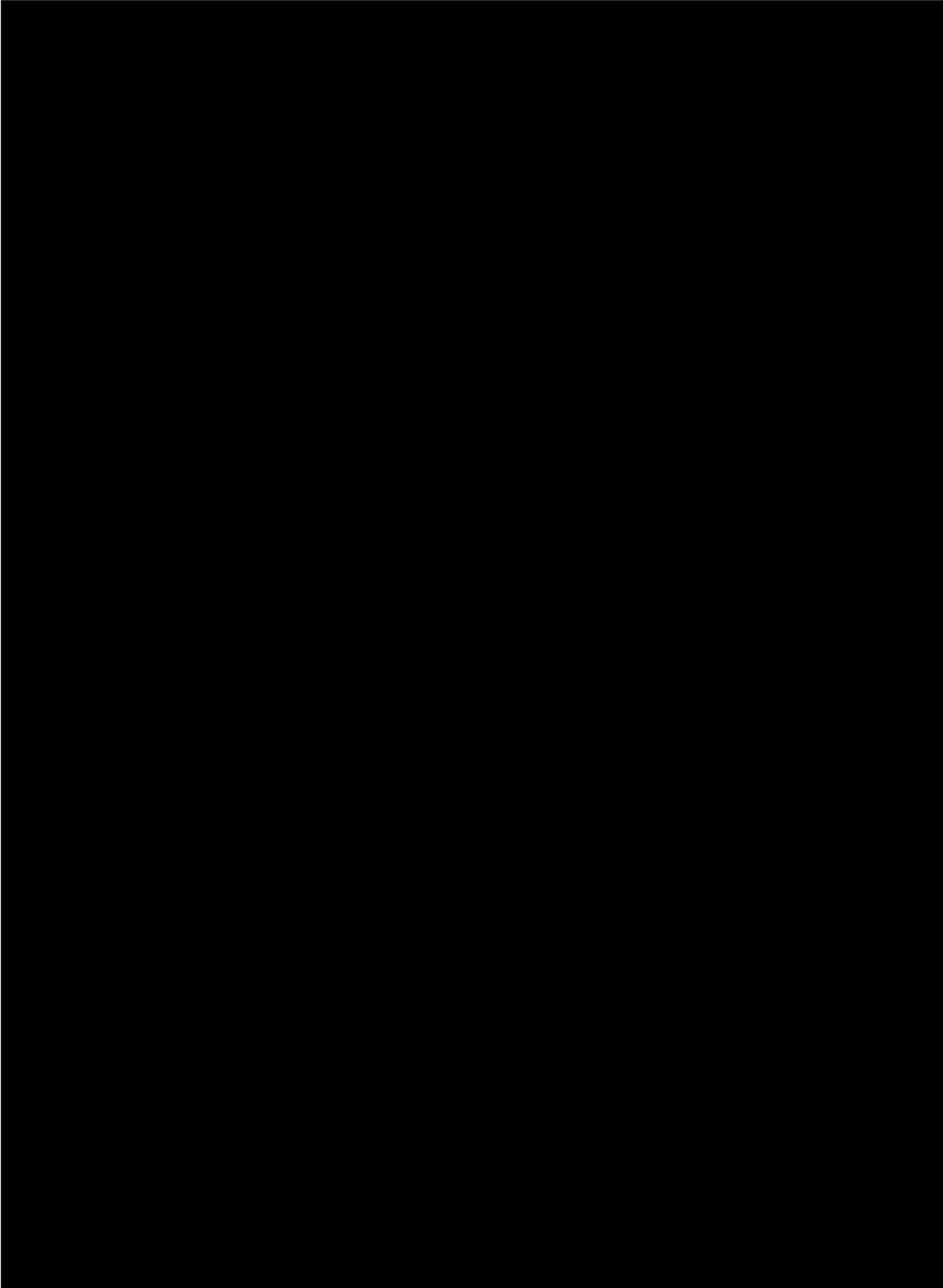
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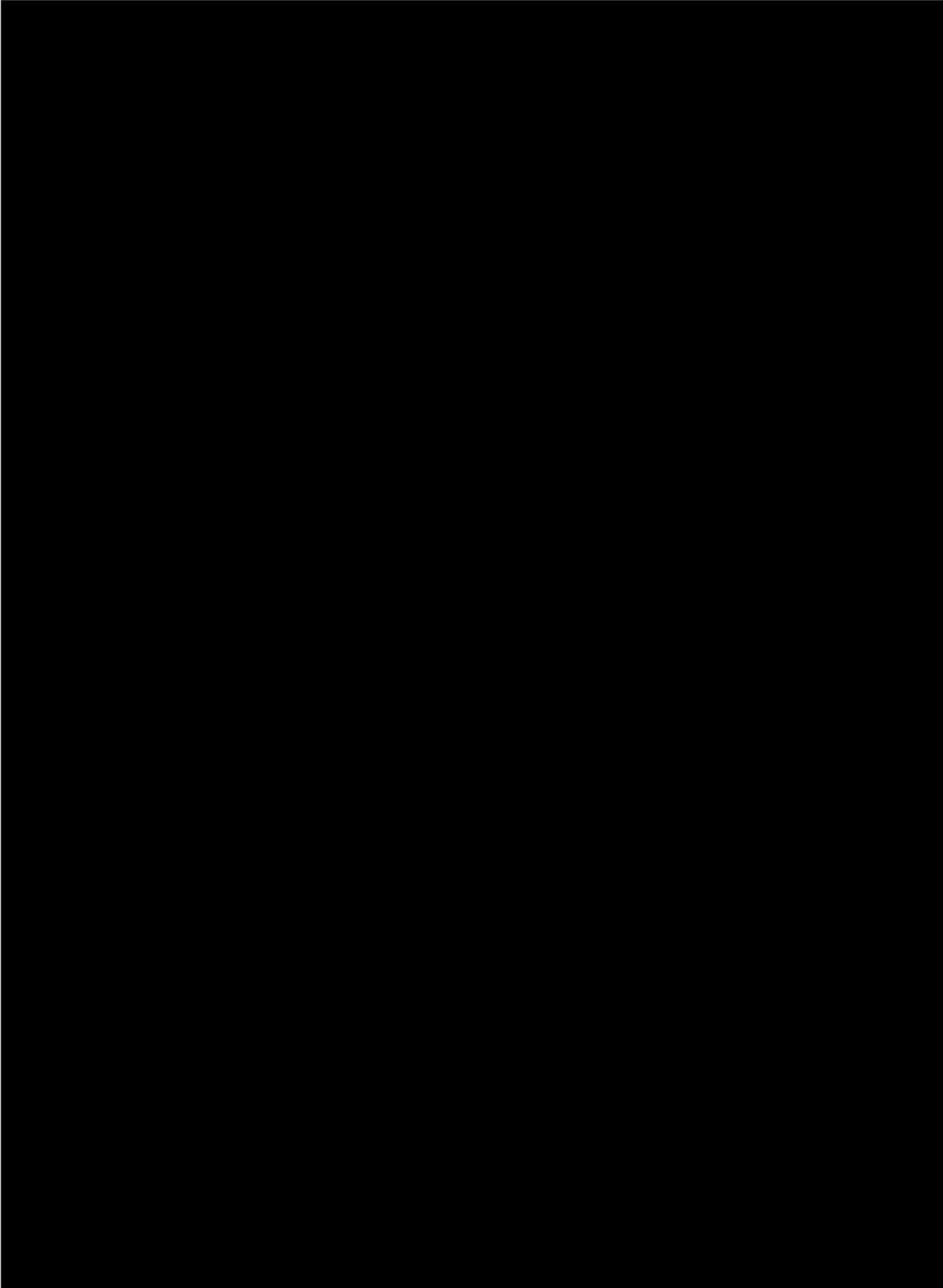
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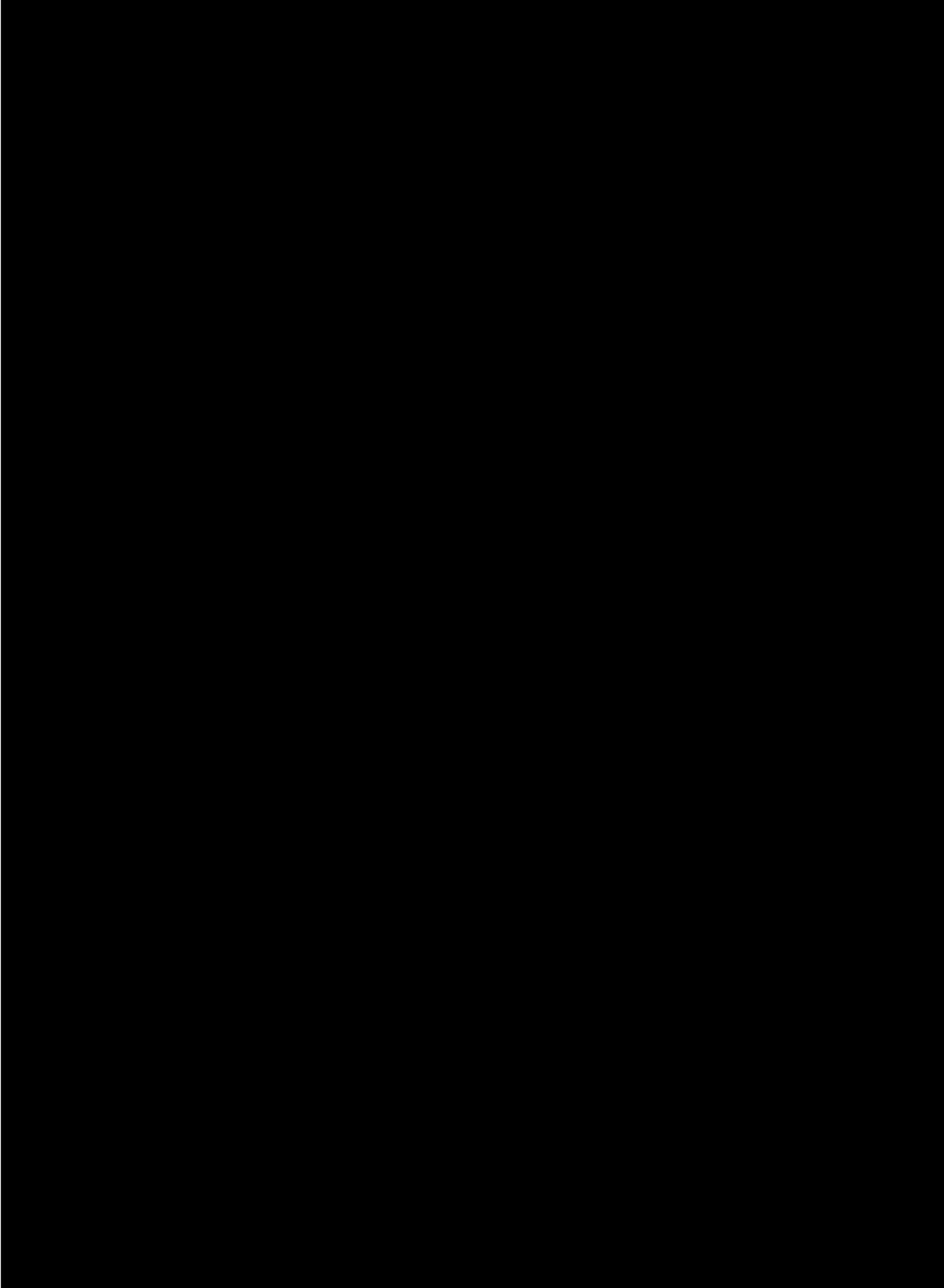
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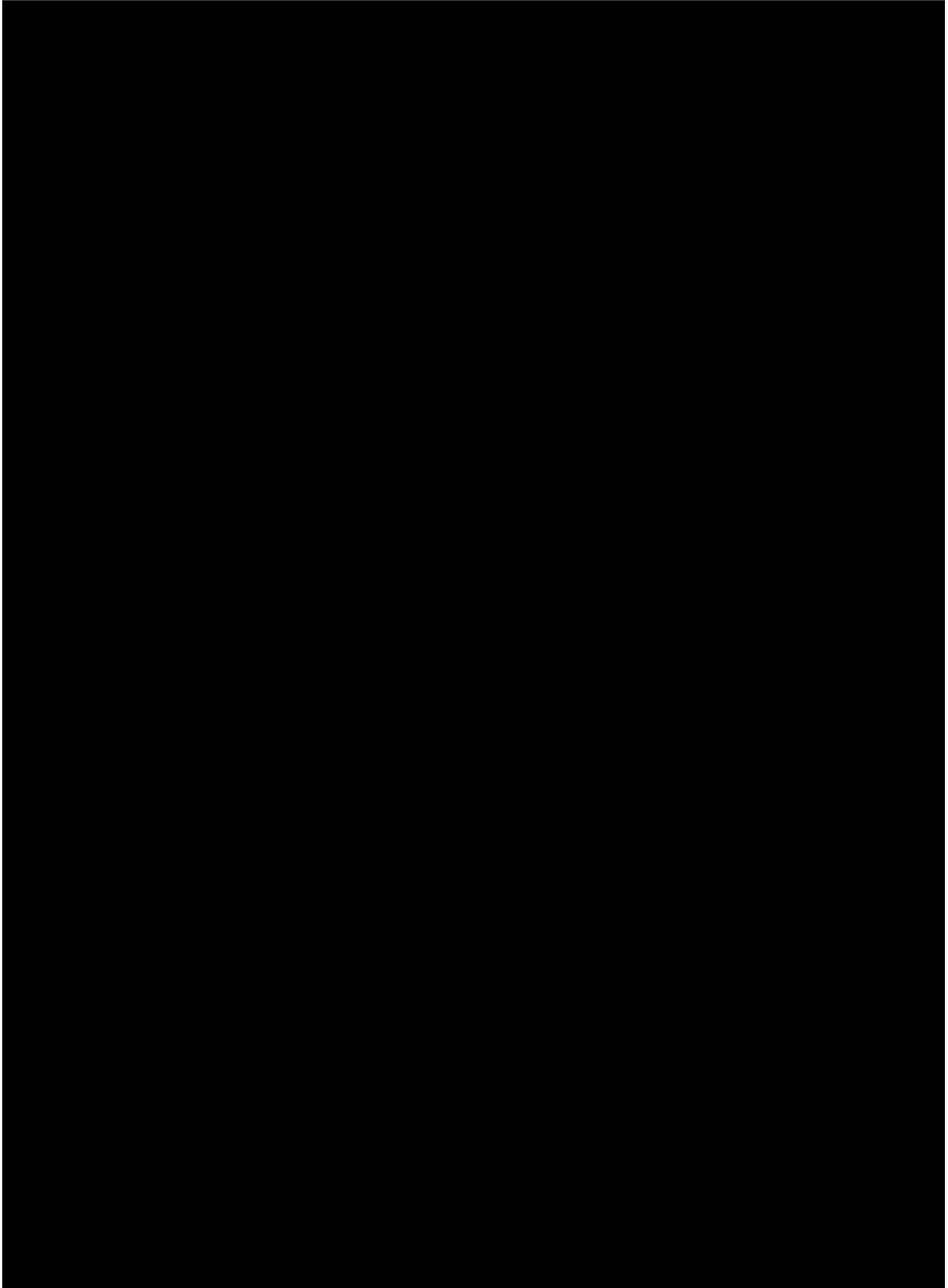
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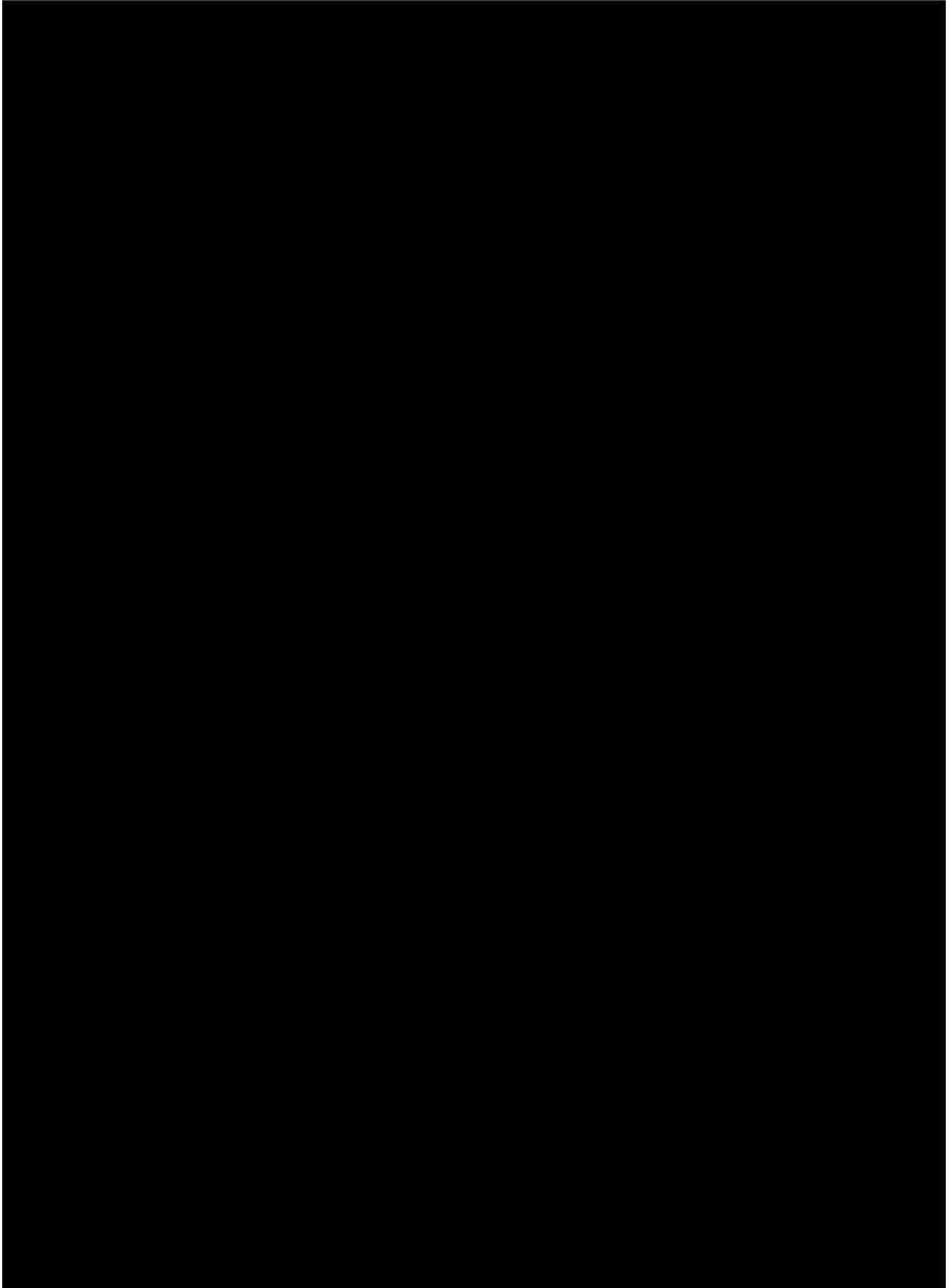
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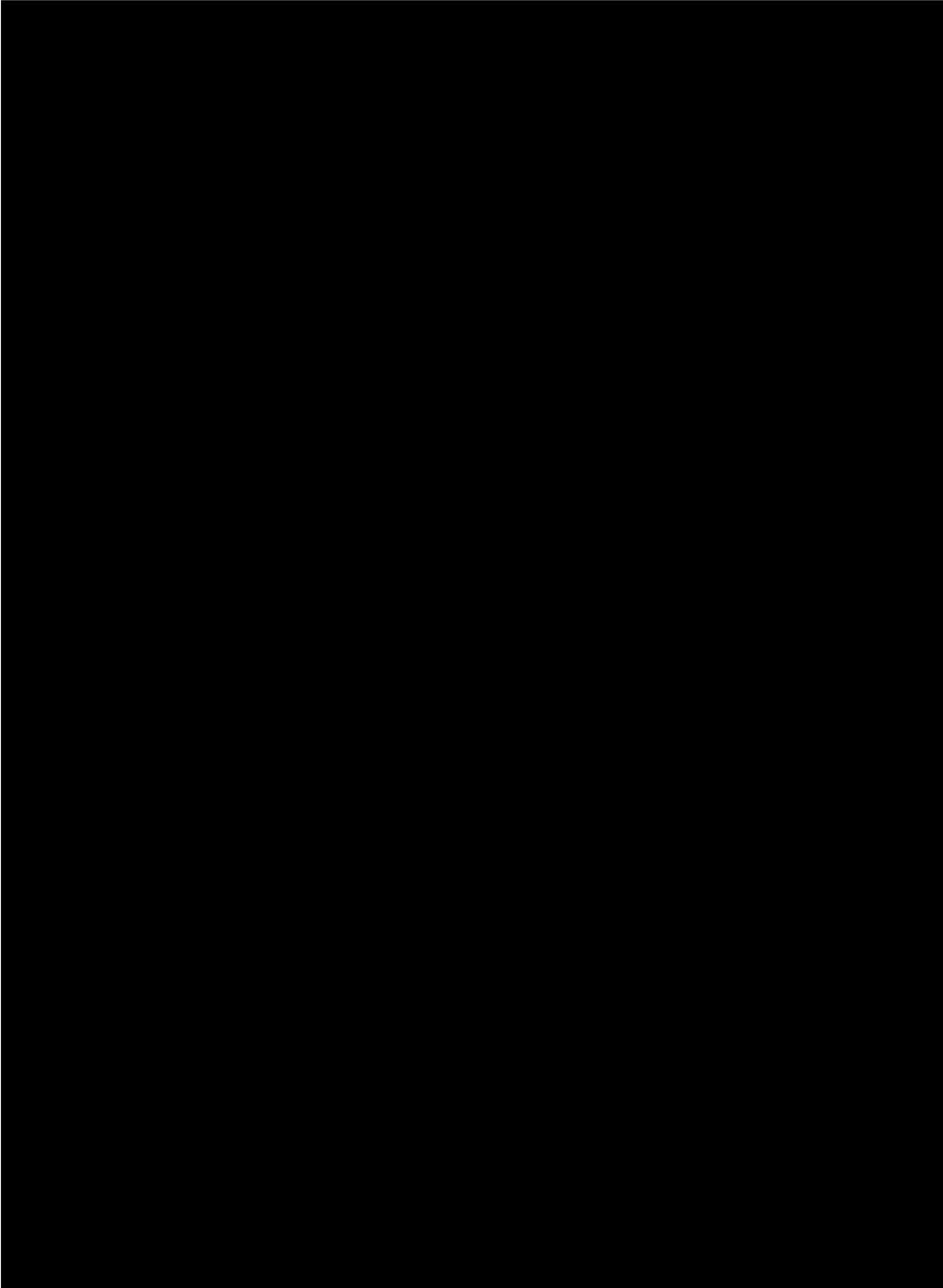
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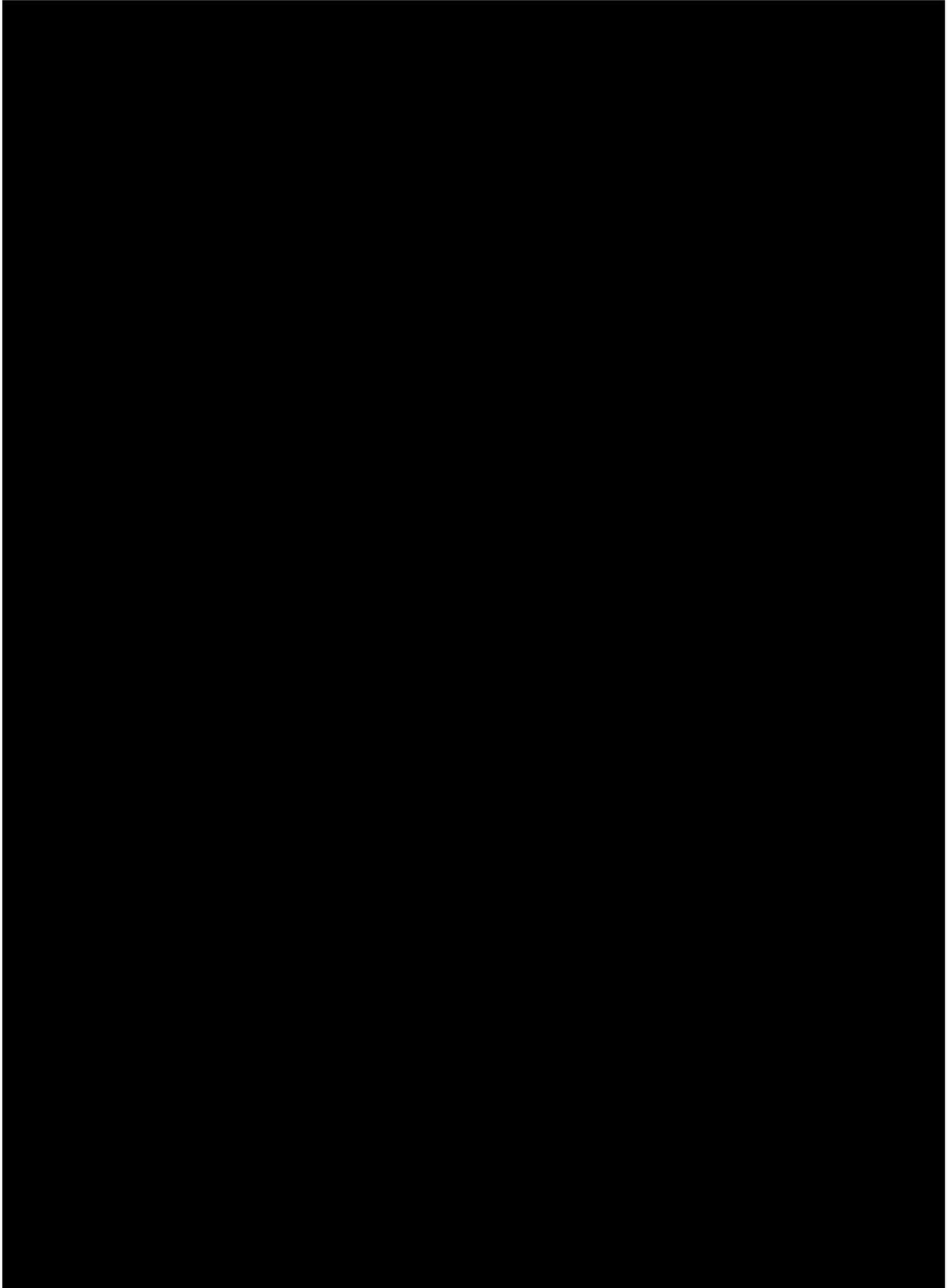
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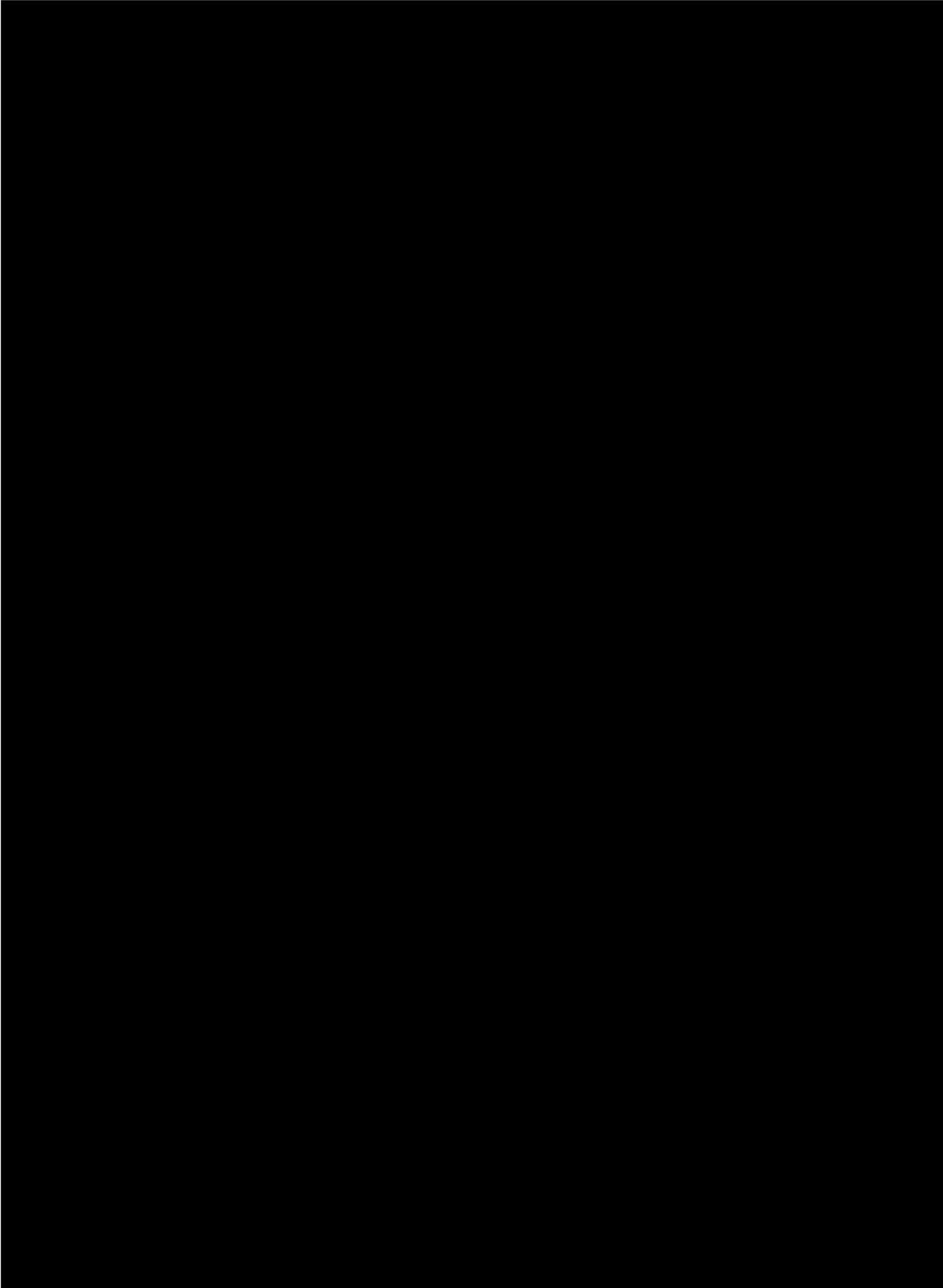
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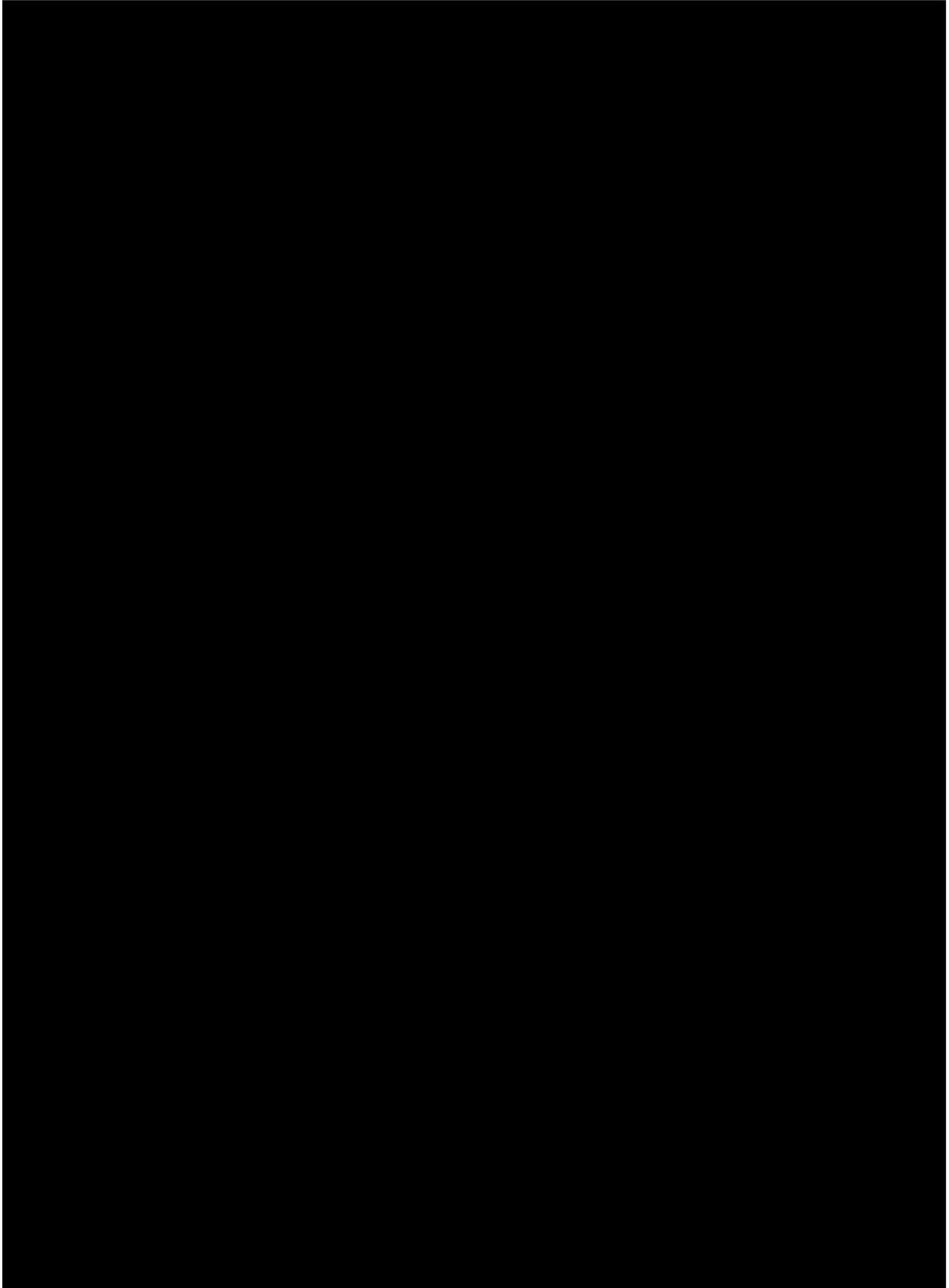
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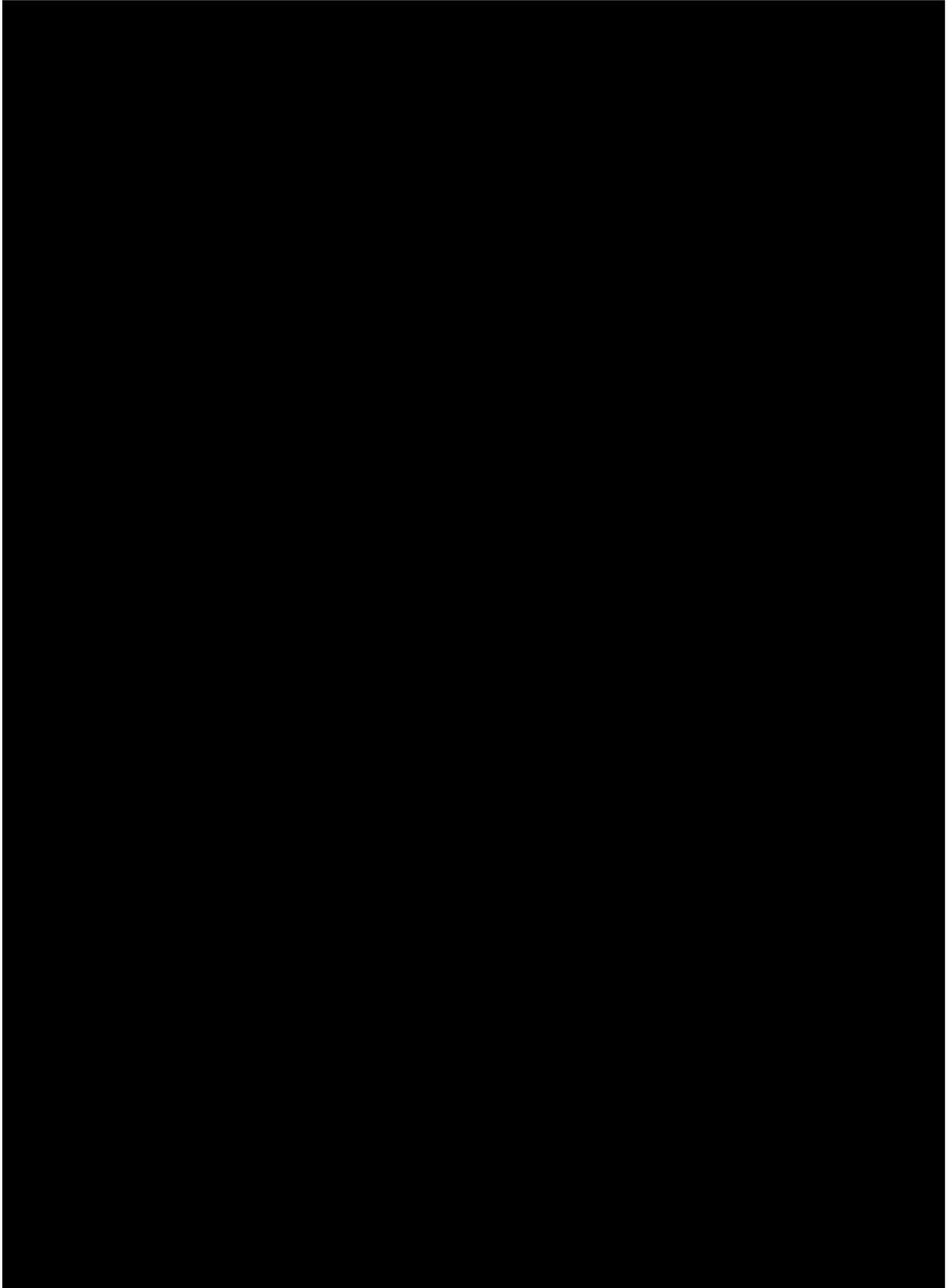
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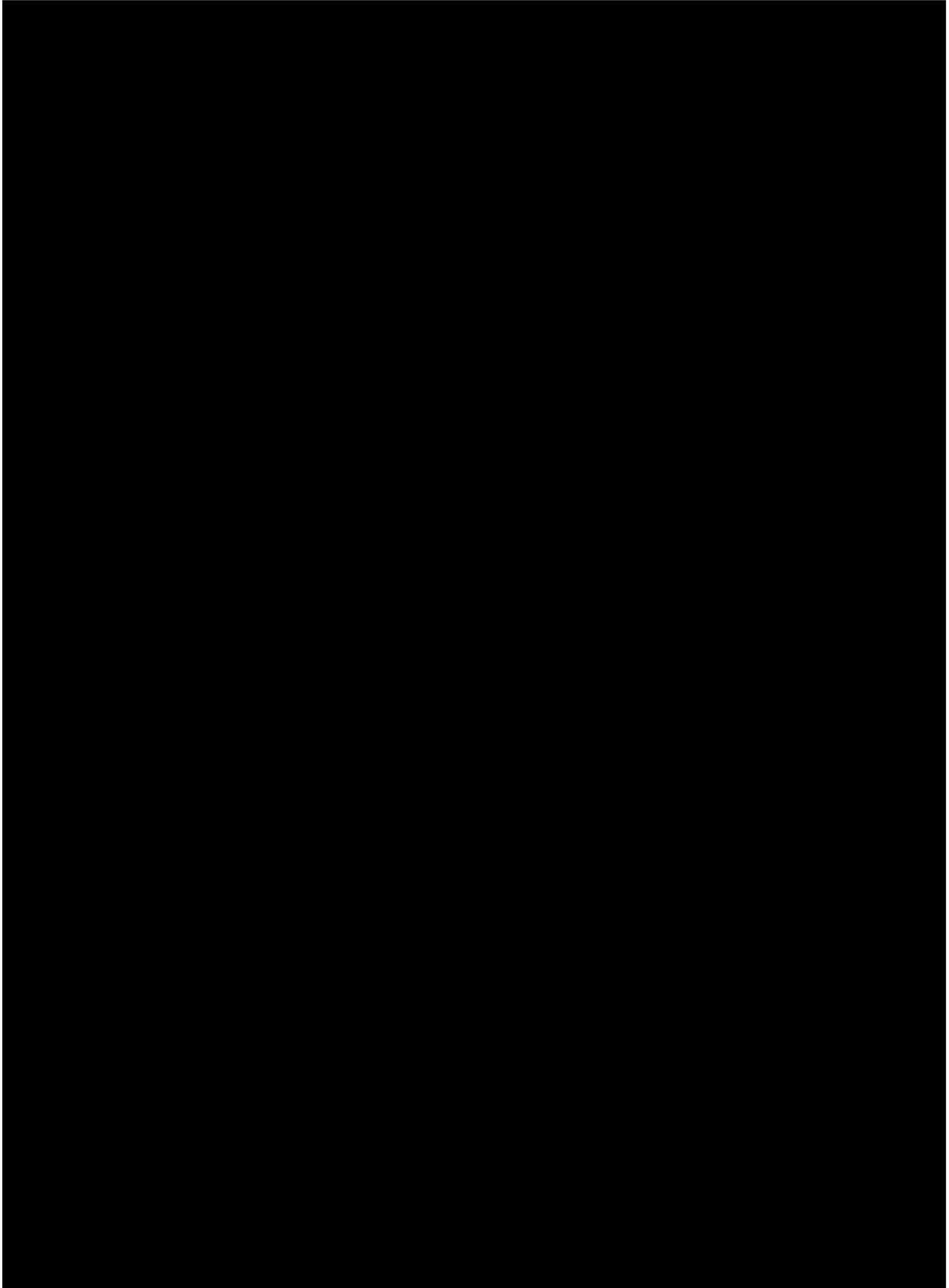
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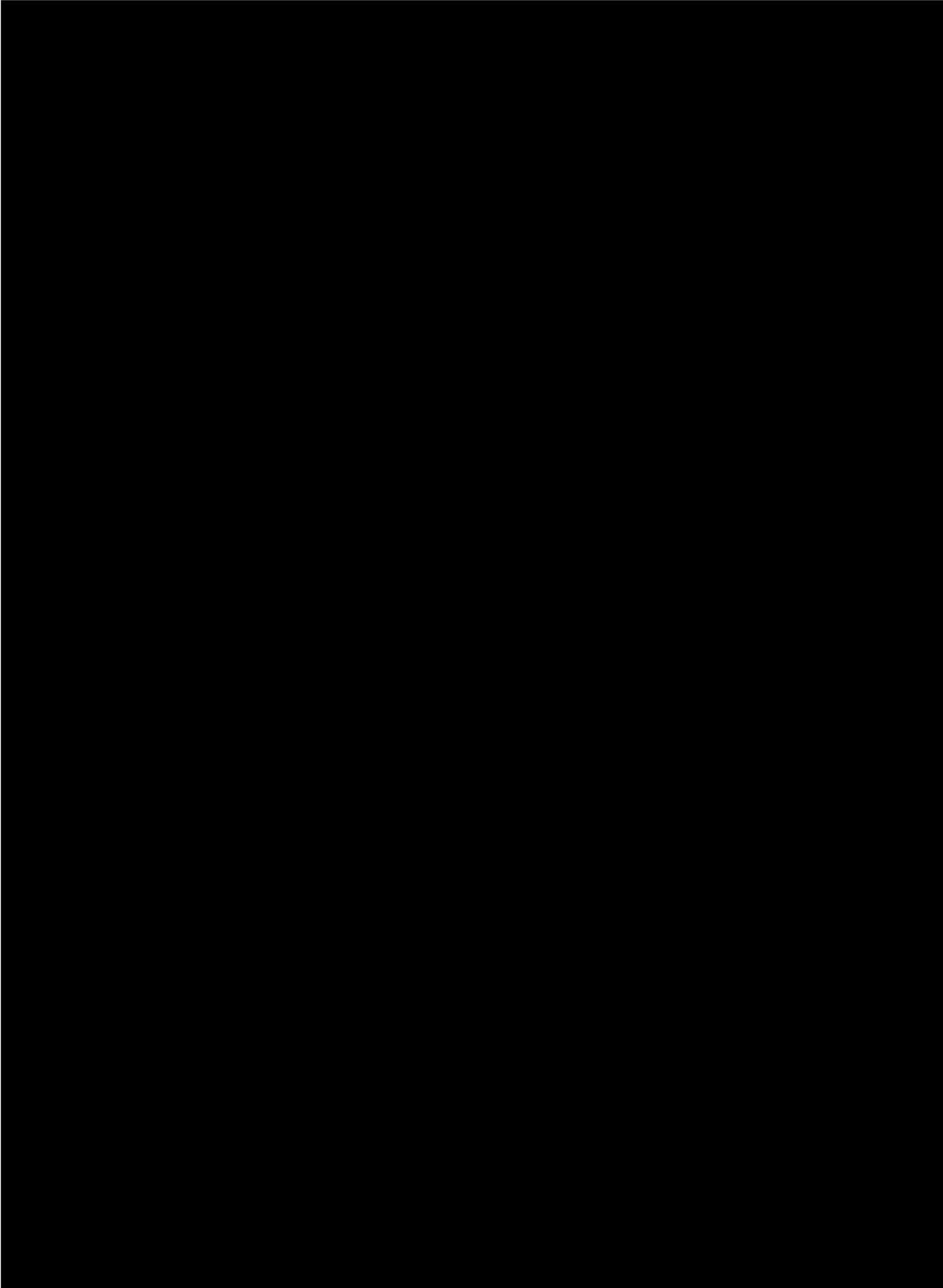
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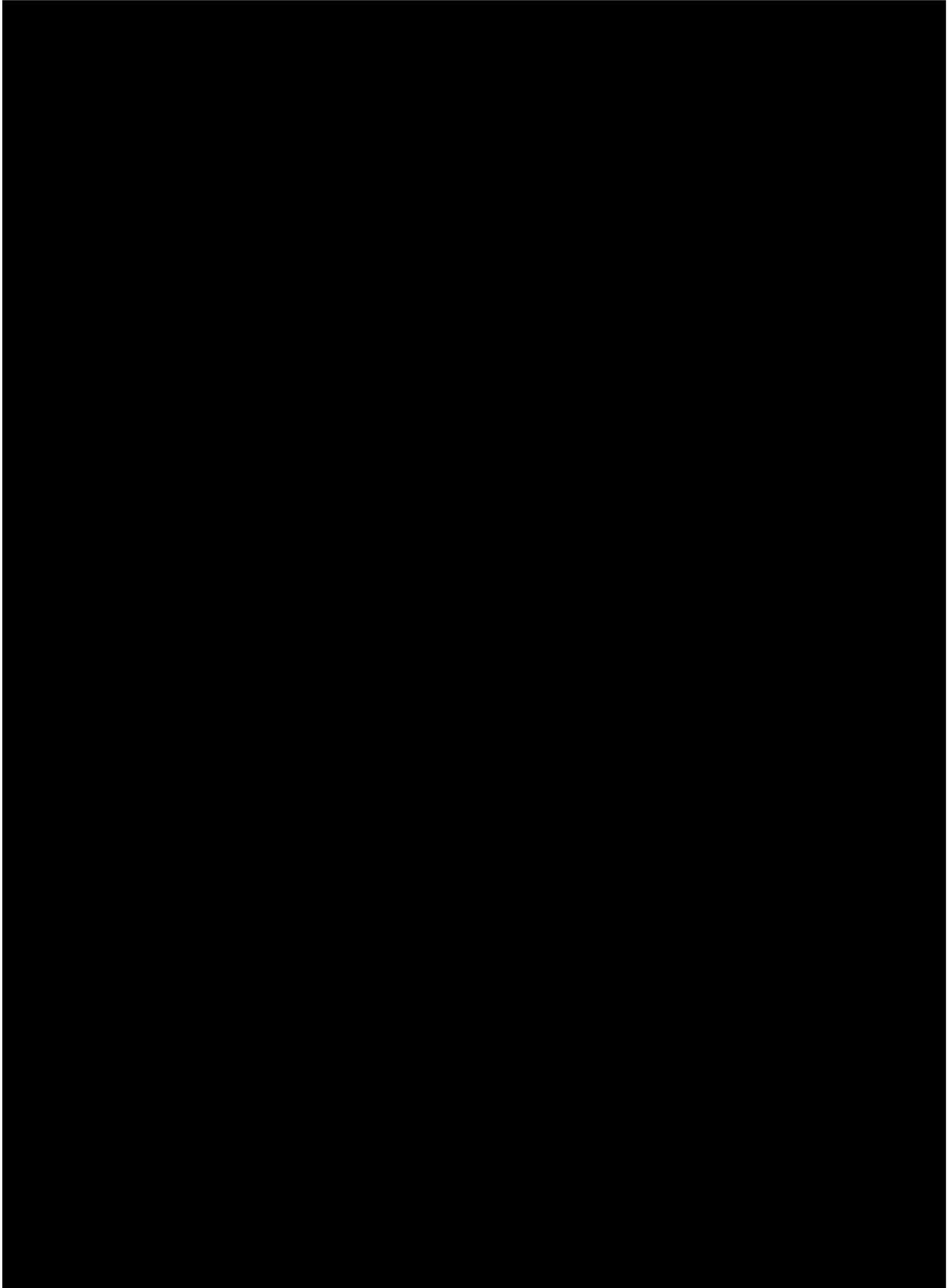
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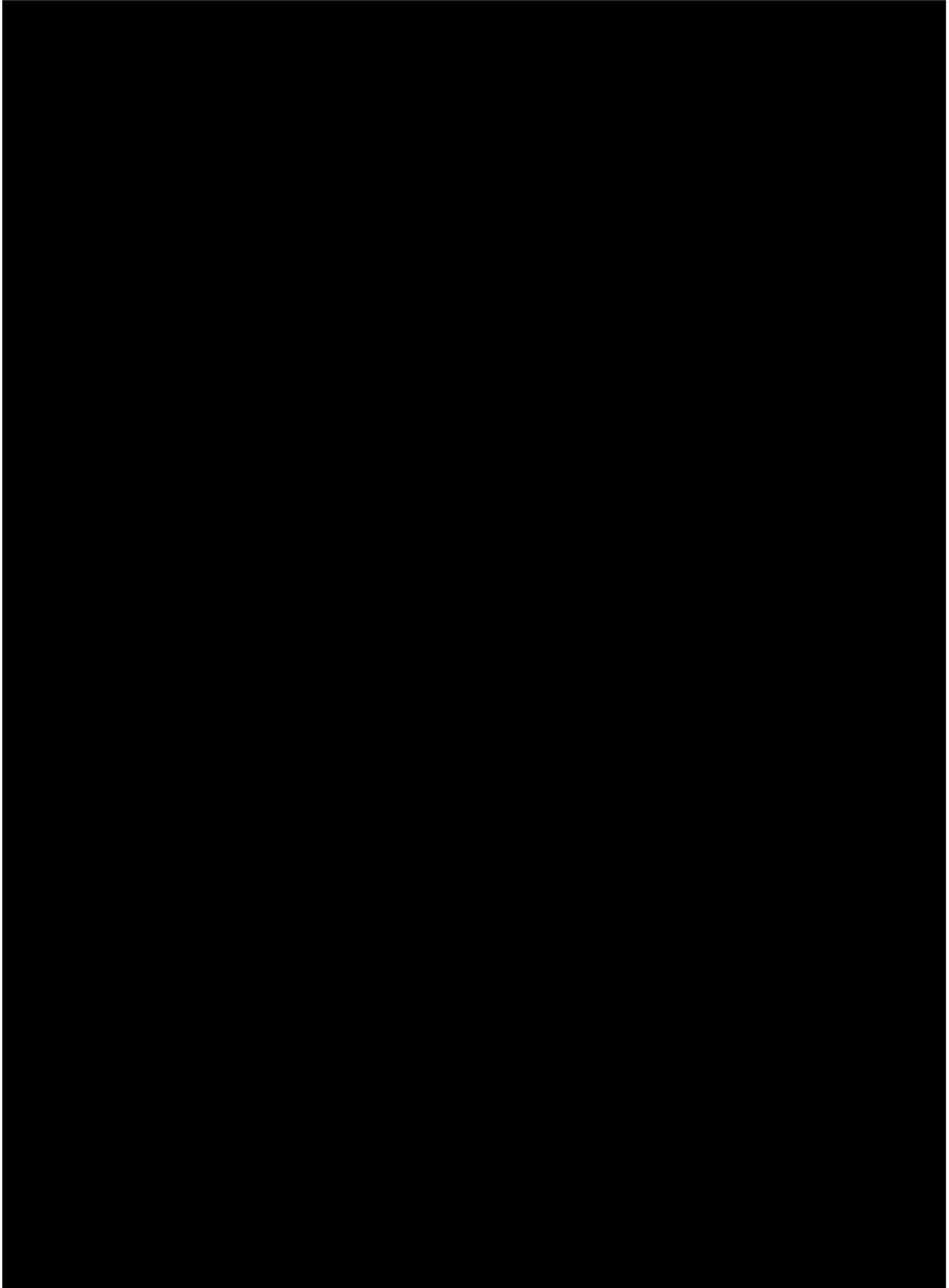
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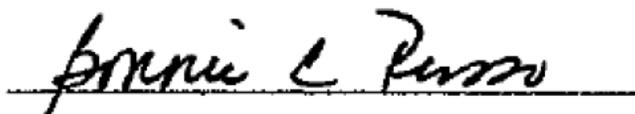
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CERTIFICATE OF NOTARY PUBLIC

I, Bonnie L. Russo, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



Notary Public in and for  
the District of Columbia

My Commission expires: August 14, 2025



1 David Gringer

2 david.gringer@wilmerhale.com

3 December 12, 2022

4 RE: In The Matter Of Intuit Inc

5 12/8/22, WILLIAM T. MAXSON, JOB NO. 5570324

6 The above-referenced transcript has been

7 completed by Veritext Legal Solutions and

8 review of the transcript is being handled as follows:

9 \_\_\_ Per CA State Code (CCP 2025.520 (a)-(e)) - Contact Veritext  
10 to schedule a time to review the original transcript at  
11 a Veritext office.

12 \_\_\_ Per CA State Code (CCP 2025.520 (a)-(e)) - Locked .PDF  
13 Transcript - The witness should review the transcript and  
14 make any necessary corrections on the errata pages included  
15 below, notating the page and line number of the corrections.  
16 The witness should then sign and date the errata and penalty  
17 of perjury pages and return the completed pages to all  
18 appearing counsel within the period of time determined at  
19 the deposition or provided by the Code of Civil Procedure.

20 \_\_\_ Waiving the CA Code of Civil Procedure per Stipulation of  
21 Counsel - Original transcript to be released for signature  
22 as determined at the deposition.

23 \_\_\_ Signature Waived - Reading & Signature was waived at the  
24 time of the deposition.

25

Page 375

1     \_\_\_ Federal R&S Requested (FRCP 30(e)(1)(B)) - Locked .PDF  
2         Transcript - The witness should review the transcript and  
3         make any necessary corrections on the errata pages included  
4         below, notating the page and line number of the corrections.  
5         The witness should then sign and date the errata and penalty  
6         of perjury pages and return the completed pages to all  
7         appearing counsel within the period of time determined at  
8         the deposition or provided by the Federal Rules.  
9     \_X\_ Federal R&S Not Requested - Reading & Signature was not  
10        requested before the completion of the deposition.

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1 In The Matter Of Intuit Inc

2 WILLIAM T. MAXSON (#5570324)

3 E R R A T A S H E E T

4 PAGE\_\_\_\_\_ LINE\_\_\_\_\_ CHANGE\_\_\_\_\_

5 \_\_\_\_\_

6 REASON\_\_\_\_\_

7 PAGE\_\_\_\_\_ LINE\_\_\_\_\_ CHANGE\_\_\_\_\_

8 \_\_\_\_\_

9 REASON\_\_\_\_\_

10 PAGE\_\_\_\_\_ LINE\_\_\_\_\_ CHANGE\_\_\_\_\_

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12 REASON\_\_\_\_\_

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18 REASON\_\_\_\_\_

19 PAGE\_\_\_\_\_ LINE\_\_\_\_\_ CHANGE\_\_\_\_\_

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21 REASON\_\_\_\_\_

22 \_\_\_\_\_

23 \_\_\_\_\_

24 WITNESS

Date

25

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS  
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

Veritext Legal Solutions complies with all federal and State regulations with respect to the provision of court reporting services, and maintains its neutrality and independence regardless of relationship or the financial outcome of any litigation. Veritext requires adherence to the foregoing professional and ethical standards from all of its subcontractors in their independent contractor agreements.

Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at [www.veritext.com](http://www.veritext.com).

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2023, I electronically filed the foregoing Opposition to Intuit Inc.’s Motion for Leave to File Surreply electronically using the FTC’s E-Filing system, and I caused the foregoing document to be sent via email to:

April Tabor  
 Office of the Secretary  
 Federal Trade Commission  
 600 Pennsylvania Avenue, NW  
 Suite CC-5610  
 Washington, DC 20580  
 ElectronicFilings@ftc.gov

*Secretary of the Commission  
 Clerk of the Court*

Hon. D. Michael Chappell  
 Chief Administrative Law Judge  
 Federal Trade Commission  
 600 Pennsylvania Avenue, NW  
 Suite H-110  
 Washington, DC 20580

*Administrative Law Judge*

I further certify that on January 10, 2023, I caused the foregoing document to be served via email on:

David Z. Gringer  
 Phoebe Silos  
 Charles Bridge  
 Eleanor Davis  
 Wilmer Cutler Pickering Hale & Dorr LLP  
 7 World Trade Center  
 250 Greenwich Street  
 New York, NY 10007  
 David.Gringer@wilmerhale.com  
 Phoebe.Silos@wilmerhale.com  
 Charles.Bridge@wilmerhale.com  
 Eleanor.Davis@wilmerhale.com  
 (212) 230-8800

Shelby Martin  
 Wilmer Cutler Pickering Hale & Dorr LLP  
 1225 Seventeenth Street, Suite 2600  
 Denver, CO 80202  
 Shelby.Martin@wilmerhale.com  
 (720) 274-3135

Katherine Mackey  
 Wilmer Cutler Pickering Hale & Dorr LLP  
 60 State Street  
 Boston, MA 02109  
 Katherine.Mackey@wilmerhale.com  
 (617) 526-6000

Jonathan E. Paikin  
 Jennifer Milici  
 Derek A. Woodman  
 Vinecia Perkins  
 Andres Salinas  
 Spencer Todd  
 Jocelyn Berteaud  
 Benjamin Chapin  
 Margaret (Molly) Dillaway  
 Reade Jacob  
 Wilmer Cutler Pickering Hale & Dorr LLP  
 1875 Pennsylvania Avenue NW  
 Washington, DC 20006  
 Jonathan.Paikin@wilmerhale.com  
 Jennifer.Milici@wilmerhale.com  
 Derek.Woodman@wilmerhale.com  
 Vinecia.Perkins@wilmerhale.com  
 Andres.Salinas@wilmerhale.com  
 Spencer.Todd@wilmerhale.com  
 Joss.Berteaud@wilmerhale.com  
 Benjamin.Chapin@wilmerhale.com  
 Molly.Dillaway@wilmerhale.com  
 Reade.Jacob@wilmerhale.com  
 (202) 663-6000

*Attorneys for Respondent, Intuit Inc.*

/s/ James Evans  
 James Evans