



Execution version

# Sydney Metro City & Southwest OTS2 Early Works Deed

Sydney Metro

ABN 12 354 063 515

and

MTR Corporation (Sydney) SMCSW Pty Limited

ACN 615 158 122

7 December 2018

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**THIS DEED** is made on 7 DECEMBER 2018

**BETWEEN:**

- (1) **Sydney Metro** ABN 12 354 063 515 a New South Wales Government agency constituted by section 38 of the *Transport Administration Act 1988* (NSW) and located at Level 43, 680 George Street, Sydney NSW 2000 (**Principal**); and
- (2) **MTR Corporation (Sydney) SMCSW Pty Limited** ACN 615 158 122 of 2 Riverside Quay, Southbank VIC 3006 (**MTR**).

**RECITALS AND OVERVIEW**

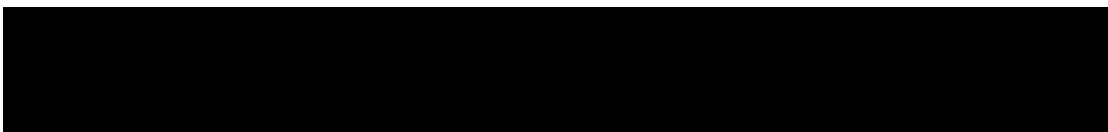
- (A) In September 2014, Transport for NSW and OpCo entered into the OTS Project Deed to deliver the OTS PPP as part of Sydney Metro Northwest. Sydney Metro Northwest includes 13 stations between Cudgegong Road and Chatswood and is currently under construction. Sydney Metro Northwest is expected to become operational in 2019.
- (B) The OTS Project Deed contains provisions providing for Transport for NSW and OpCo to establish a cooperative and consultative process by which they can discuss and work together on the project definition, planning, development and delivery of an augmentation of Sydney Metro Northwest.
- (C) On 7 December 2017, Transport for NSW, OpCo and the NRT Parties entered into the Commitment Deed to record the terms agreed by Transport for NSW, OpCo and the NRT Parties with respect to the Augmentation and the OTS2 PPP.
- (D) All assets, rights and liabilities of Transport for NSW arising from or in connection with the Project (including from or in connection with the OTS Project Deed) were transferred to, and became assets, rights and liabilities of, the Principal on 1 July 2018 under section 94 of the *Transport Administration Act* following the establishment of the Principal as a NSW Government agency under the *Transport Administration Amendment (Sydney Metro) Act 2018* (NSW).
- (E) In order to provide greater certainty that the time objectives for the OTS2 Works set out in the Initial Delivery Program will be met, MTR will perform the Early Works Activities on the basis set out in in this deed.
- (F) MTR acknowledges and agrees that it is the intention that from Financial Close under the Executed OTS2 Project Deed, the Early Works will form part of the OTS2 Works and, from the date of Financial Close, will be treated as having been performed by OpCo2 under the Executed OTS2 Project Deed and by MTR under the Integrator Deed.

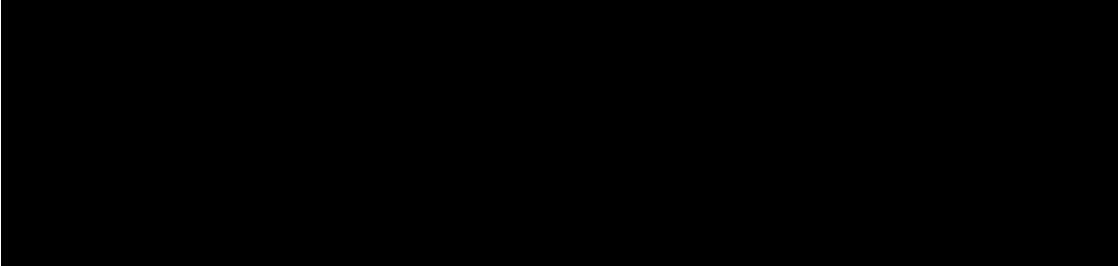
**THE PARTIES AGREE AS FOLLOWS:**

**1. INTERPRETATION**

**1.1 Definitions**

Capitalised terms used in this deed, including in the Recitals and Overview, have the meaning given to them in clause 1.1 (*Definitions*) of the Draft OTS2 Project Deed, unless otherwise defined in this deed. The following definitions apply in this deed.





**Commercially Sensitive Information** means the information identified in or of the type referred to in Schedule 13 (*Commercially Sensitive Information*).

**Completion** has the meaning given in clause 5.3 (*Requirements for Completion*).

**Completion Notice** means a notice referred to in clause 5.5(a)(i) substantially in the form of Part A of Schedule 9.

**Contract Finalisation Deed** means the deed titled "OTS2 – Contract Finalisation Deed" between the Principal, the NRT Parties, the O&M Contractor and the Equity Parties (as such parties are defined in the Draft OTS2 Project Deed) and dated 7 December 2018.

**Date for Milestone Achievement** means in respect of a Milestone, the date set out in Schedule 11 (*Nominated Subcontracts*) or Schedule 12 (*Early Works Milestones*), as applicable.

**Date of Completion** means the date on which Completion is achieved for the Early Works, being the date stated by the Principal's Representative in the Completion Notice.

**Dispute Resolution Mechanism** means the dispute resolution mechanism incorporated into this deed pursuant to clause 3.3 (*Incorporation by reference*).

**Draft Base Case Financial Model** means the financial model set out in Schedule 11 (*Draft Base Case Financial Model*) of the Contract Finalisation Deed.

**Draft OTS2 Project Deed** means the project deed in respect of Phase 1 of the Project, the form of which as at the date of this deed is set out in 0A (*OTS2 Project Deed (Phase 1)*) of the Contract Finalisation Deed.

**Draft OTS2 Project Deed (Phase 1 & 2)** means the project deed in respect of Phases 1 and 2 of the Project, the form of which as at the date of this deed is set out in 5A (*OTS2 Project Deed (Phase 1 & 2)*) of the Contract Finalisation Deed.

**Early Works** means the services and deliverables that MTR must perform and/or deliver under this deed set out in Schedule 2 (*Scope of Early Works*) including any Modifications directed or approved in accordance with clause 6 (*Modifications*).

**Early Works Activities** means all activities that MTR performs, or is required to perform, to exercise its rights or comply with its obligations under this deed, whether or not the performance of such things or tasks is subcontracted to a MTR Contractor.

**Early Works Payments** means the payments in respect of Milestones set out in Schedule 5 (*Early Works Payments*).

**Early Works Termination Event** means the termination events set out in clause 14.1 (*Early Works Termination Events*).

**Early Works Termination Payment** means the payment determined in accordance with clause 14.7 (*Consequences of termination*).

**Executed OTS2 Project Deed** means the executed form of the project deed in respect of the Project, to be entered into between the Principal and OpCo2.

**Initial Delivery Program** means the initial delivery program and set out in Exhibit 4 of the Draft OTS2 Project Deed.

**Milestones** means each of the checkpoint milestones set out in Schedule 11 (*Nominated Subcontracts*) and each of the milestones set out in Schedule 12 (*Early Works Milestones*) and any additional Milestone agreed pursuant to clause 9.7 (*Milestone Payments and update to Early Works Payments*) and **Milestone** means any of them.

**Milestone Completion** has the meaning given in clause 5.2(c).

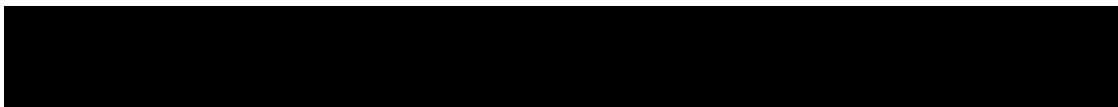
**Milestone Completion Notice** means a notice referred to in clause 5.5(a)(i) substantially in the form of Part B of Schedule 9.

**Milestone Payment** means an Early Works Payment that is payable following Milestone Completion of a Milestone.

**Modification** means any change to the requirements of this deed for:

- (a) the Early Works; or
- (b) the Early Works Activities,

including any addition, reduction, increase, decrease or omission to or from them or any suspension by the Principal pursuant to clause 13(b)(ii).



**MTR Contractor** means a contractor, sub-contractor, sub-sub-contractor and so on right down the contracting chain (including all suppliers, tradespersons and consultants) of MTR involved in performing the Early Works Activities.

**MTR's Representative** means [REDACTED] or any other person appointed by MTR to be its representative for the purpose of the Early Works.

**MTR Parent Company Guarantee** means the parent company guarantee in the form set out in Schedule 7 (*MTR Parent Company Guarantee*) dated on or about the date of this deed between [REDACTED] as guarantor and the Principal as beneficiary under which [REDACTED] guarantees the performance of the obligations of MTR under this deed.

**Nominated Subcontract** means a subcontract in relation to Nominated Subcontract Work between MTR and a Nominated Subcontractor.

**Nominated Subcontract Work** means the Early Works Activities to be performed by a Nominated Subcontractor which are described in Schedule 11 (*Nominated Subcontract Work*).

**Nominated Subcontractor** means the persons specified in Schedule 11 (*Nominated Subcontract Work*).

**PDCS** means the Principal's web based TeamBinder project data and collaboration system, or such other electronic project data and collaboration system notified to MTR by the Principal's Representative.



**Principal's Representative** means [REDACTED] or any other person appointed by the Principal.

**Roles and Responsibilities Matrices** means the documents listed in Appendix B of Schedule 2 (*Scope of Early Works*), as updated from time to time by MTR in accordance with clause 6 of Schedule 2 (*Scope of Early Works*).

**Total Early Works Payment** means the aggregate of all Early Works Payments set out in Schedule 5 (*Early Works Payments*) as adjusted for any Modification agreed or directed by the Principal.

## 1.2 Rules for interpreting this document

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this deed, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
  - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
  - (ii) a document or agreement (including this deed), or a provision of a document or agreement (including this deed), including any document or agreement (or provisions thereof) which exists in draft form, is to that document, agreement or provision as amended, supplemented, replaced or novated;
  - (iii) the parties means the parties to this deed at the relevant time;
  - (iv) a party means a party to this deed;
  - (v) a party to this deed or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;
  - (vi) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
  - (vii) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.
- (c) A reference to any authority, institute, association or body is:
  - (i) if that authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
  - (ii) if that authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that authority, institute, association or body.
- (d) A word which suggests one gender includes the other genders.

- (e) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (g) A reference to **information** is to information of any kind in any form or medium, whether formal or informal, written or unwritten, for example, computer software or programs, concepts, data, drawings, ideas, knowledge, procedures, source codes or object codes, technology or trade secrets.
- (h) The expression **this deed** includes the agreement, arrangement, understanding or transaction recorded in this deed.
- (i) A reference to **dollars** or **\$** is to an amount in Australian currency.

### 1.3 **Non Business Days**

If the day on or by which a person must do something under this deed is not a Business Day:

- (a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
- (b) in any other case, the person must do it on or by the previous Business Day.

### 1.4 **The rule about "contra proferentem"**

This deed is not to be interpreted against the interests of a party merely because that party proposed this deed or some provision in it or because that party relies on a provision of this deed to protect itself.

### 1.5 **Representations and warranties**

MTR represents and warrants that:

- (a) it is duly registered and remains in existence;
- (b) the execution, delivery, performance of this deed does not violate any law or any document or agreement to which it is a party or which is binding on it or any of its assets;
- (c) it subsists and is properly constituted;
- (d) it does not have any immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
- (e) it is not aware of any material facts or circumstances that have not been disclosed to the Principal and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this deed; and
- (f) no litigation, arbitration, mediation, conciliation, criminal or administrative procedures are current, pending or to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect upon it or its ability to perform its financial or other obligations under this deed.



## 1.6 Unfettered discretion

- (a) This deed will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of the Principal to exercise any of its statutory functions and powers pursuant to any law.
- (b) Without limiting clause 1.6(a), anything the Principal does, fails to do or purports to do, pursuant to its functions and powers under any law, will be deemed not to be an act or omission by the Principal (including a breach of contract) under or in connection with this deed and will not entitle MTR to make any Claim against the Principal.
- (c) MTR also acknowledges and agrees that the Principal's obligations under this deed are subject to any change in any policy or guideline of the NSW Government.
- (d) Clauses 1.6(a), 1.6(b) and 1.6(c) do not limit any liability which the Principal would have to MTR under this deed as a result of a breach by the Principal of this deed but for subclauses 1.6(a), 1.6(b) and 1.6(c).

## 2. PURPOSE

The purpose of this deed is to record the terms agreed by the Principal and MTR in respect of the Early Works and delivery of the Early Works Activities.

## 3. EARLY WORKS AND OTS2 PROJECT DEED

### 3.1 Early Works

MTR must carry out the Early Works in accordance with the requirements of this deed.

### 3.2 OTS2 Project Deed

- (a) The parties acknowledge and agree that, if the Draft OTS2 Project Deed is executed by the Principal and OpCo2 and Financial Close occurs under the Executed OTS2 Project Deed, the Early Works carried out by MTR pursuant to this deed will on and from the date of Financial Close:
  - (i) form part of the OTS2 Works under the Executed OTS2 Project Deed and be deemed to have been performed by or on behalf of OpCo2 under the Executed OTS2 Project Deed; and
  - (ii) form part of the OTS2 Works (as defined in the Integrator Deed) under the Integrator Deed and be deemed to have been performed by or on behalf of the Integrator under the Integrator Deed,and the parties agree that:
  - (iii) OpCo2 will owe liabilities and obligations to the Principal in respect of the Early Works under the Executed OTS2 Project Deed; and
  - (iv) MTR will owe liabilities and obligations to OpCo2 in respect of the Early Works under the Integrator Deed,

notwithstanding that the Early Works will have been performed by or on behalf of MTR and any acts or omissions in respect of the Early Works performed will have occurred prior to the date of Financial Close under the Executed OTS2 Project Deed.

- (b) This deed does not constitute a contract between the Principal and MTR to perform the OTS2 Works the subject of the Draft OTS2 Project Deed and which will be the subject of the Executed OTS2 Project Deed.

### 3.3 **Incorporation by reference**

The clauses of the Draft OTS2 Project Deed set out in Schedule 1 (*Draft OTS2 Project Deed clauses incorporated by reference*) are incorporated by reference into this deed as if references in the Draft OTS2 Project Deed to:

- (a) OpCo2 were to MTR;
- (b) OpCo2's Activities were to Early Works Activities;
- (c) OTS2 Works were to Early Works;
- (d) OpCo2 Contractors were to MTR Contractors; and
- (e) "this deed", a "Project Agreement" or a "Principal Project Agreement" were to this deed.

## 4. **TERM**

- (a) Subject to clause 4(b), the rights and obligations of the Principal and MTR under this deed begin on the date of this deed and terminate on the earlier to occur of:

- (i) the date of Financial Close under the Executed OTS2 Project Deed; and
- (ii) the date of termination of this deed under clause 14 (*Termination*),

in each case without prejudice to the rights and obligations of the parties which have accrued prior to the date of termination (including amounts due but not yet payable).

- (b) If this deed is terminated in accordance with clause 4(a)(i), the rights of the Principal and any liabilities of MTR which have accrued prior to the date of termination will be taken to have accrued under the Executed OTS2 Project Deed and executed Integrator Deed (respectively) rather than this deed, notwithstanding that:

- (i) the Early Works will have been performed by or on behalf of MTR; and
- (ii) any acts or omissions in respect of the Early Works will have occurred prior to the date of Financial Close under the Executed OTS2 Project Deed.

## 5. **TIME**

### 5.1 **Commencement**

MTR must promptly commence performance of, and regularly and diligently progress, the Early Works Activities following execution of this deed.

### 5.2 **Dates for Milestone Achievement**

- (a) MTR must use its best endeavours to achieve Milestone Completion for each Milestone by the relevant Date for Milestone Achievement or as soon as possible thereafter.

- (b) Milestone Completion (**Milestone Completion**) in respect of a Milestone will be achieved when:
  - (i) the Milestone is complete and complies with the requirements of this deed; and
  - (ii) the Principal's Representative has issued a Milestone Completion Notice in respect of the Milestone in accordance with clause 5.5 (*Completion Notice*).

### 5.3 Requirements for Completion

Completion (**Completion**) will be achieved when:

- (a) the Early Works are complete and comply with the requirements of this deed;
- (b) Milestone Completion for all Milestones has been achieved; and
- (c) the Principal's Representative has issued a Completion Notice in respect of the Early Works in accordance with clause 5.5 (*Completion Notice*).

### 5.4 Notice of Completion

MTR must give the Principal's Representative:

- (a) at least 5 Business Days notice of the date on which it expects to achieve Milestone Completion or Completion; and
- (b) a written request for a Milestone Completion Notice or Completion Notice when it believes Milestone Completion or Completion has been achieved (which request must not be given earlier than 5 Business Days after the date on which MTR gives notice under clause 5.4(a)).

### 5.5 Completion Notice

- (a) Within 5 Business Days of receipt of the request under clause 5.4(b), the Principal's Representative must determine whether Milestone Completion or Completion has been achieved and either:
  - (i) if Milestone Completion or Completion has been achieved, issue a Milestone Completion Notice or Completion Notice to MTR stating the date on which Milestone Completion or Completion was achieved; and
  - (ii) if Milestone Completion or Completion has not been achieved, issue a notice to MTR and the Principal which:
    - (A) lists the items which remain to be completed before Milestone Completion or Completion can be achieved; or
    - (B) states that the Early Works are so far from achieving Milestone Completion or Completion that it is not practicable to provide the list referred to in clause 5.5(a)(ii)(A).
- (b) If the Principal's Representative issues a notice under clause 5.5(a)(ii), MTR must continue with the Early Works Activities to achieve Milestone Completion or Completion and clause 5.4 (*Notice of Completion*) and clause 5.5 (*Completion Notice*) will reapply.

## 5.6 **Effect of Completion Notice**

- (a) A Milestone Completion Notice or Completion Notice will not:
  - (i) constitute approval by the Principal or the Principal's Representative of MTR's performance of its obligations under this deed or, following Financial Close, of OpCo2's obligations under the Executed OTS2 Project Deed;
  - (ii) be taken as an admission or evidence that the Early Works comply with this deed or, following Financial Close, the Executed OTS2 Project Deed; or
  - (iii) prejudice any rights or powers of the Principal or the Principal's Representative under this deed or, following Financial Close, under the Executed OTS2 Project Deed.
- (b) Without limiting clause 5.6(a), the parties agree that, in the absence of manifest error on the face of the certification, the Milestone Completion Notice or Completion Notice is final and binding on the parties for the purposes only of establishing that Milestone Completion or Completion has occurred under this deed.

## 6. **MODIFICATIONS**

### 6.1 **Proposed Modifications**

- (a) At any time prior to Financial Close under the Executed OTS2 Project Deed, the Principal's Representative may issue a document titled "Modification Proposal Request" to MTR, which will set out details of a proposed Modification that the Principal is considering.
- (b) Within 10 Business Days of the receipt of a "Modification Proposal Request", or such other time as agreed between the parties, MTR must provide the Principal's Representative with a written notice in which MTR sets out such details as may be reasonably required by the Principal's Representative (including any adjustments to the Early Works Payments and their reimbursement to the Principal on Financial Close under the Executed OTS2 Project Deed (if relevant)).
- (c) The Principal will not be obliged to proceed with any proposed Modification that is the subject of a "Modification Proposal Request".

### 6.2 **Modification Orders**

- (a) Whether or not the Principal's Representative has issued a "Modification Proposal Request" under clause 6.1(a), the Principal's Representative may at any time prior to Financial Close under the Executed OTS2 Project Deed, direct MTR to carry out a Modification to the Early Works by issuing a written document titled "Modification Order", in which the Principal's Representative will state one of the following:
  - (i) that the proposed adjustments to the Early Works Payments and their reimbursement to the Principal on Financial Close under the Executed OTS2 Project Deed (if relevant) set out in MTR's notice under clause 6.1 (*Proposed Modifications*) are agreed and the Early Works Payments will be adjusted accordingly; or
  - (ii) that any adjustment to the Early Works Payments will be determined under clause 6.3(b).
- (b) There is no limitation on the power of the Principal's Representative to direct a Modification and no Modification or direction to carry out a Modification will invalidate this deed.

- (c) MTR must comply with a "Modification Order" irrespective of:
  - (i) the nature, extent or value of the work the subject of the Modification;
  - (ii) the location or timing (including the impact on any Date for Completion) of the work involved in the Modification; or
  - (iii) any Dispute related to the Modification.

### 6.3 Valuation of Modifications

Subject to the Dispute Resolution Mechanism and the notification of claims provision incorporated into this deed pursuant to clause 3.3 (*Incorporation by reference*), the Early Works Payments will be adjusted for all Modifications that have been directed by the Principal's Representative by:

- (a) to the extent that clause 6.2(a)(i) applies, the agreed amount as specified in the Modification Order; and
- (b) to the extent that clause 6.2(a)(ii) applies:
  - (i) an amount in respect of the Modification to be determined by the Principal's Representative on the basis of Schedule 5 (*Early Works Payments*);
  - (ii) an amount in respect of the Modification to be determined by the Principal's Representative having regard to the payment profile for the relevant OTS2 Works set out in the Draft Base Case Financial Model; or
  - (iii) to the extent clauses 6.3(b)(i) and 6.3(b)(ii) do not apply, an amount determined by the Principal's Representative on the basis of reasonable prices and rates.

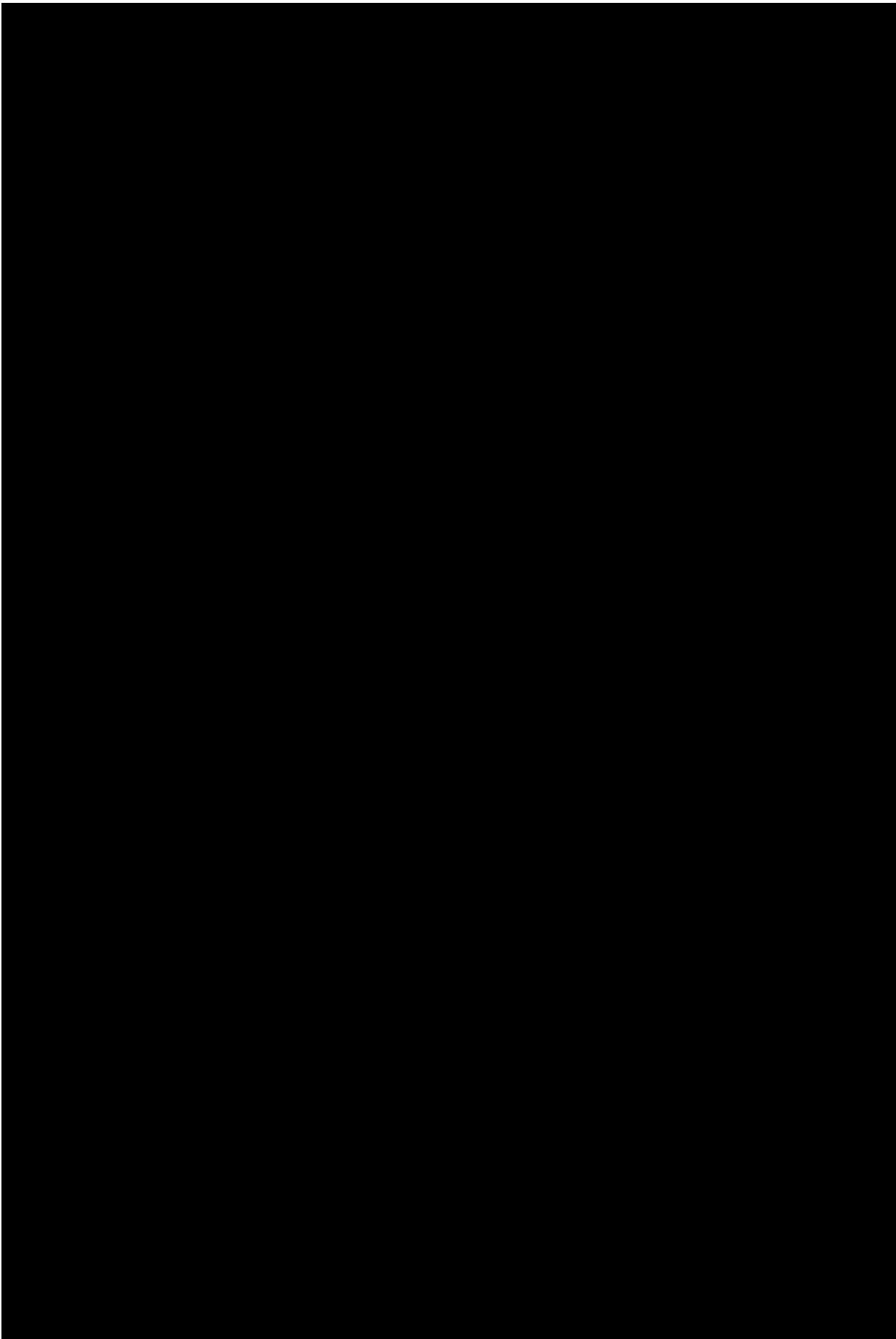
### 6.4 Omissions

If a Modification the subject of a direction by the Principal's Representative requires the omission or deletion of any part of the Early Works Activities, the Principal:

- (a) may either perform this work itself or employ or engage any other person or persons to carry out and complete the omitted or deleted work; and
- (b) will not be liable upon any Claim by MTR arising out of or in any way in connection with any work being omitted or deleted from the Early Works Activities whether or not the Principal performs this work itself or employs or engages any other person or persons to carry out and complete the omitted or deleted work, but without prejudice to clause 15.3(c) of the Contract Finalisation Deed.

### 6.5 MTR entitlements

This clause 6 (*Modifications*) is an exhaustive code of MTR's rights in any way in connection with any Modification under this deed. MTR waives all rights at law to make any Claim against the Principal in any way in connection with any of the matters set out in this clause 6 (*Modifications*) otherwise than in accordance with the terms of this deed, but without prejudice to clause 15.3(c) of the Contract Finalisation Deed.





## 8. INSURANCE

### 8.1 MTR insurance obligations

MTR must effect and maintain (or cause to be effected and maintained) the following insurances for amounts not less than, and with deductibles not more than, those set out in Part A (*MTR Insurances*) Schedule 6 (*Insurances*):

- (a) a professional indemnity insurance policy covering the liability of MTR in respect of any breach of a duty owed in a professional capacity by MTR, MTR Contractors and anyone engaged by MTR or any MTR Contractor in relation to the Early Works Activities;
- (b) workers' compensation insurance as required by law (and on the basis that, where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance shall extend to cover the vicarious liability of the Principal for the acts or omissions of MTR) and, where common law claims can be brought outside of the relevant statutory workers compensation or accident compensation scheme, employer's liability insurance covering any injury, damage, expense, loss or liability suffered or incurred by any persons employed by MTR or engaged in performing the Early Works Activities on behalf of MTR or their dependants (and on the basis that such insurance shall extend to cover the vicarious liability of the Principal for the acts or omissions of MTR); and
- (c) such other insurance as MTR is required to maintain in accordance with Legislation or as directed by the Principal in connection with the Early Works Activities.

### 8.2 Periods of MTR's insurances

MTR must maintain:

- (a) the professional indemnity insurance policy referred to in clause 8.1(a) from the date of this deed for a period of not less than 10 years; and
- (b) the workers' compensation insurance referred to in clause 8.1(b) from the date of this deed until the expiry or earlier termination of this deed.

### 8.3 Principal's Insurance

(a) Where reference is made in Schedule 1 (*Draft OTS2 Project Deed clauses incorporated by reference*) to clause 38.1 of the Draft OTS2 Project Deed regarding the Principal effecting and maintaining insurance this shall apply to the following insurances and to the extent of the Early Works only:

- (i) contract works; and
- (ii) public and products liability.

- (b) The Principal will effect and maintain the policies required in accordance with clause 8.3(a) on the terms of the policies set out in Part B (*Principal's Insurances*) Schedule 6 (*Insurances*).

**9. EARLY WORKS PAYMENTS**

**9.1 Principal's payment for Early Works**

- (a) The Principal must pay MTR the Early Works Payments in accordance with Schedule 5 (*Early Works Payments*) and this clause 9 (*Early Works Payments*) for the achievement of each Milestone Completion.
- (b) If the requirements of this clause 9 (*Early Works Payments*) are complied with in respect of a payment claim, the Principal must pay the amount of such claim into the MTR nominated bank account.
- (c) In no circumstances shall:
  - (i) the Principal's total aggregate liability in respect of the Early Works Payments exceed the Total Early Works Payment;
  - (ii) the Principal be liable under this deed to make an Early Works Payment for Early Works Activities not performed or completed by MTR; or
  - (iii) the Principal be required to make a Milestone Payment unless Milestone Completion has been achieved for the relevant Milestone to which the Milestone Payment relates.

**9.2 Early Works payment claims**

- (a) MTR must give the Principal's Representative a payment claim, with respect to the Early Works Payments:
  - (i) on the 25th day of each month (or if this day is not a Business Day (SOP), the next Business Day (SOP) after this day); and
  - (ii) 30 Business Days (SOP) after the issue of a Completion Notice for each package of Nominated Subcontract Work.
- (b) For each payment claim made under clause 9.2(a), MTR must give the Principal's Representative, a claim:
  - (i) in a format required by the Principal's Representative (including electronic format) showing the amount MTR claims in respect of each relevant Milestone Completion that has been achieved; and
  - (ii) which is a valid tax invoice for any taxable supplies to which the payment relates.
- (c) The Principal's Representative must, on behalf of the Principal, within 10 Business Days (SOP) of receipt of MTR's payment claim under clause 9.2(a), issue to MTR and the Principal a payment schedule stating:
  - (i) the amount (if any) which the Principal's Representative believes to be then payable by the Principal to MTR and which the Principal proposes to pay to MTR; or
  - (ii) the amount which the Principal's Representative believes to be then payable by MTR to the Principal,

including details of the calculation of the payment amount. In issuing a payment schedule the Principal's Representative:

- (iii) may deduct from the amount which would otherwise be payable to MTR any amount which the Principal is entitled to retain, deduct, withhold or set-off under this deed, including under clause 9.4 (*Provision of documentation and other requirements*), clause 9.5 (*Payment of subcontractors, workers compensation and payroll tax*) and clause 56.15 (*Payments*) of the Draft OTS2 Project Deed (Phase 1 & 2); and
  - (iv) must, if the payment schedule shows an amount less than the amount claimed by MTR in the payment claim, set out in the payment schedule why the amount is less and if the reason for the difference is that the Principal has retained, deducted withheld or set-off payment for any reason, the reason for the retention, deduction, withholding or setting-off of payment.
- (d) If MTR does not give the Principal's Representative a payment claim at a time required by clause 9.2(a), the Principal's Representative may nevertheless (but is not obliged to) issue a payment schedule as if a progress claim was made at the time required.
- (e) A payment schedule issued under clause 9.2(c) or clause 9.2(d) will separately identify the sum of the amounts due.
- (f) If the amount set out in a payment schedule issued under clause 9.2(c) is different to the amount in MTR's progress claim or if the Principal's Representative issues a payment schedule under clause 9.2(d), MTR must, within 2 Business Days (SOP) of receiving the payment schedule, issue a revised tax invoice, adjustment note or tax invoice (as the case may be) to the Principal to reflect the amount in the payment schedule.
- (g) Within 15 Business Days (SOP) of the date of MTR's payment claim in accordance with clause 9.2(a) or within 5 Business Days (SOP) of the issue of a payment schedule in accordance with clause 9.2(d):
- (i) where the payment schedule provides that an amount is payable by the Principal to MTR, the Principal must pay MTR the progress payment due to MTR as certified in the payment schedule; and
  - (ii) where the payment schedule provides that an amount is payable by MTR to the Principal, MTR must pay the Principal the amount due to the Principal as certified in the payment schedule.
- (h) Despite any other provisions of this deed to the contrary, the amount of any payment claim to which MTR is entitled in relation to an Early Works Payment and the amount to be allowed by the Principal's Representative in any payment schedule issued under clause 9.2(c) as the amount payable to MTR arising out of or in any way in connection with the Early Works will:
- (i) not include the following amounts:
    - (A) any amount which this clause 9 (*Early Works Payments*) provides cannot be claimed or is not payable because of the failure by MTR to take any action (including to give any notice to the Principal or the Principal's Representative);
    - (B) any amount which represents unliquidated damages claimed against the Principal (whether for breach of contract, in tort or otherwise);

- (C) any amount which this clause 9 (*Early Works Payments*) provides is not payable until certain events have occurred or conditions have been satisfied, to the extent those events have not occurred or those conditions have not been satisfied;
  - (D) any amount in respect of which the obligation of the Principal to make payment has been suspended under this deed;
  - (E) any amount in respect of which MTR has failed to provide supporting information as required by this clause 9 (*Early Works Payments*); or
  - (F) any amount for the Early Works for which payment has already been claimed or which is otherwise not in accordance with this deed;
- (ii) deduct the following amounts:
- (A) any amounts which have become due from MTR to the Principal under this deed; and
  - (B) any amounts which MTR is entitled under this deed to retain, deduct, withhold or set-off against the progress claim, including under clause 9.4 (*Provision of documentation and other requirements*), clause 9.5 (*Payment of subcontractors, workers compensation and payroll tax*) and clause 25.11(a) of the Draft OTS2 Project Deed which is incorporated into this deed pursuant to clause 3.3 (*Incorporation by reference*);
- (iii) in determining amounts to be excluded or deducted under clause 9.2(h)(i) and clause 9.2(h)(ii), have regard to matters or circumstances occurring at any time before the date that the determination is being made; and
- (iv) be determined having regard to the Early Works Payments (with additions or deductions, if any, provided for by this deed).
- (i) MTR must include in the progress claim lodged by it after the issue of the Completion Notice with respect to each package of Nominated Subcontract Work, all Claims that MTR wishes to make against the Principal in respect of any fact, matter or thing arising out of, or in any way in connection with, such package of Nominated Subcontract Work which occurred prior to the date of that progress claim.

### 9.3 **Effect of payment schedules and payments**

- (a) Neither the issue of a payment schedule under clause 9.2(c) or clause 9.2(d), nor the making of any payment pursuant to any such payment schedule, will:
- (i) constitute the approval of any work or other matter or prejudice any Claim by the Principal or the Principal's Representative with respect to the Early Works;
  - (ii) constitute evidence of the value of any work or an admission of liability or evidence that the Early Works have been executed or completed in accordance with this deed; or
  - (iii) prejudice the right of either party to dispute under the Dispute Resolution Mechanism whether any amount certified as payable in a payment schedule is the amount properly due and payable (and on determination, whether under the Dispute Resolution Mechanism or as otherwise agreed, of the amount properly due and payable, the Principal or MTR, as the case may be,

will be liable to pay the difference between the amount of such payment and the amount which is properly due and payable),

and any payments made pursuant to a payment schedule are payments on account only.

- (b) The Principal's Representative may at any time correct, modify or amend any payment schedule.

#### 9.4 **Provision of documentation and other requirements**

The value of the construction work carried out by MTR, and the amount of the progress payment to which MTR is entitled, will be no more than [REDACTED] of the amount that the Principal's Representative would otherwise have set out in any payment schedule unless and until MTR has:

- (a) effected and is maintaining all insurances it is required to effect and maintain under this deed;
- (b) complied with clause 11 (*MRT Parent Company Guarantee and Legal Opinion*); and
- (c) provided the Principal's Representative with a statutory declaration in the form of Schedule 8 (*Statutory Declaration*) which has been duly executed:
  - (i) by a representative of MTR who is in a position to know the facts declared; and
  - (ii) on the date the relevant progress claim was issued.

#### 9.5 **Payment of subcontractors, workers compensation and payroll tax**

- (a) If a worker or a subcontractor of MTR, obtains a court order in respect of the moneys payable to him, her or it in respect of his, her or its employment on, materials supplied for, or work performed with respect to, the Early Works, and produces to the Principal the court order and a statutory declaration that it remains unpaid, the Principal may (but is not obliged to) pay the amount of the order and costs included in the order to the worker or subcontractor, and the amount paid shall be a debt due from MTR to the Principal.
- (b) Notwithstanding clause 9.5(a), if any amount is:
  - (i) certified as payable; or
  - (ii) otherwise due and payable (and not disputed amounts),to a Nominated Subcontractor under a Nominated Subcontract, and MTR does not pay such amount to that Nominated Subcontractor in accordance with that Nominated Subcontract, then the Principal may pay such amount to that Nominated Subcontractor provided it has given MTR 10 Business Days notice of its intention to do so, and any amount so paid by the Principal to that Nominated Subcontractor will be a debt due and payable by MTR to the Principal if such amount has previously been paid by the Principal to MTR.
- (c) If the Principal receives notices of:
  - (i) MTR being placed under administration; or
  - (ii) the making of a winding up order in respect of MTR,



the Principal will not make any payment to a worker or subcontractor without the concurrence of the administrator, provisional liquidator or liquidator, as the case may be.

- (d) Nothing in this clause 9.5 (*Payment of subcontractors, workers compensation and payroll tax*) limits or otherwise affects the Principal's rights under section 175B(7) of the *Workers Compensation Act 1987* (NSW), section 18(6) of schedule 2 of the *Payroll Tax Act 2007* (NSW) and section 127(5) of the *Industrial Relations Act 1996* (NSW).

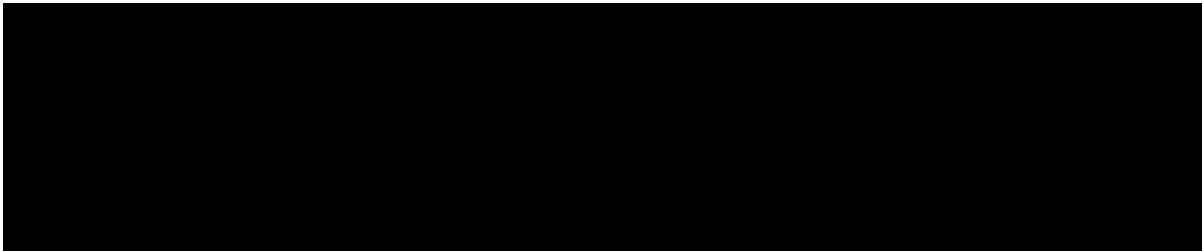
#### 9.6 **Release after final payment claim**

MTR releases the Principal from any Claim in respect of any fact, matter or thing arising out of, or in any way in connection with, the Early Works Activities, the Early Works or this deed that occurred prior to the date of submission of the final payment claim, except for any Claim which has been notified to the Principal's Representative in accordance with the requirements of clause 57 of the Draft OTS2 Project Deed, incorporated into this deed pursuant to clause 3.3 (*Incorporation by reference*).

#### 9.7 **Milestone Payments and update to Early Works Payments**

- (a) The parties acknowledge that certain of the payment amounts referred to in the tables in Part B of Schedule 5 (*Early Works Payments*) do not have a Milestone attributable to them as the relevant Milestone remains to be confirmed. The parties agree that they will work together in good faith after the date of this deed to agree the Milestone (which may be a milestone not currently contemplated) for a payment amount where it is indicated as "TBC", recognising that MTR also needs to reach an equivalent agreement with the relevant Nominated Contractor. Only once the Milestone is agreed between the parties can a claim for payment be made if Milestone Completion of that Milestone is achieved.
- (b) Once agreement is reached on the inclusion of additional Milestones as described above, the parties will record in writing the agreed update to Schedule 5 (*Early Works Payments*) which will then be deemed to be updated accordingly.

### 10. **LIABILITY AND INDEMNITY**



#### 10.2 **Indemnity from MTR**

MTR must indemnify the Principal and the State (each a **State Indemnified Party**) from and against:

- (a) any Loss incurred by a State Indemnified Party in respect of:
  - (i) damage to, loss or destruction of, or loss of use of (whether total or partial), any real or personal property belonging to a State Indemnified Party; or
  - (ii) any claim against a State Indemnified Party (including by another State Indemnified Party) in respect of:
    - (A) any illness, personal injury to, or death of, any person; or



- (B) damage to, loss or destruction of, or loss of use of or access to (whether total or partial), any real or personal property, caused by, arising out of, or in any way in connection with the Early Works Activities; or
- (b) any Loss incurred by a State Indemnified Party arising out of or in any way in connection with:
  - (i) any breach or failure to comply with the terms of this deed by MTR; or
  - (ii) any fraudulent, negligent or other wrongful act or omission by MTR.

### 10.3 Exclusions from indemnity

MTR's liability under clause 10.2 (*Indemnity from MTR*) will be reduced to the extent that the Loss arises from:

- (a) any act or omission of any State Indemnified Party or its Associates;
- (b) a third party claim for pure economic loss arising solely as a result of:
  - (i) the decision by the State or the Principal to proceed with the Sydney Metro; or
  - (ii) the existence or location of the Sydney Metro; or
- (c) loss of use of or access to (whether total or partial), any real or personal property, to the extent MTR has not received the proceeds of insurance (provided MTR has complied with its insurance obligations under this deed and has diligently pursued all insurance claims under the insurances available to it).

### 10.4 Consequential or Indirect Loss

- (a) Subject to clause 10.5 (*Other exclusions*), but otherwise despite any other provision of this deed:
  - (i) MTR has no liability to any State Indemnified Party (whether in contract, tort or otherwise, including under clause 10.2 (*Indemnity from MTR*), nor will any State Indemnified Party be entitled to make any Claim against MTR, in respect of Consequential or Indirect Loss incurred or sustained by the State Indemnified Party as a result of any act or omission of MTR (whether negligent or otherwise); and
  - (ii) the Principal has no liability to MTR (whether in contract, tort or otherwise), nor will MTR be entitled to make any Claim against the Principal, in respect of Consequential or Indirect Loss incurred or sustained by MTR as a result of any act or omission of the Principal (whether negligent or otherwise).

### 10.5 Other exclusions

- (a) Nothing in this deed, including clause 10.1 (*Limitation of Liability*) limits MTR's liability in respect of liability which:
  - (i) cannot be limited or excluded at law;
  - (ii) arises under the indemnities in clause 10.2(a) (*Indemnity from MTR*);
  - (iii) is due to any Wilful Breach of this deed by MTR;

- (iv) is due to any Wilful Misconduct, fraud or criminal conduct of MTR;
- (v) arises in connection with MTR's abandonment of its obligations under this deed; or
- (vi) to the extent that MTR is entitled to be indemnified for that liability under a policy of insurance, or would have been entitled to be indemnified for that liability if it had:
  - (A) diligently pursued a claim under that policy of insurance;
  - (B) complied with the terms and conditions of that policy of insurance; or
  - (C) complied with its insurance obligations under this deed,

and those liabilities will not be included in any calculation of MTR's total aggregate liability under clause 10.1 (*Limitation of Liability*).

- (b) Clause 10.4 (*Consequential or Indirect Loss*) does not limit MTR's liability:
  - (i) in respect of liability which:
    - (A) cannot be limited at law;
    - (B) is in respect of any liability of a State Indemnified Party to a third party (including another State Indemnified Party), except to the extent such liability arises in contract;
    - (C) is due to MTR's Wilful Misconduct, fraud or criminal conduct; or
    - (D) arises in connection with MTR's abandonment of its obligations under this deed; or
    - (E) for Loss incurred by a State Indemnified Party to a third party, in respect of:
      - (aa) any illness, personal injury to, or death of, any person; or
      - (bb) damage to, or loss or destruction of (whether total or partial), any real or personal property,
 caused by, or arising out of, or in any way in connection with, any Early Works Activities;
  - (ii) to the extent that MTR is entitled to be indemnified for that liability under a policy of insurance, or would have been entitled to be indemnified for that liability if it had:
    - (A) diligently pursued a claim under that policy of insurance;
    - (B) complied with the terms and conditions of that policy of insurance; or
    - (C) complied with its insurance obligations under this deed, and
  - (iii) to the extent that MTR has recovered from a third party (including any subcontractor and whether by way of indemnity or otherwise), an amount in respect of that liability.

11. **MTR PARENT COMPANY GUARANTEE AND LEGAL OPINION**

MTR must simultaneously with the execution by MTR of this deed:

- (a) procure that [REDACTED] executes the MTR Parent Company Guarantee; and
- (b) provide a legal opinion:
  - (i) on which the Principal is entitled to rely;
  - (ii) in a form satisfactory to the Principal; and
  - (iii) from [REDACTED] legal counsel satisfactory to the Principal, confirming, amongst other things, that the MTR Parent Company Guarantee from [REDACTED]:
    - (iv) has been duly authorised and properly executed under the laws of [REDACTED];
    - (v) that a judgement obtained in [REDACTED] against [REDACTED] would be enforceable against it under the laws of [REDACTED]; and
    - (vi) the choice of [REDACTED] law under clause 10.1 of the MTR Parent Company Guarantee will be upheld.

12. **ASSIGNMENT AND SUBCONTRACTING**

12.1 **General**

- (a) MTR may not, without the prior written approval of the Principal, assign, transfer or novate any of its rights or obligations under this deed.
- (b) The Principal may assign, transfer or novate any of its rights or obligations under this deed without notice to MTR.
- (c) Subject to clause 12.2 (*Nominated Subcontractors*), MTR must not subcontract any part of the Early Works Activities without the prior written approval of the Principal (which may be conditional but which will not be unreasonably withheld).
- (d) Subcontracting does not relieve MTR of any obligation under this deed.

12.2 **Nominated Subcontractors**

- (a) Unless the Principal's Representative otherwise approves in writing (which must not be unreasonably withheld or delayed), MTR must:
  - (i) enter into the Nominated Subcontracts with the Nominated Subcontractors on terms acceptable to the Principal (acting reasonably);
  - (ii) use its best endeavours to ensure that each Nominated Subcontractor complies with the terms of its Nominated Subcontract;
  - (iii) not terminate, surrender, rescind or accept repudiation of (or give the relevant Nominated Subcontractor an entitlement to terminate, surrender, rescind or accept repudiation of) a Nominated Subcontract;

- (iv) not permit the novation, assignment or substitution of any party's right, obligation or interest in a Nominated Subcontract;
  - (v) notify the Principal of:
    - (A) any material breach of a Nominated Subcontract; or
    - (B) any dispute which is notified as such under a Nominated Subcontract, immediately upon becoming aware of such breach or dispute; and
  - (vi) keep the Principal informed of the status of any such breach or dispute.
- (b) MTR will:
- (i) be liable to the Principal for the acts and omissions of the Nominated Subcontractors in connection with the Early Works Activities as if such acts or omissions were acts or omissions of MTR; and
  - (ii) not be relieved of any obligation or liability it has to the Principal under this deed by reason of MTR entering into any Nominated Subcontract with a Nominated Subcontractor.
- (c) MTR must ensure that each Nominated Subcontract includes a clause providing that if this deed is terminated for any reason, MTR and the Nominated Subcontractor must, after the Principal has given a direction to do so, promptly (and within 5 Business Days) execute a deed of novation in a form acceptable to the Principal.

### 13. **SUSPENSION**

- (a) The Principal's Representative may direct MTR to suspend and, after a suspension has been directed, to re-commence, the carrying out of all or a part of the Early Works Activities.
- (b) If the suspension under this clause 13 (*Suspension*) arises:
  - (i) as a result of MTR's failure to carry out its obligations in accordance with this deed, MTR will not be entitled to make, and the Principal will not be liable upon, any Claim arising out of, or in any way in connection with, the suspension; or
  - (ii) does not arise as a result of MTR's failure to carry out its obligations in accordance with this deed then the Principal must direct any suspension by means of a Modification pursuant to clause 6 (*Modifications*).
- (c) MTR must take all steps possible to mitigate the extra costs incurred by it as a result of the suspension.

### 14. **TERMINATION**

#### 14.1 **Early Works Termination Events**

Each of the following events is an **Early Works Termination Event**:

- (a) MTR does not commence or does not progress the Early Works Activities in accordance with the requirements of clause 5.1 (*Commencement*) and fails to do so within 10 Business Days after receipt of a notice from the Principal directing it to do so;

- (b) MTR does not effect and maintain (or cause to be effected and maintained) an insurance in breach of clause 8 (*Insurance*);
- (c) MTR fails to provide the MTR Parent Company Guarantee in breach of clause 11 (*MTR Parent Company Guarantee and legal opinion*) or the MTR Parent Company Guarantee ceases to be in full force and effect;
- (d) an Insolvency Event occurs in relation to MTR or [REDACTED] whether or not there has been a breach of this deed; and
- (e) the occurrence of any of the following events:
  - (i) MTR or an MTR Contractor ceases to hold an Approval, breaches a law or (other than in respect of the events in clause 14.1(a) and clause 14.1(c) above) breaches a term of this deed and such failure or breach is, in the reasonable opinion of the Principal, material to the performance of MTR's obligations under this deed and where the failure or breach is:
    - (A) capable of being remedied, it is not remedied within 20 Business Days of the date on which the Principal notifies MTR of the failure or breach; or
    - (B) not capable of remedy, and MTR has not satisfied the Principal that it is able to implement and comply with a satisfactory implementation plan to address the Principal's requirements; and
  - (ii) it is or becomes unlawful for MTR or an MTR Contractor to perform any of its obligations under the deed, and such event is not remedied within 20 Business Days of MTR becoming aware of the relevant event occurring.

#### 14.2 **Notice of Early Works Termination Event**

Without limiting the Principal's other rights or MTR's other obligations under this deed, MTR must notify the Principal's Representative immediately within 2 Business Days of becoming aware of an Early Works Termination Event or an event or occurrence that, with the giving of notice, or lapse of time, would or is likely to become an Early Termination Event.

#### 14.3 **Termination for Early Works Termination Event**

Upon the occurrence of an Early Works Termination Event, the Principal may:

- (a) suspend payments to MTR until the date upon which MTR remedies the breach or makes arrangements satisfactory to the Principal; and
- (b) by notice in writing to MTR terminate this deed.

#### 14.4 **Voluntary termination by the Principal**

The Principal may, at any time for its sole convenience and without giving reasons, terminate this deed by no less than 10 Business Days written notice to MTR with effect from the date stated in the notice (which date must not precede the date the notice is received by MTR).

#### 14.5 **Automatic termination**

If the Contract Finalisation Deed is terminated in accordance with its terms then this deed shall automatically terminate on the date of termination of the Contract Finalisation Deed.



#### 14.6 Consequences of termination

Upon expiry or termination of this deed:

- (a) the rights and obligations of the parties under this deed will cease except for:
  - (i) any accrued rights and obligations under this deed, including those arising out of the termination of this deed; and
  - (ii) any rights and obligations which expressly or impliedly continue after termination of this deed, including those referred to in clause 17.2 (*Survival of certain provisions: no merger*);
- (b) MTR must, subject to the limitations in respect of Trains and Signalling Intellectual Property (Northwest) and Trains and Signalling Intellectual Property (Sydney Metro) set out in Schedule 34 (*Intellectual Property*) of the Draft OTS2 Project Deed, deliver to the Principal or the Principal's nominee (or both, if required) all documents and information concerning the Early Works Activities which is required for the efficient transfer of responsibility for their performance, including:
  - (i) all Data (Sydney Metro) (as defined in Schedule 34 (*Intellectual Property*) of the Draft OTS2 Project Deed) and any documentation or programs required to be provided under Schedule 34 (*Intellectual Property*) of the Draft OTS2 Project Deed; and
  - (ii) any other documentation specified in this deed;
- (c) when requested by the Principal, MTR must procure the novation to the Principal or its nominee of, or execute any document required to effect MTR ceasing to be a party to, an agreement with an MTR Contractor with effect from the end of the Term or such other date as the Principal may agree;
- (d) if this deed is terminated in accordance with clause 14.1(a), the Principal may thereafter either itself or by third parties carry out some or all of the Early Works Activities (if the Principal elects to do so); and
- (e) in addition to the matters referred to in paragraphs (a) to (d) above, MTR shall take all other steps that the Principal reasonably requires in order to effect a smooth and efficient handover of any on-going Early Works to the Principal or any third party nominated by the Principal within 20 Business Days of the date of termination, including, as required, the conduct of workshops and the transfer of information and electronic files (in addition to those electronic files that are within the scope of paragraph (b) above). Except in the case of a termination pursuant to clause 14.3(b), the Principal will reimburse MTR for the costs reasonably and properly incurred by MTR in complying with the Principals' requirements pursuant to this paragraph (d). The parties agree that the Principal shall also have the right to require an independent audit to confirm that the Principal's requirements have been complied with; and
- (f) in the case of termination pursuant to clause 14.3(b), the Principal will, subject to clause 10 (*Liability and Indemnity*), be entitled to recover from MTR any Loss suffered or incurred by the Principal arising out of or in any way in connection with the breach, Insolvency Event or termination of this deed and until the Principal's rights in this regard are satisfied, the Principal will not be obliged to make any further payments to MTR.



14.7 **Early Works Termination Payment**

- (a) If this deed is terminated under this clause 14 (*Termination*), the Principal must pay to MTR for work carried out prior to the date of termination, the amount which would have been payable if this deed had not been terminated and MTR submitted a payment claim under clause 9 (*Early Works Payments*) for work carried out to the date of termination (**Early Works Termination Payment**).
- (b) The Early Works Termination Payment will be a limitation upon the Principal's liability to MTR arising out of, or in any way in connection with, the termination of this deed and the Principal will not be liable to MTR upon any Claim arising out of, or in any way in connection with, the termination of this deed other than for the Early Works Termination Payment.
- (c) In the calculation of an Early Works Termination Payment under this clause 14.7, there will not be any double counting of any amounts, whether such amounts are referred to in clause 14.6 (*Consequences of termination*) or elsewhere in this deed.

14.8 **No other termination rights**

Despite any rule of law or equity to the contrary, this deed may not be terminated other than as provided for in this deed.

15. **NO COLLUSION**

MTR may not engage in any collusive tendering, anti-competitive conduct or any other similar conduct with any other person in relation to this deed or the planning, development or delivery of the Early Works.

16. **NOTICES**

- (a) Wherever referred to in this clause, Notice means each communication (including each notice, consent, approval, request and demand) under or in connection with this deed.
- (b) At any time and from time to time the Principal may notify MTR that a PDCS will be used for giving Notices under or in connection with this deed. The Principal's notice will set out:
  - (i) the name of the relevant PDCS;
  - (ii) the commencement date for use of the PDCS;
  - (iii) any password, login details or similar information required for the parties to use the PDCS; and
  - (iv) any other information reasonably necessary for the use and service of Notices via the PDCS.
- (c) Each Notice must:
  - (i) before the date referred to in clause 16(b)(ii):
    - (A) be in writing;
    - (B) be addressed:
      - (aa) in the case of a Notice from the Principal, to [REDACTED] or

- (bb) in the case of a Notice from MTR, to the Principal's Representative (any Notice in relation to a Claim or a Dispute must also be addressed to the General Counsel - Sydney Metro and sent to [REDACTED]);
- (C) be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party; and
- (D) be delivered or posted to the relevant address shown below (or to any new address notified by the intended recipient):

**Principal**

Name: Sydney Metro, a New South Wales Government agency

Address: Level 43, 680 George Street, Sydney NSW 2000

For the attention of: Principal's Representative

**MTR**

Name: MTR Corporation (Sydney) SMCSW Pty Limited

Address: c/o MTR Corporation Limited, MTR Headquarters Building Telford Plaza, Kowloon Bay, Hong Kong

For the attention of: MTR's Representative

- (ii) on and from the commencement date for use of the PDCS referred to in clause 16(b)(ii):
  - (A) be sent through the PDCS in accordance with the requirements set out in clause 16(e) and:
    - (aa) in the case of a Notice from the Principal, be addressed to [REDACTED] or
    - (bb) in the case of a Notice from MTR, be addressed to the Principal's Representative (any Notice in relation to a Claim or a dispute must also be addressed to the General Counsel - Sydney Metro and sent to [REDACTED] or
  - (B) in circumstances where the PDCS is temporarily disabled or not operating, be issued in accordance with clause 16(c)(i).
- (d) A communication is taken to be received by the addressee:
  - (i) (in the case of a Notice sent through the PDCS) at the time recorded on the PDCS as being the time at which the Notice was sent;
  - (ii) (in the case of prepaid post sent to an address in the same country) 2 Business Days after the date of posting;

- (iii) (in the case of international post) 7 Business Days after the date of posting;
- (iv) (in the case of delivery by hand) on delivery;
- (v) (in the case of an email) if it is transmitted:
  - (A) by 5.00pm (Sydney time) on a Business Day – on that Business Day; or
  - (B) after 5.00pm (Sydney time) on a Business Day, or on a day that is not a Business Day – on the next Business Day; and
- (vi) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent,

provided that if the communication would be deemed to be received on a day which is not a Business Day or after 5.00pm on a Business Day, it is deemed to be received at 9.00am on the next Business Day.

- (e) With respect to Notices sent through the PDCS:
  - (i) all Notices must be submitted by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
  - (ii) only the text in any Notice, or subject to clause 16(e)(iii), any attachments to such Notice which are referred to in the Notice, will form part of the Notice. Any text in the subject line will not form part of the Notice; and
  - (iii) an attachment to a Notice will only form part of a Notice if it is uploaded to the PDCS in:
    - (A) pdf format;
    - (B) a format compatible with Microsoft Office; or
    - (C) such other format as may be agreed between the parties in writing from time to time.

## 17. GENERAL

### 17.1 Governing law and jurisdiction

- (a) This deed is governed by and must be construed according to the law applying in New South Wales.
- (b) Subject to the Dispute Resolution Mechanism, each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this deed.

### 17.2 Survival of certain provisions; no merger

- (a) Clauses 1 (*Interpretation*), 3.3 (*Incorporation by reference*), 4 (*Term*), 10 (*Liability and Indemnity*), 11 (*MTR Parent Company Guarantee and Legal Opinion*), 12 (*Assignment and Subcontracting*), 14.6 (*Consequences of termination*), 14.7 (*Early Works Termination Payments*), 16 (*Notices*), 17 (*General*), the Dispute Resolution Mechanism, clauses 11.2 (*Information Documents*), 25.11 (*Set Off*), 45.1

(Records), 47 (Disclosure, Confidentiality and Publicity), 48 (Intellectual Property) and Schedule 34 (Intellectual Property), 57 (Notice of Claims), 60 (Proportionate Liability), 61 (Taxes) and the relevant parts of clause 62 referenced in Schedule 1 (Draft OTS2 Project Deed clauses incorporated by reference), the representations, warranties and indemnities given by MTR under this deed and any other provisions which are expressed to survive termination (together, the **Surviving Clauses**) will survive rescission, termination or expiration of this deed.

- (b) If this deed is rescinded or terminated, a party will not be liable to the other party except:
  - (i) under the Surviving Clauses; or
  - (ii) in respect of any breach of this deed occurring before such rescission or termination.
- (c) No right or obligation of any party will merge on completion of any transaction under this deed. All rights and obligations under this deed survive the execution and delivery of any transfer or other agreement which implements any transaction under this deed.

### 17.3 **Transfer of functions or Public Transport Agency assets**

- (a) The parties acknowledge that:
  - (i) a Public Transport Agency may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, rights, liabilities or responsibilities of a Public Transport Agency may be transferred to or vested in another entity;
  - (ii) if a Public Transport Agency is reconstituted, renamed, dissolved, replaced or restructured and/or some or all of that Public Transport Agency's powers, functions, rights or responsibilities are transferred to or vested in another entity, then unless otherwise notified by the Public Transport Agency, references in this deed to that Public Transport Agency must, subject to any facilitative legislation, be deemed to refer, as applicable, to the reconstituted, renamed, restructured or new entity or entity replacing that Public Transport Agency to the extent that such entity has assumed or has had transferred to it or vested in it those powers, functions, rights or responsibilities; and
  - (iii) a Public Transport Agency may be required to or may, at its absolute discretion, elect to (including as a result of changes to New South Wales government policy or directions) acquire, or dispose of, any property or assets.
- (b) MTR acknowledges and agrees that it must, to the extent required by a Public Transport Agency and without limiting any facilitative legislation, negotiate in good faith any variations required to this deed, or any replacement agreement or agreements for this deed to give effect to a Public Transport Agency being reconstituted, renamed, dissolved, replaced or restructured.
- (c) MTR will be taken for all purposes to have consented to, and will not have, and no Public Transport Agency will be liable for, any claim as a result of any action, matter or circumstance referred to in, or contemplated by this clause 17.3.
- (d) For the purposes of this clause 17.3:

- (i) "another entity" means a government or semi-government entity including any agency, statutory corporation, statutory authority, department or state owned corporation; and
- (ii) "Public Transport Agency" means the Principal, Transport for NSW (and each of its divisions), RailCorp, Sydney Trains and NSW Trains.

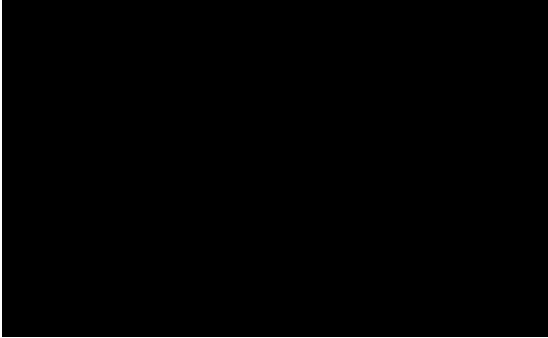
**17.4 Public Disclosure**

- (a) The parties accept that the Principal may publish or disclose (on the internet or otherwise):
  - (i) the terms and conditions of this deed; and
  - (ii) any document or information arising under, out of or in connection with this deed or relating to the performance of this deed,provided that the Principal reasonably considers the redaction of any Commercially Sensitive Information.
- (b) Subject to clause 17.4(a), the Principal must keep confidential the Commercially Sensitive Information.

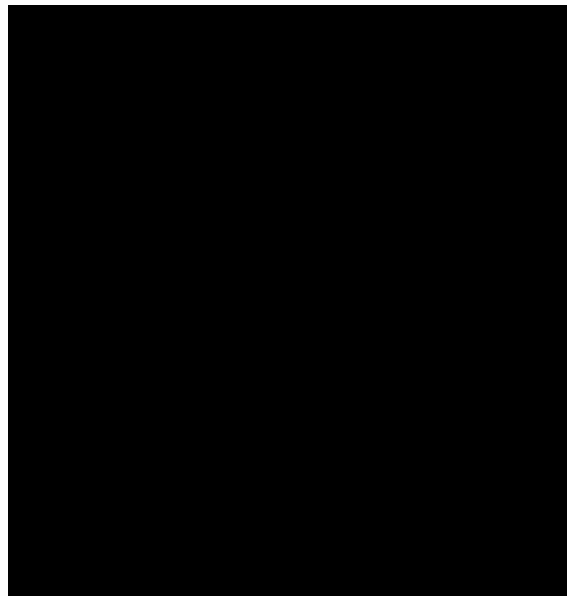
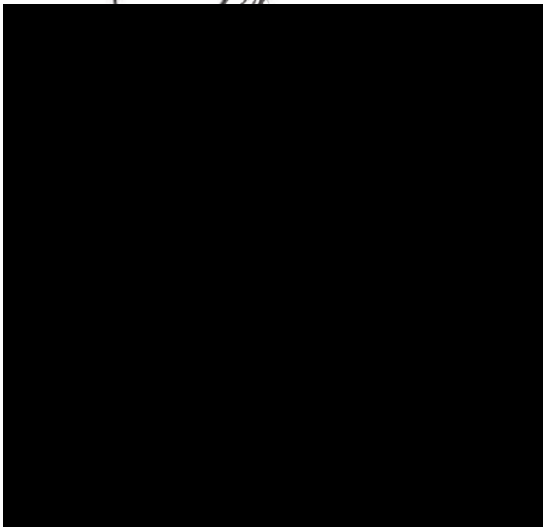
**EXECUTED** as a deed.

Each person who executes this deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

**EXECUTED** by **SYDNEY METRO ABN 12 354 063 515** by its authorised delegate, in the presence of:



**SIGNED, SEALED and DELIVERED** for **MTR CORPORATION (SYDNEY) SMCSW PTY LIMITED** by its attorney under power of attorney in the presence of;





## SCHEDULE 1

### Draft OTS2 Project Deed clauses incorporated by reference

clauses 5.1 (*Principal's Representative*), 5.2 (*Appointees of the Principal's Representative*) and 5.3 (*OpCo2's Representative*);

clauses 6.1(a)(i) and (ii) (*Compliance with laws*);

clauses 6.2 (*Approvals*);

clause 9.1 (*All work included*);

clause 9.2(e) (*Authorisations and licences*);

clause 9.3 (*Protection of persons and property*);

clause 9.4 (*Work health and safety*);

clause 9.8 (*Industrial relations*);

clauses 11.2 (*Information Documents*) and 11.3 (*Condition of the Sydney Metro Site, Sydney Metro Northwest and structures*);

clause 13;

clause 16(a) (*Quality*);

clause 25.10 (*Interest*)

clause 25.11 (*Set off*);

clause 25B.6 (*SOP Act*) of the OTS2 Project Deed (*Phase 1 & 2*);

clause 38.1 (*Principal's Insurances*), clause 38.8 (*Insurance requirements generally*), clause 38.9 (*Premiums*), clause 38.10 (*Evidence*), clause 38.11 (*Failure to produce proof of evidence*), clause 38.12 (*OpCo2's obligations not limited*), clause 38.13 (*General insurance obligations*) and clause 38.14 (*Claims under Insurances*);

clause 45.1 (*Records*);

clause 45.10 (*Privacy*);

clause 47 (*Disclosure, Confidentiality and Publicity*);

clause 48 (*Intellectual Property*) and Schedule 34 (*Intellectual Property*);

clauses 56.3 (*Notice of Dispute*), 56.4 (*Executive Negotiation*), 56.5 (*Expert determination*), 56.6 (*Notice of dissatisfaction*), 56.7 (*Final and binding decision*), 56.8 (*Failure to comply with an Expert's decision*), 56.9 (*Amicable settlement*), 56.10 (*Litigation or arbitration*), 56.11 (*Arbitration rules*), 56.12 (*Exclusion from determination or award*), 56.17 (*Payments*), 56.18 (*Parties to continue performing obligations*) and 56.19 (*Urgent relief*);

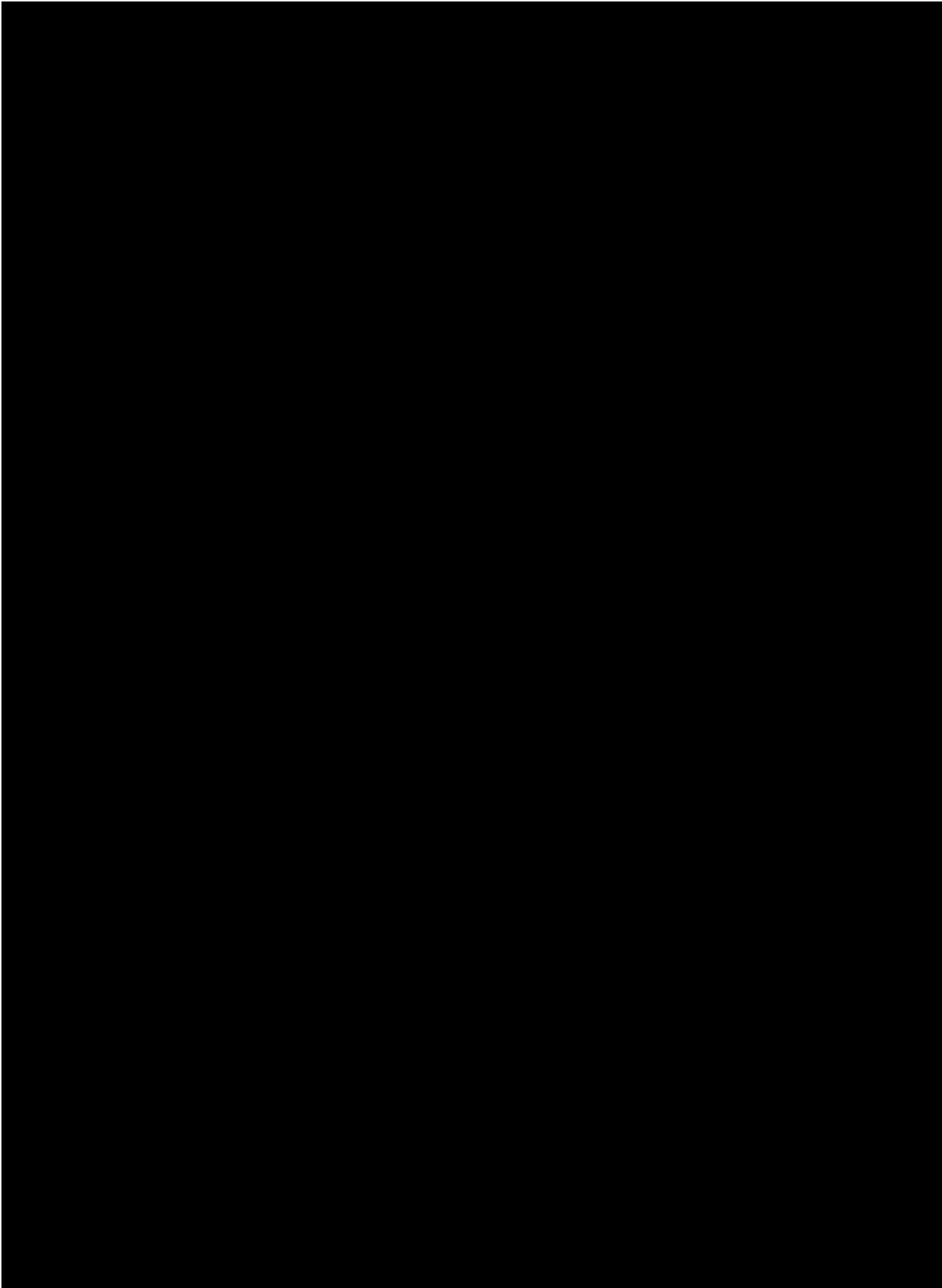
clause 57 (*Notice of Claims*);

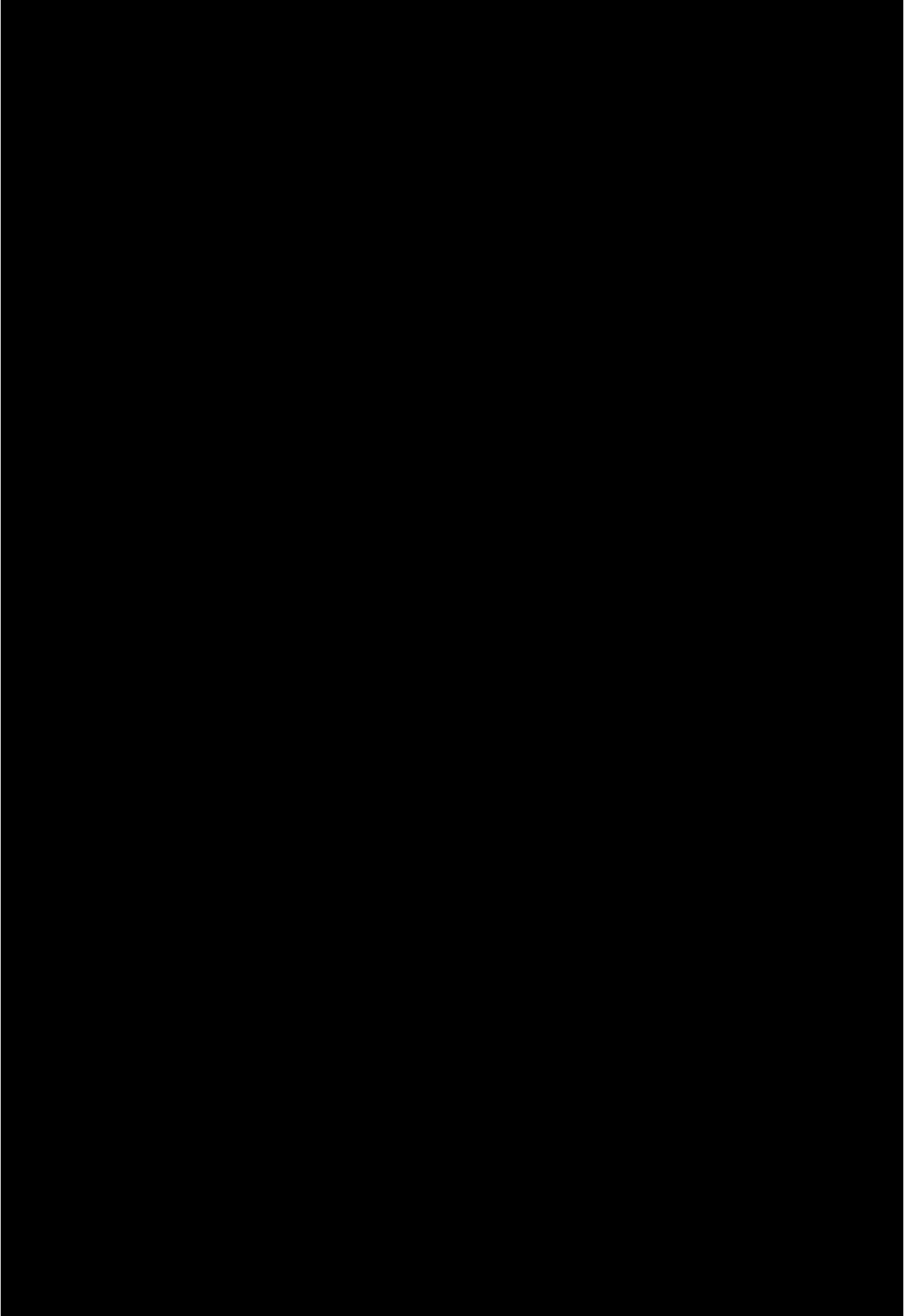
clause 60 (*Proportionate Liability*);

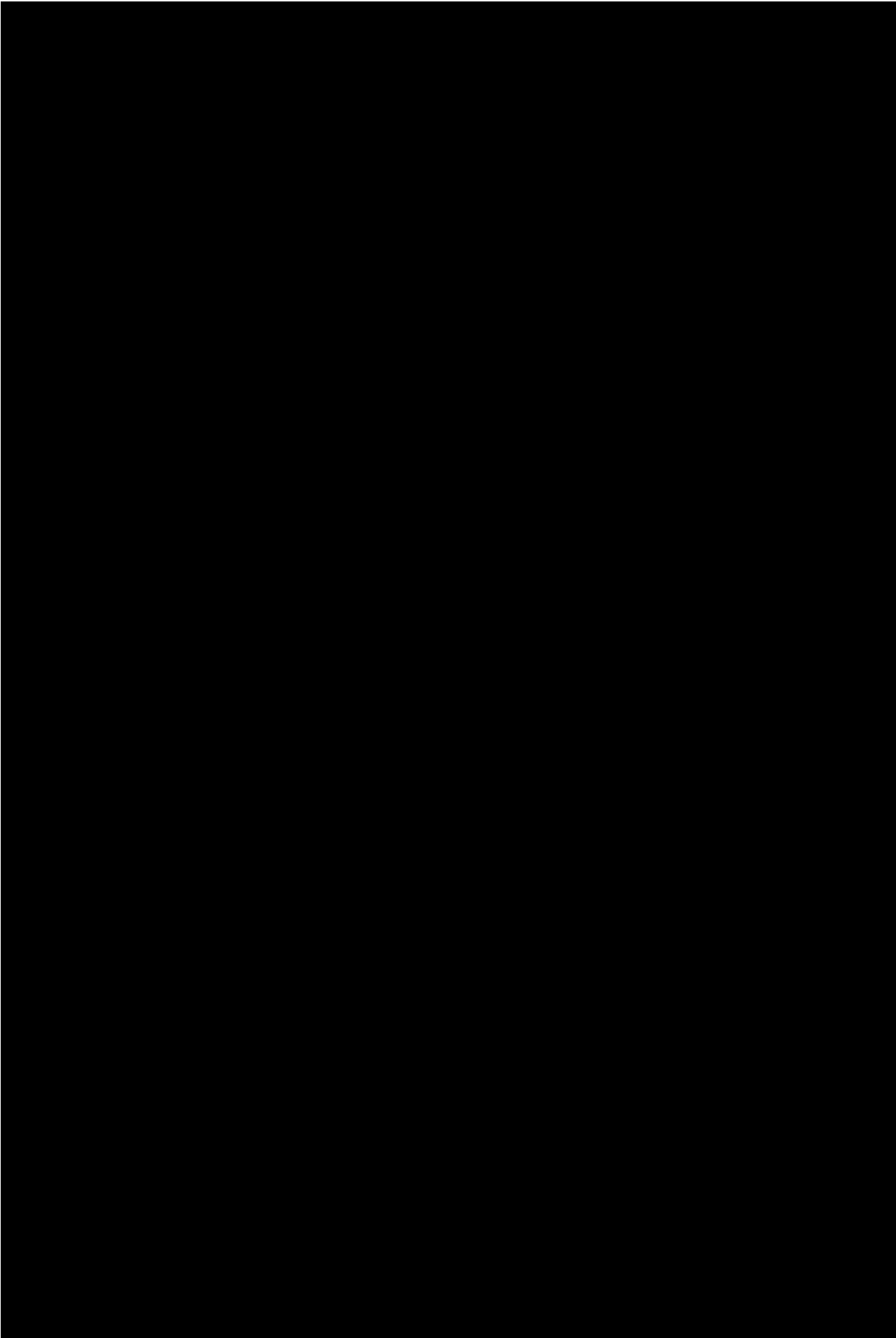
clause 61 (*Taxes*); and

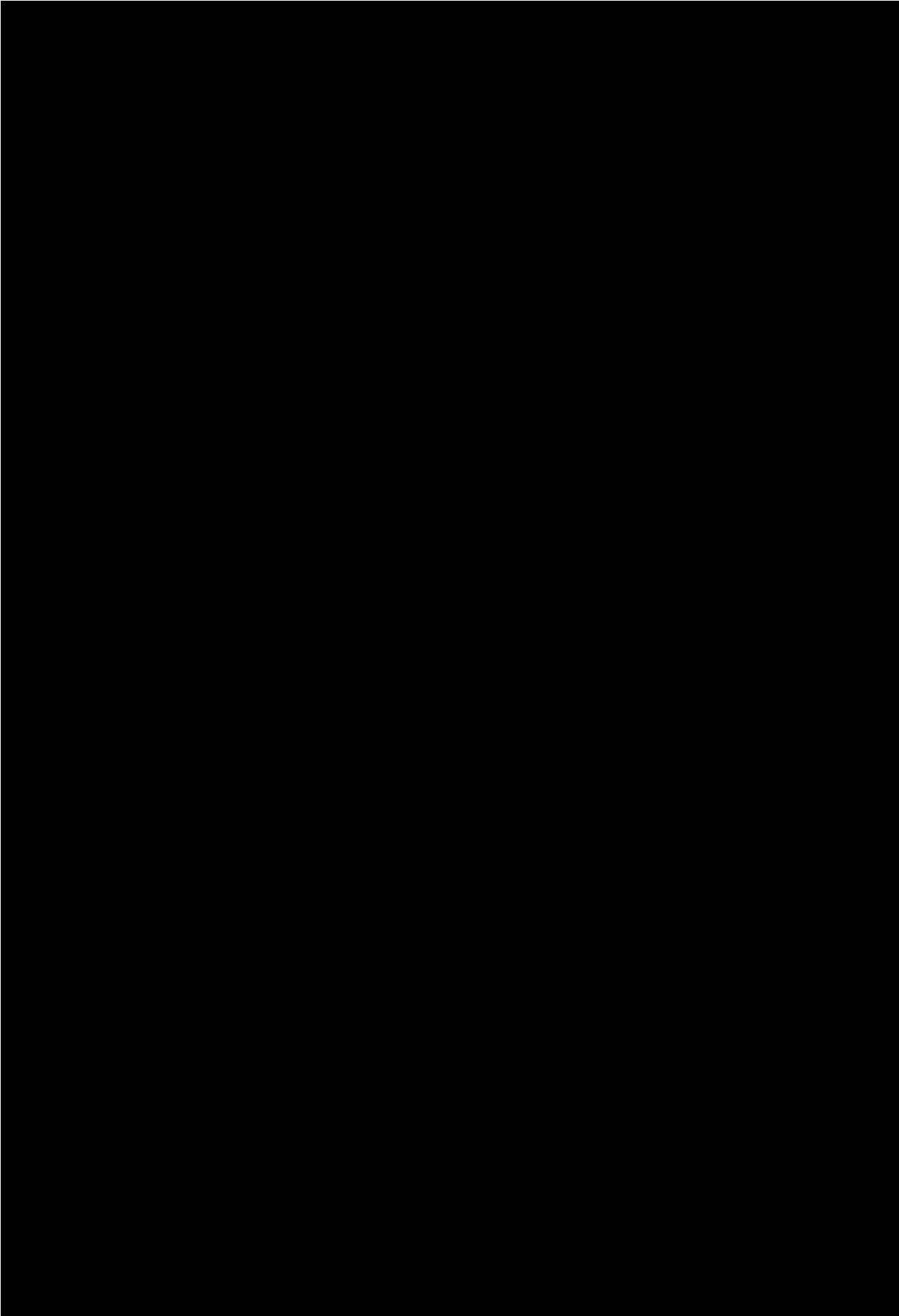
clauses 62.2 (*Cost of performing obligations*), 62.4 (*Amendments*), 62.5 (*Waiver*), 62.7 (*Further acts and documents*), 62.8 (*Consents*), 62.9 (*No representation or reliance*), 62.10 (*Severance*), 62.12 (*Entire agreement*), 62.13 paragraphs (a), (b) and (c) (*Indemnities*), 62.14 (*Counterparts*) and 62.17 (*Contract documents to be in English*).

**SCHEDULE 2**

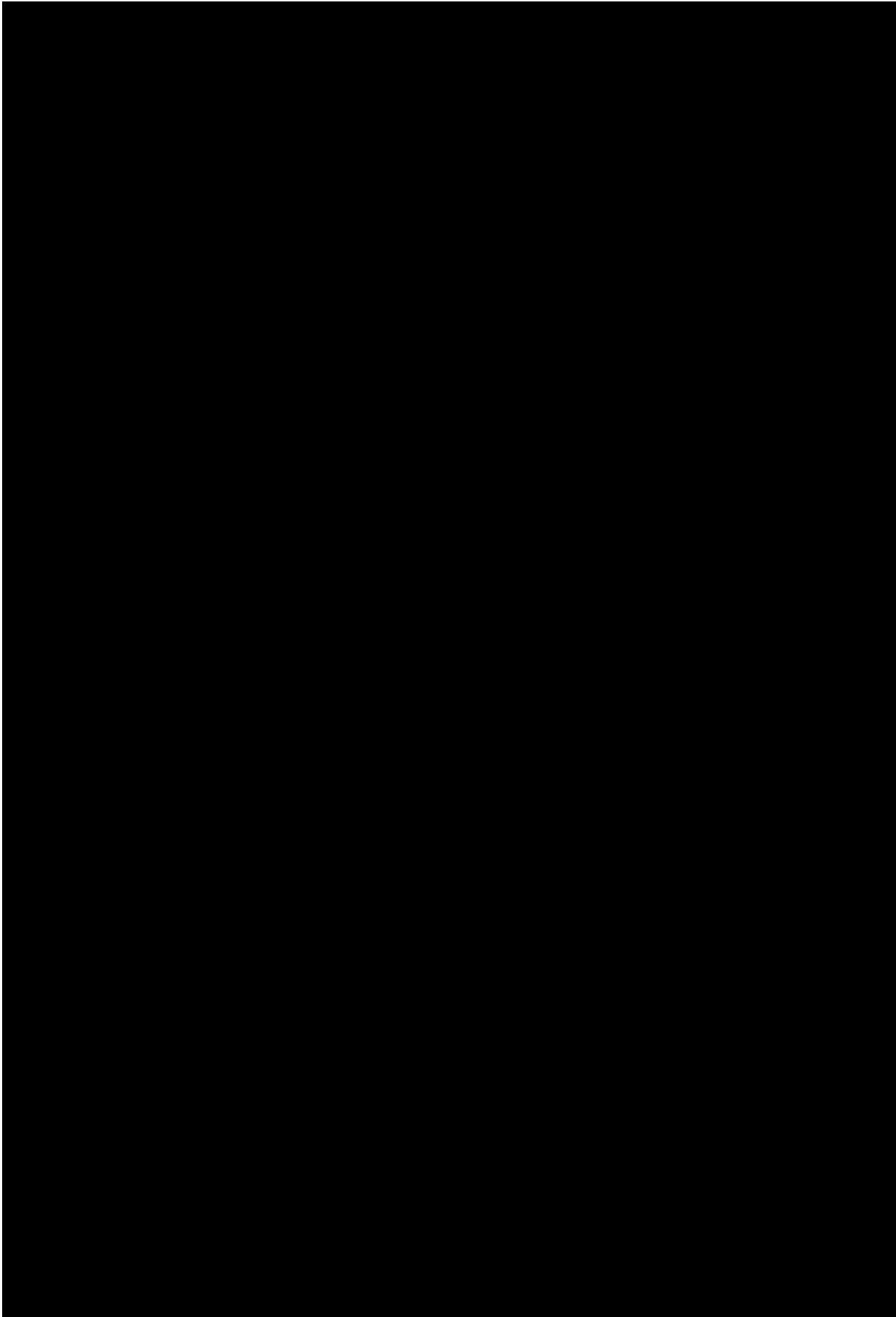


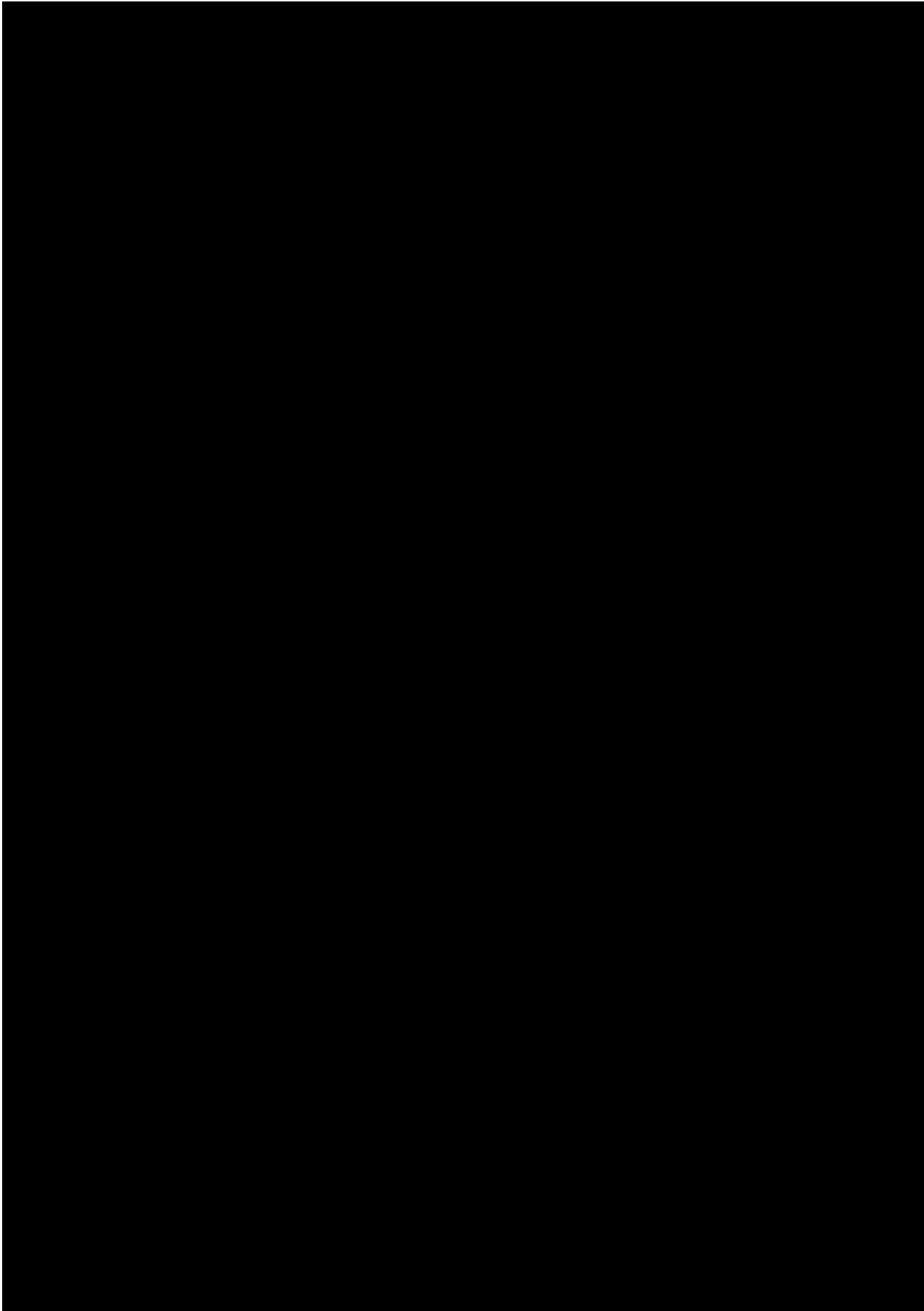


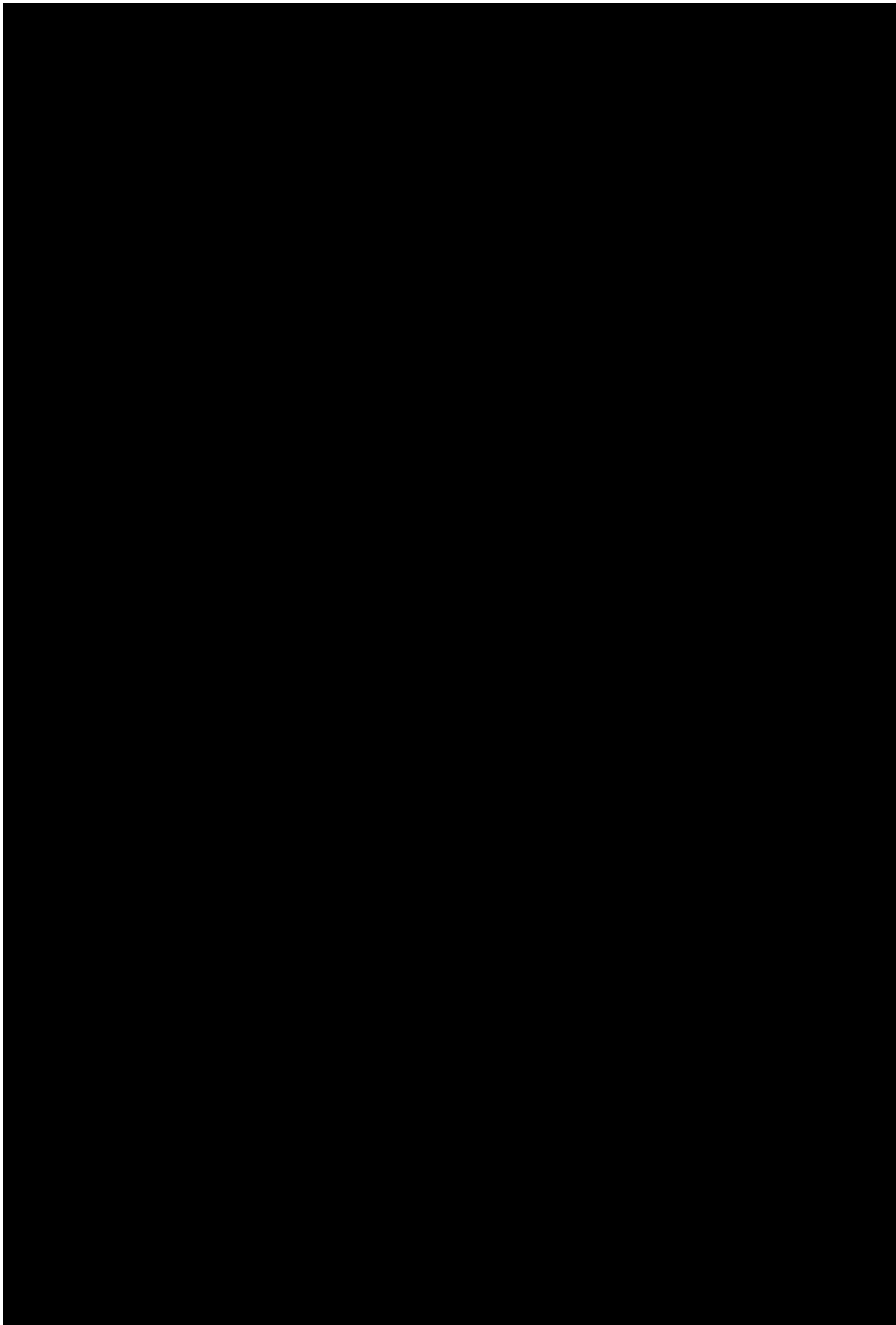


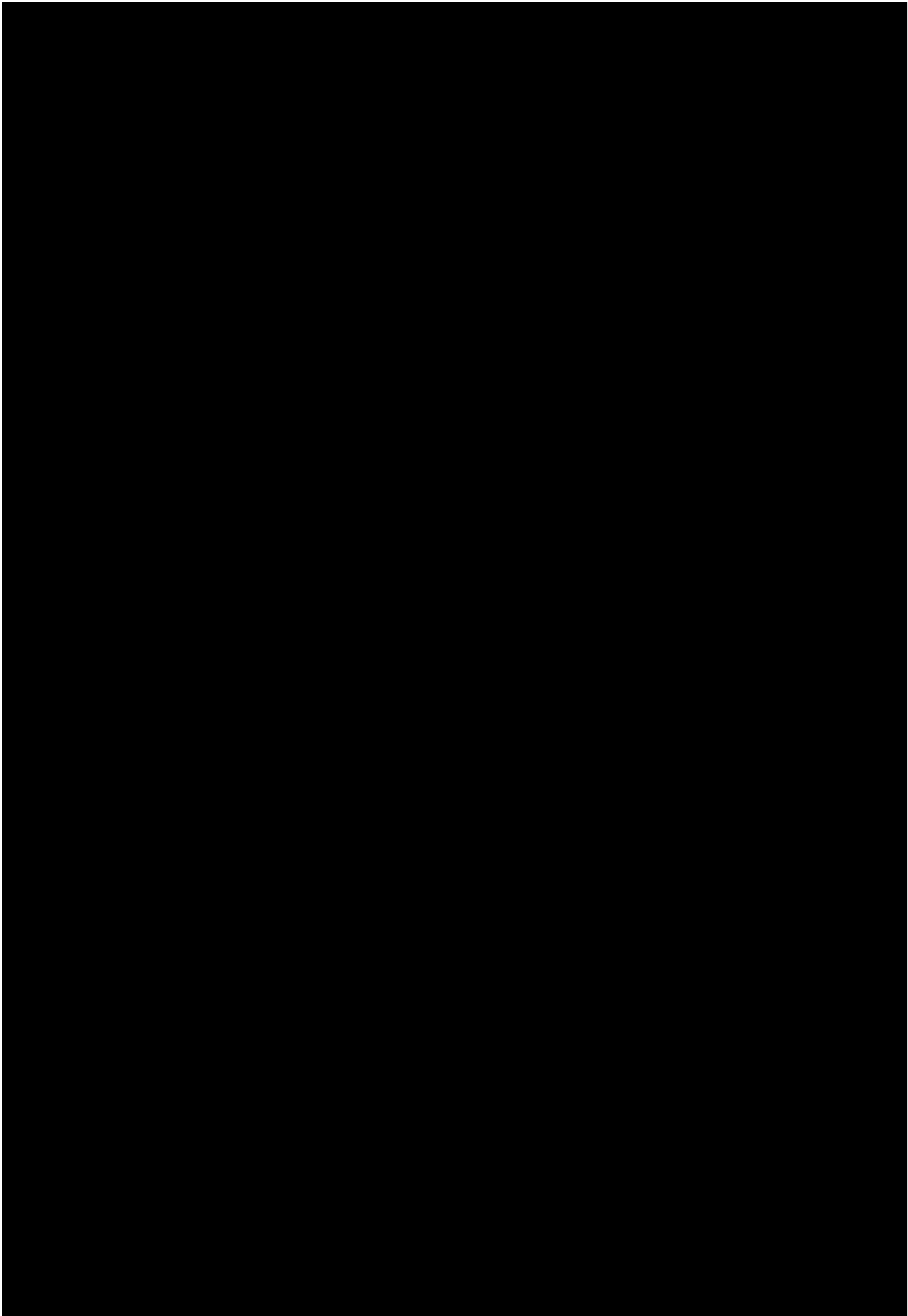


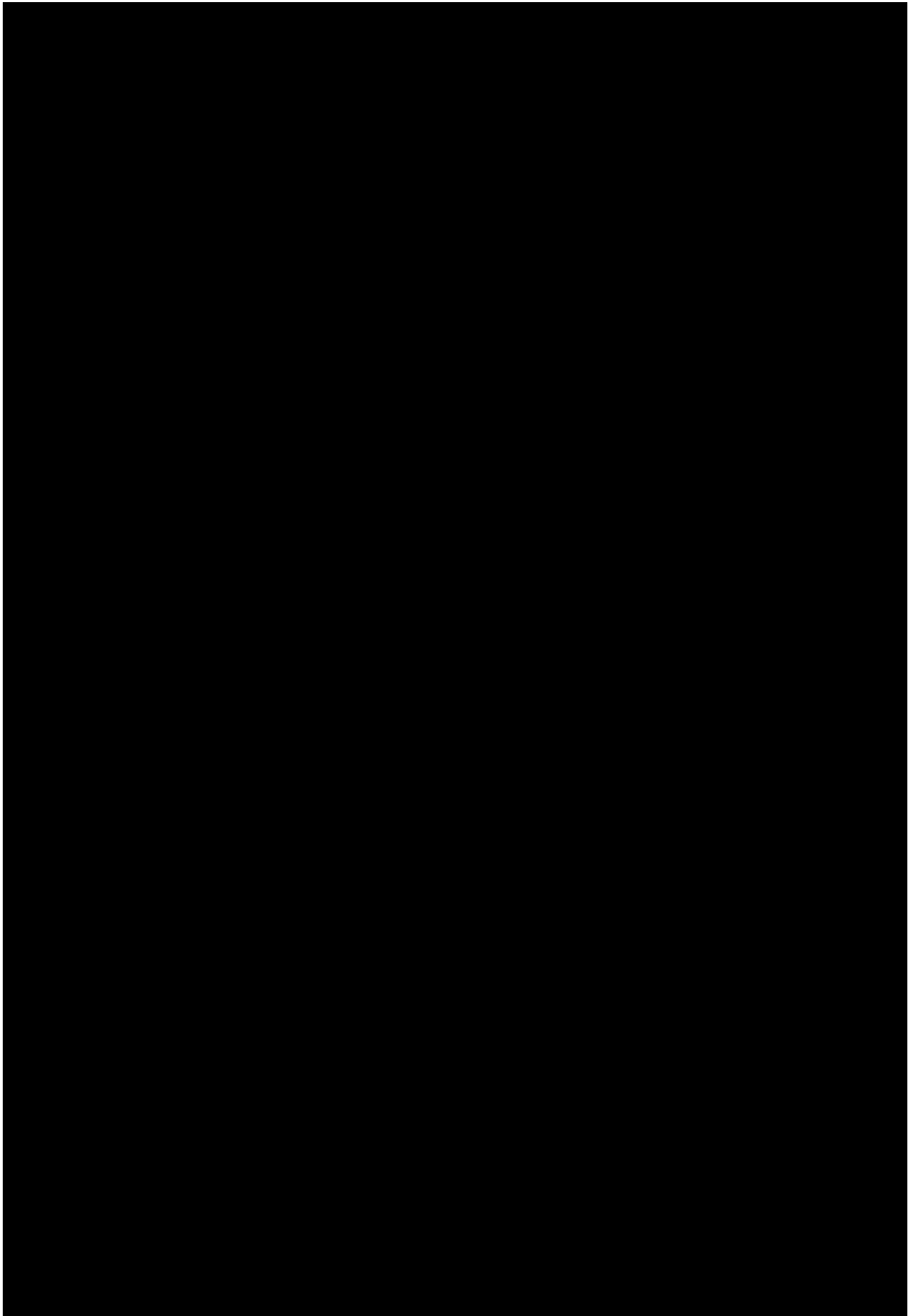


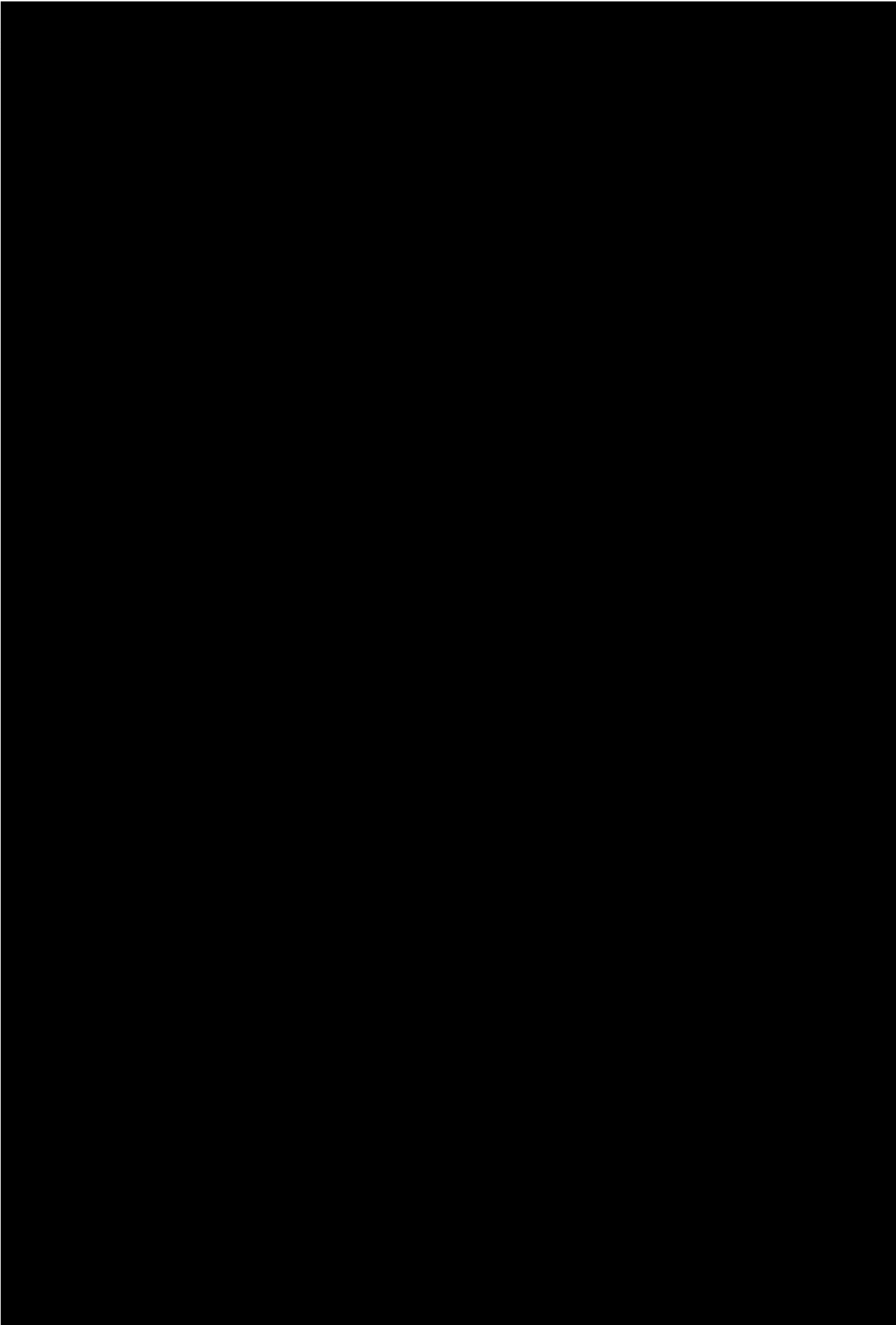




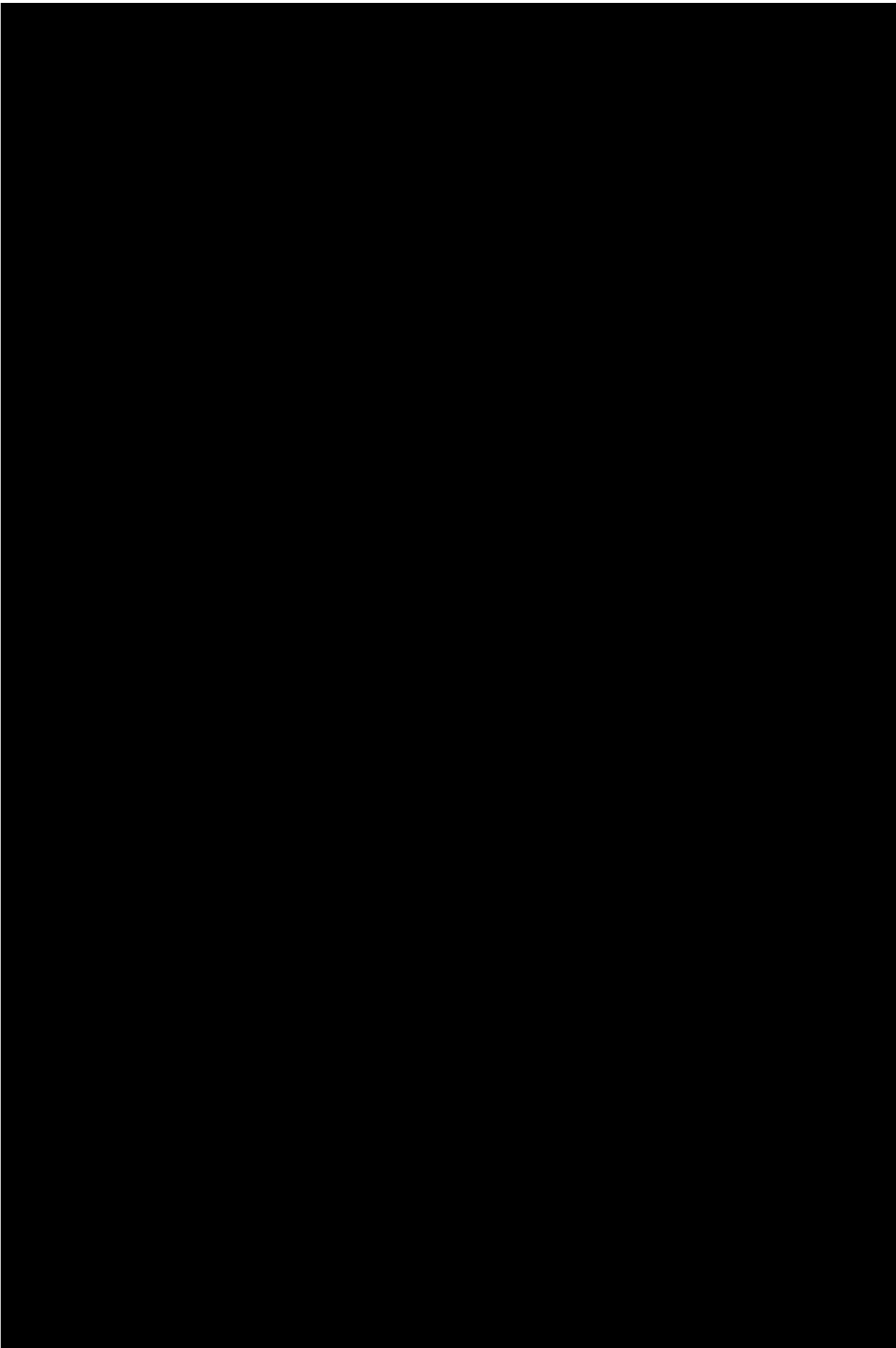


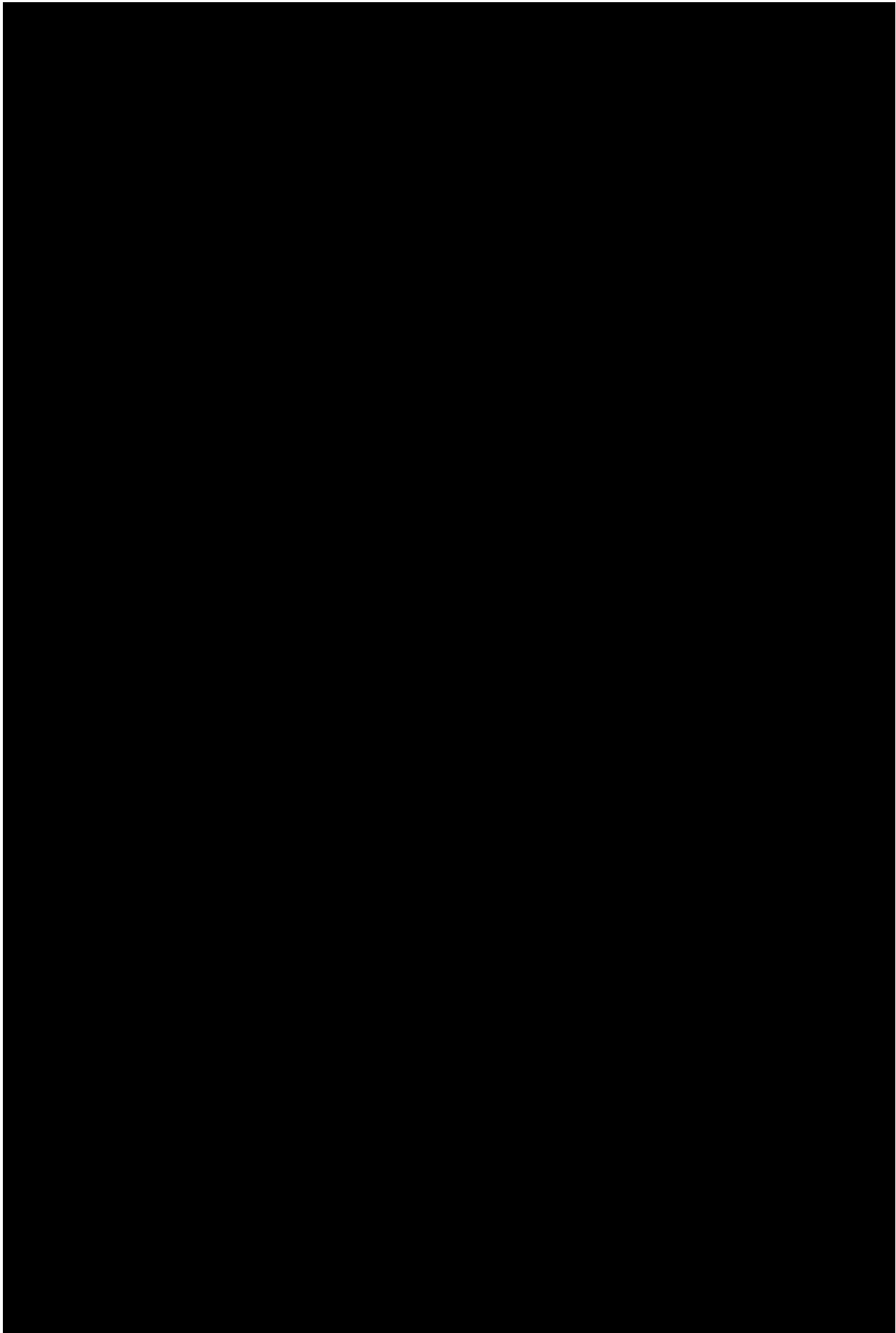


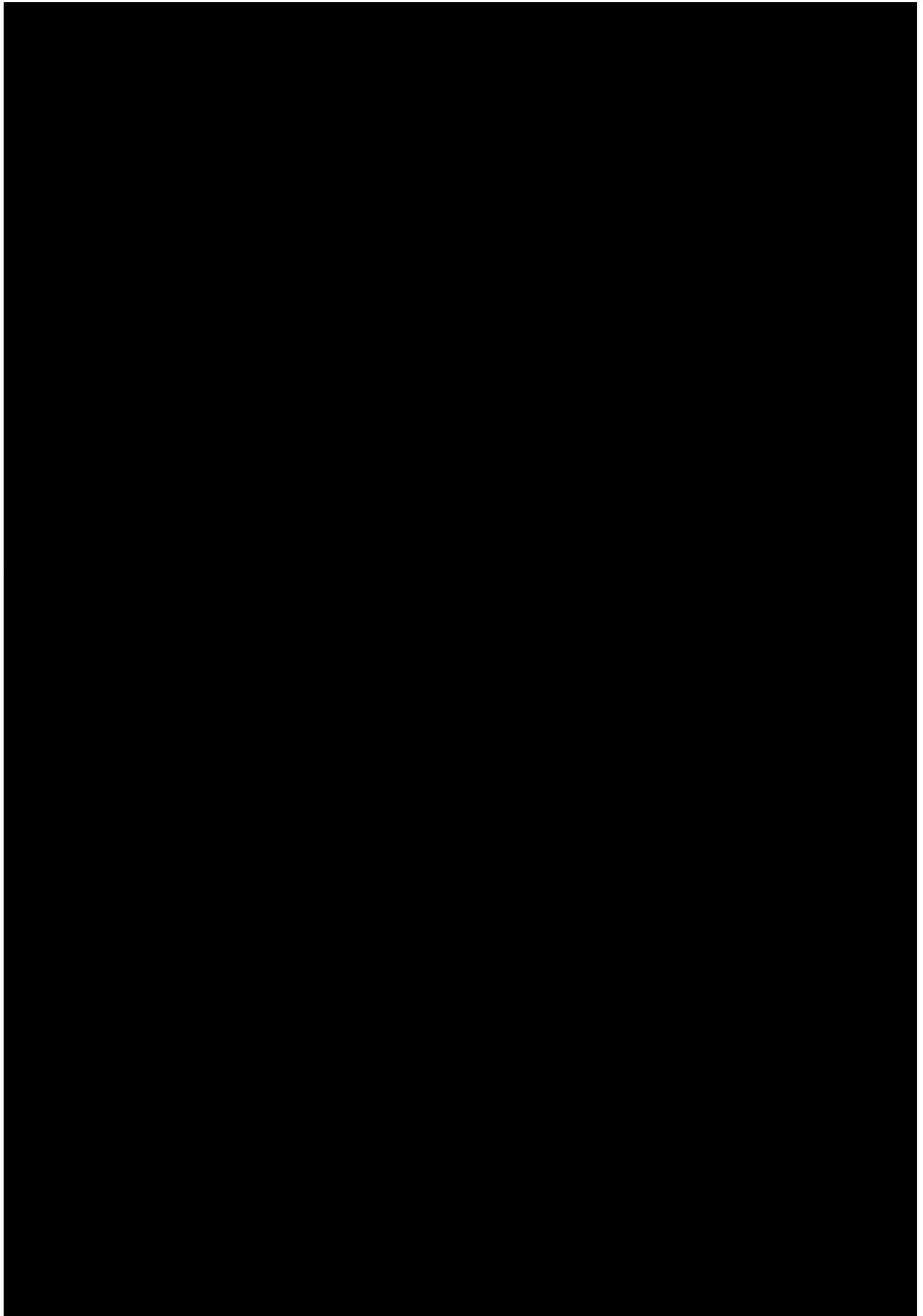


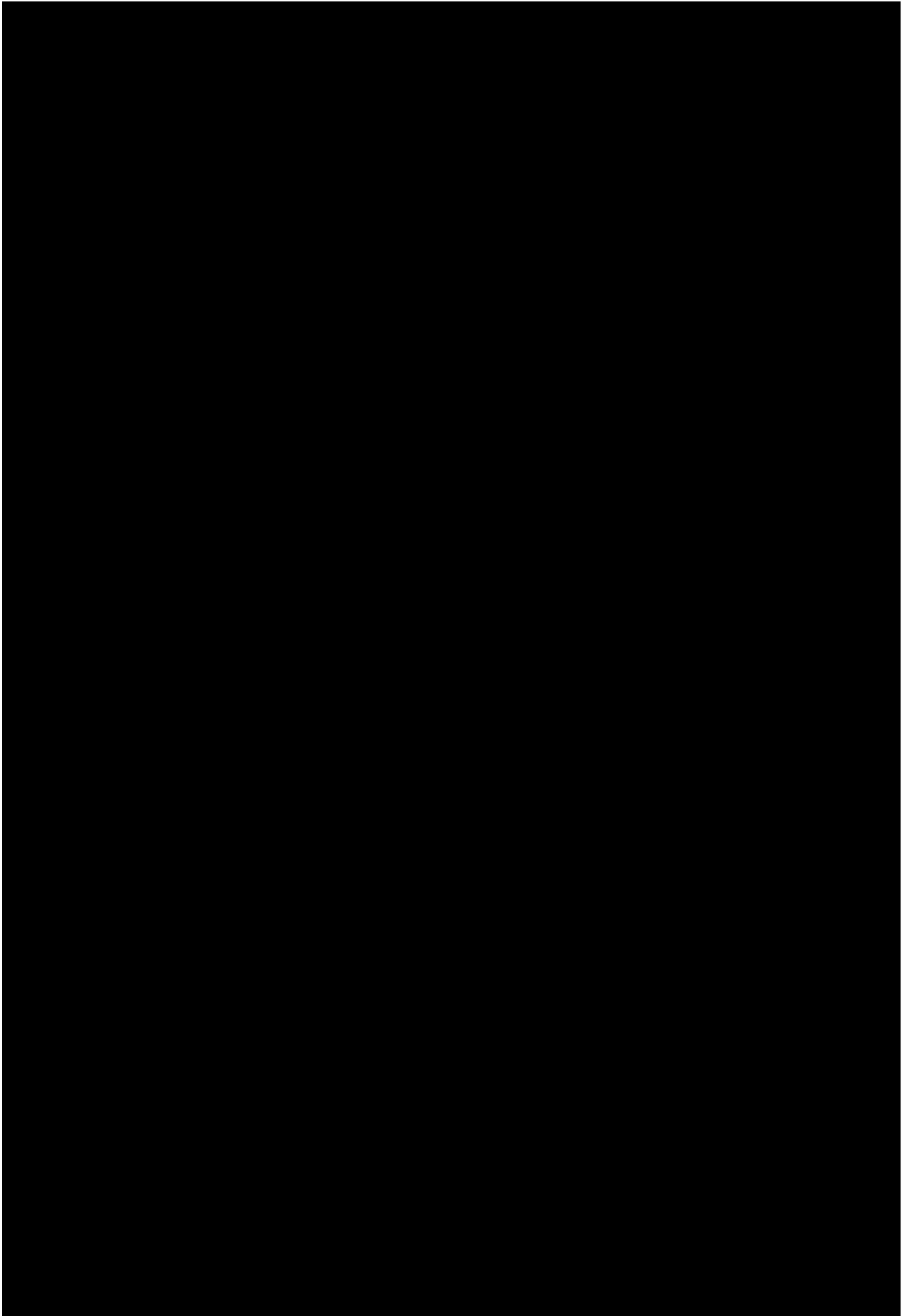


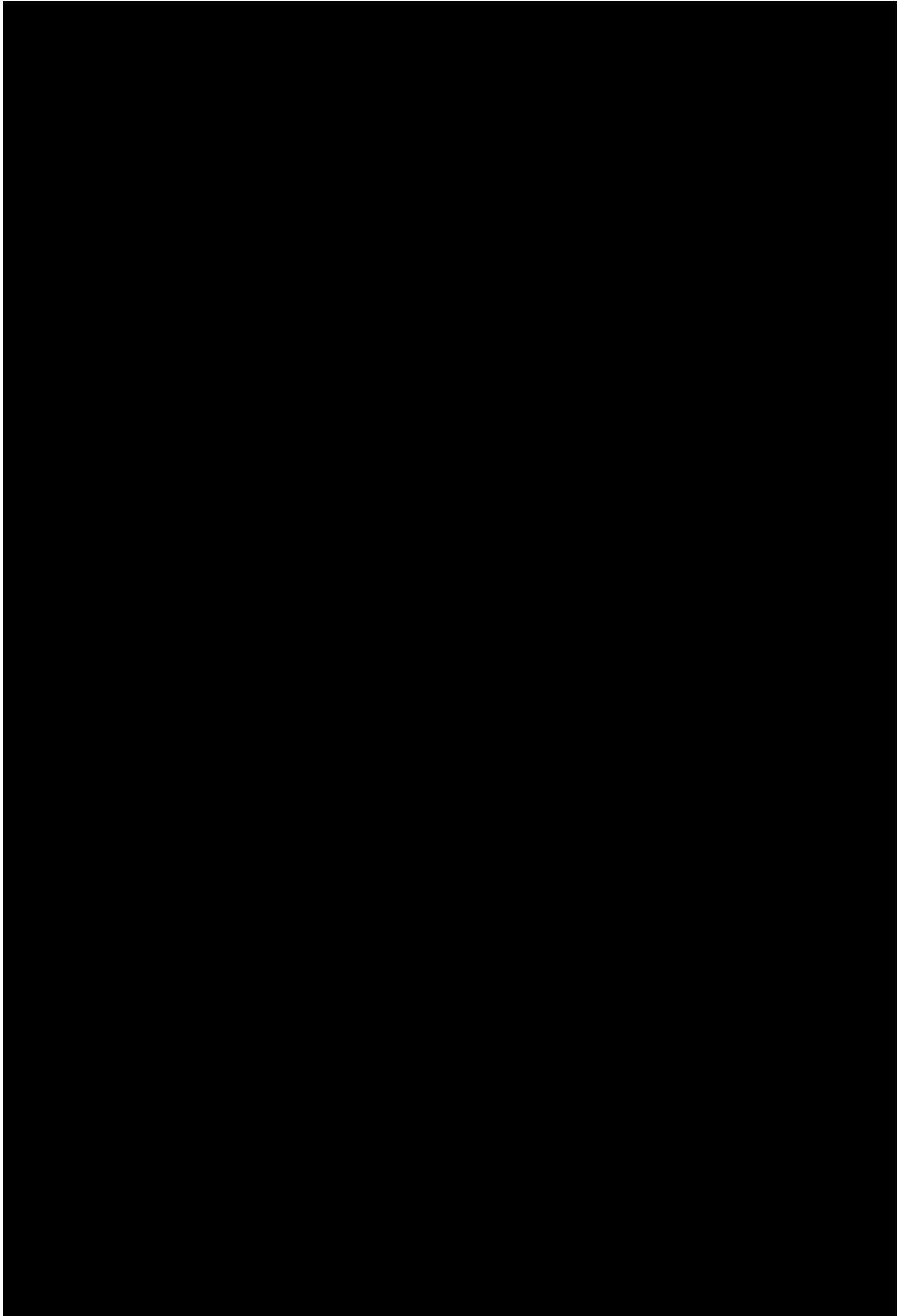


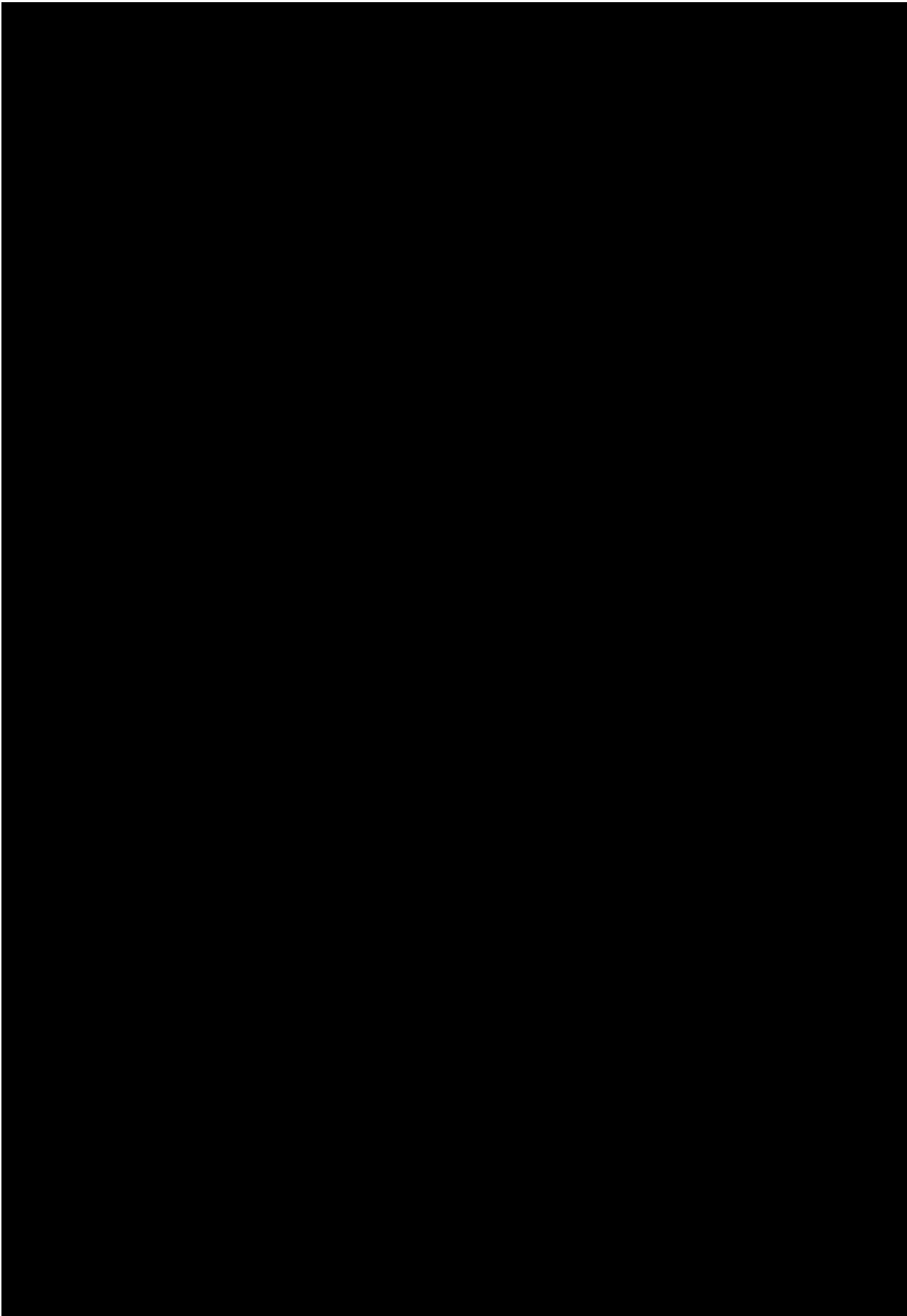














**SCHEDULE 3**

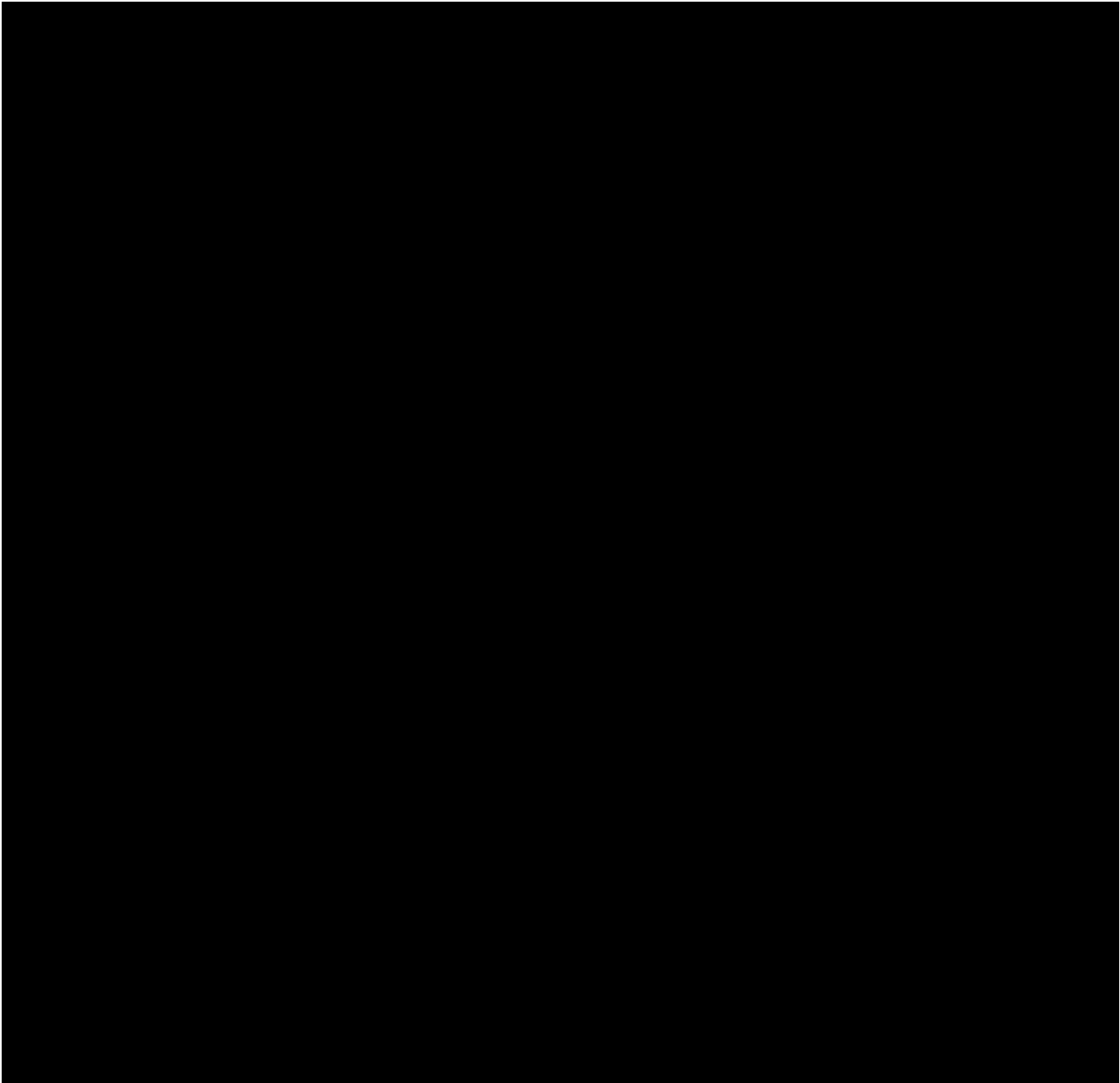
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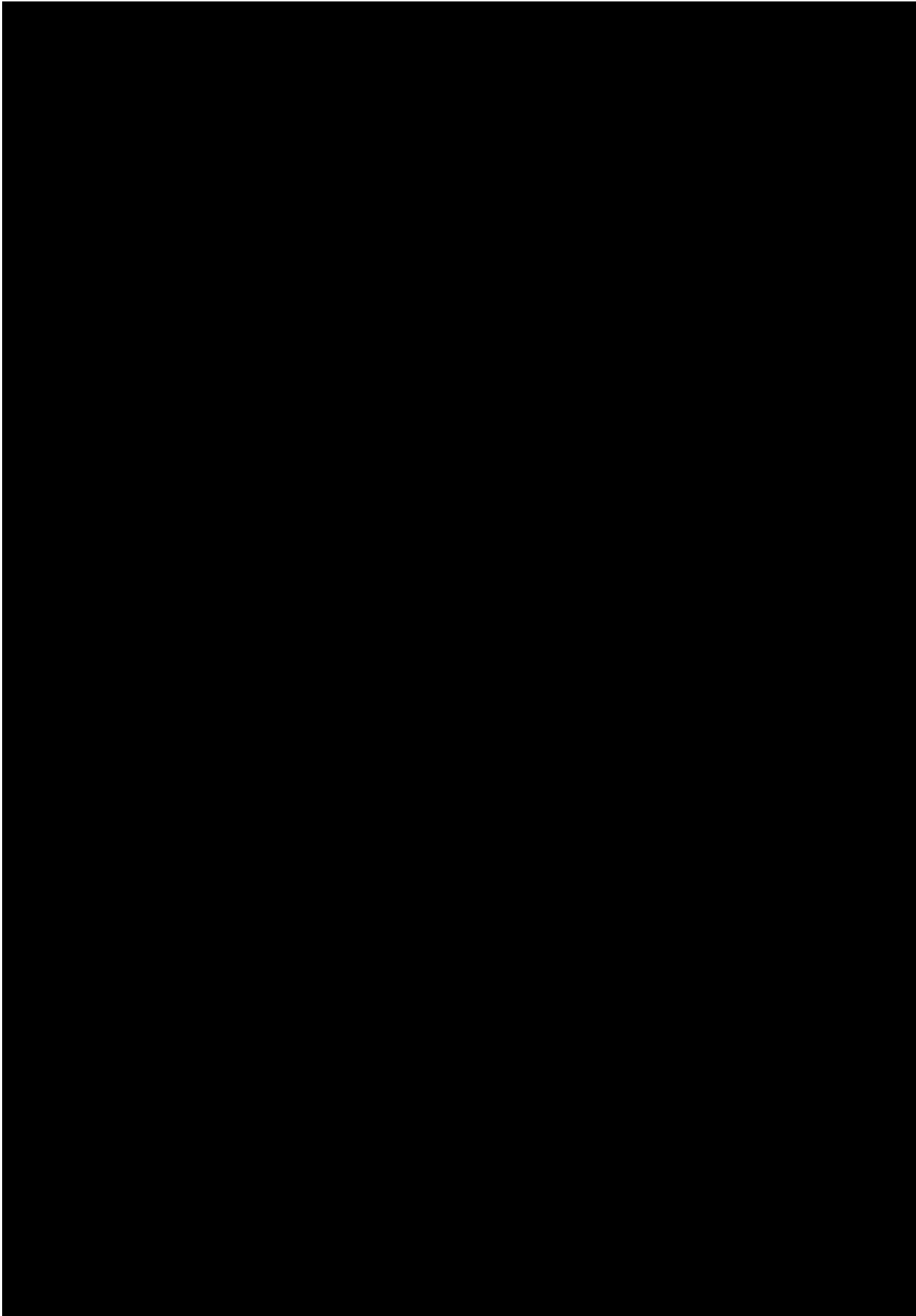
**SCHEDULE 4**

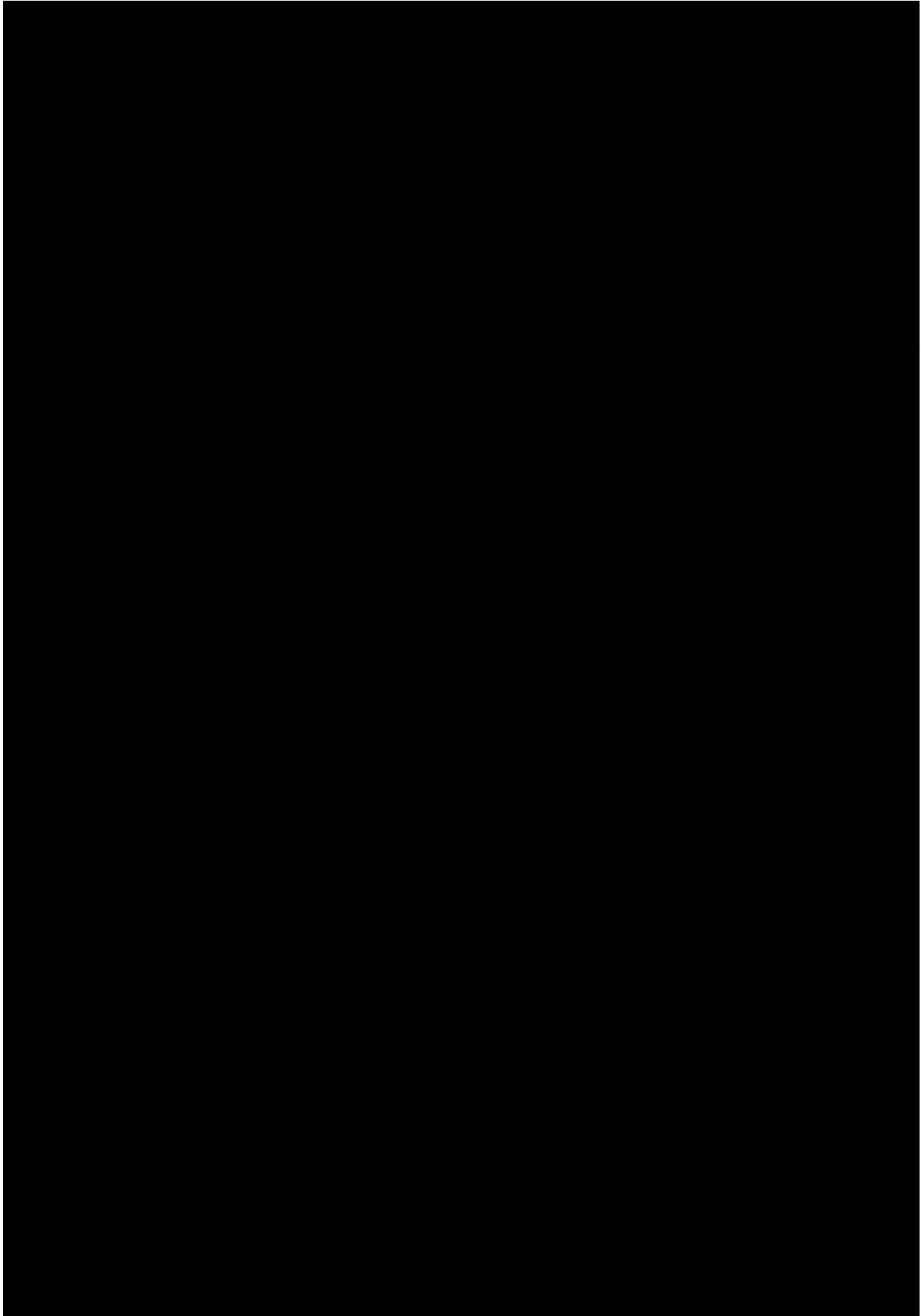
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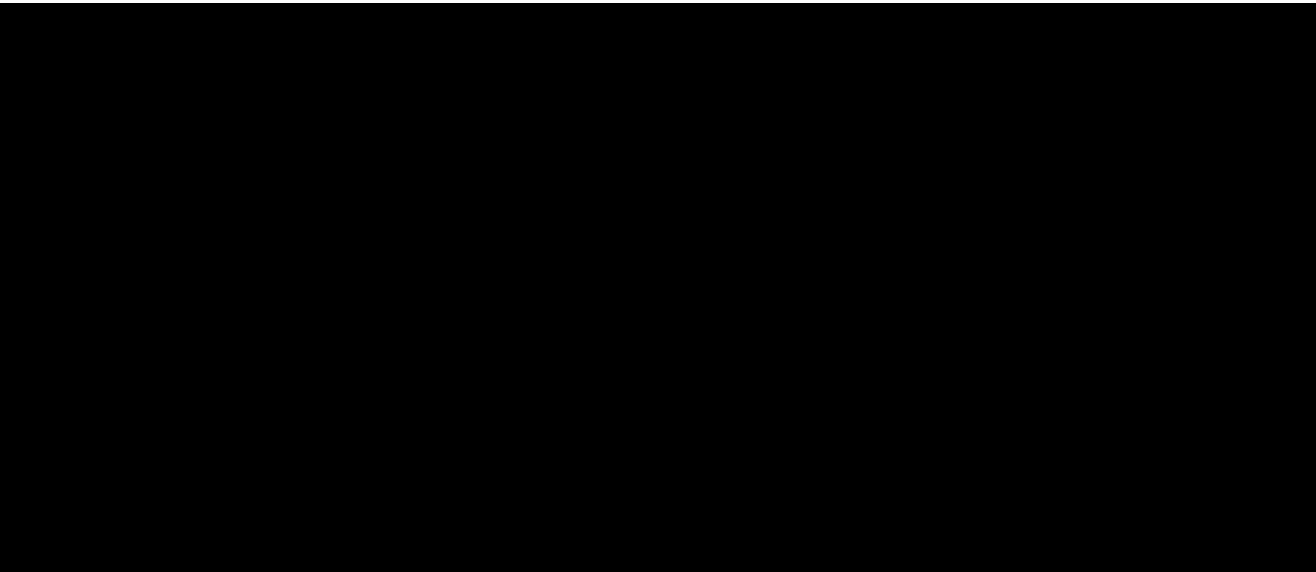


**SCHEDULE 5**











**SCHEDULE 6**

**Insurances**

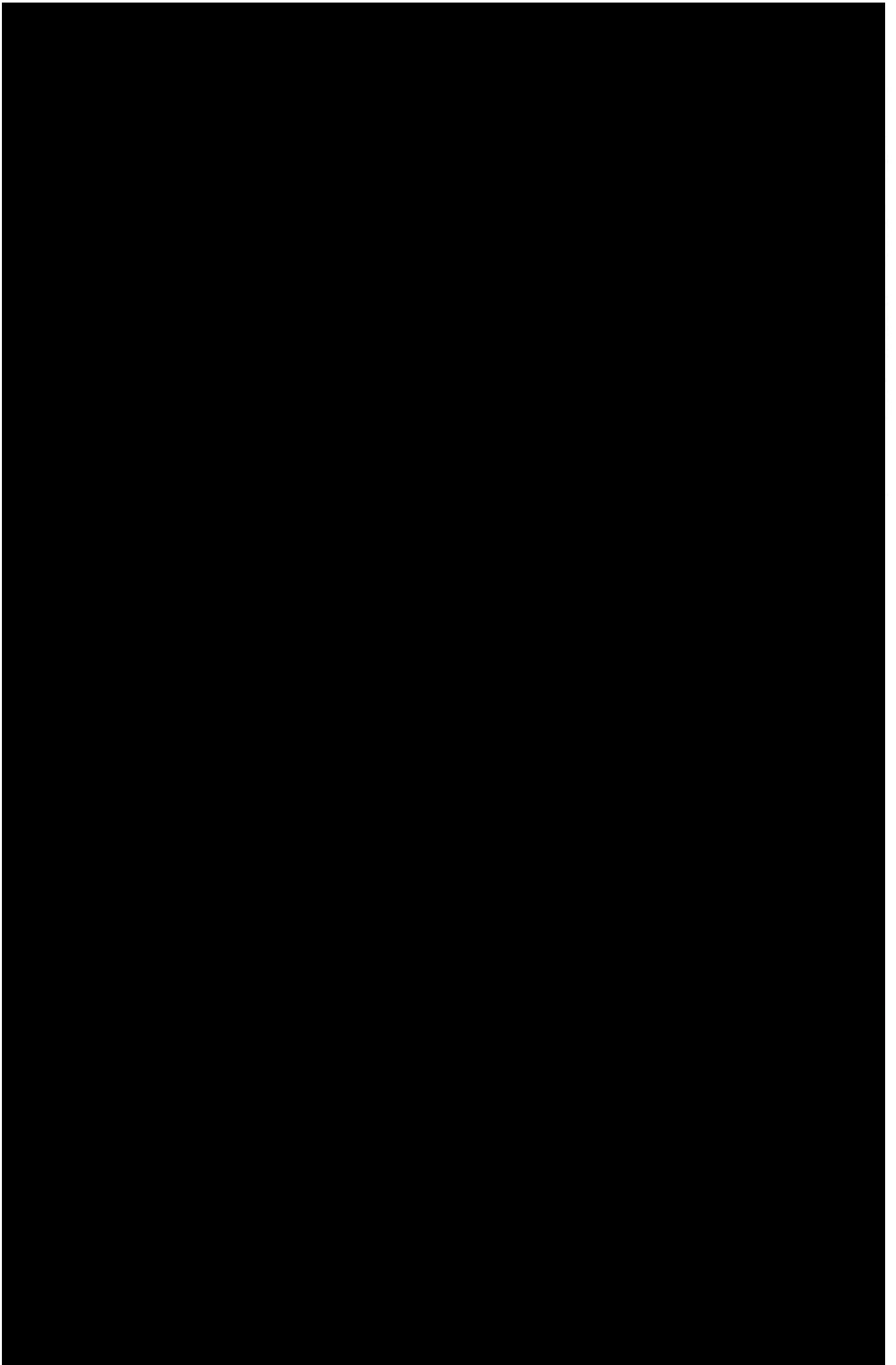
**Part A - MTR Insurances**

<b>Insurance</b>	<b>Cover</b>	<b>Deductible</b>
Professional Indemnity	██████████ of cover for anyone claim and in the aggregate for the policy period. The policy to include a principals indemnity extension in favour of the Principal.	██████████
Workers Compensation and employers liability	As required by law	As required by law

## **Part B - Principal's Insurances**

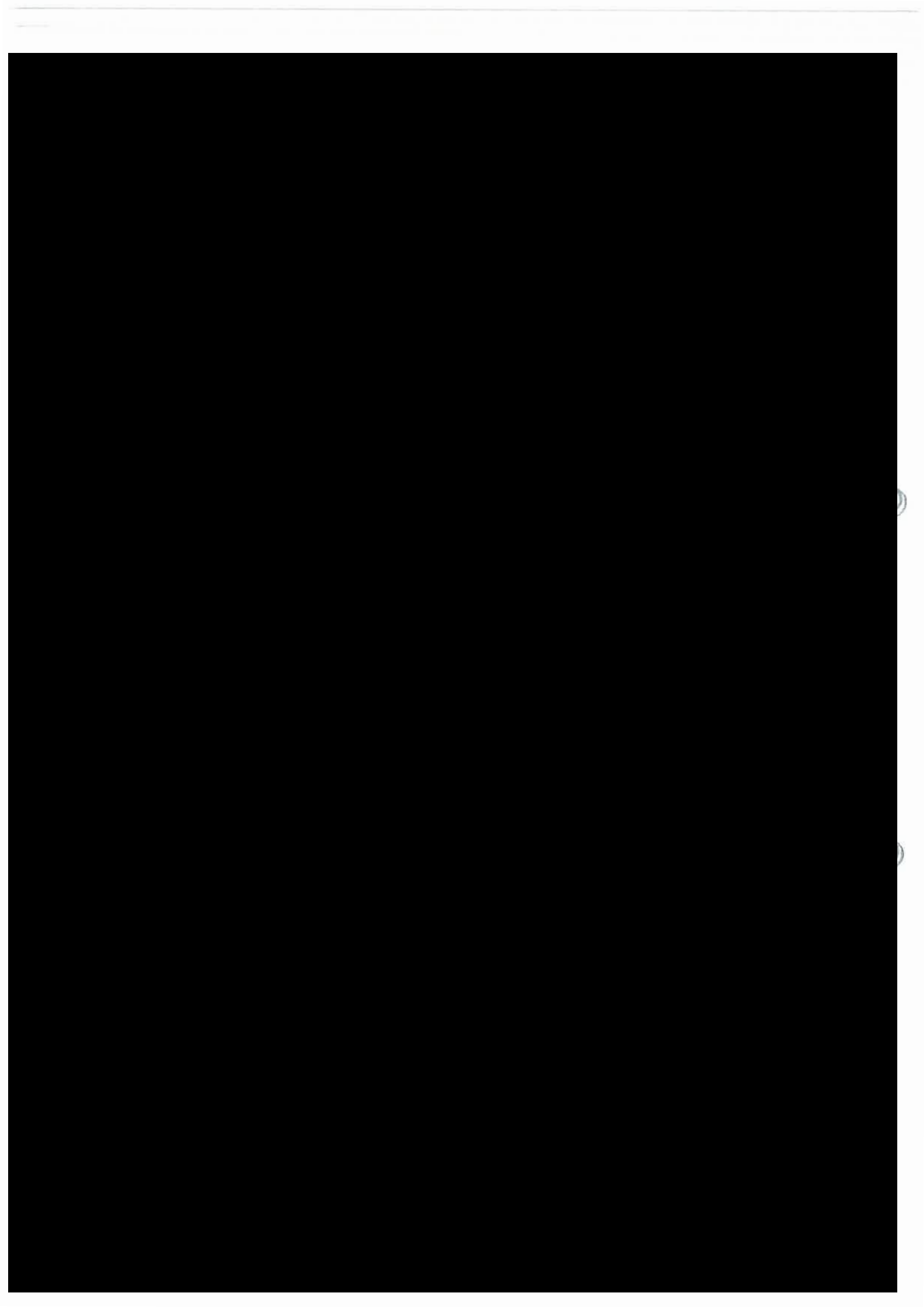
This Part B of Schedule 6 includes the following attachments:

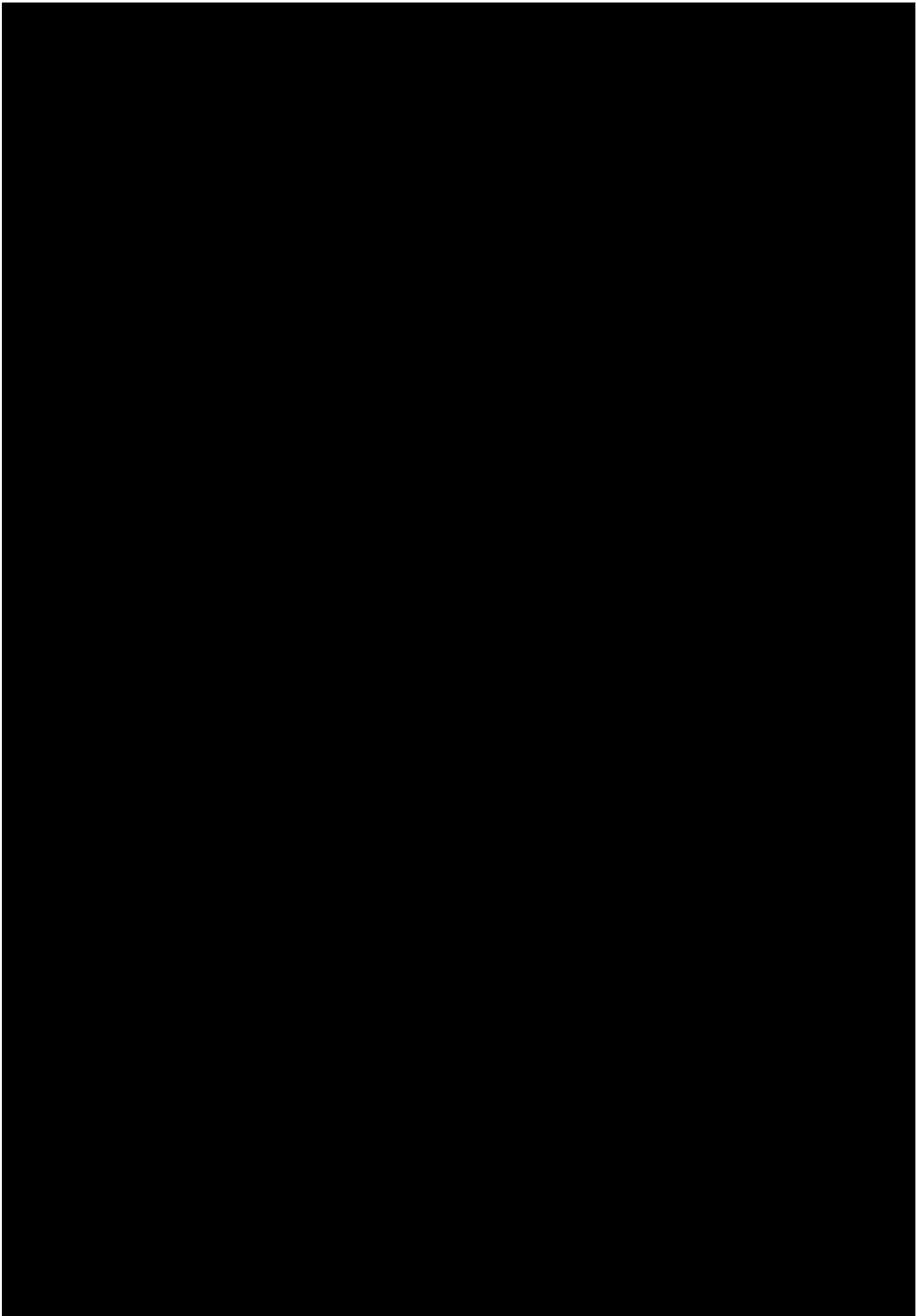
- (a) Insurance Policy: Project Construction Risks – Contract Works (Transport for NSW – Sydney Metro City & South West) dated July 2017; and
- (b) Insurance Policy: Project Construction Risks – Public & Products Liability (Transport for NSW – Sydney Metro City & South West) dated July 2017.



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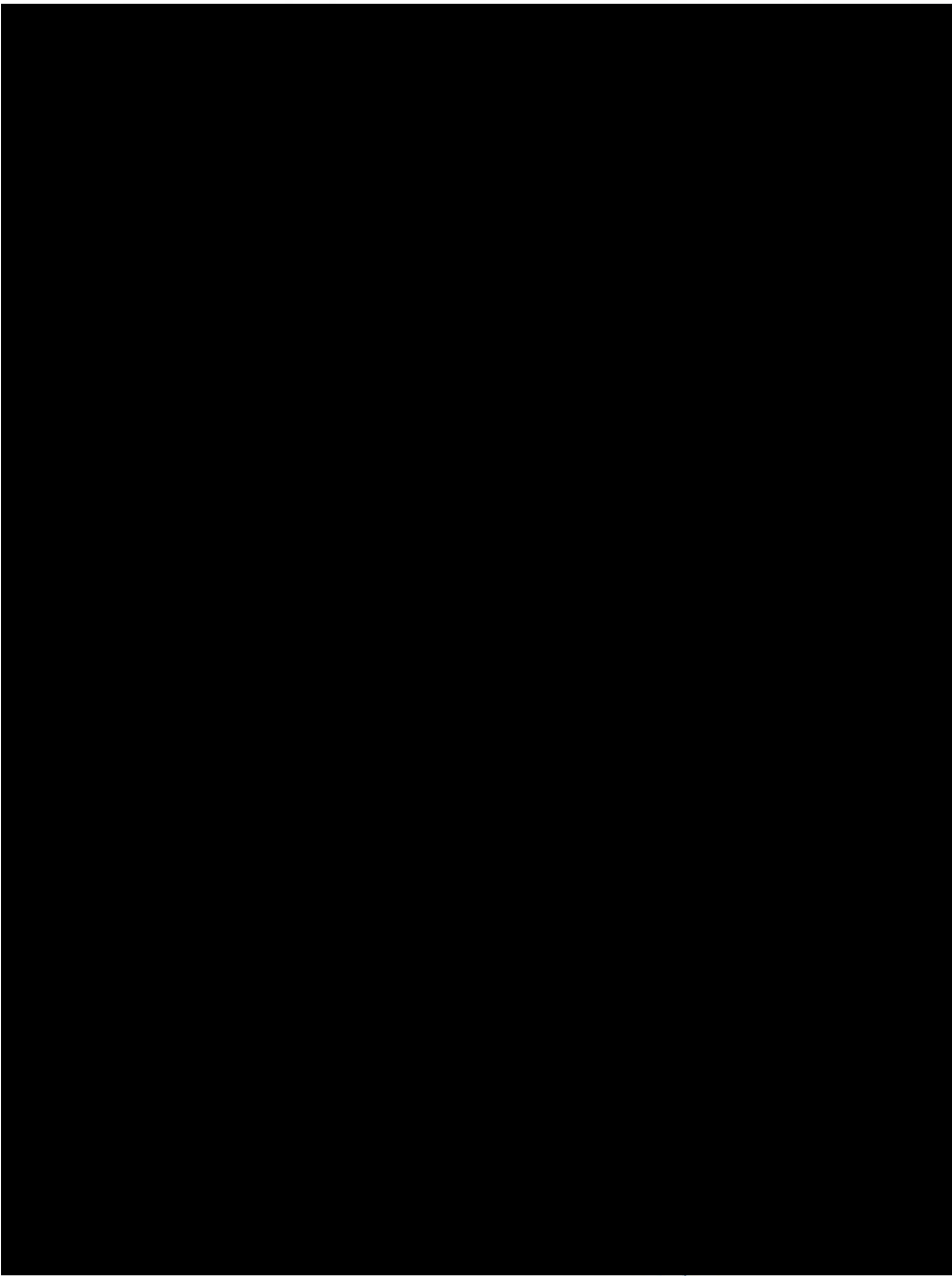
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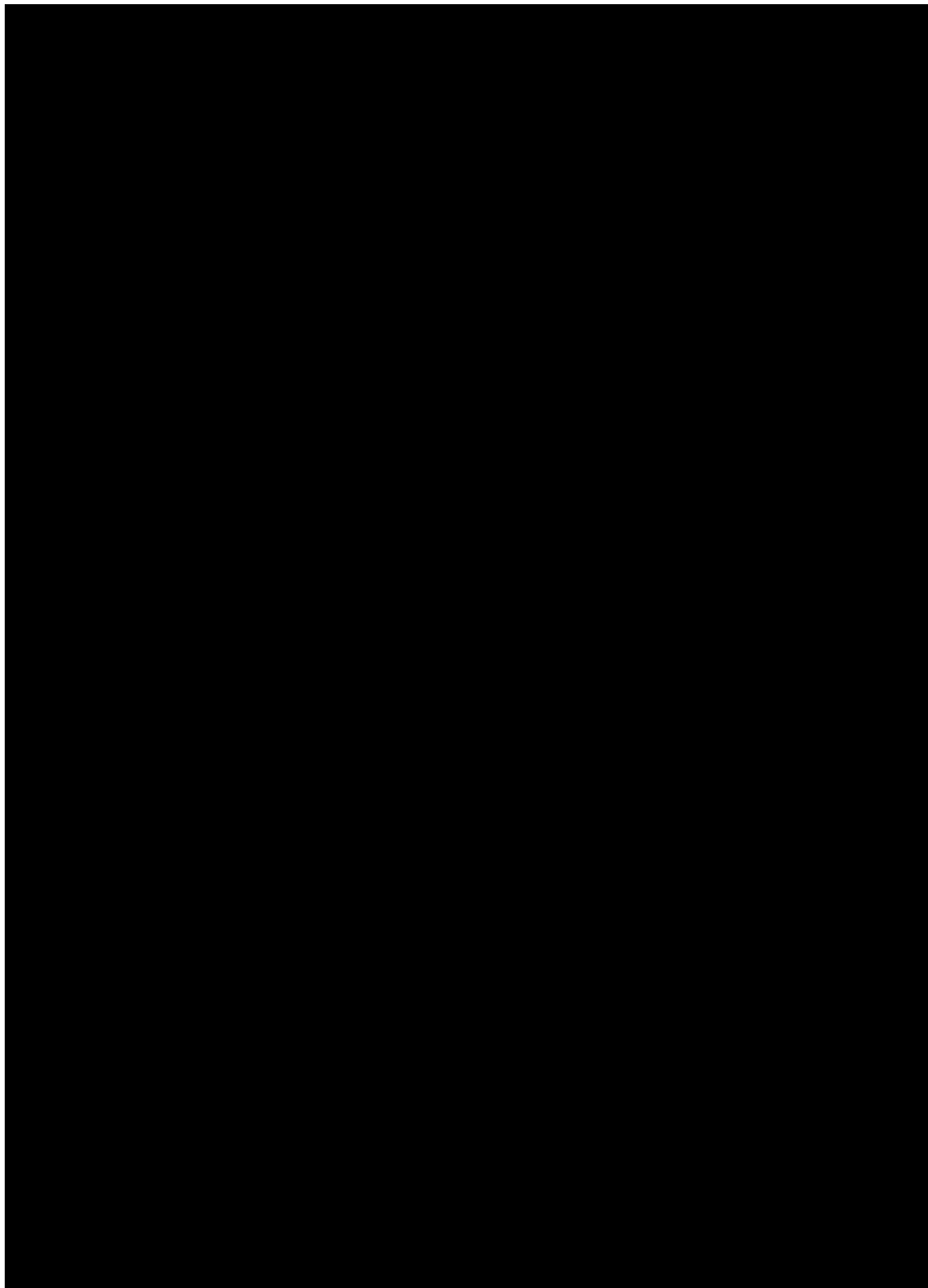




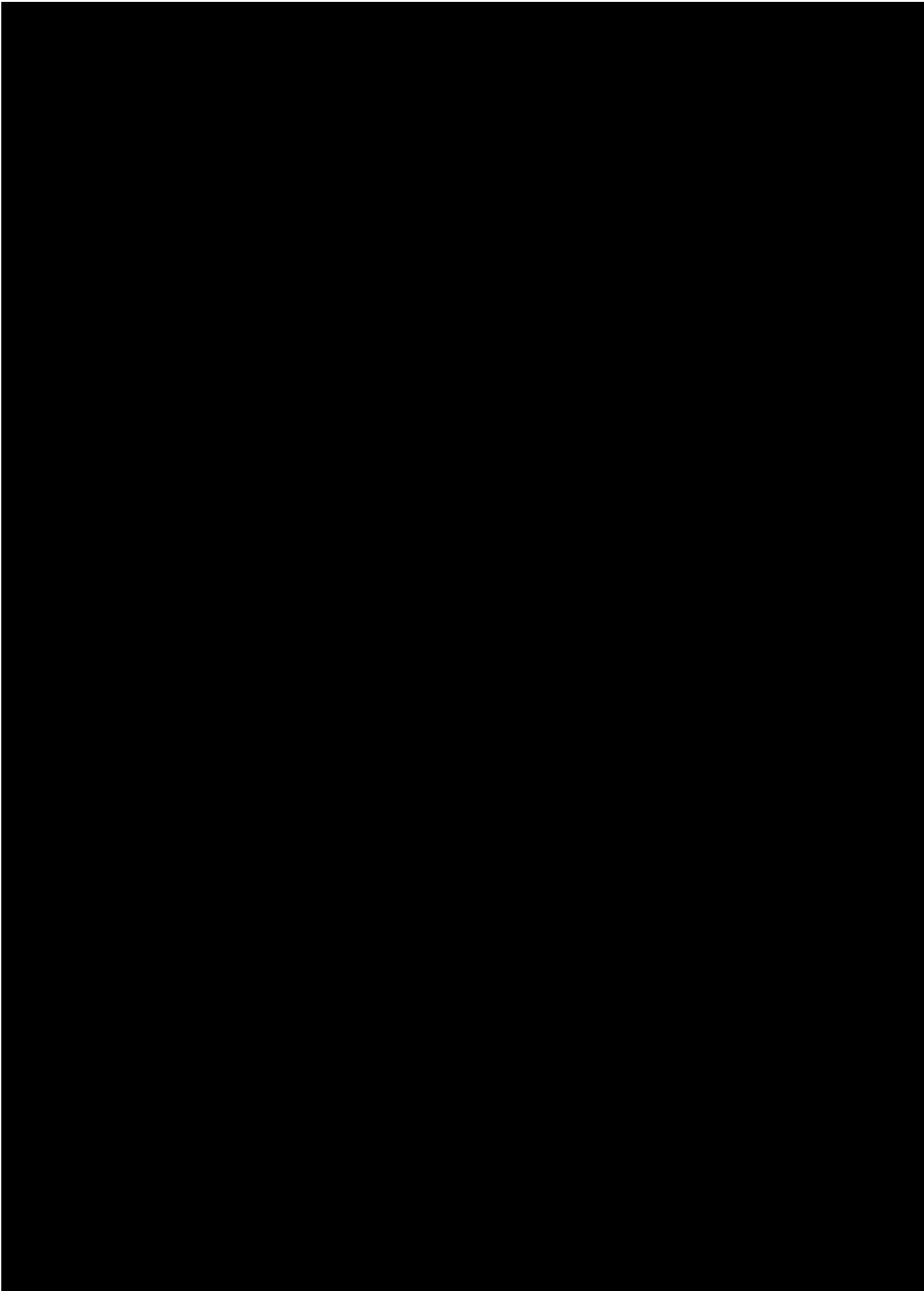
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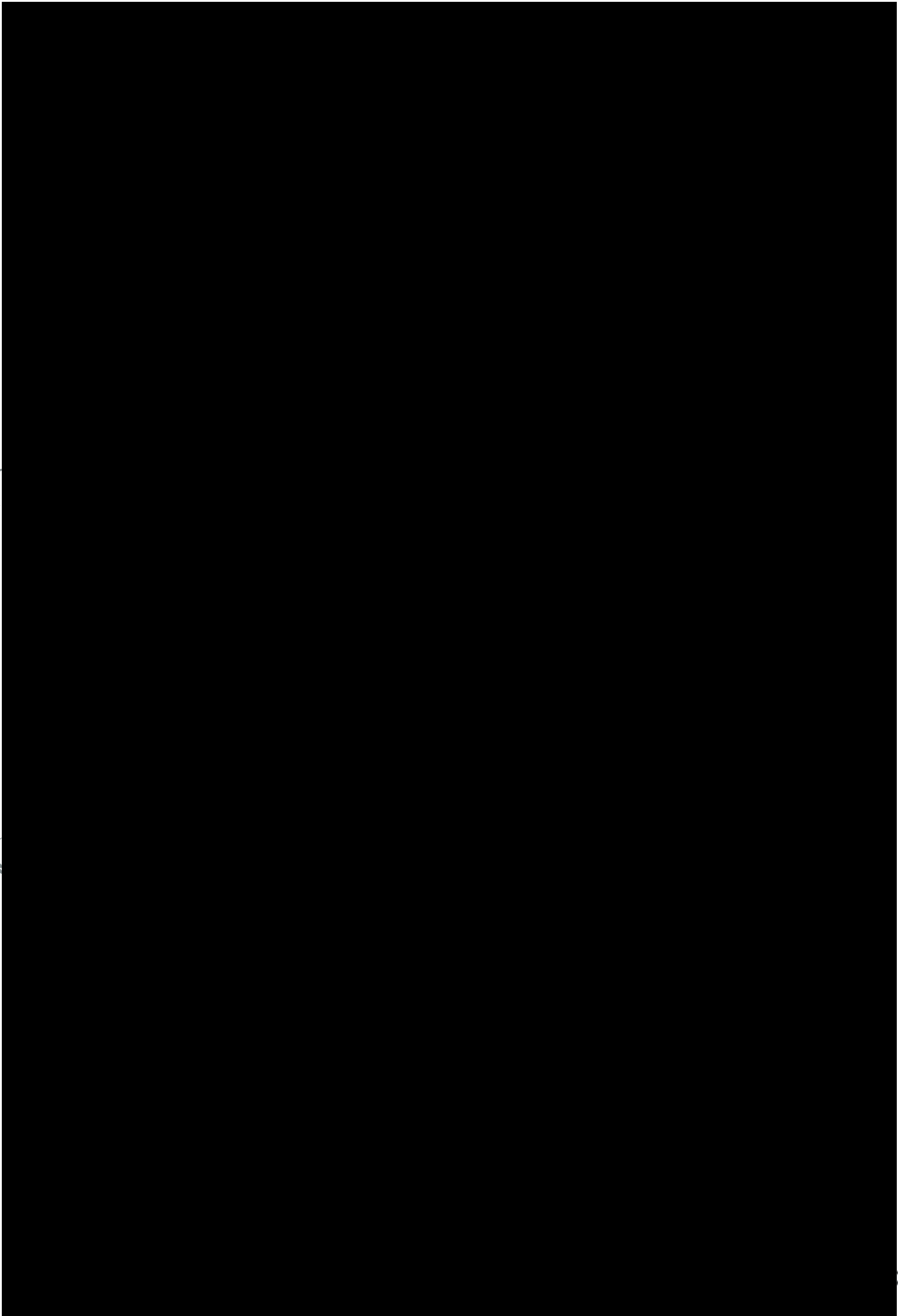


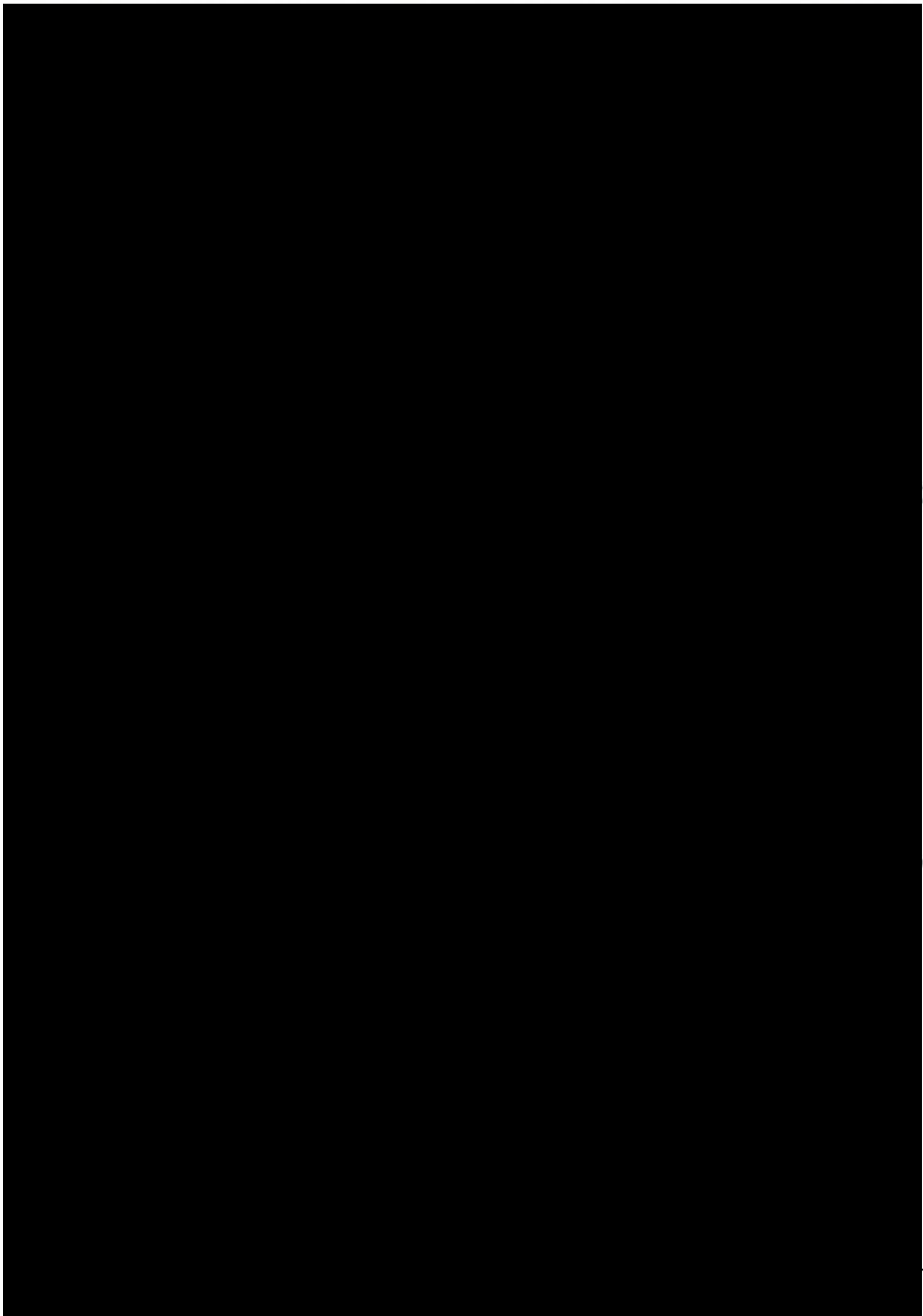


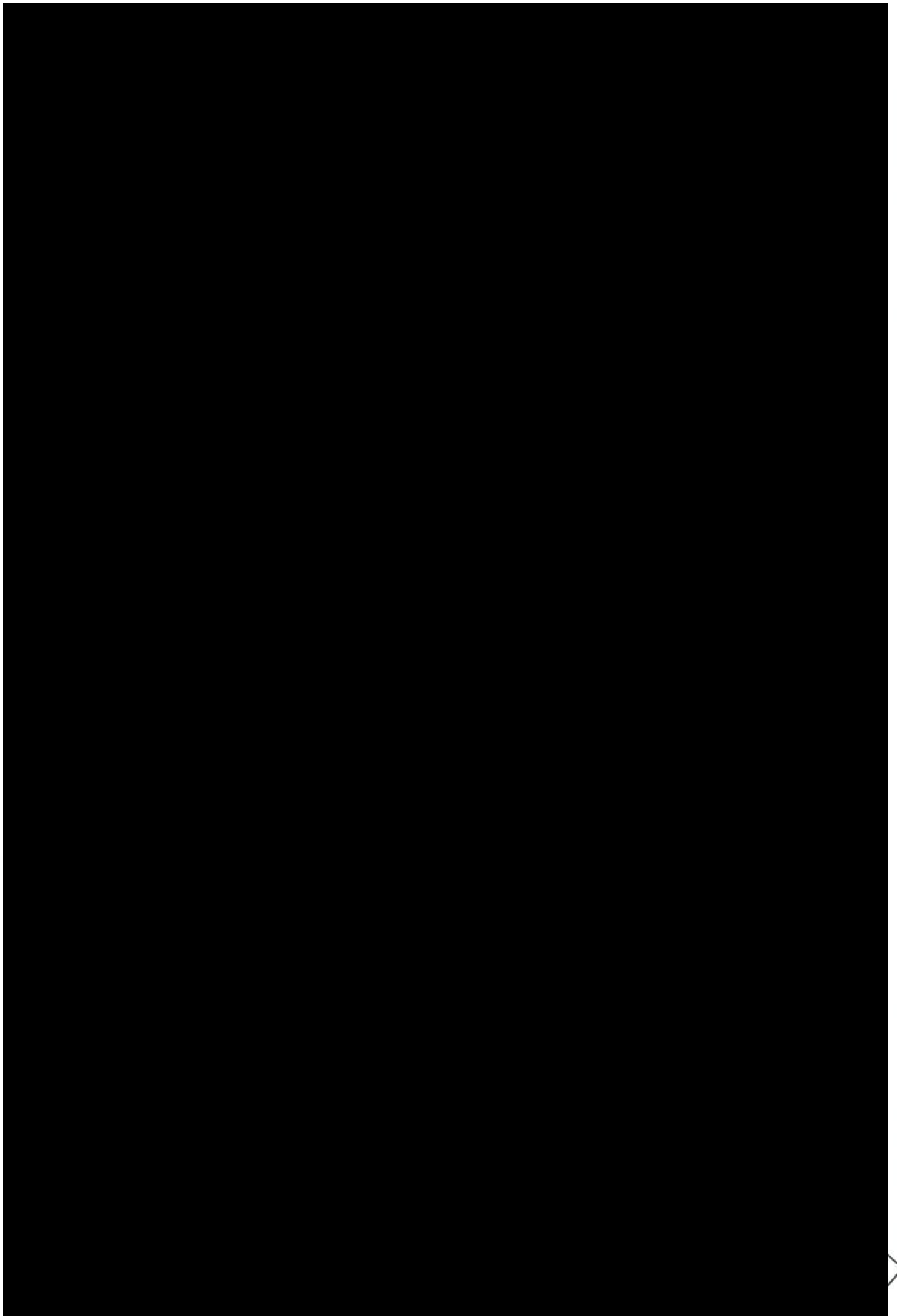


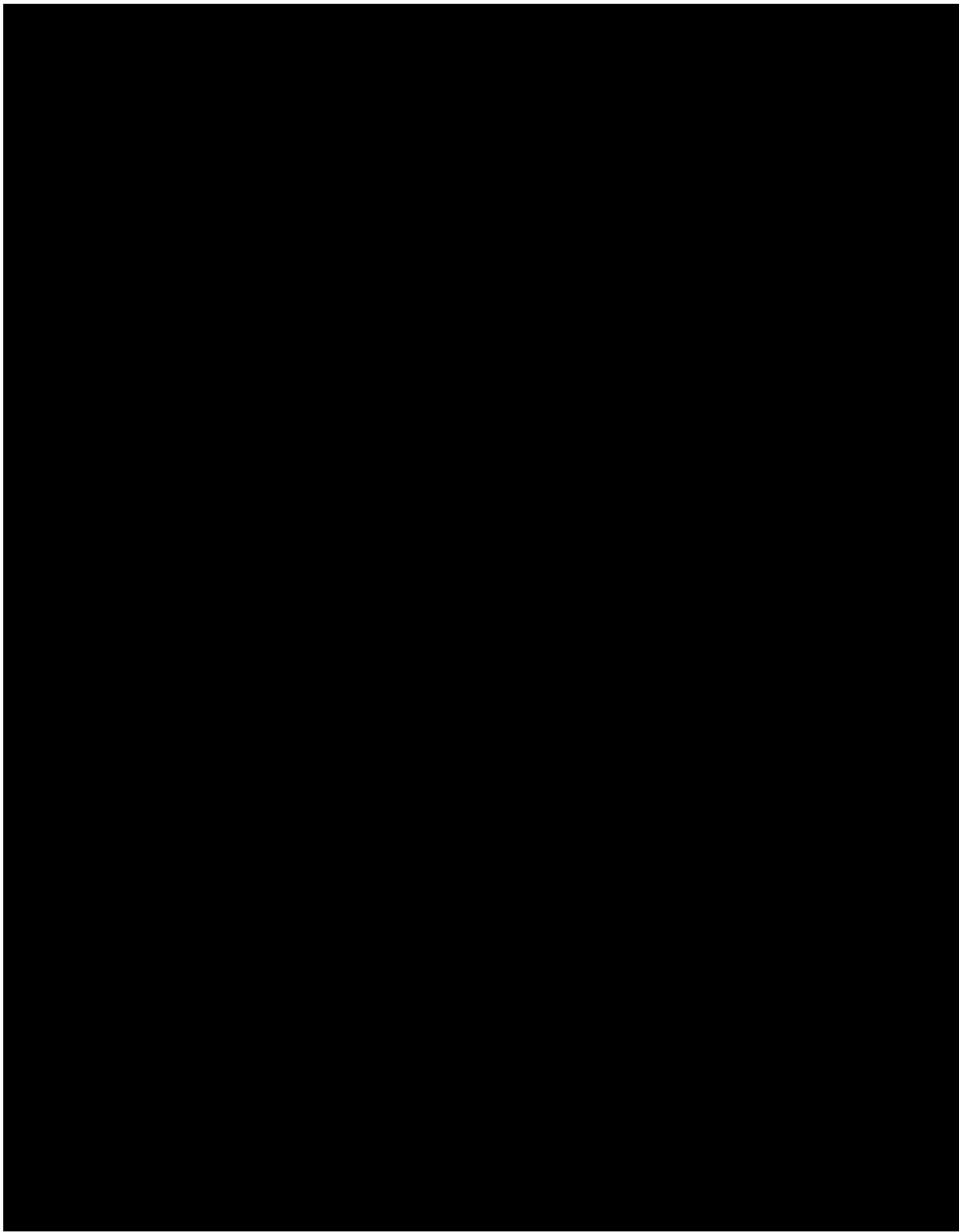
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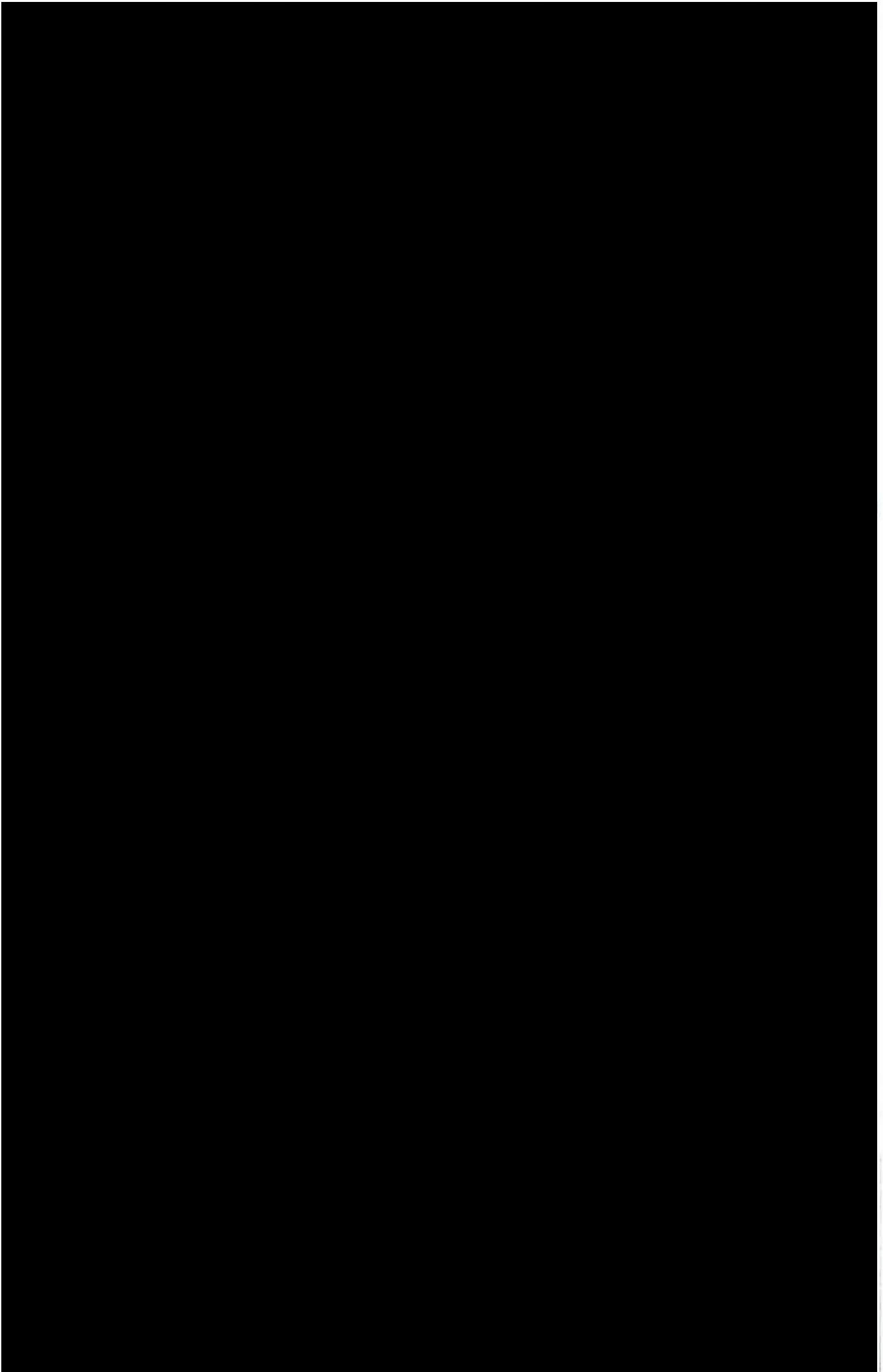


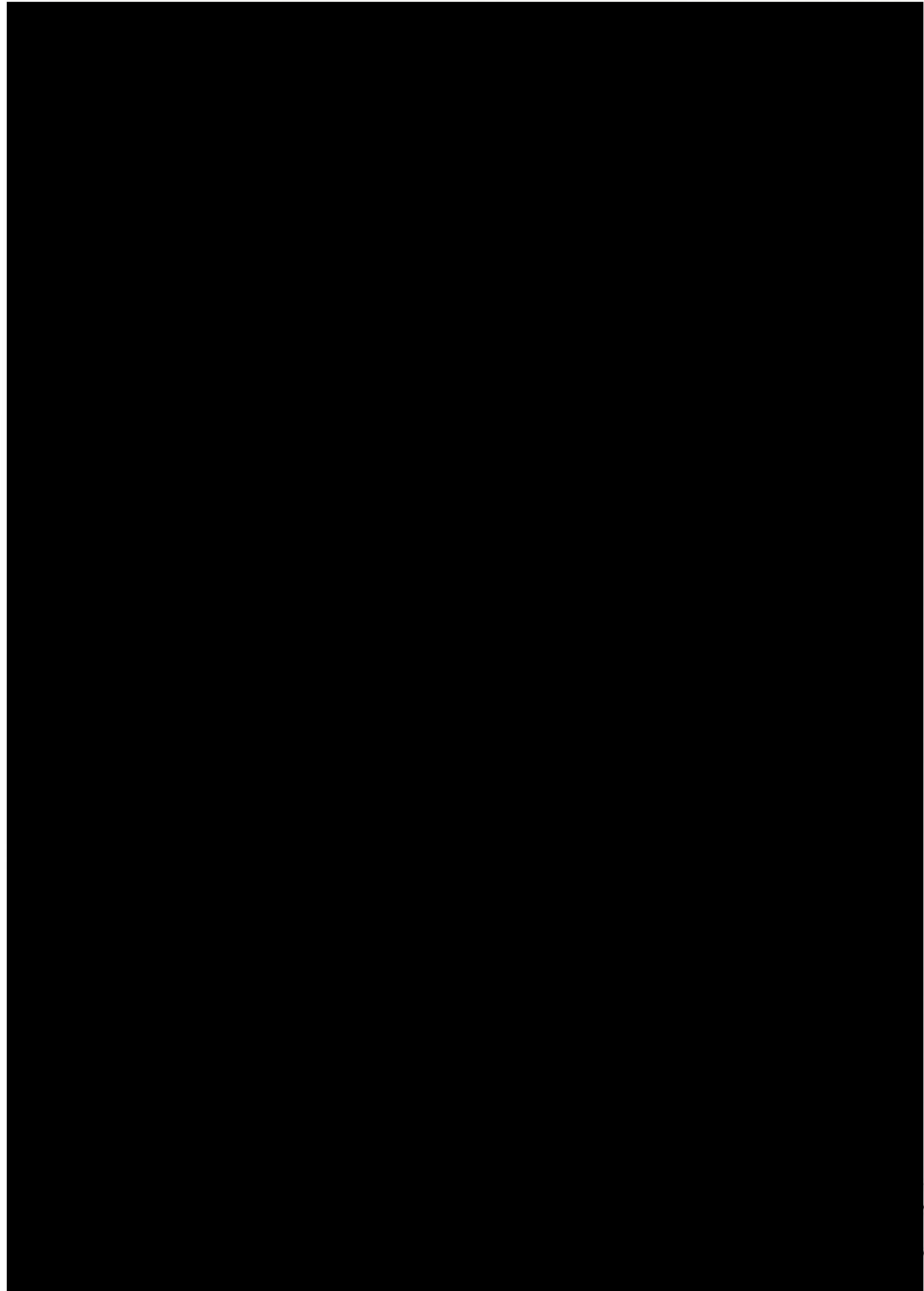




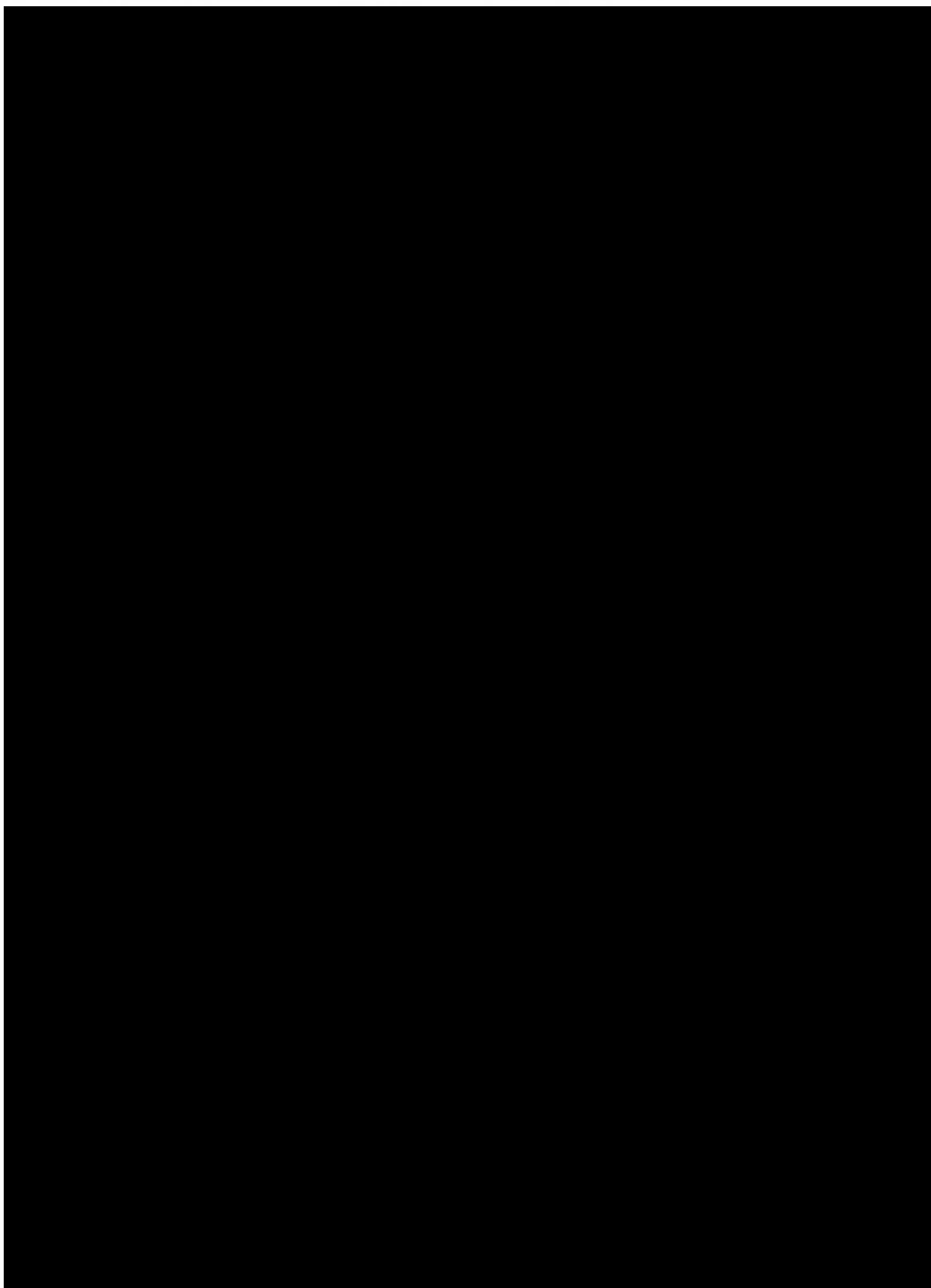
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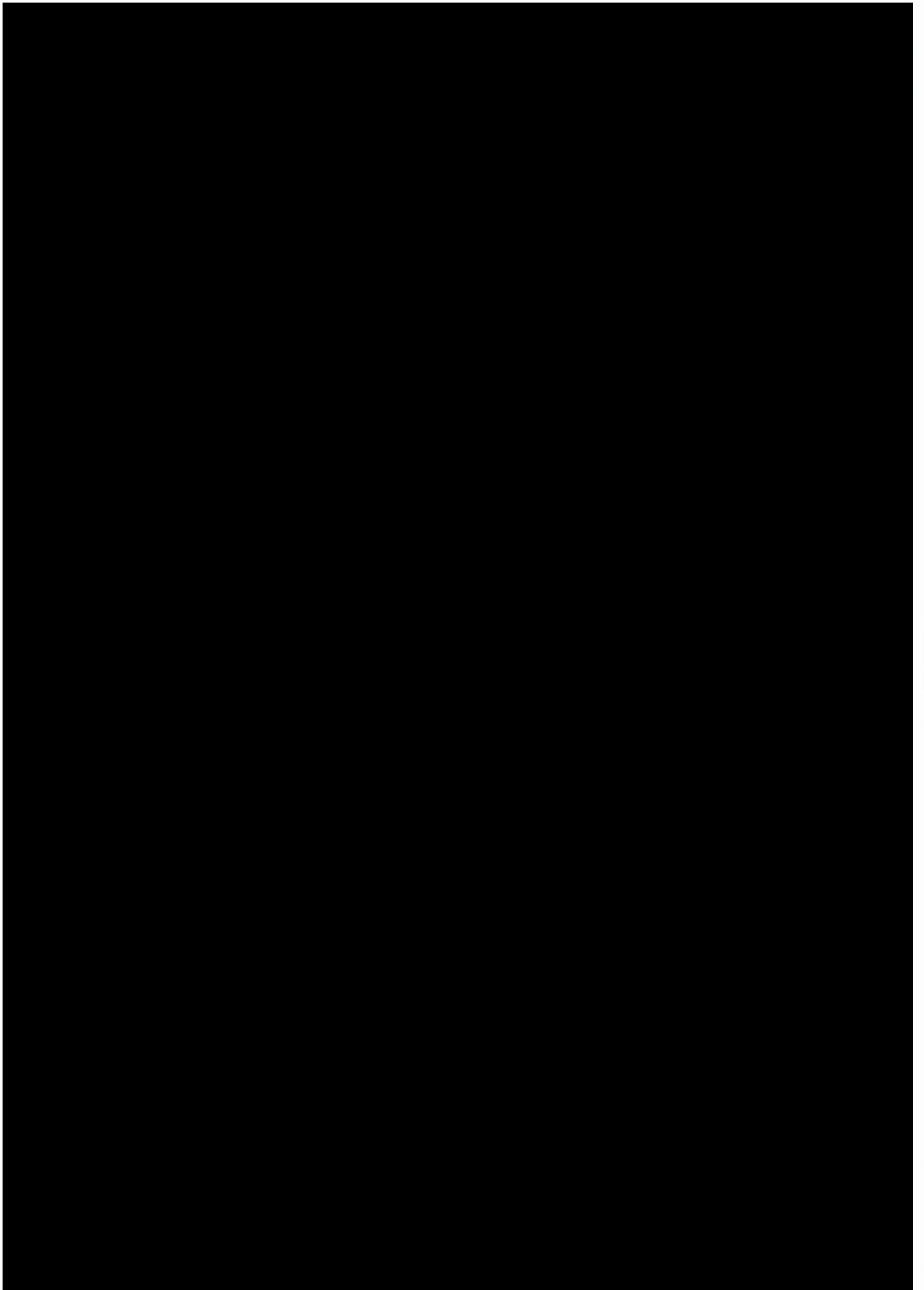
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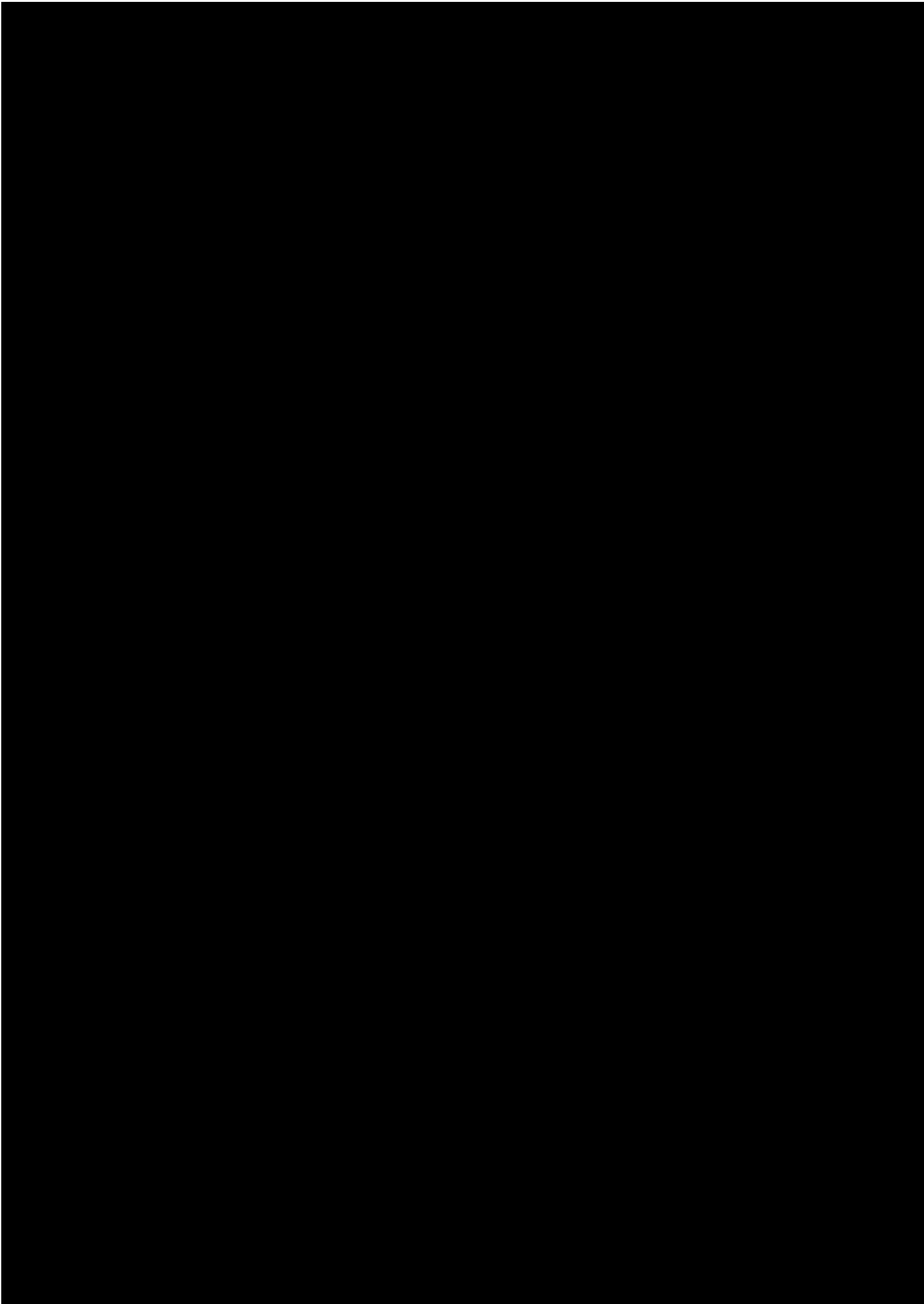


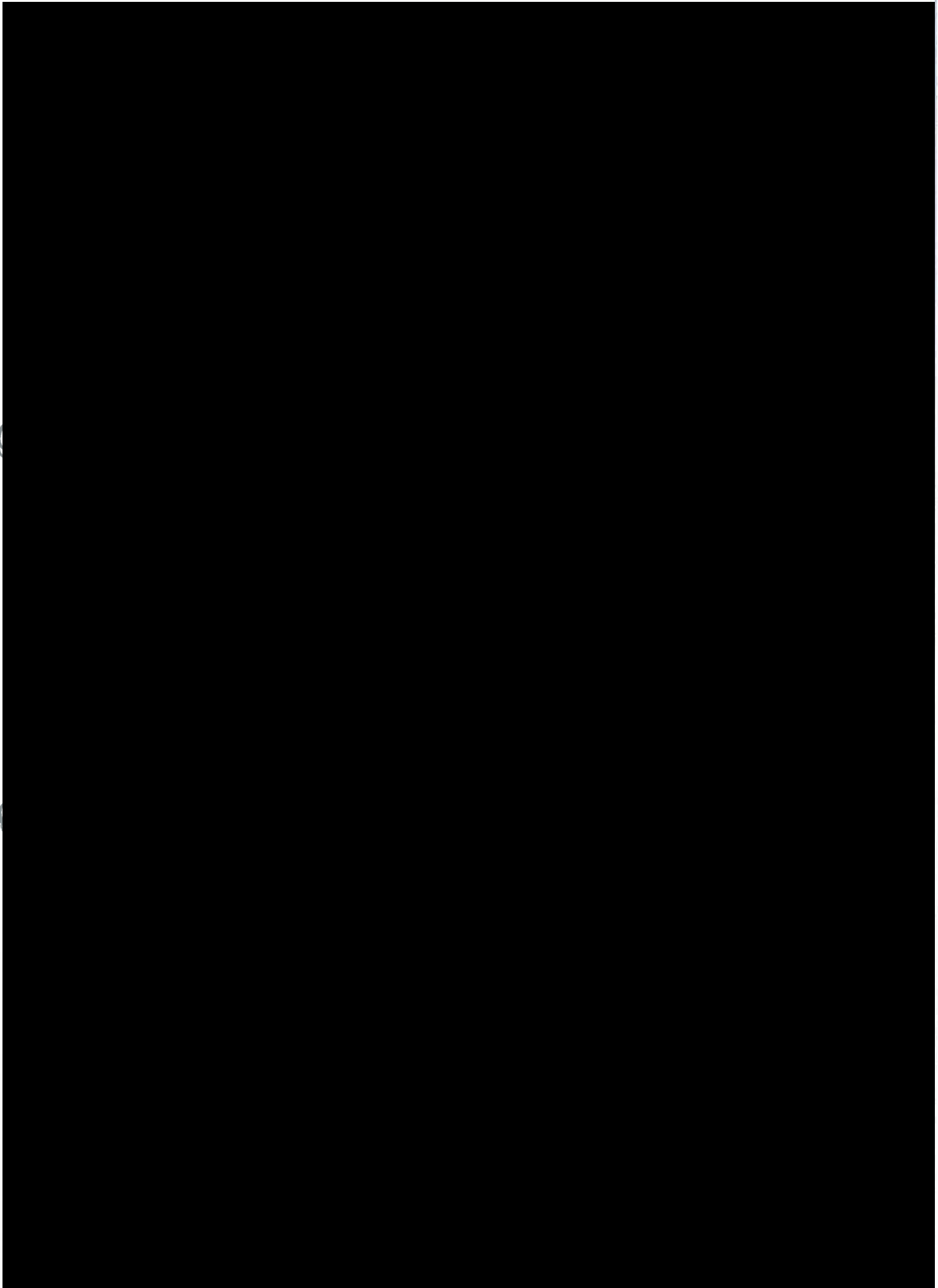


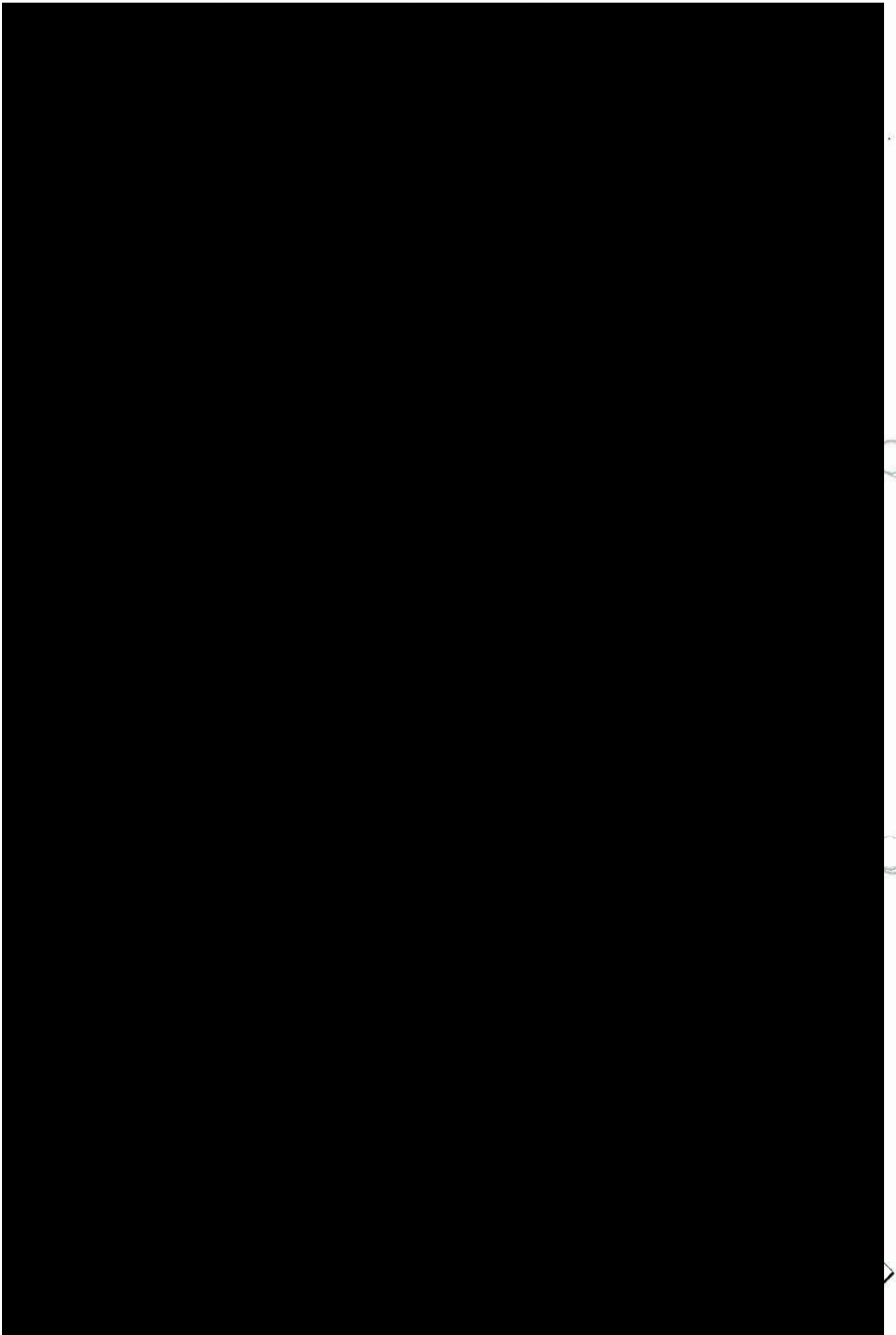


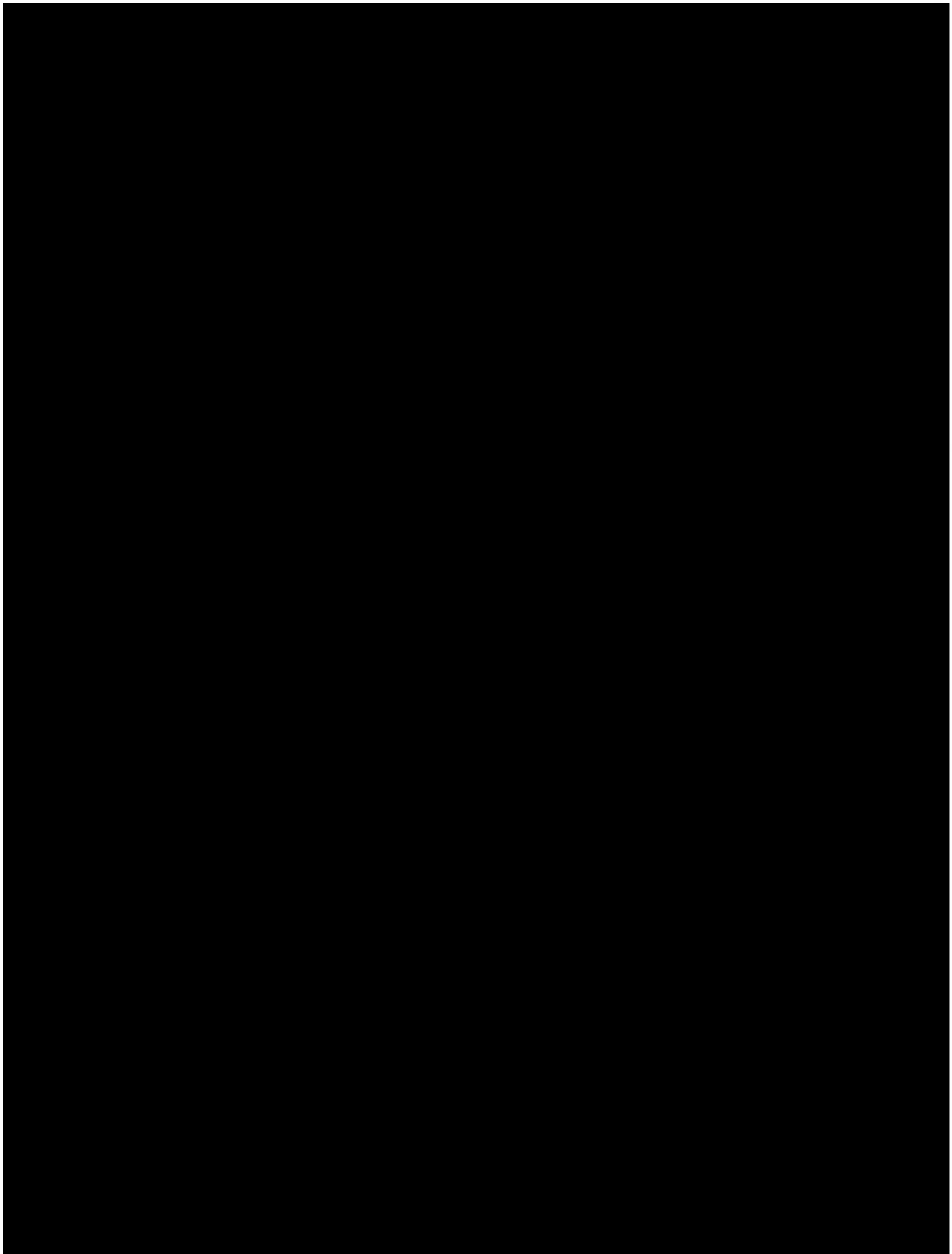


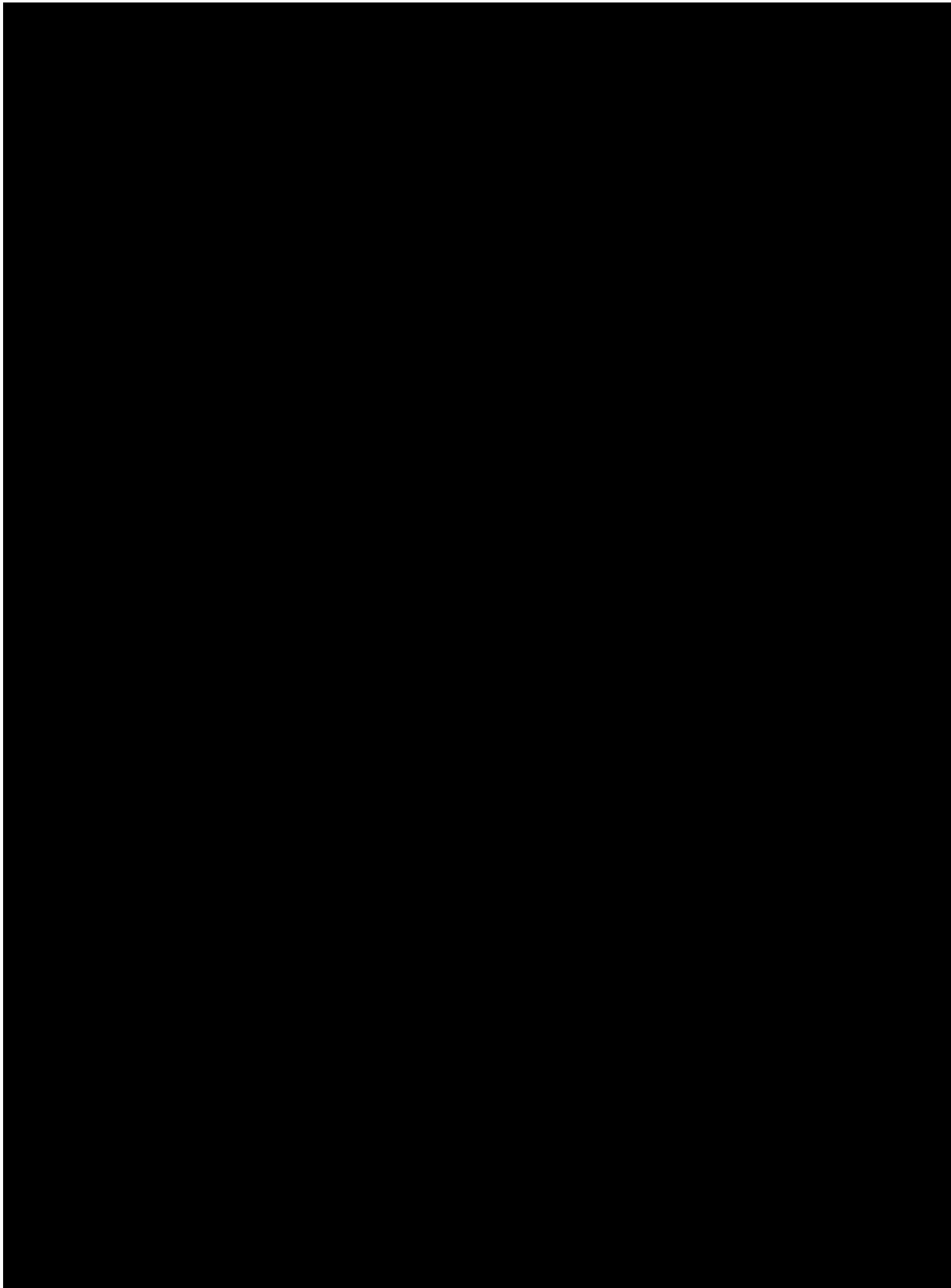


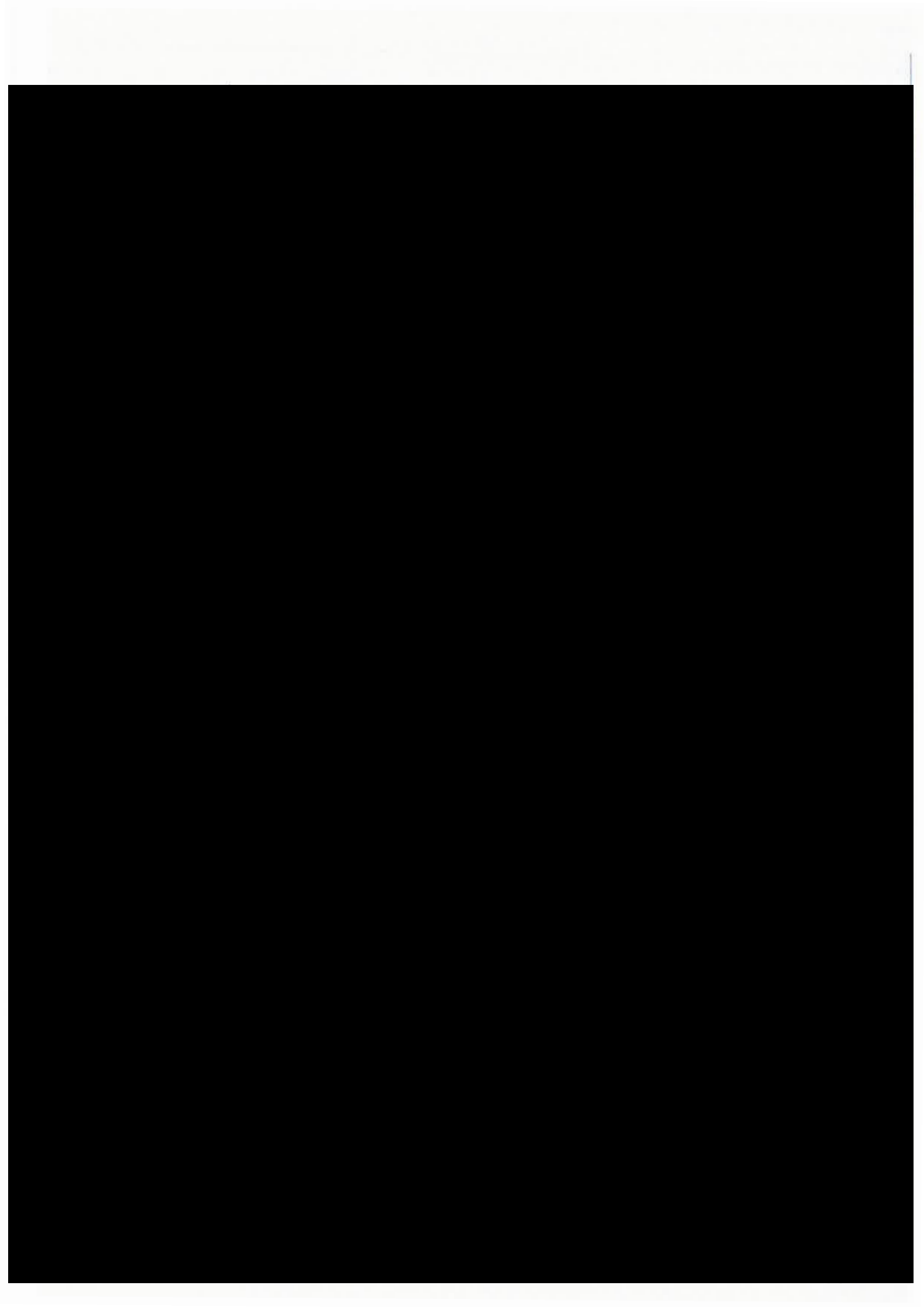




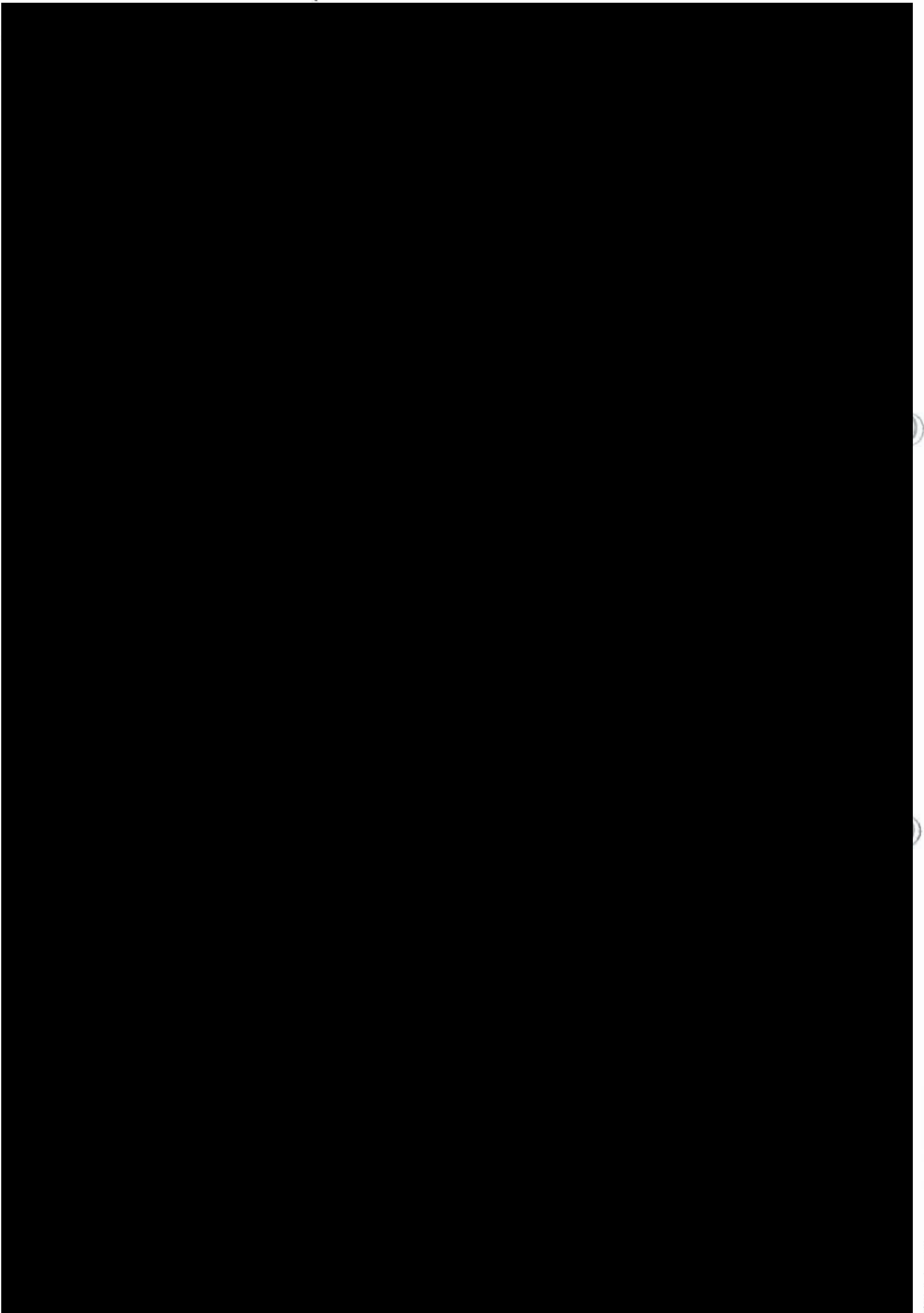


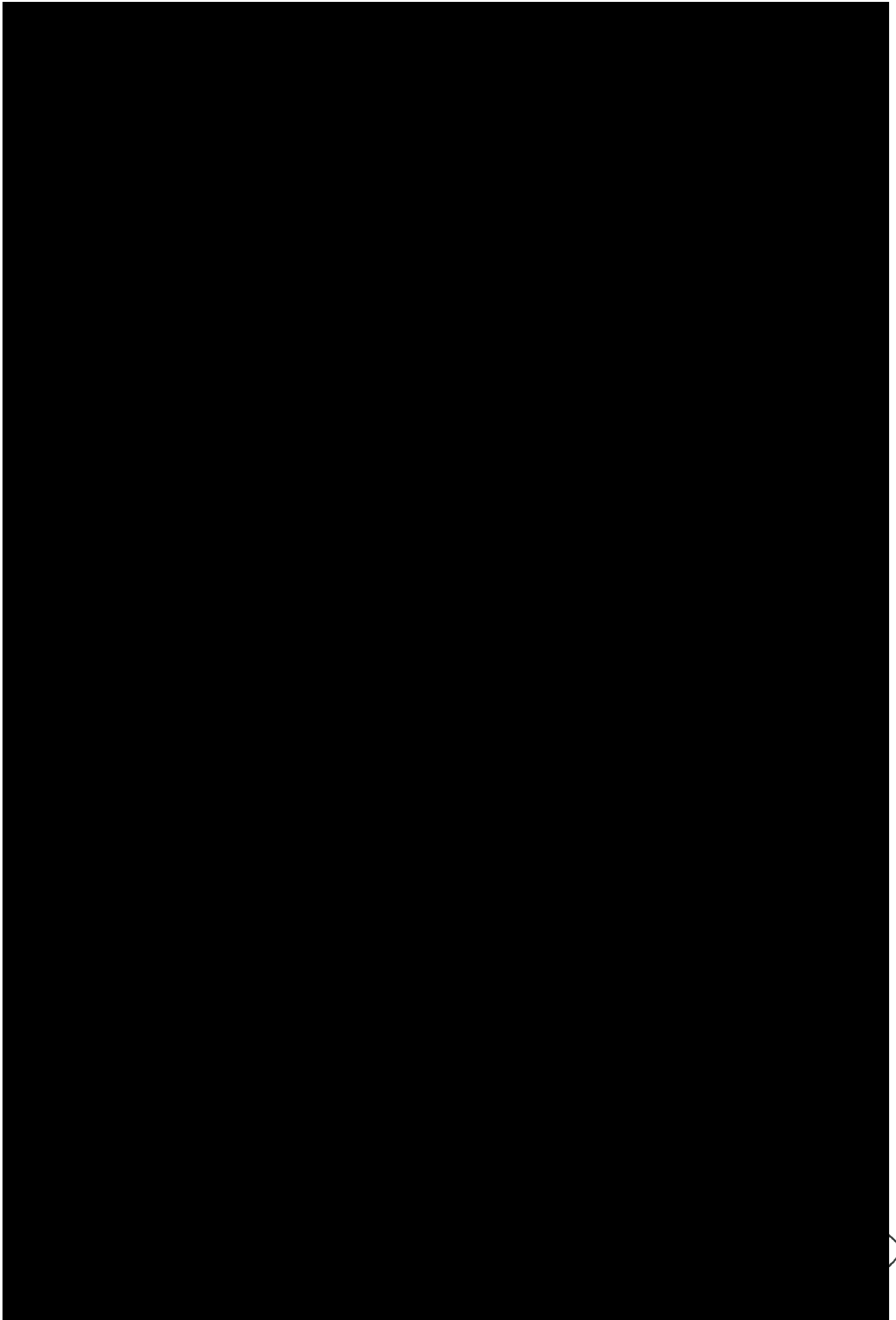


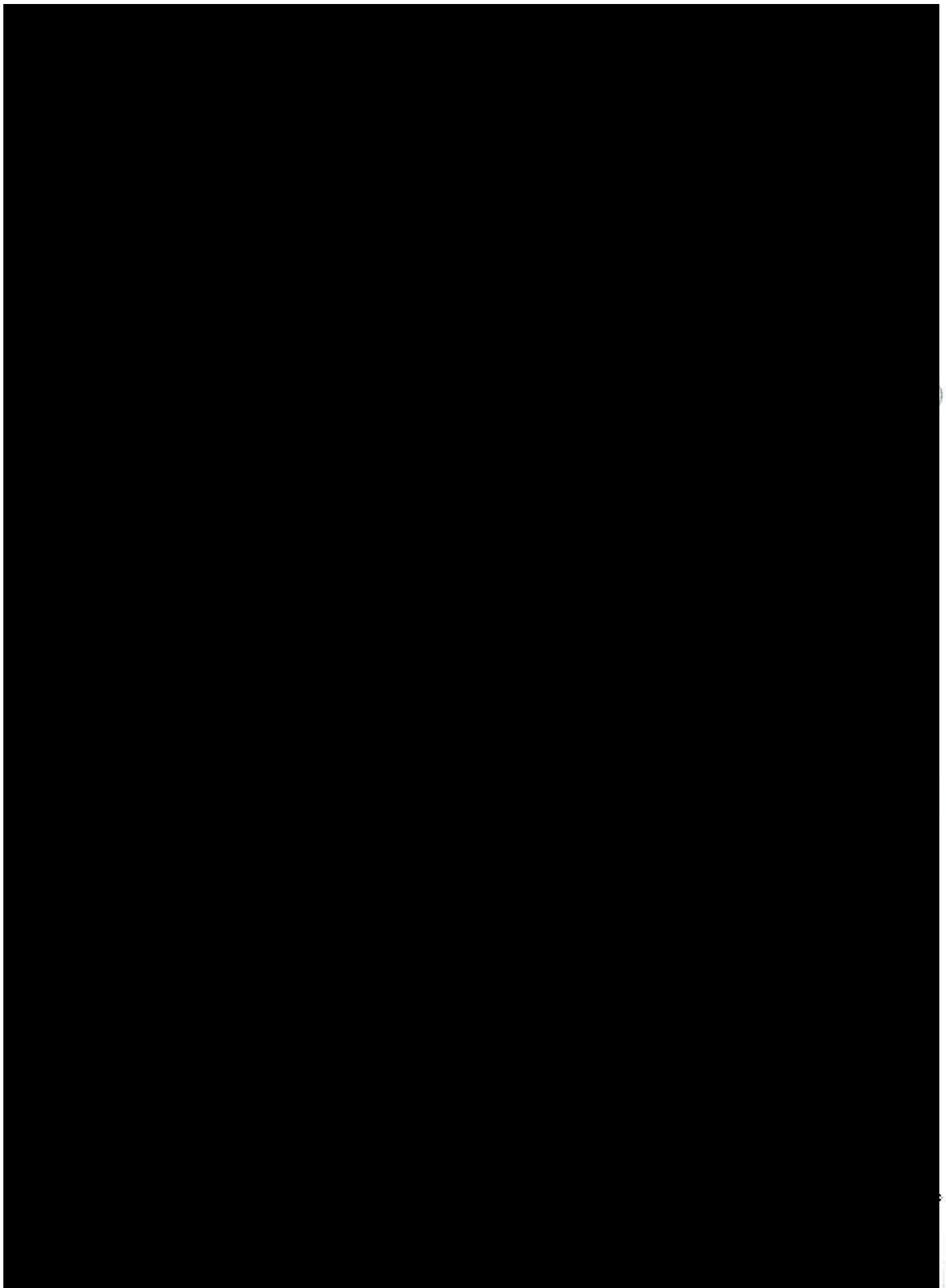


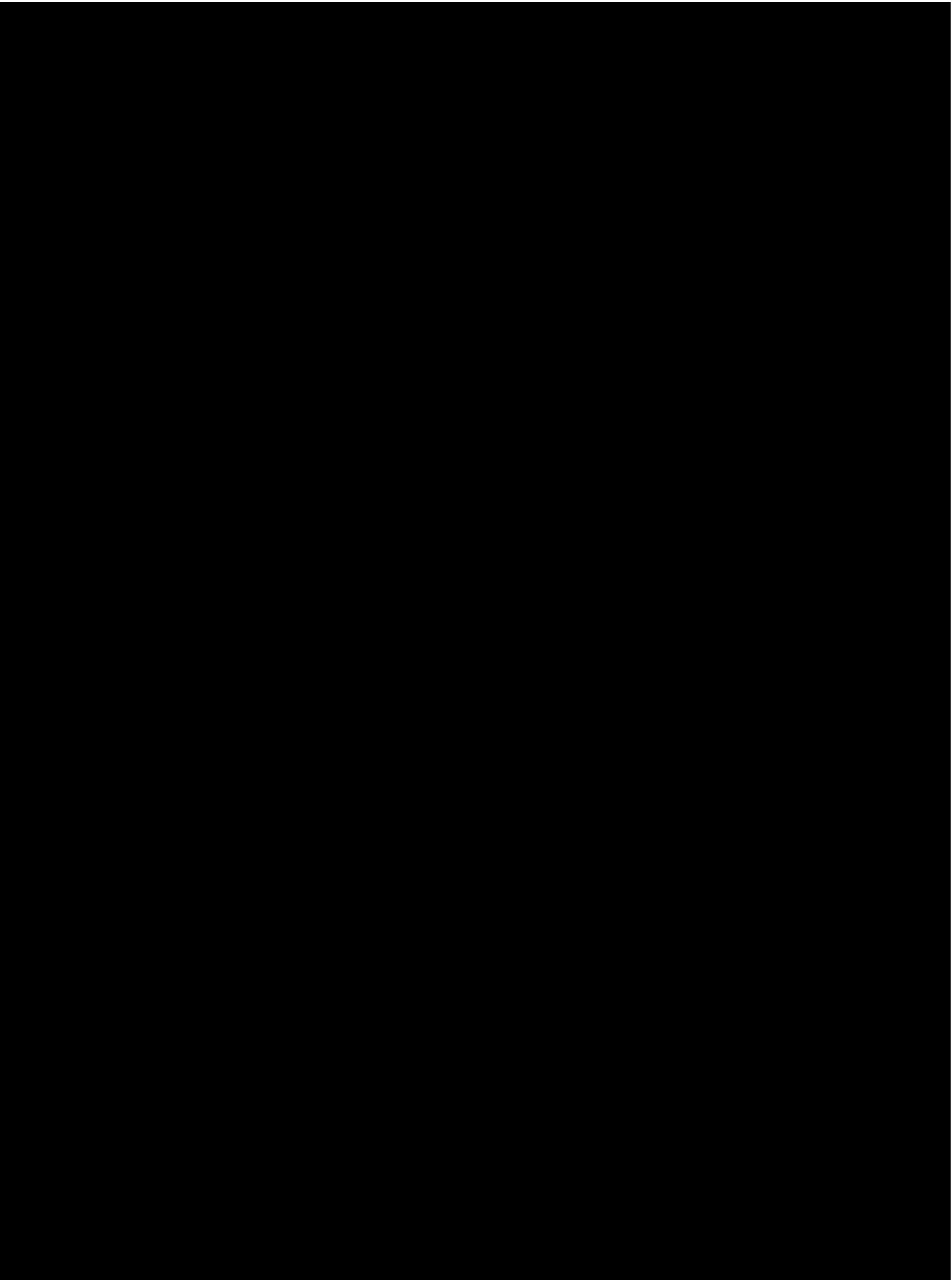


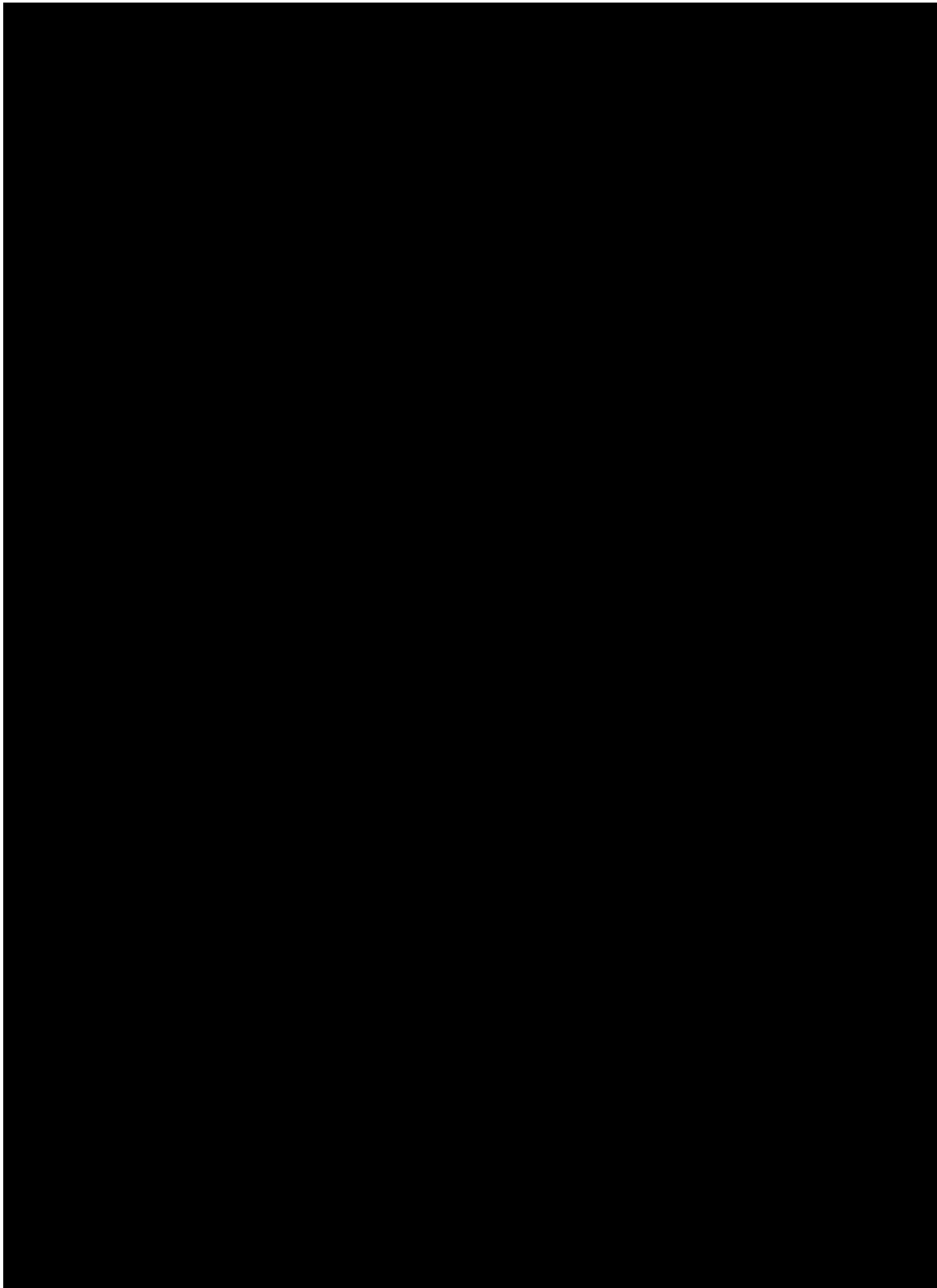






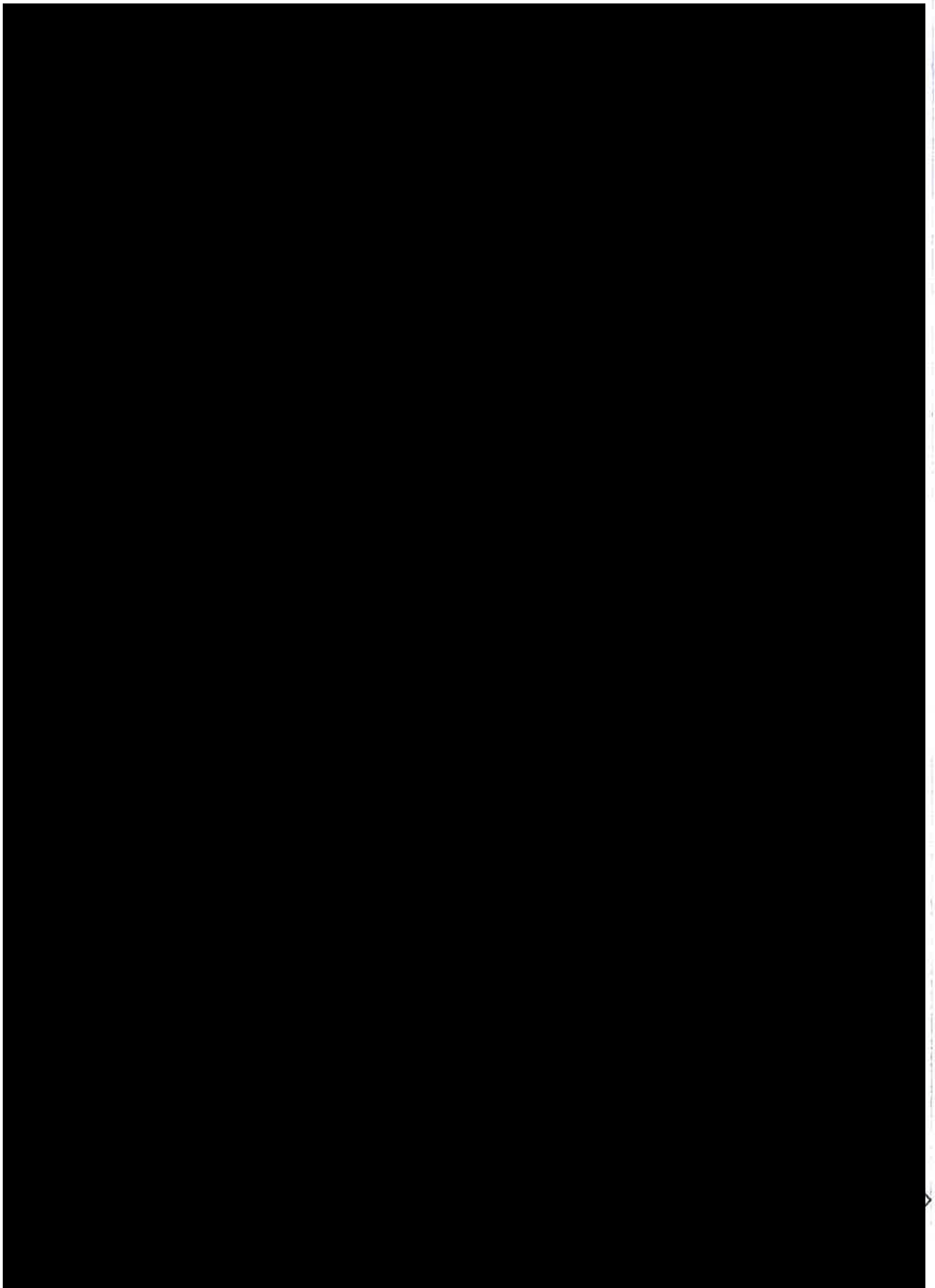


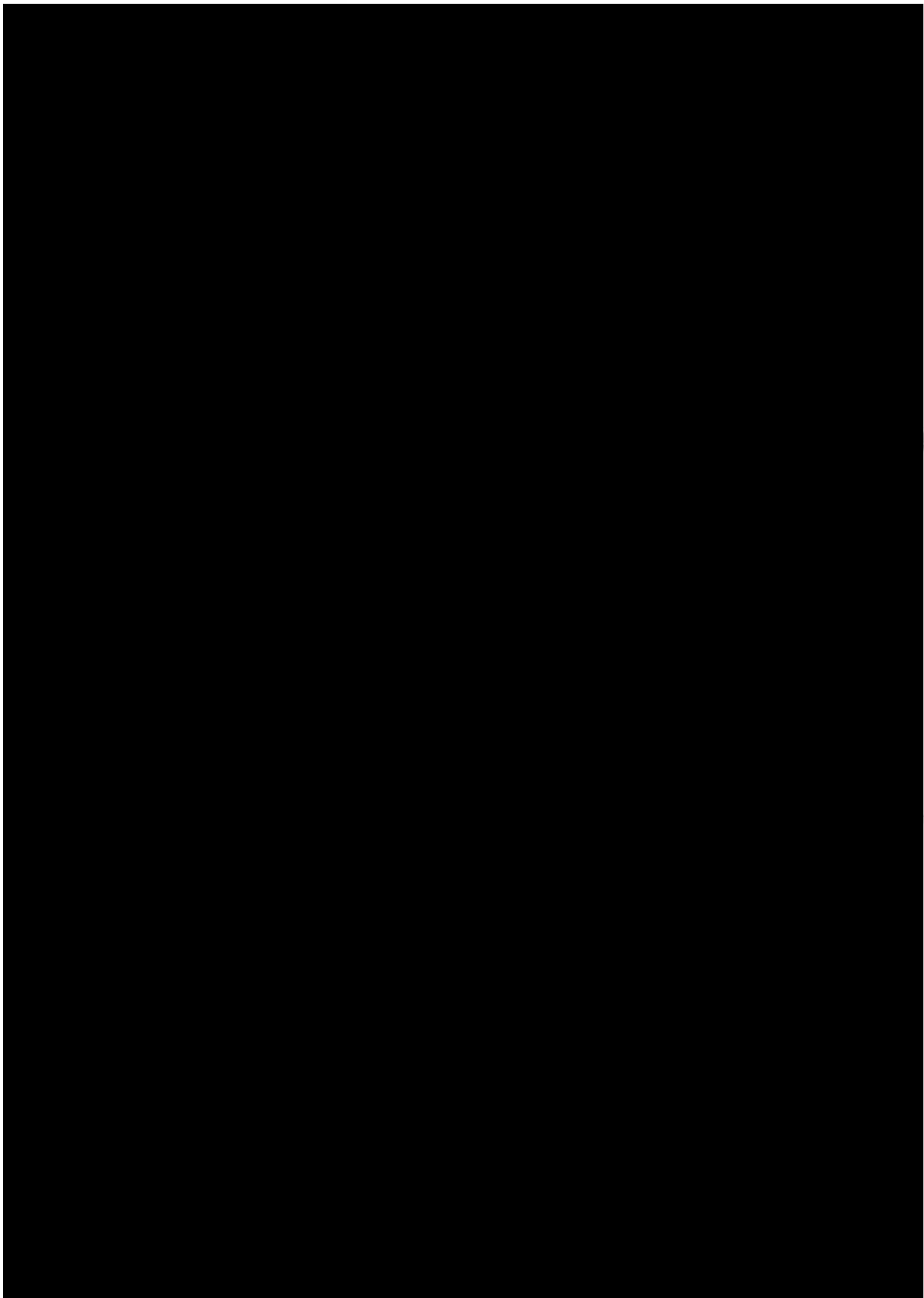


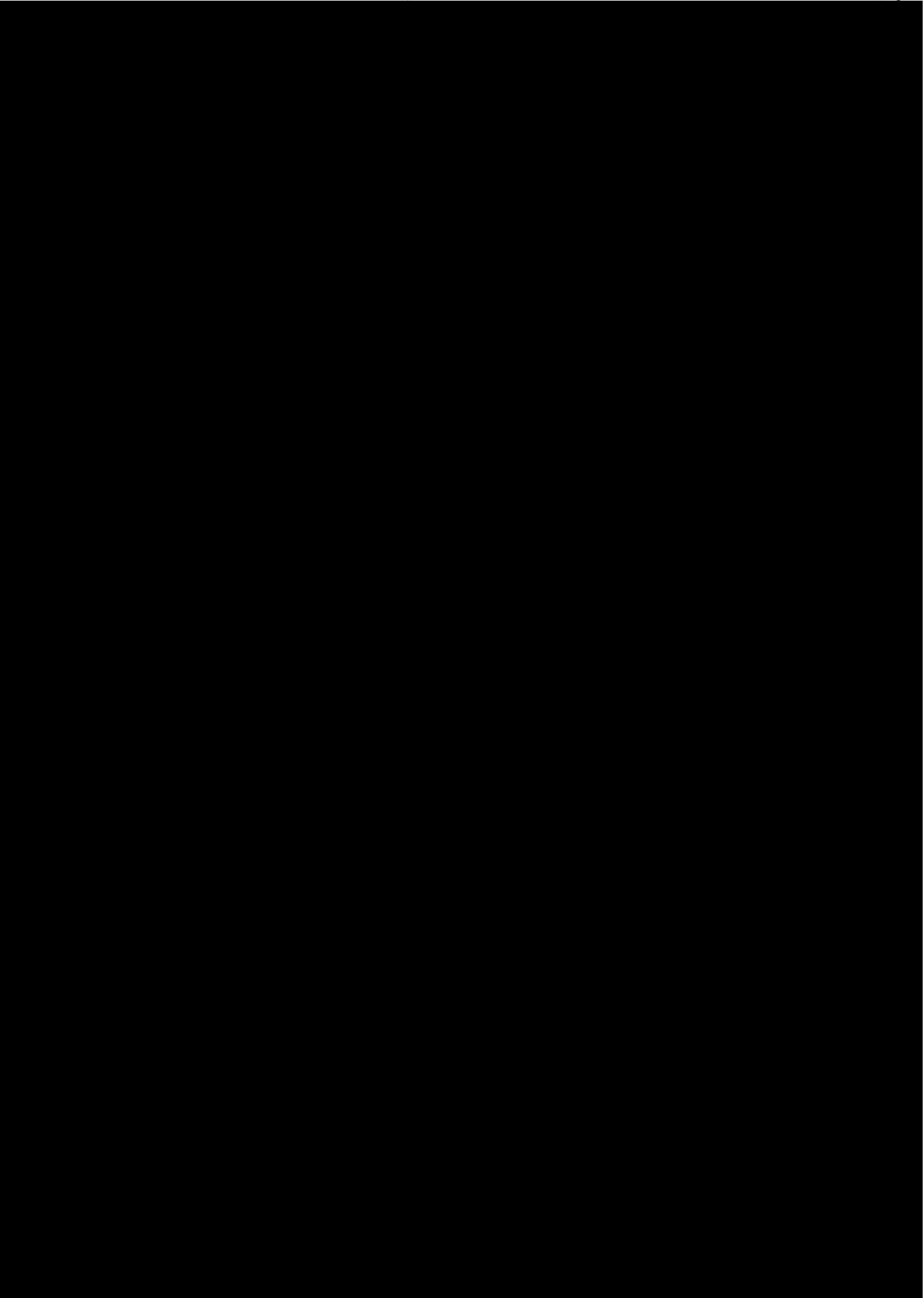


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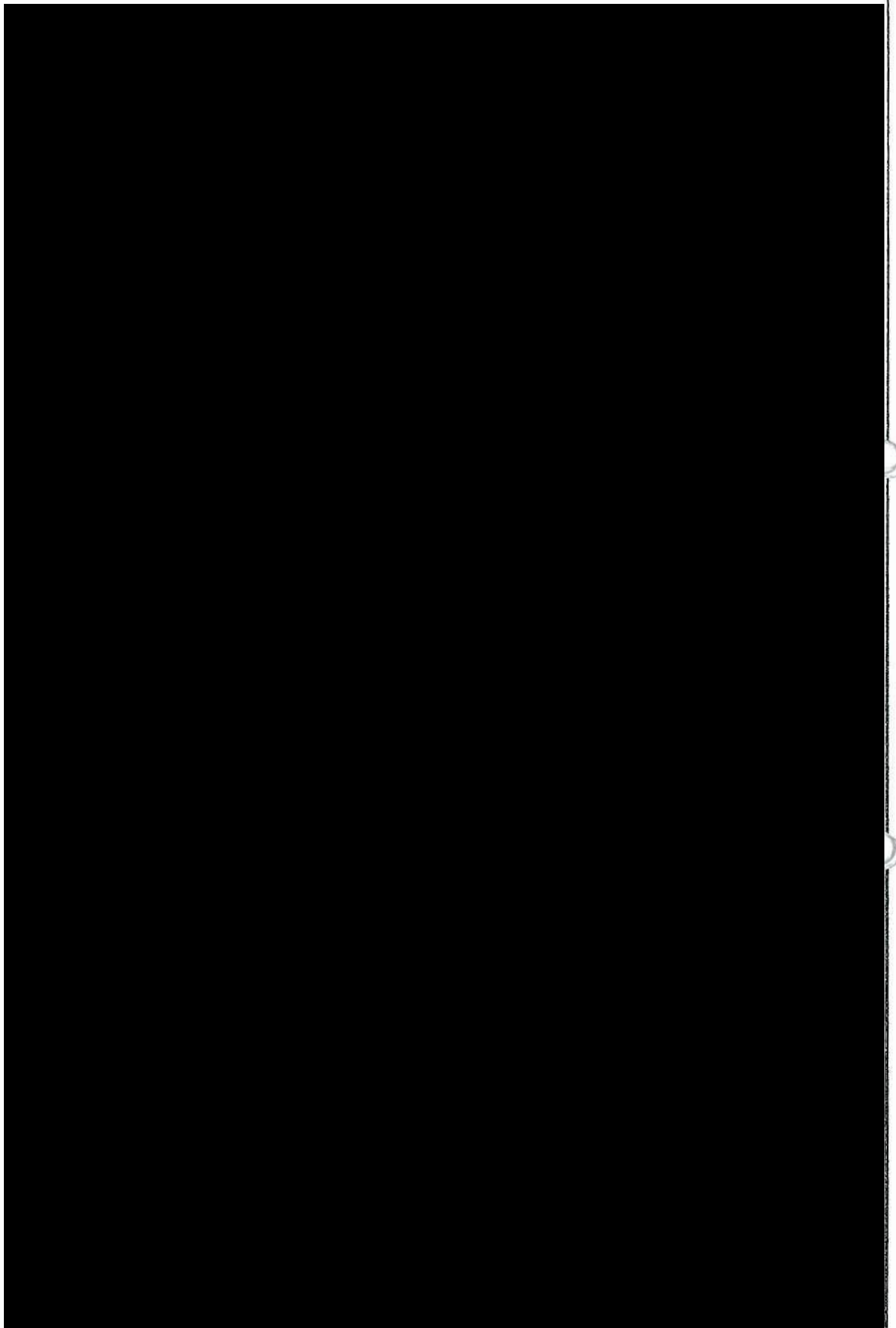
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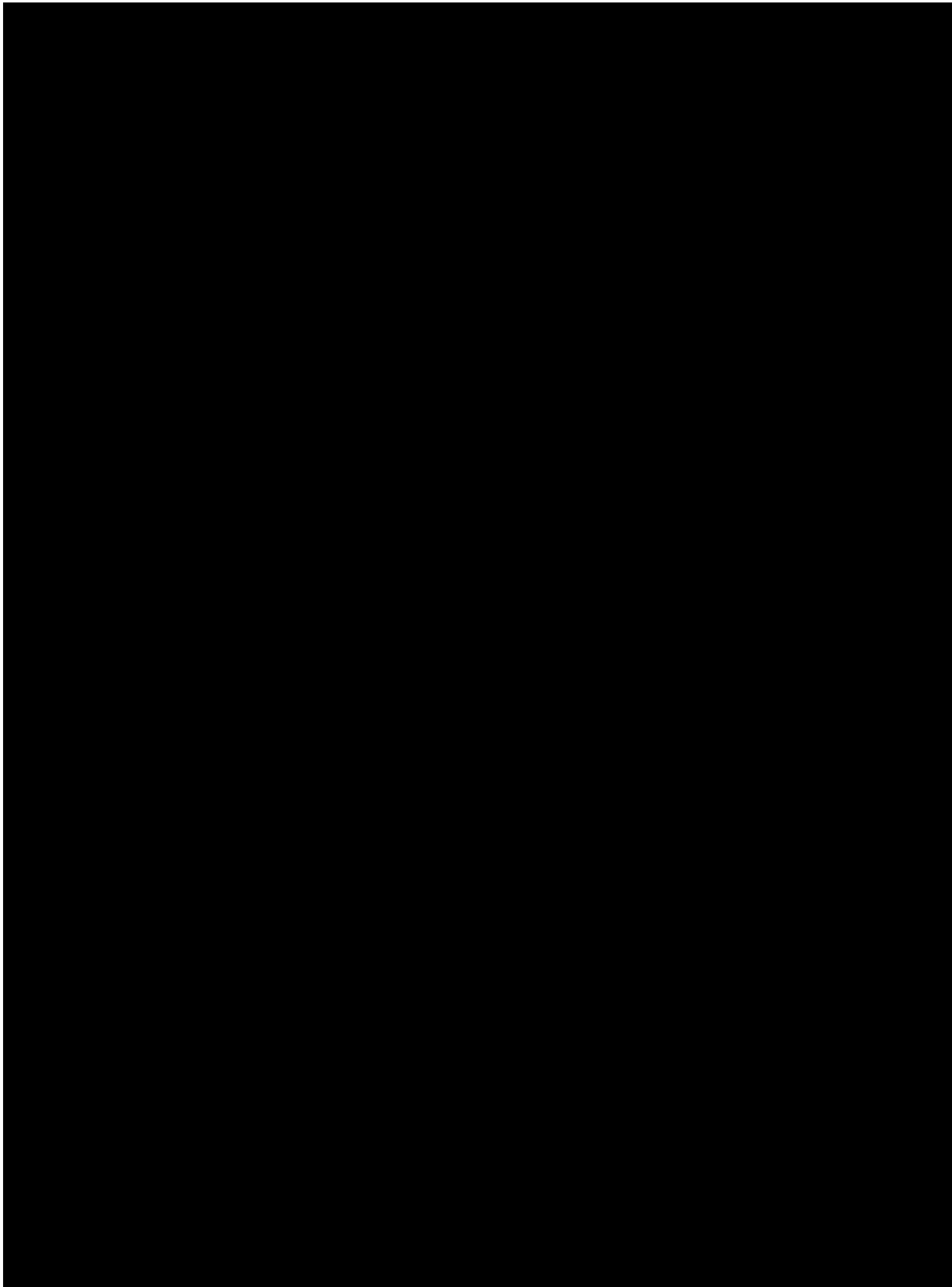


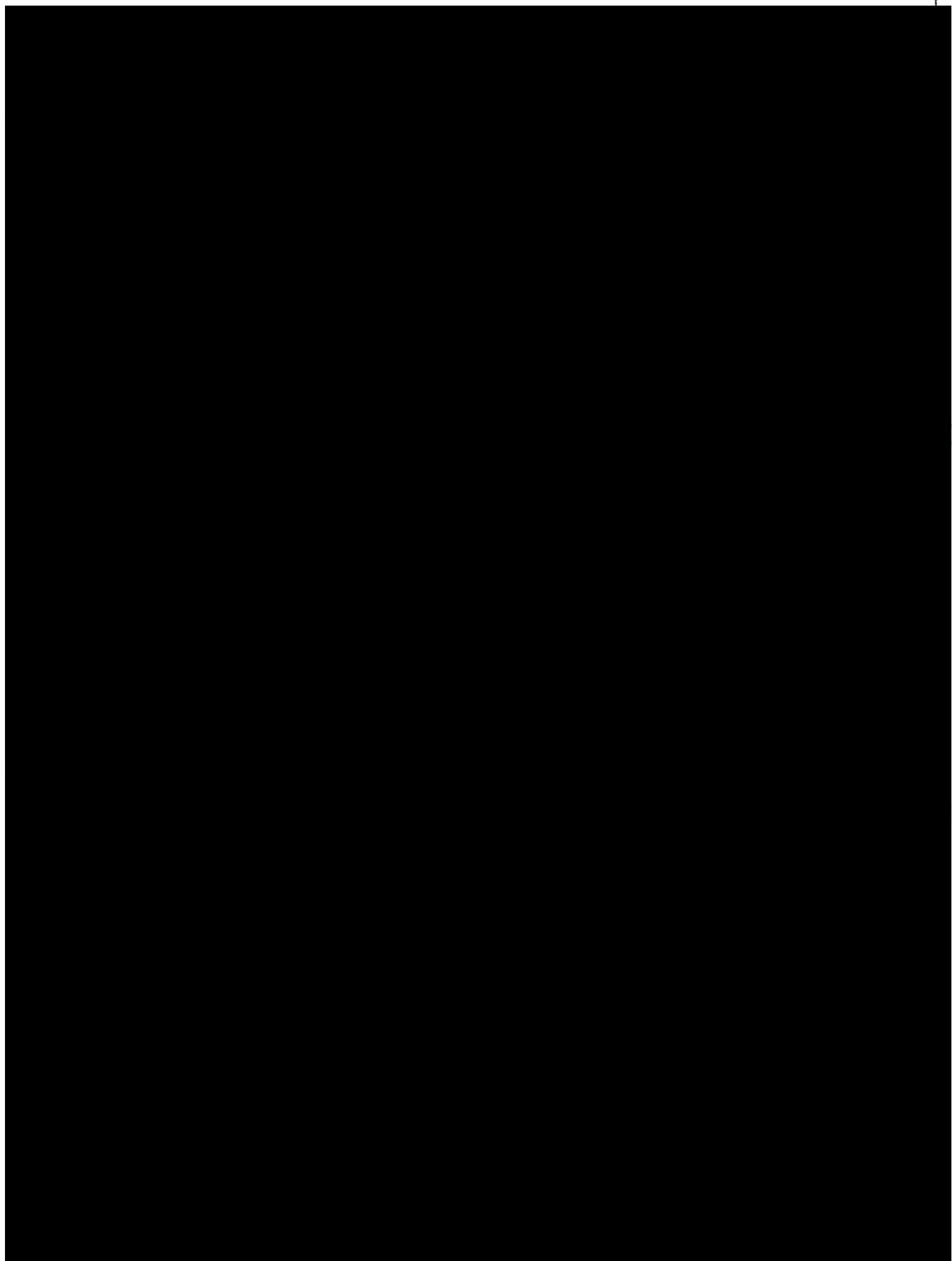


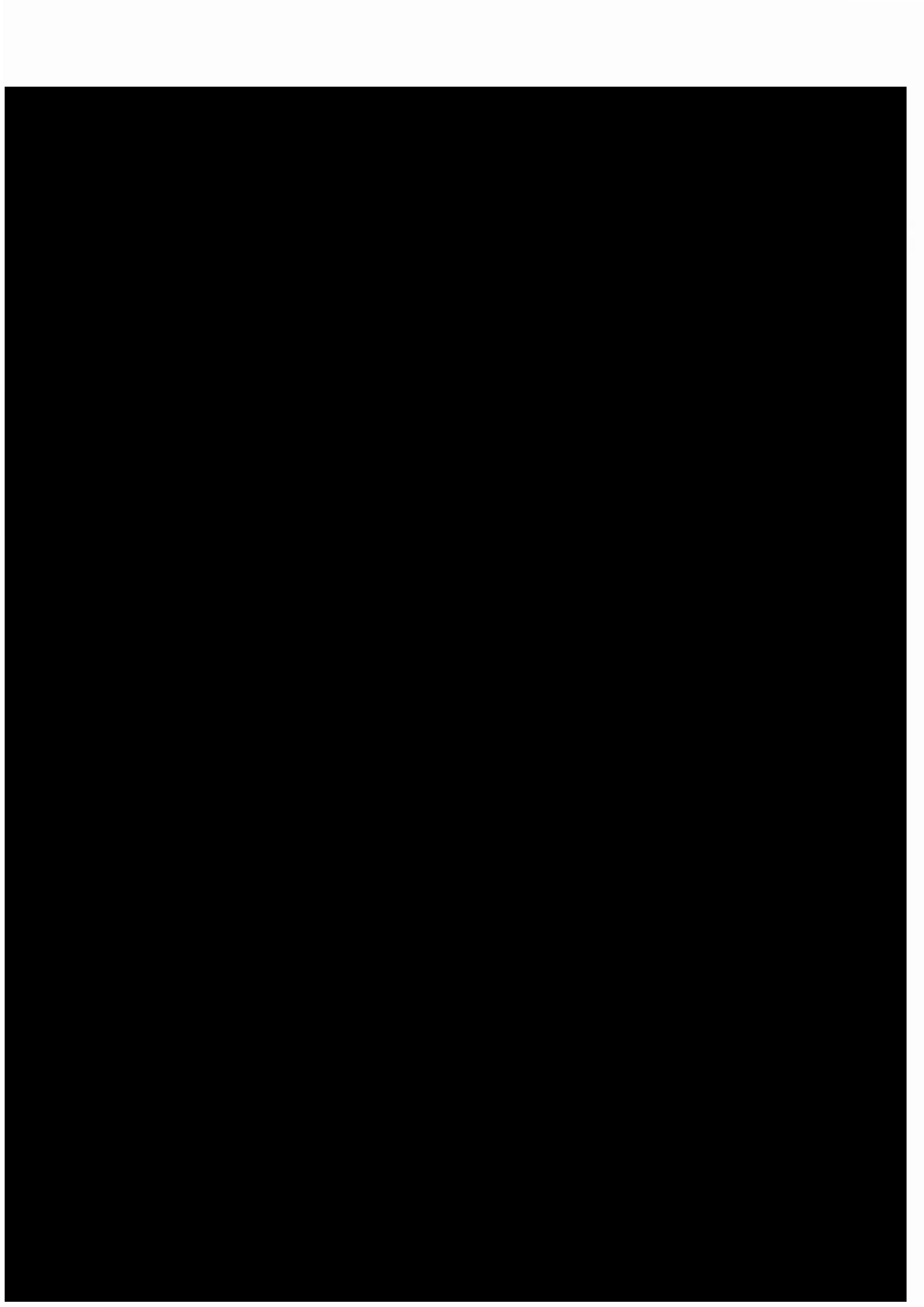


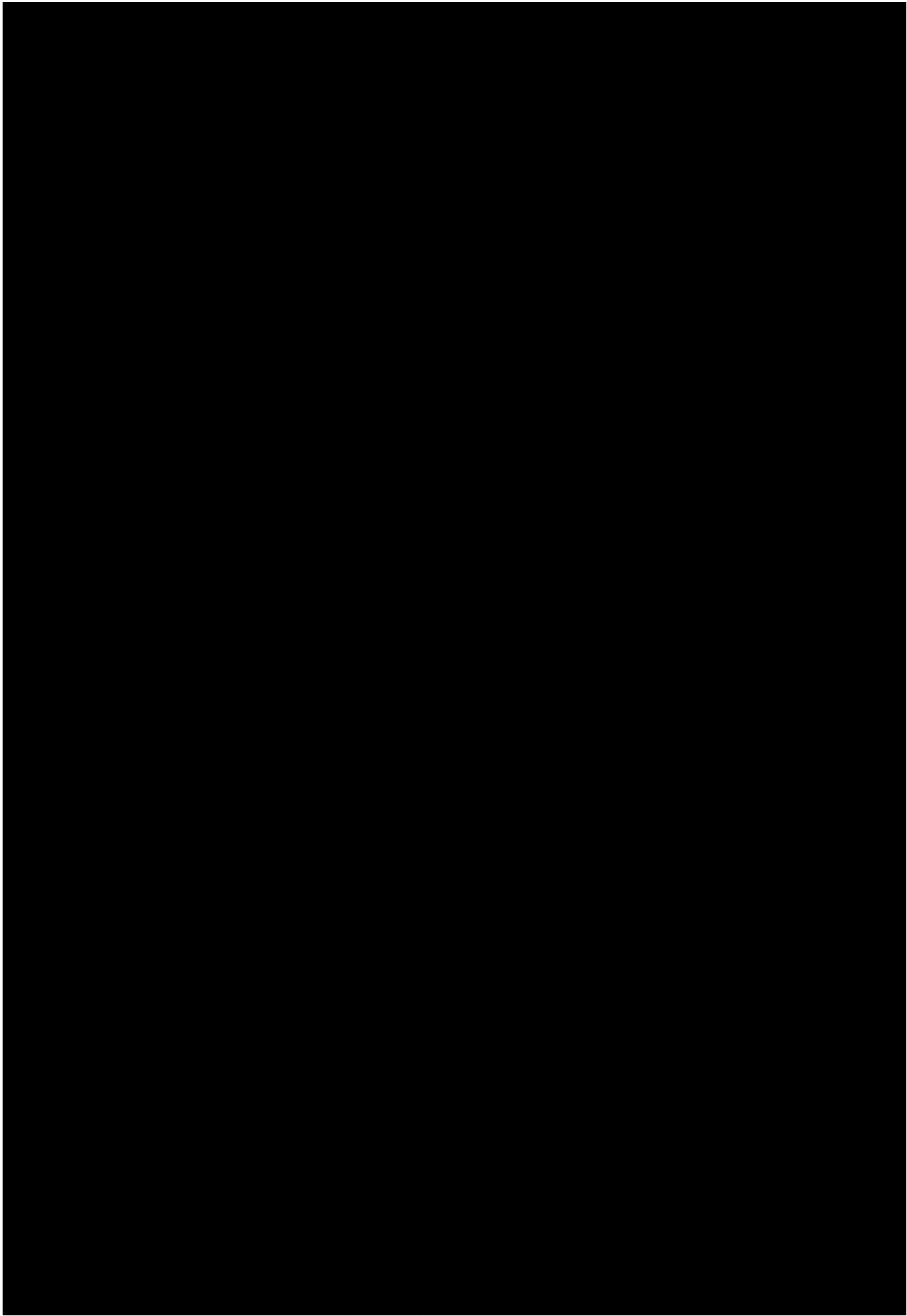


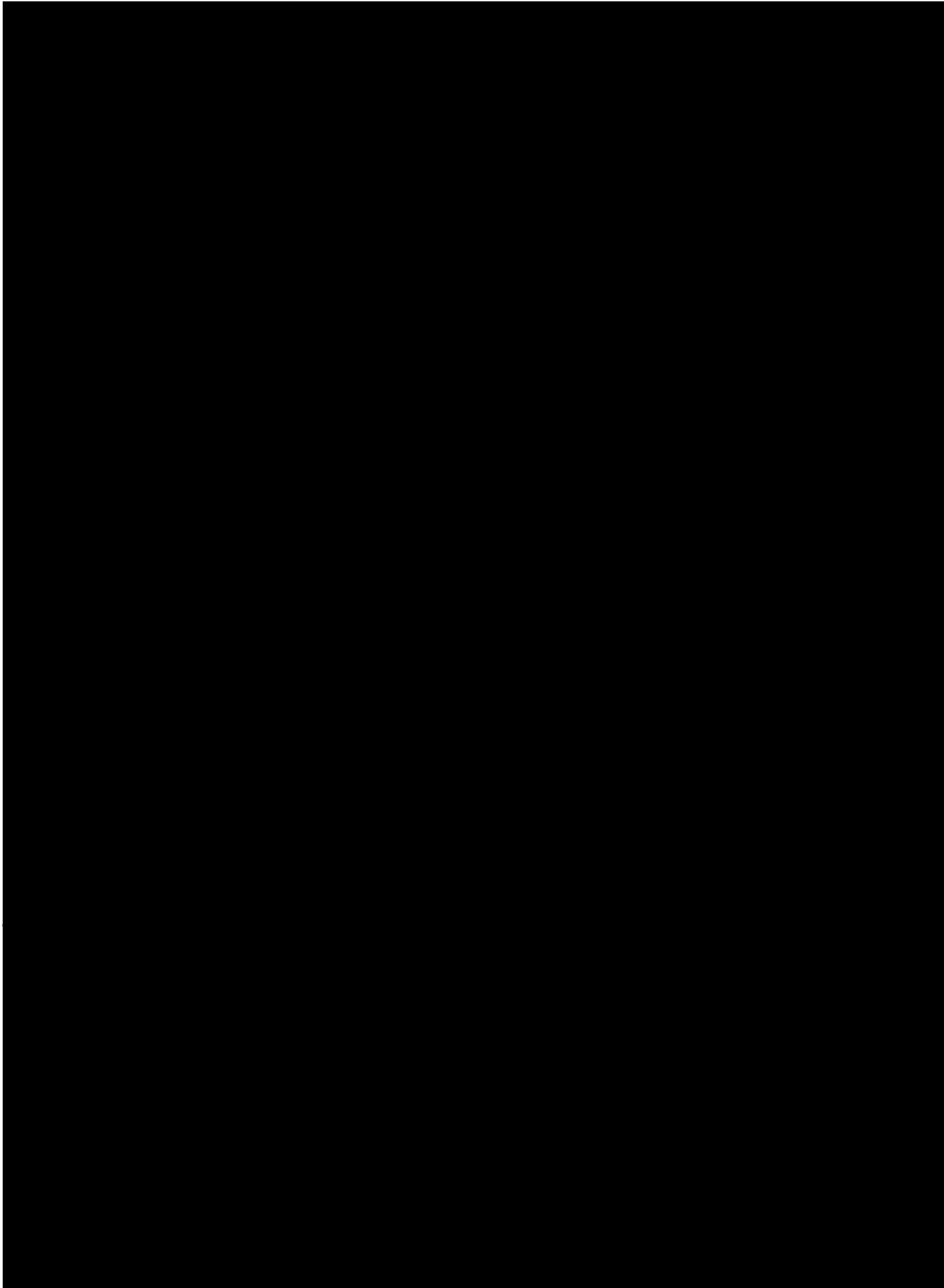


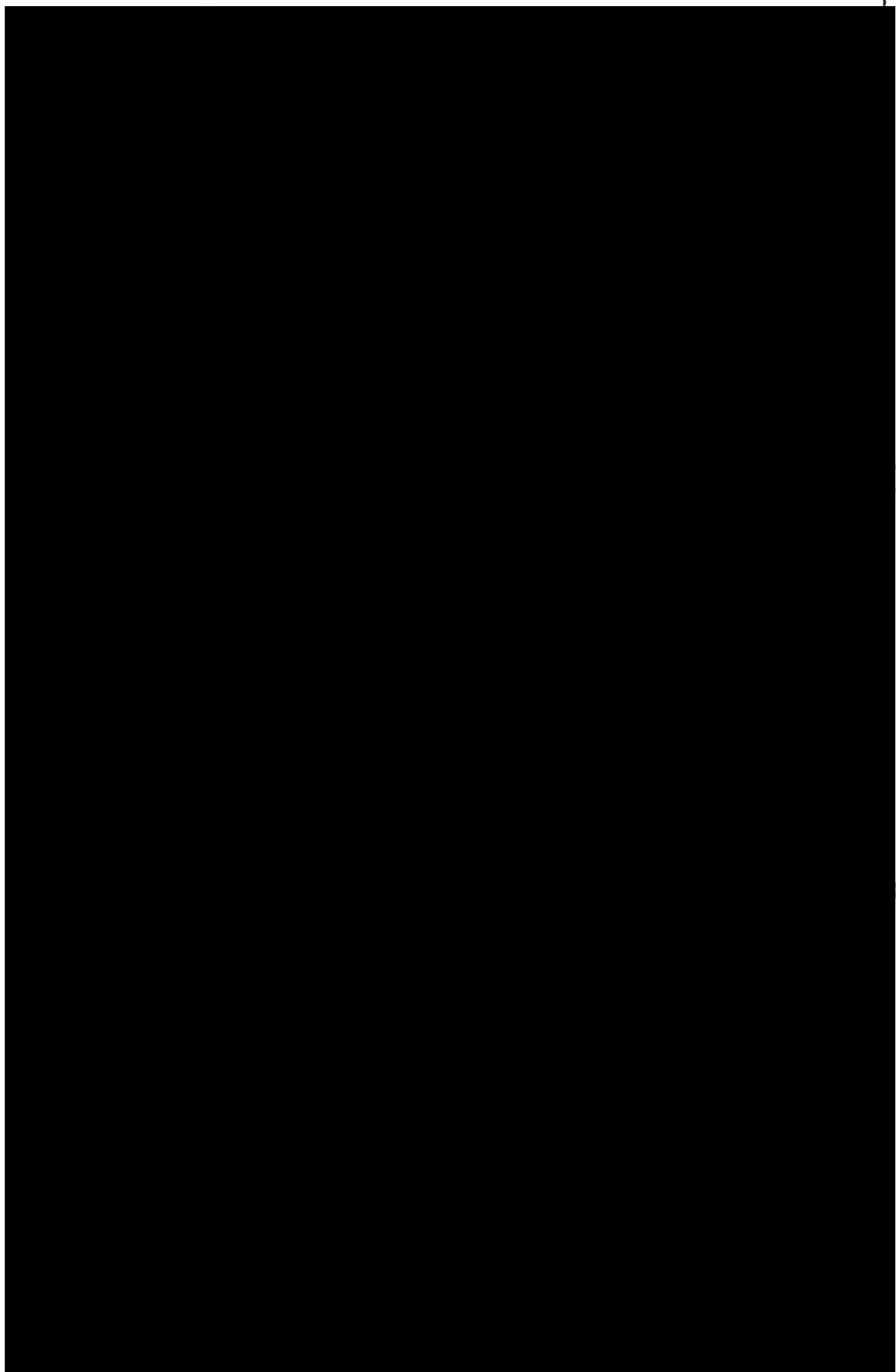


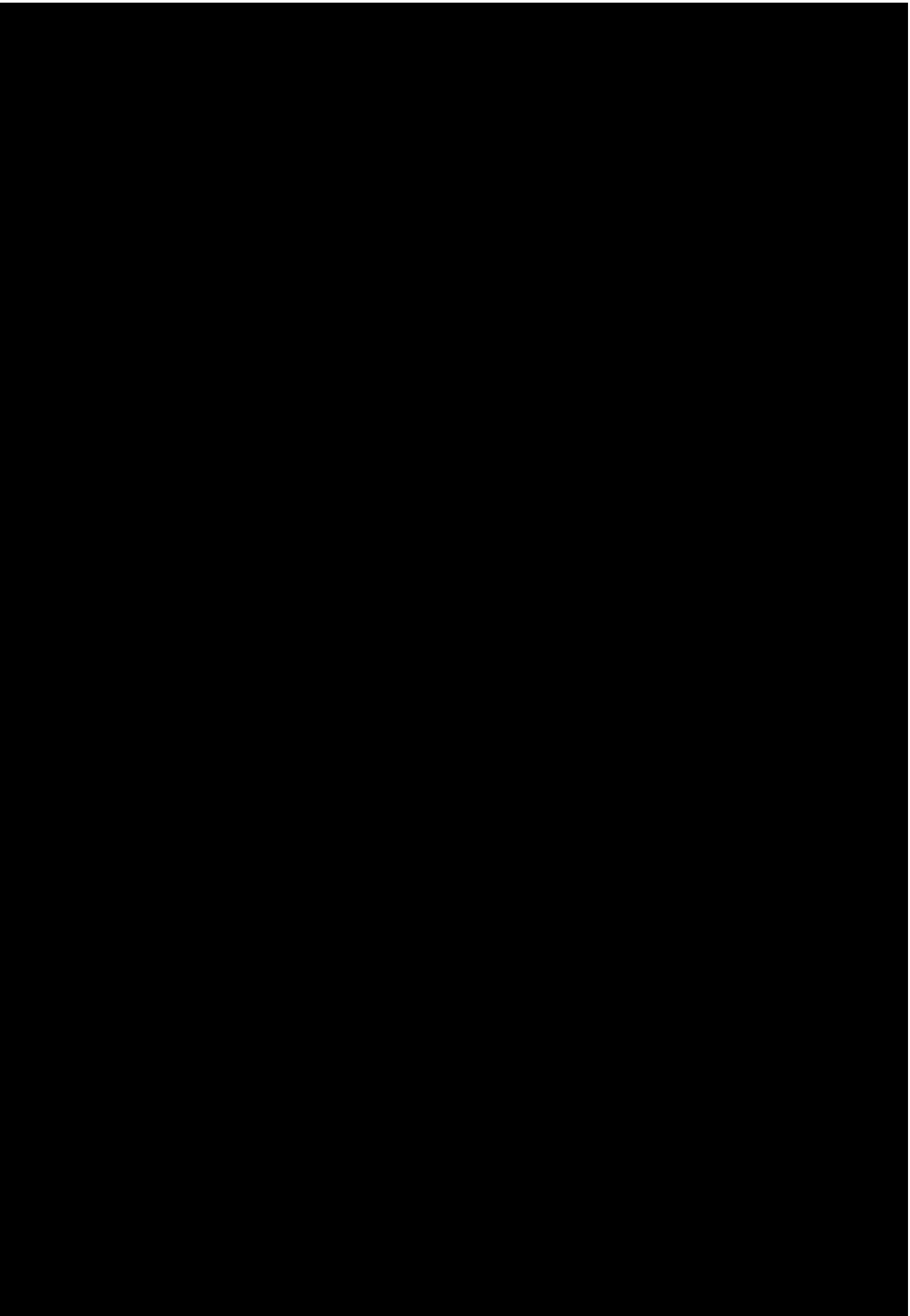




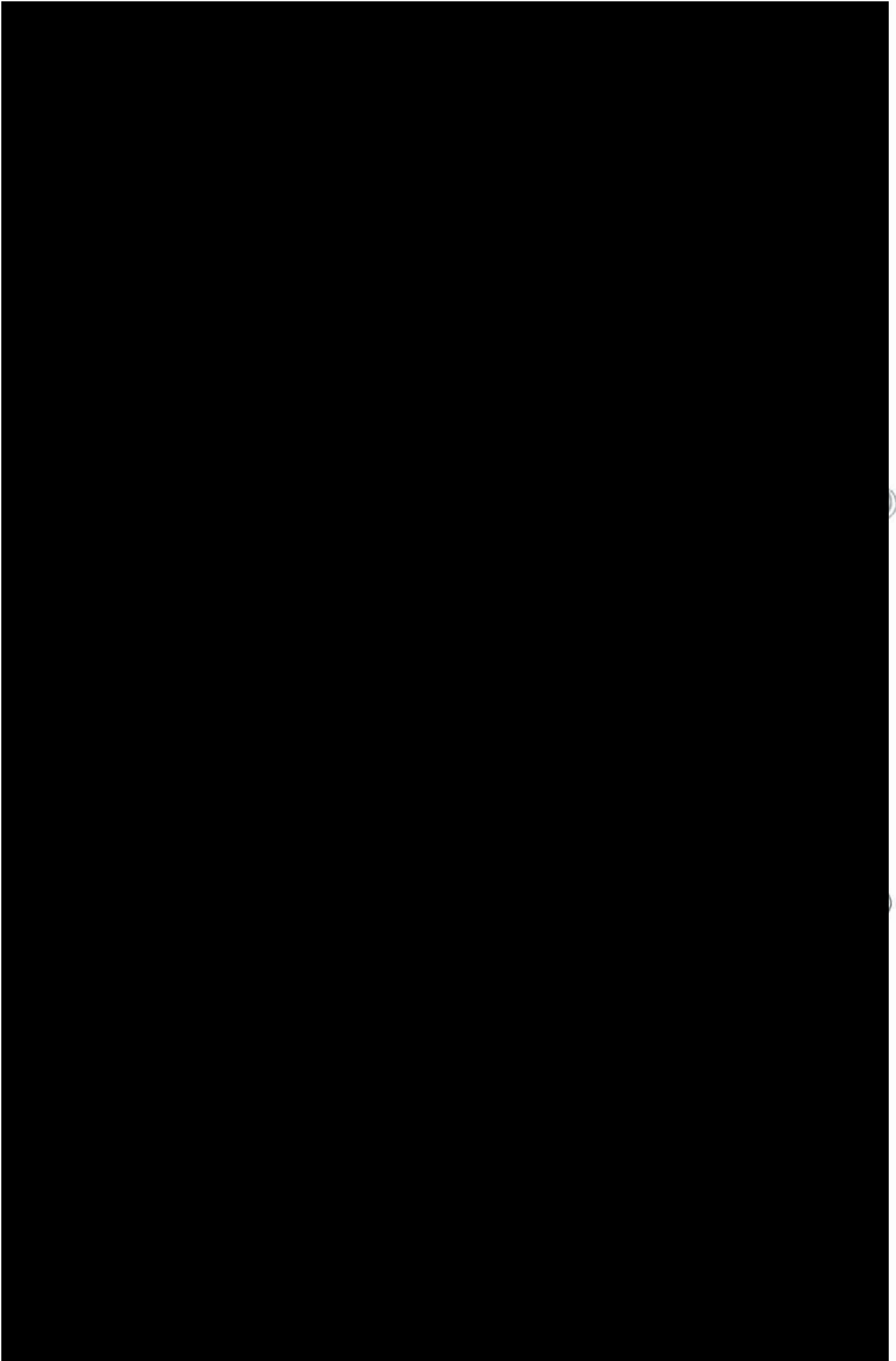


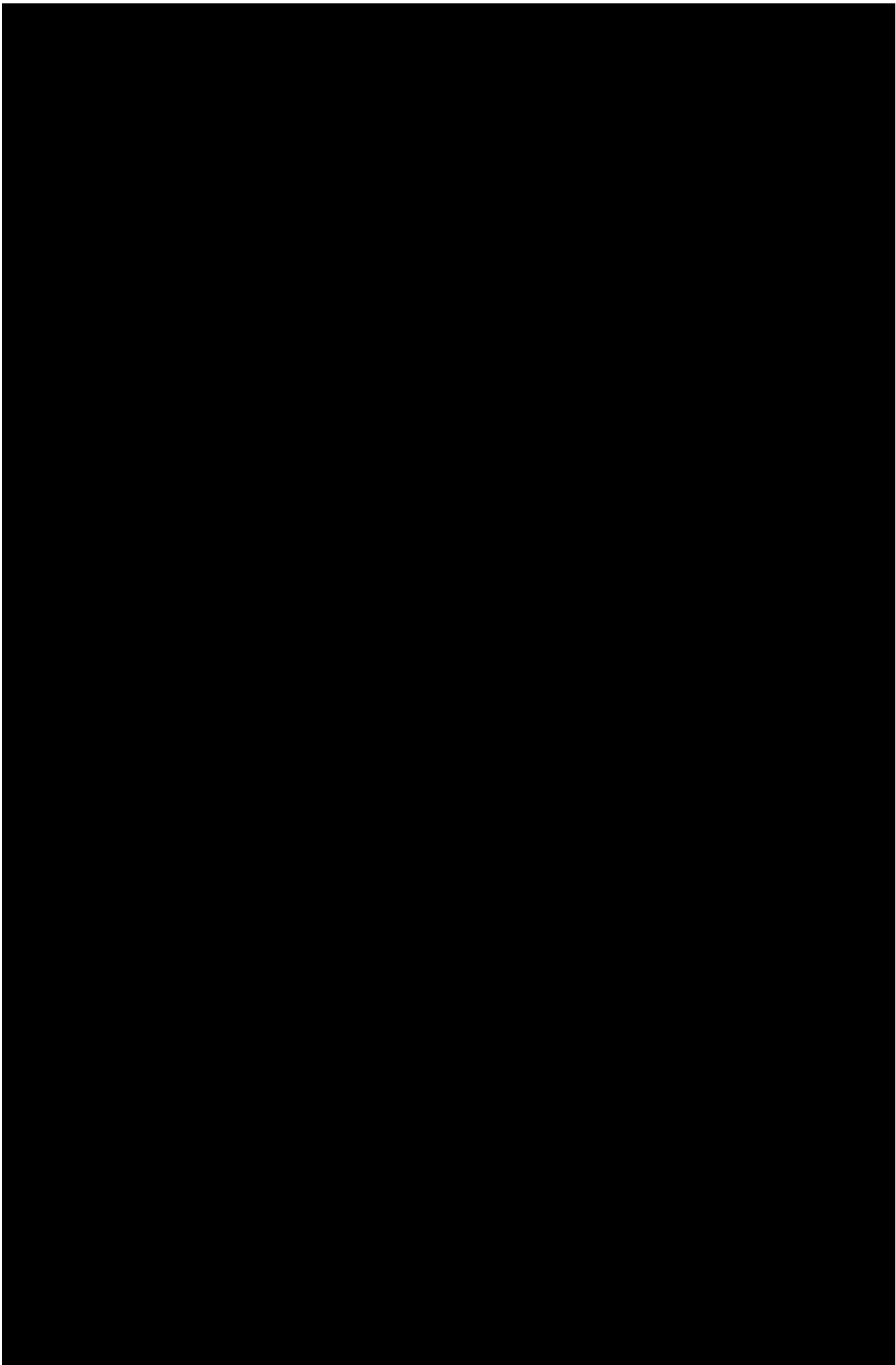


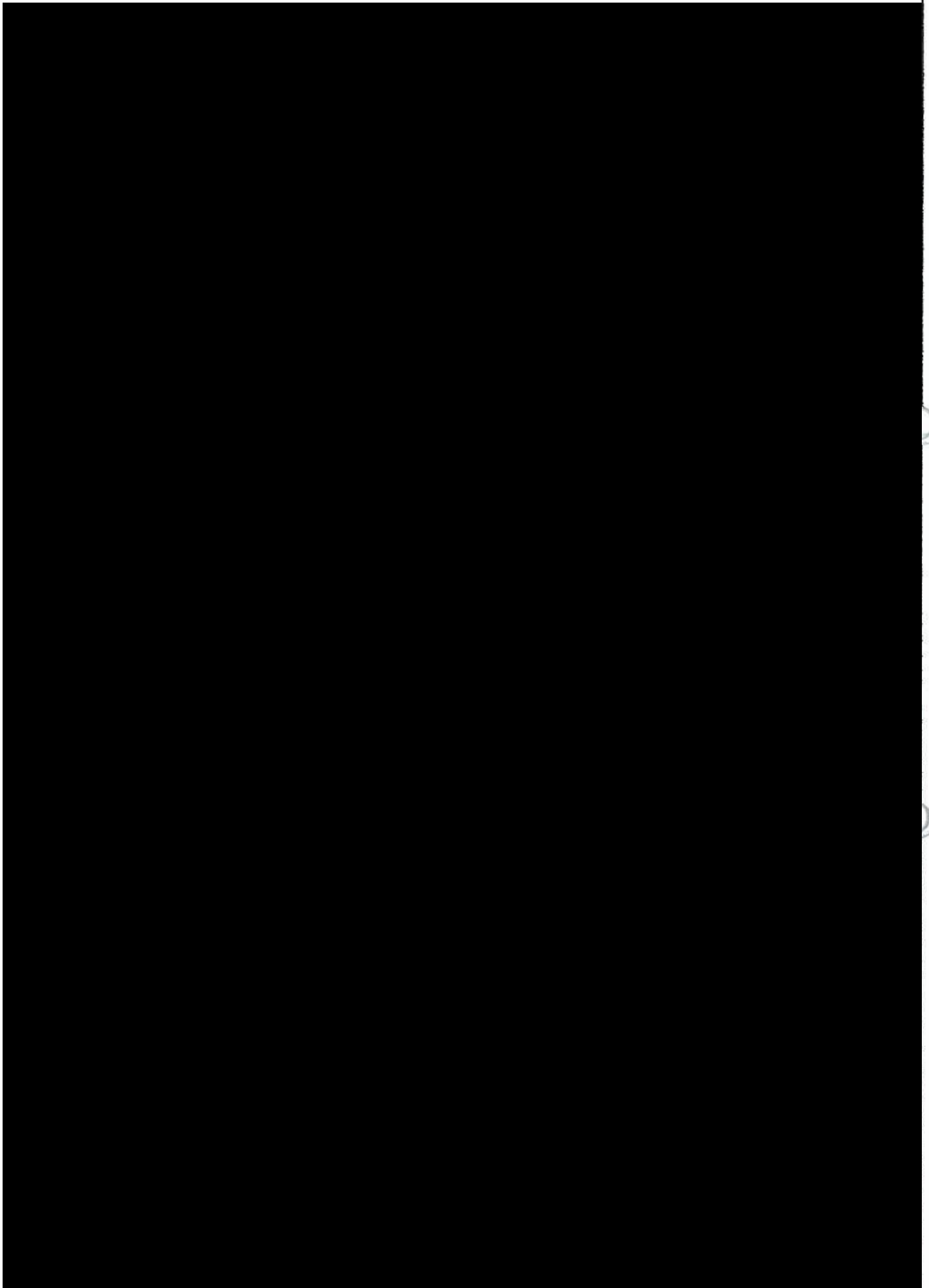


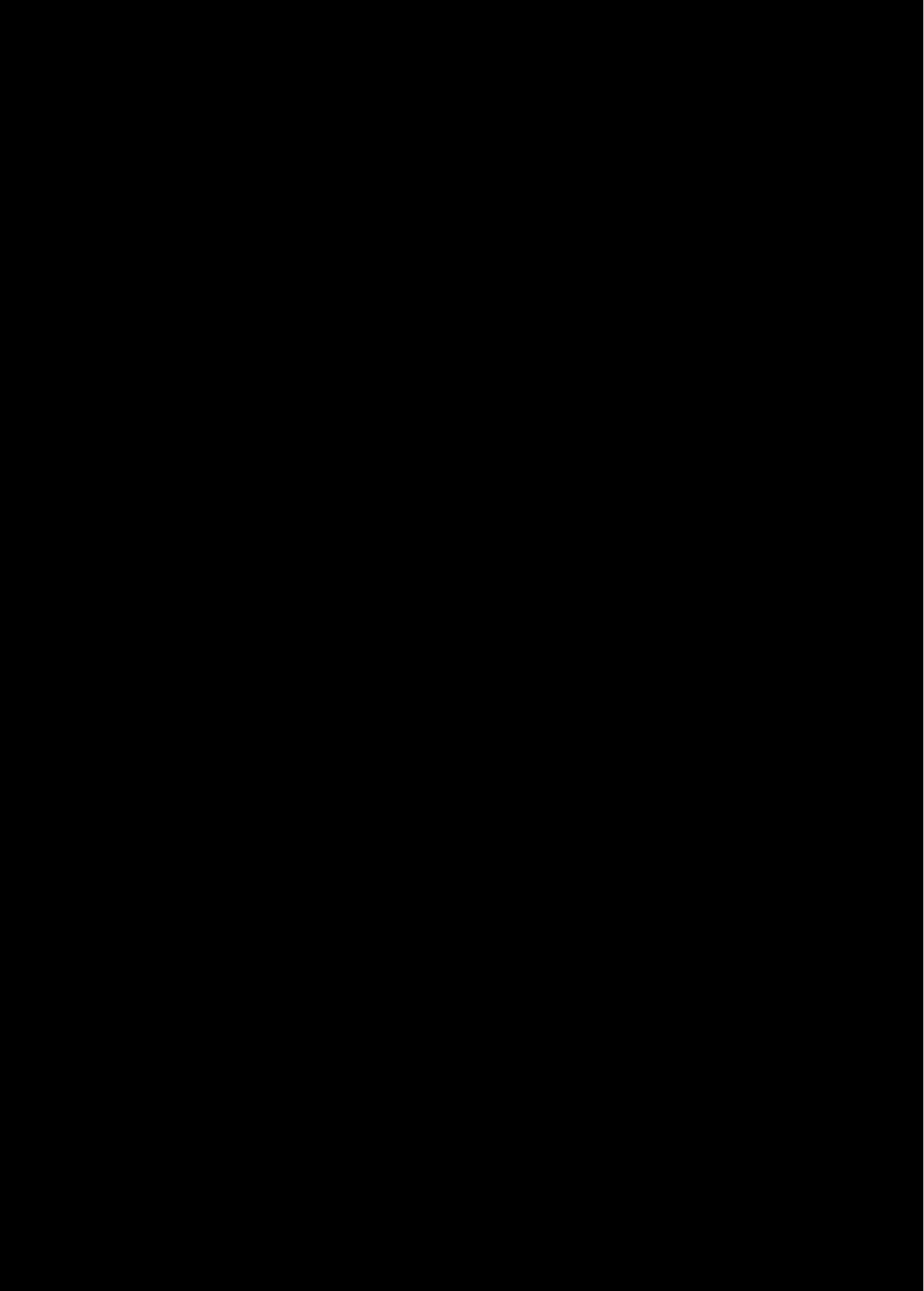


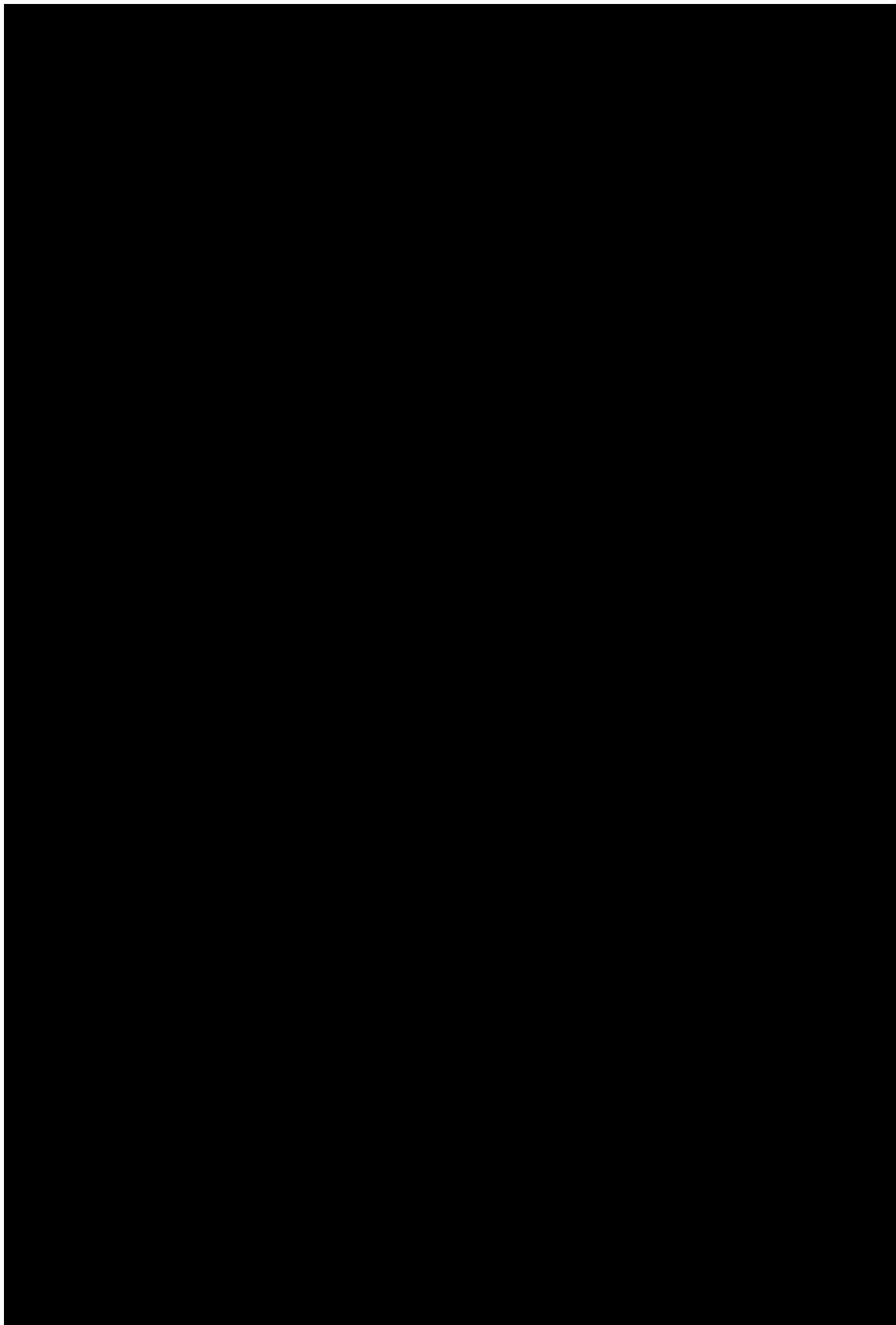


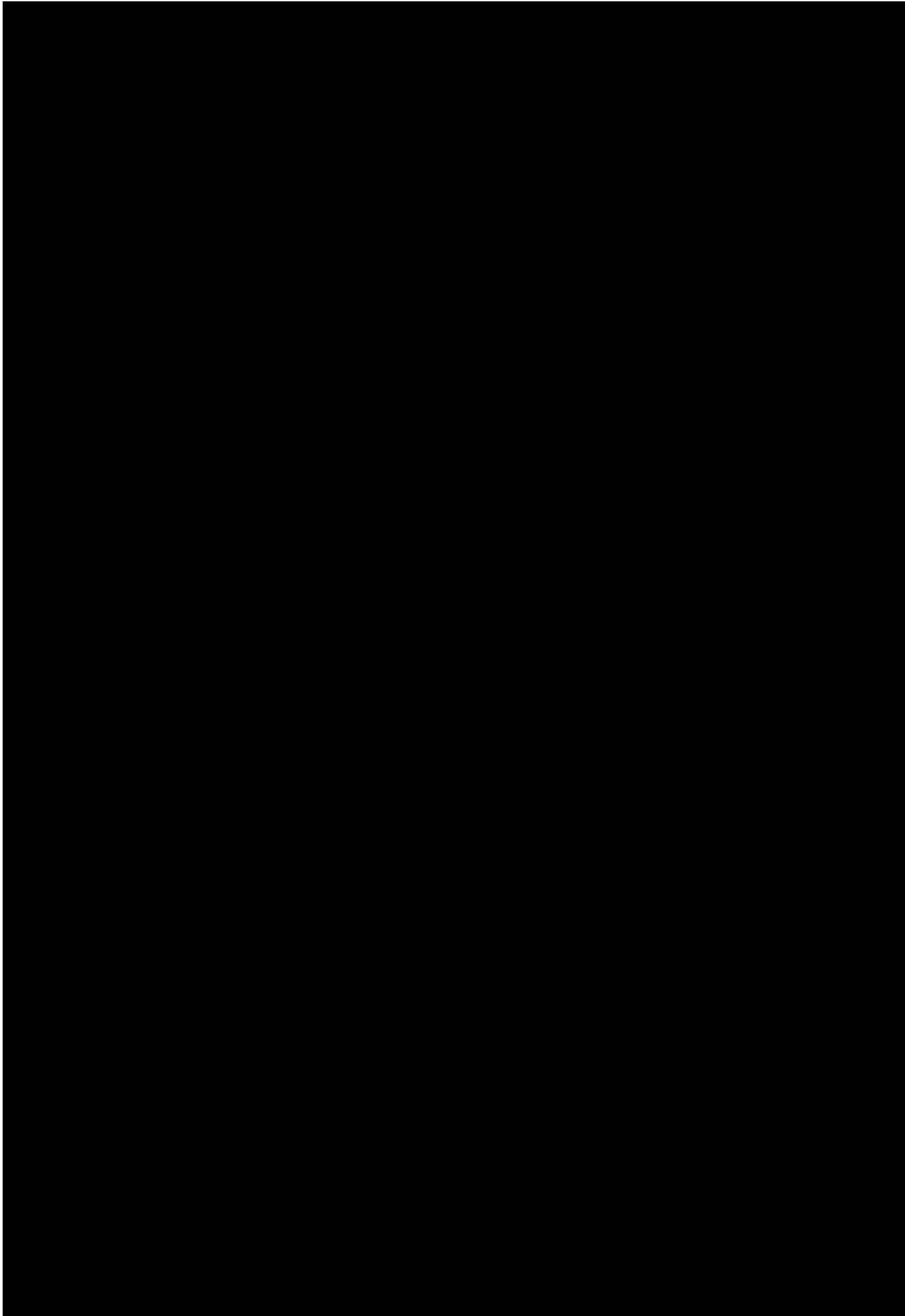


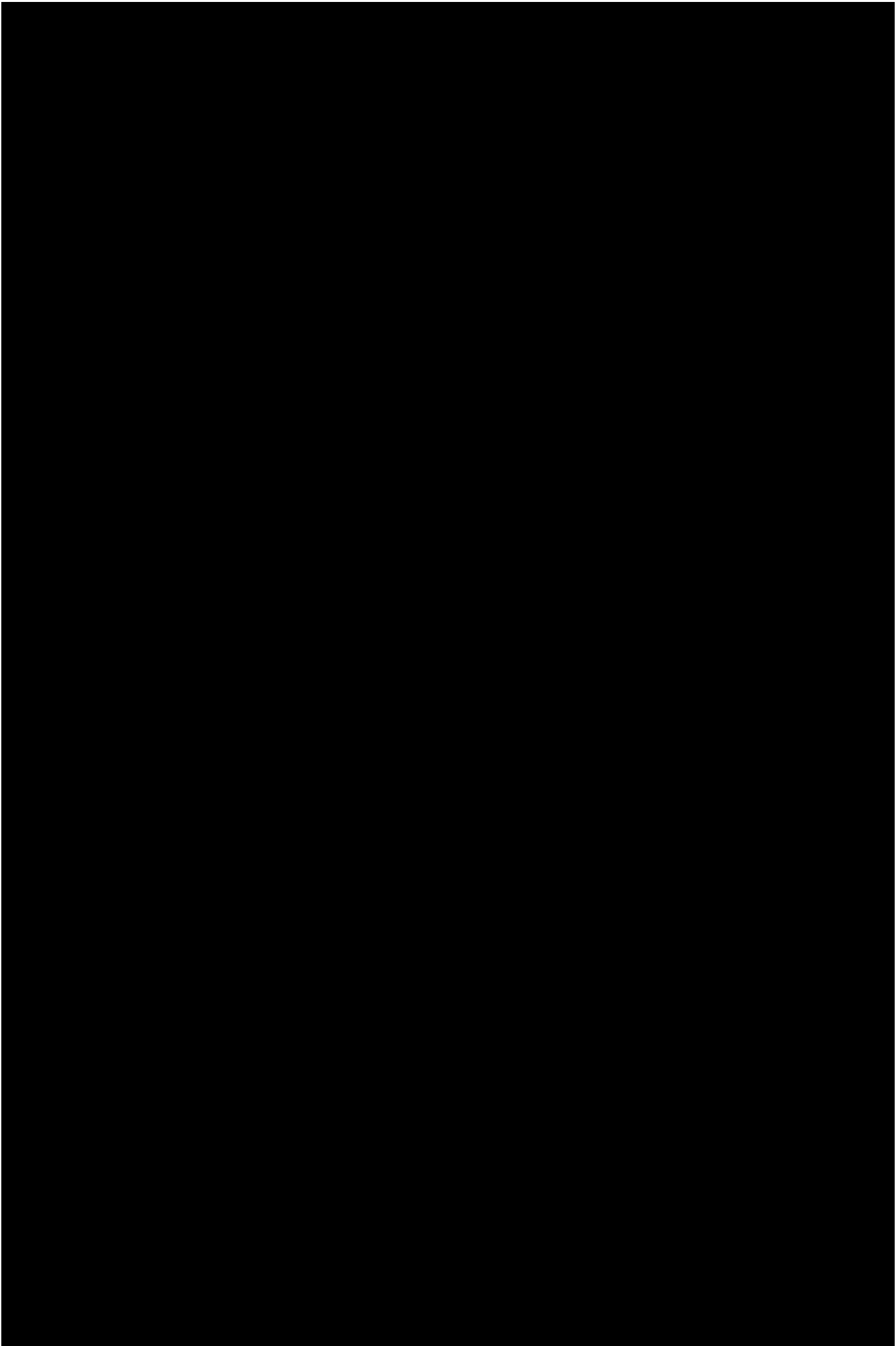


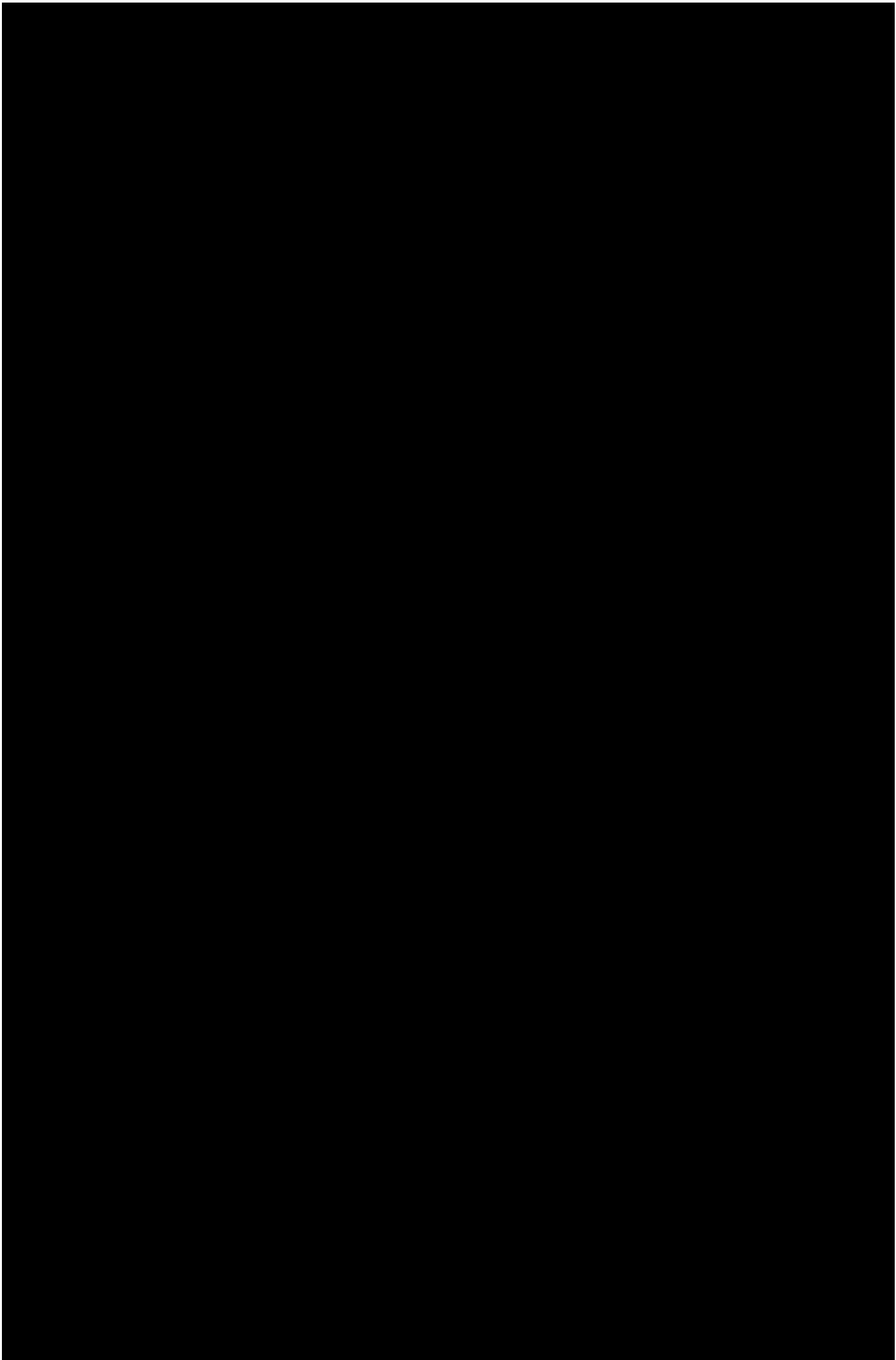




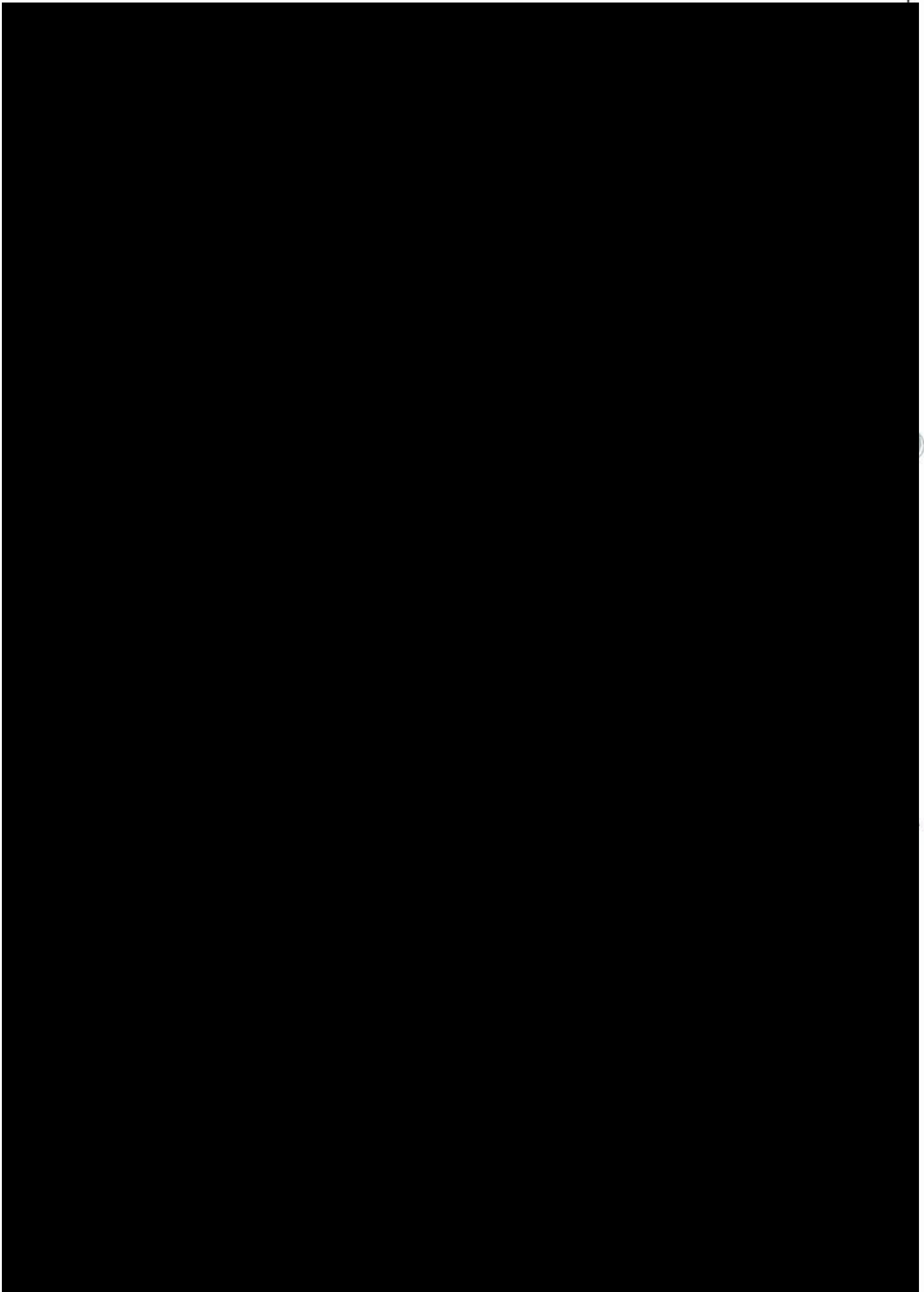


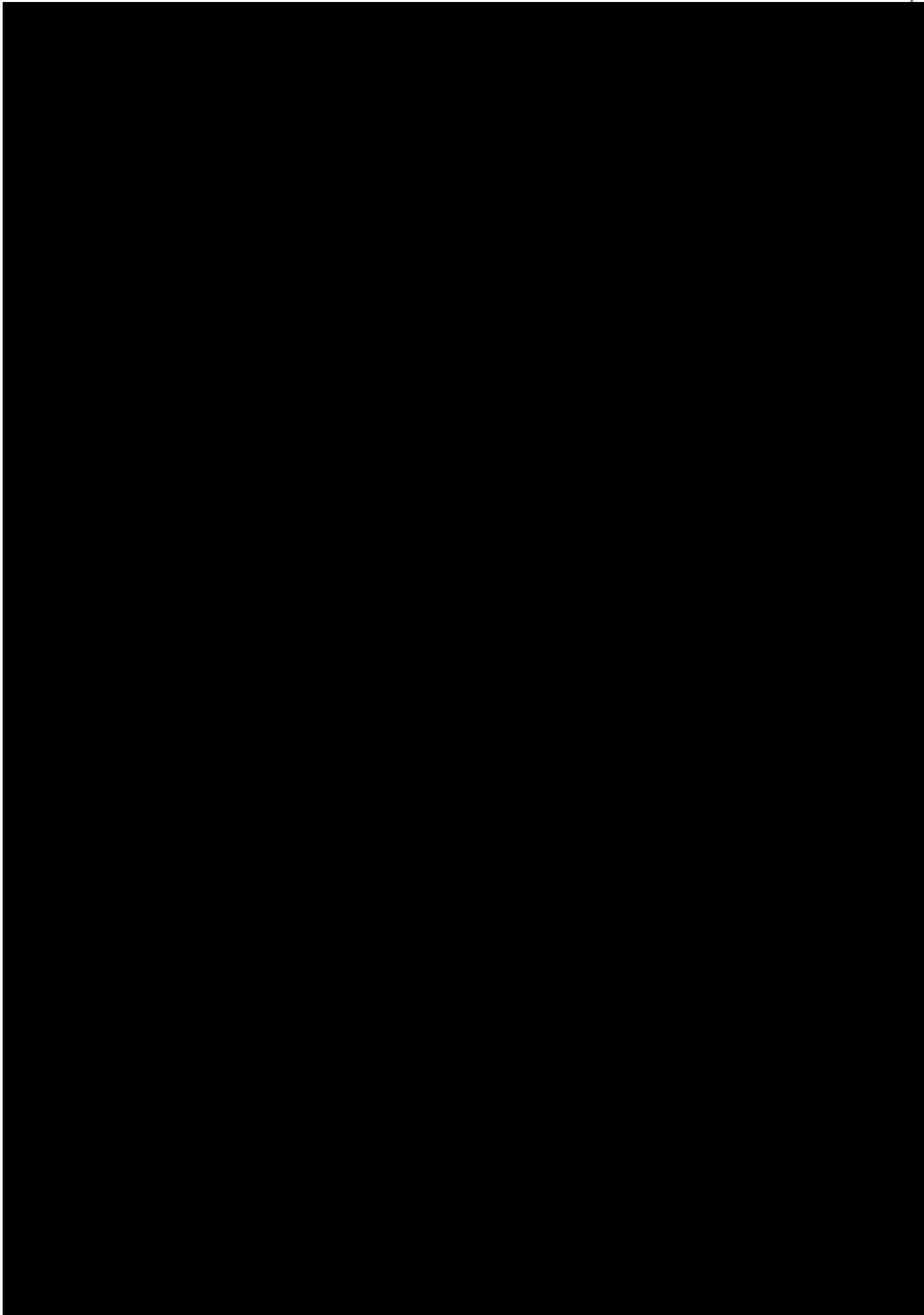


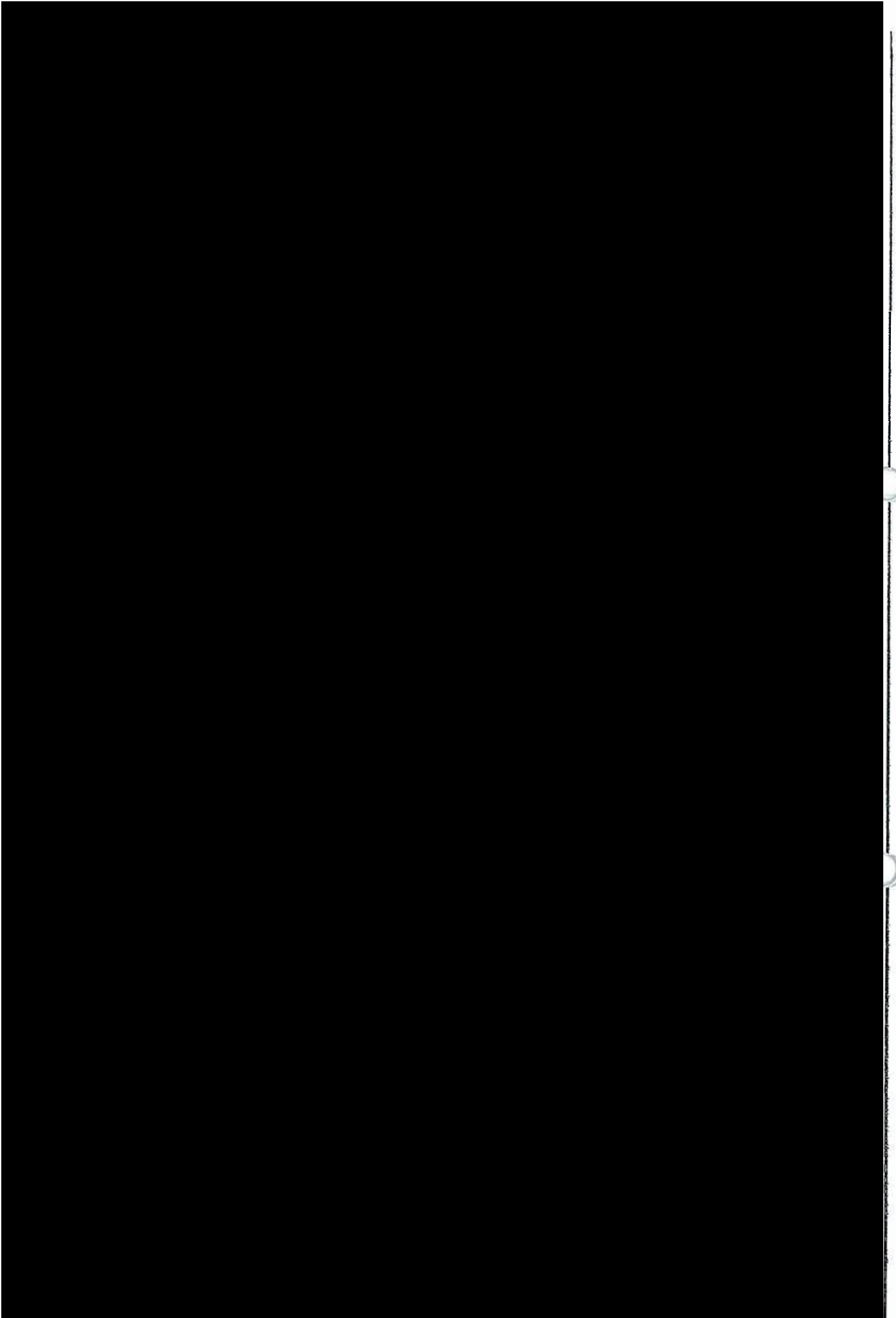






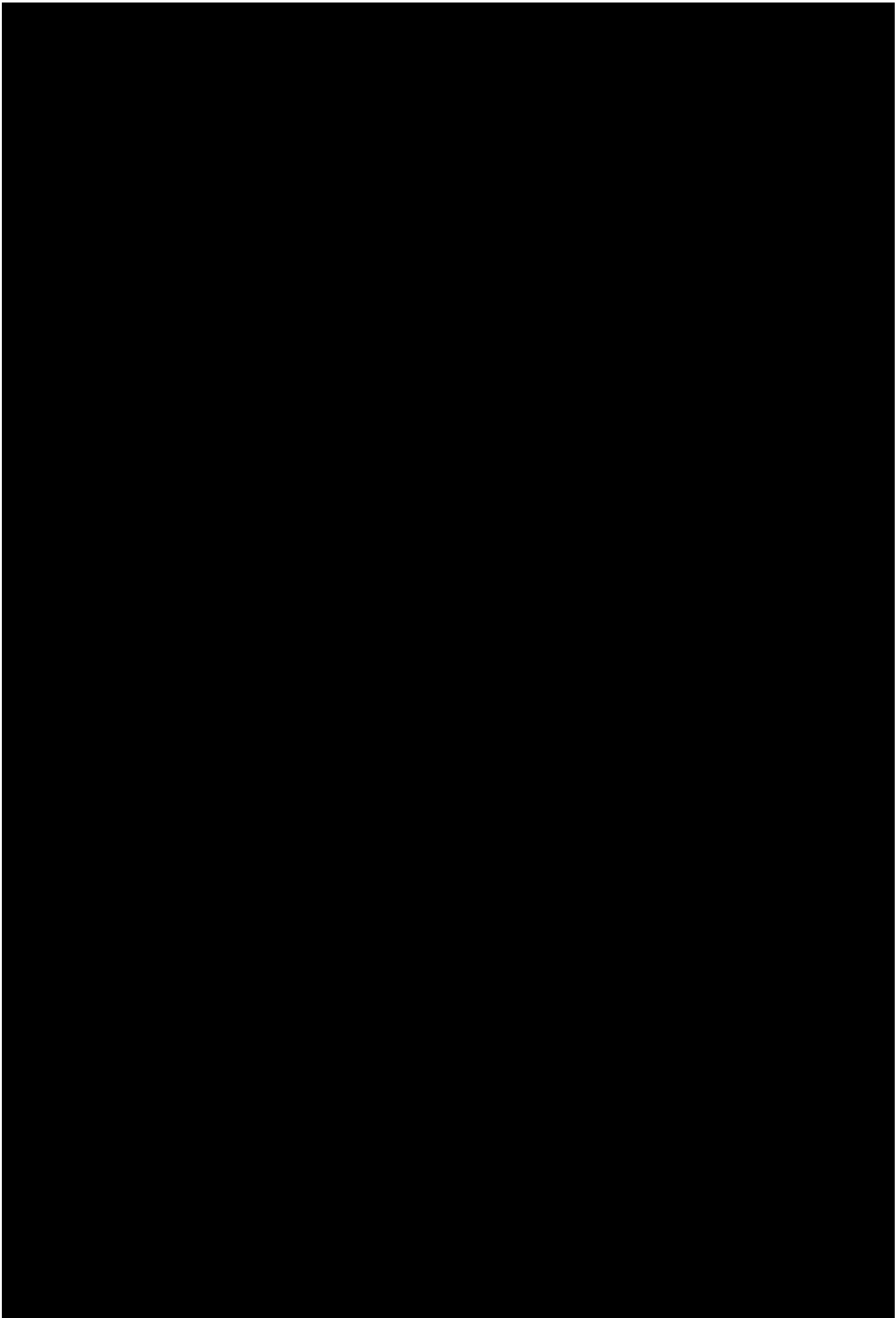


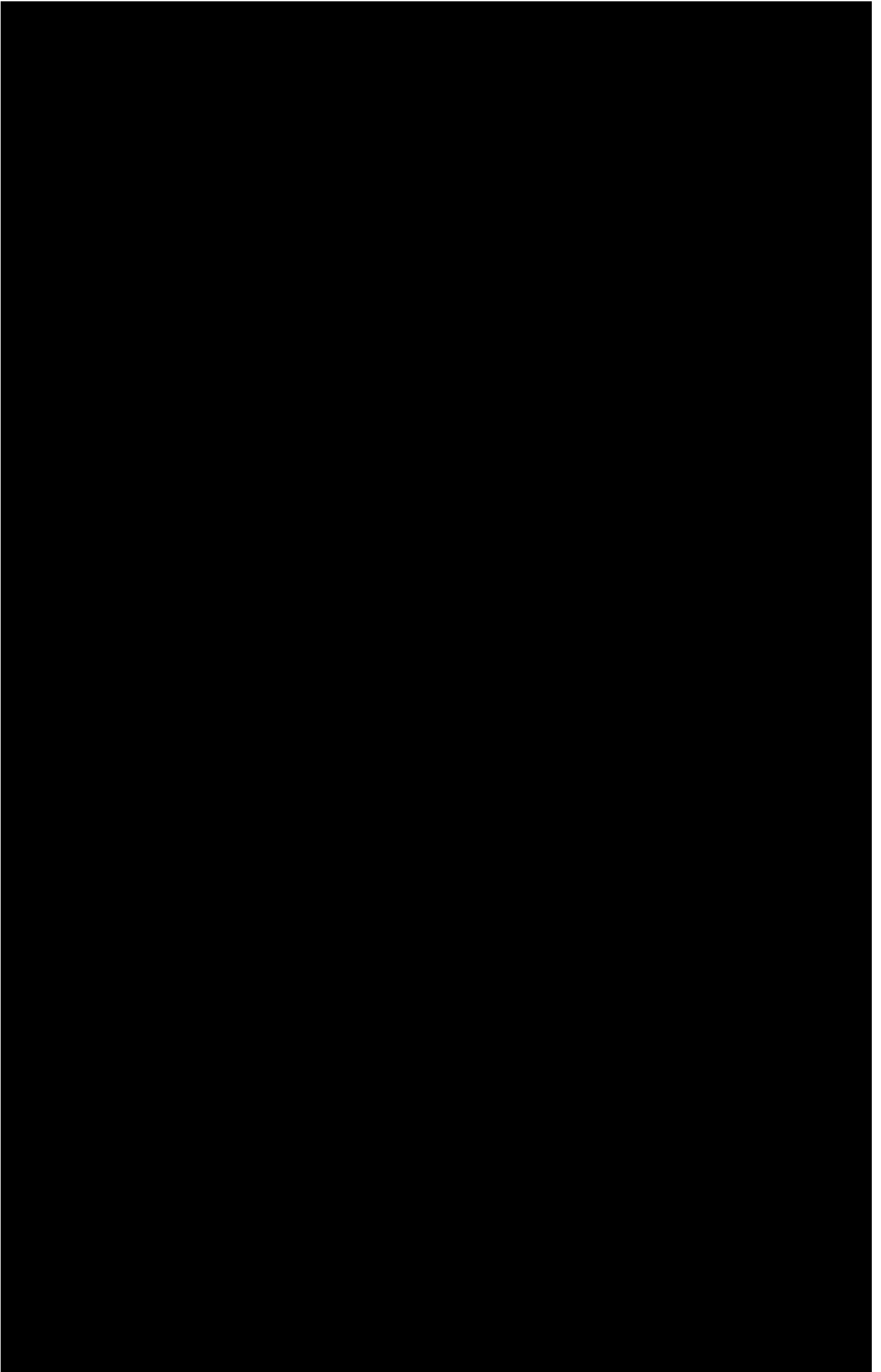


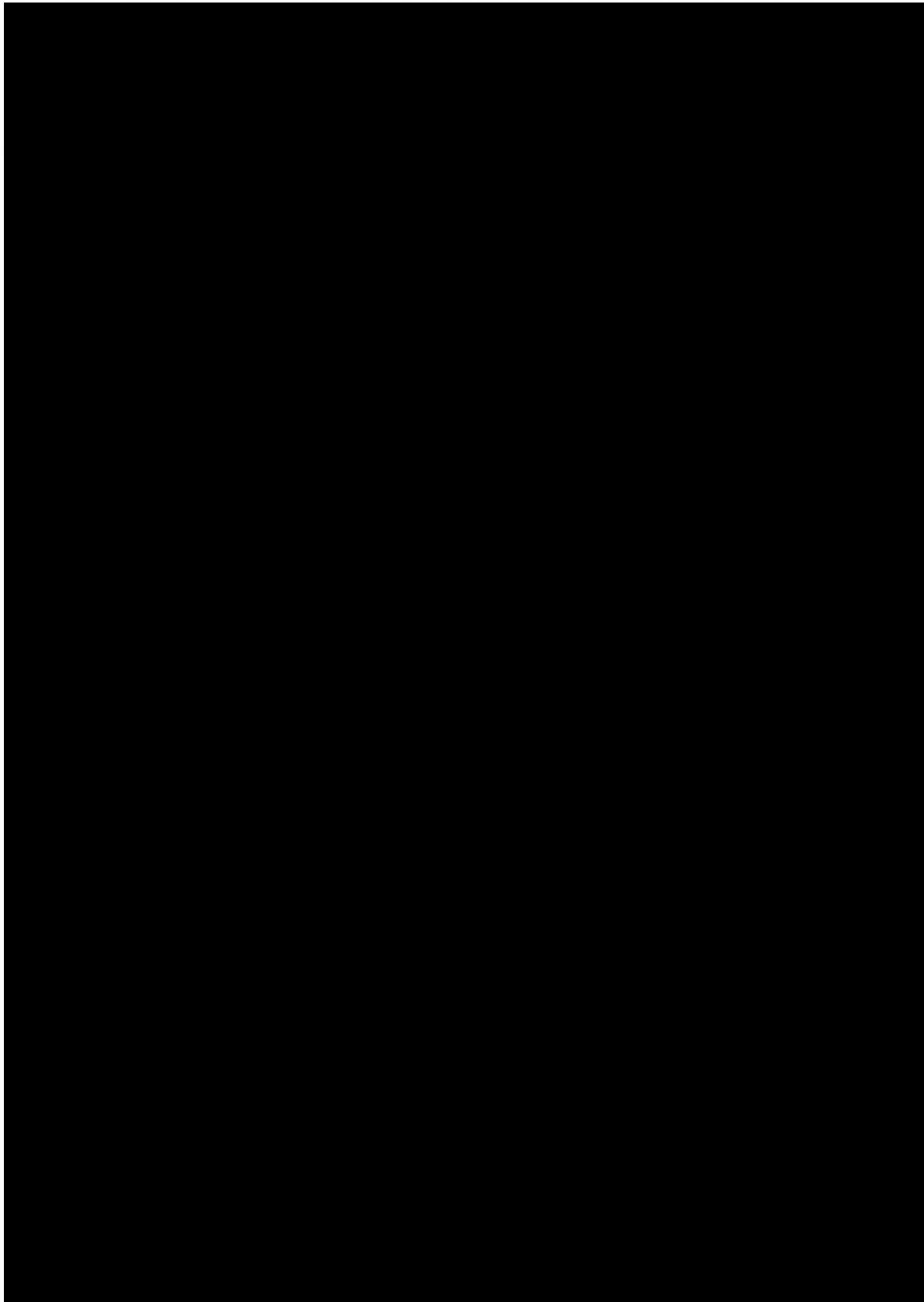


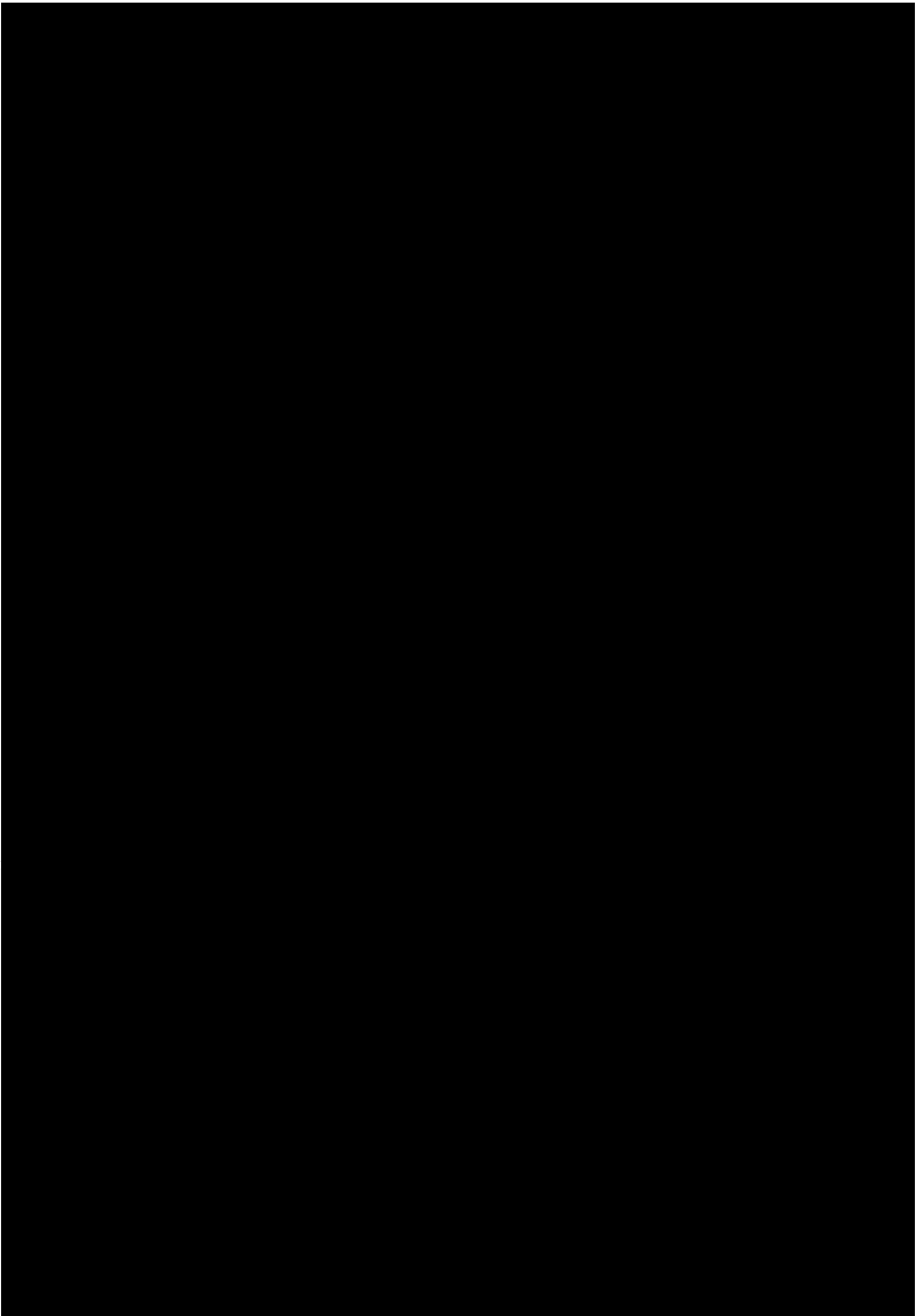
**SCHEDULE 7**

**MTR Parent Company Guarantee**

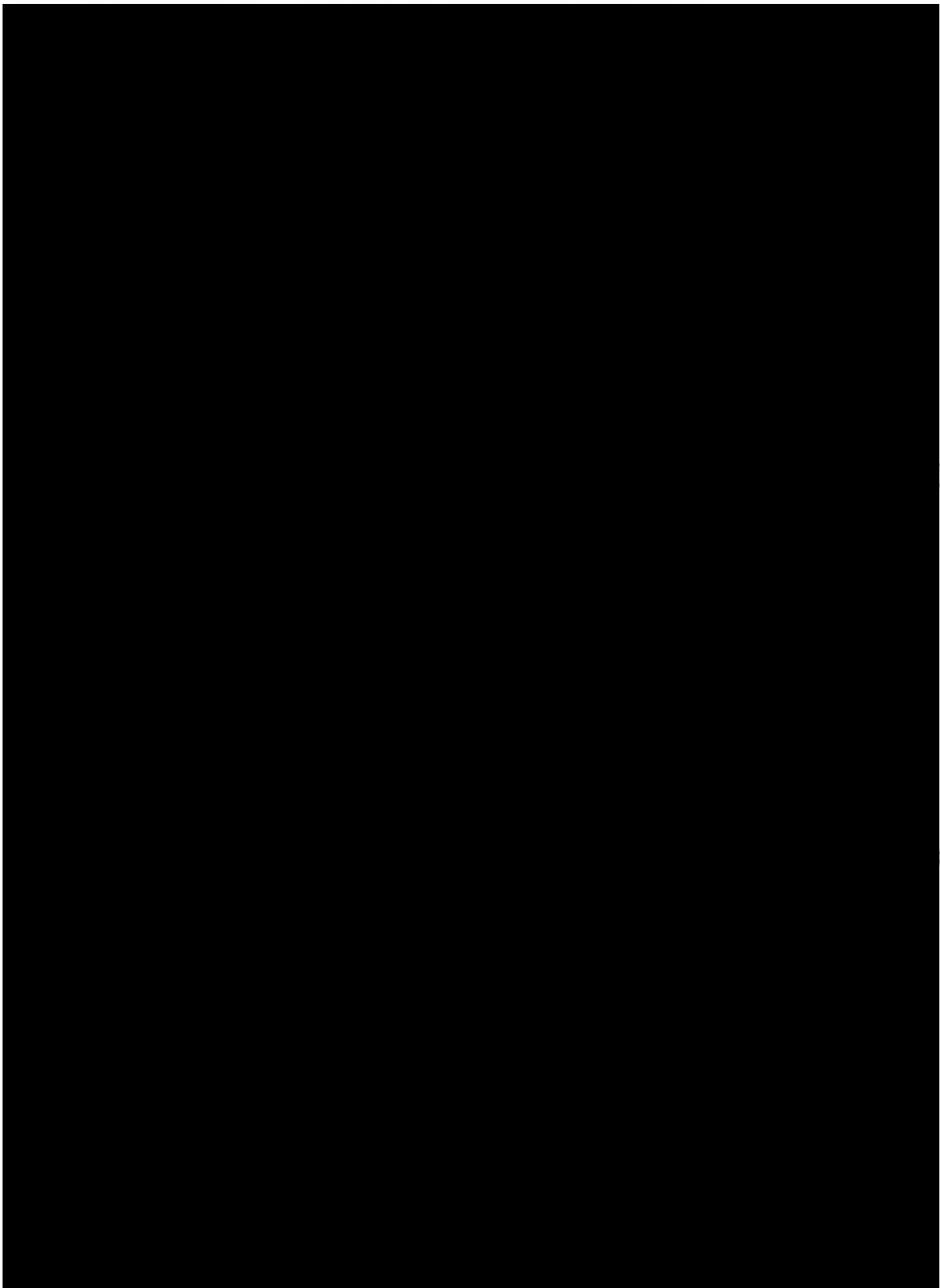


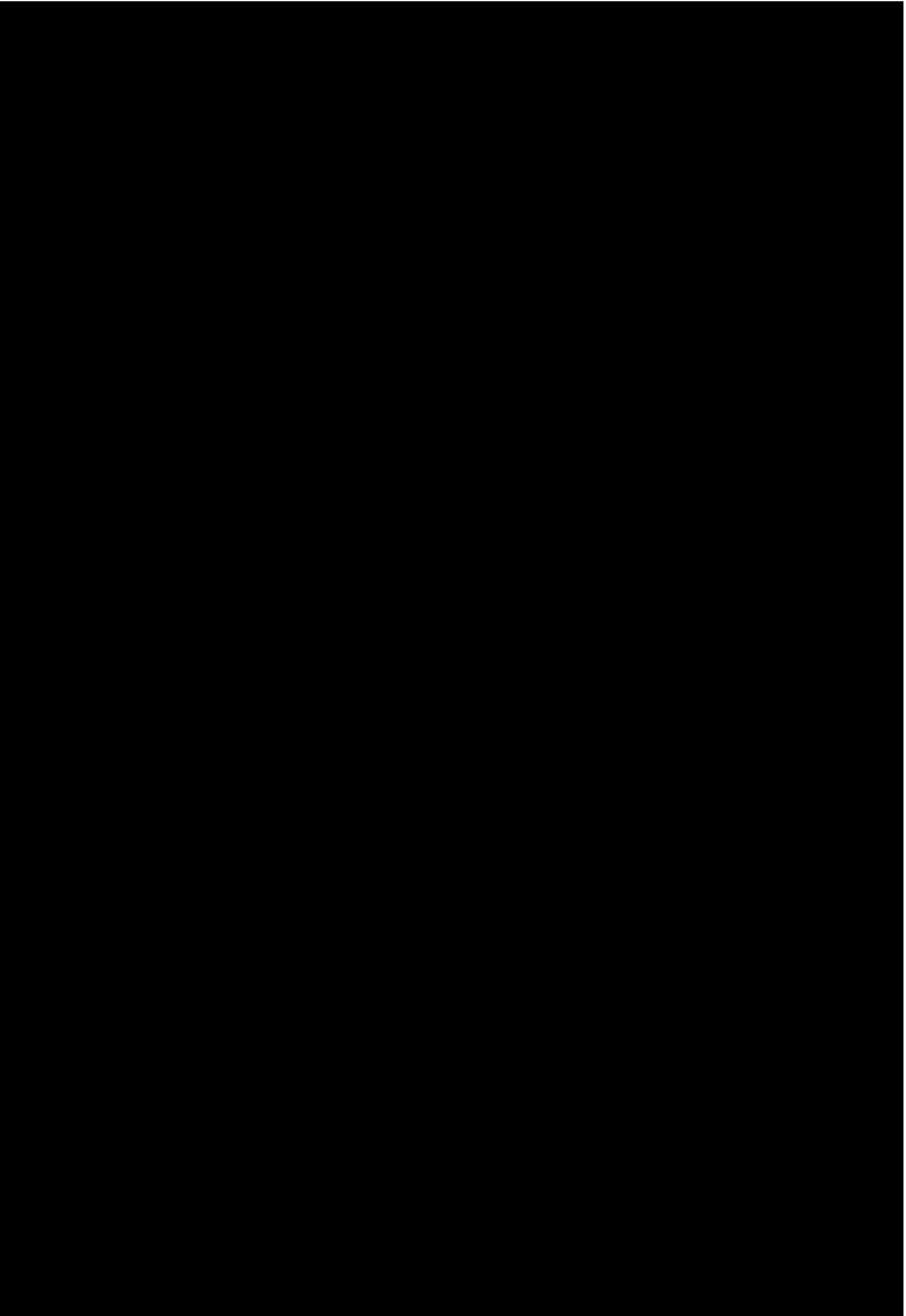


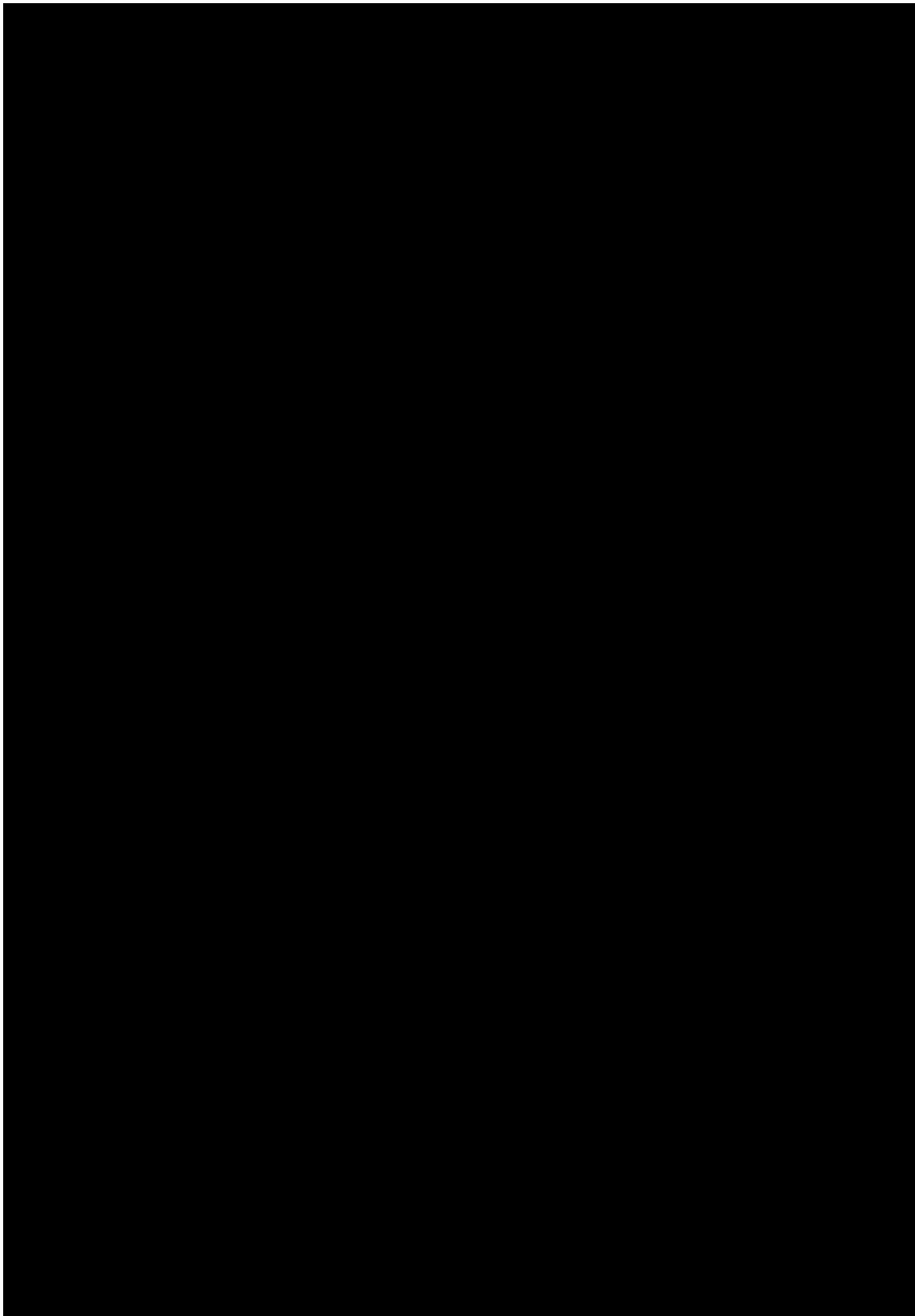


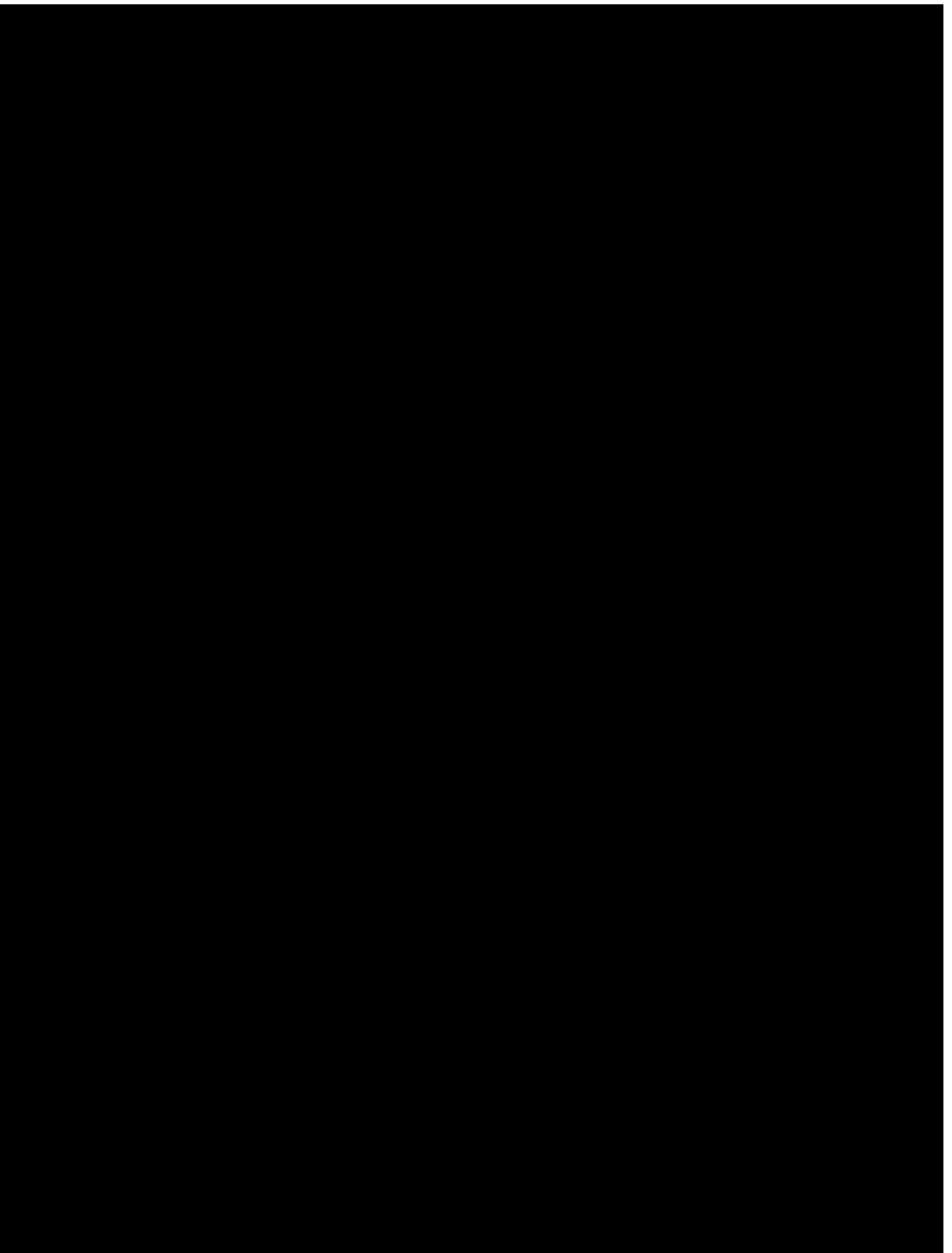


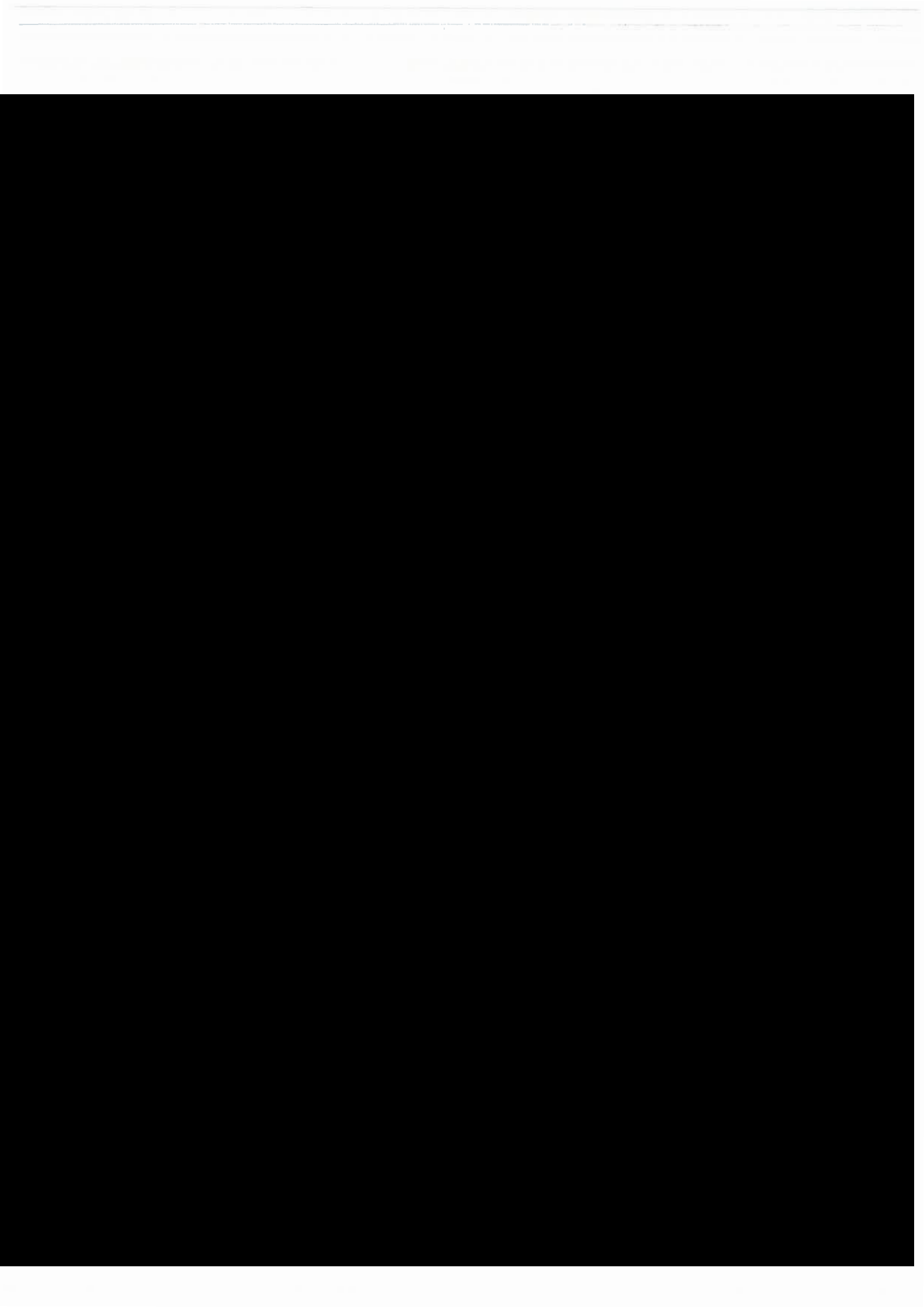


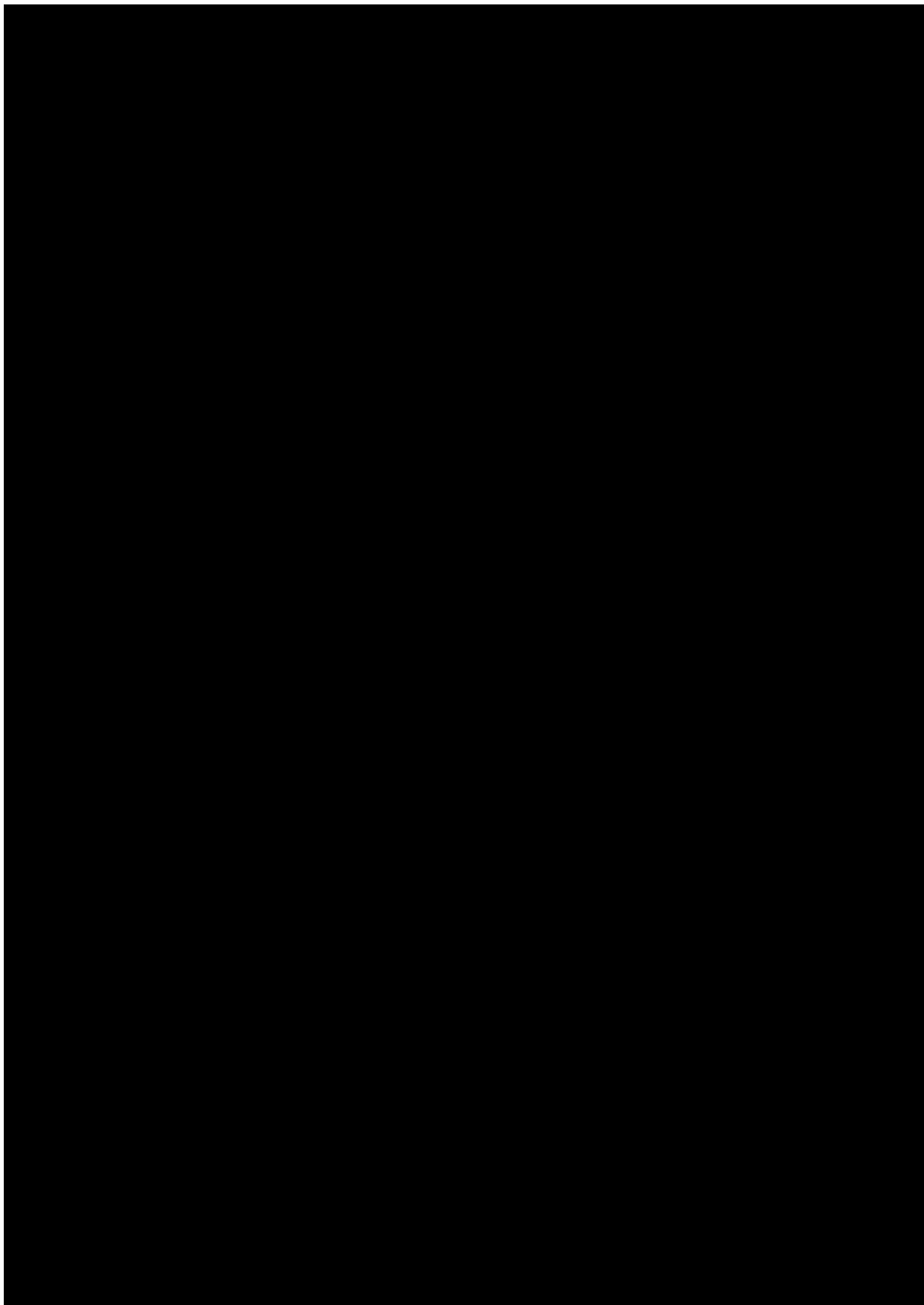


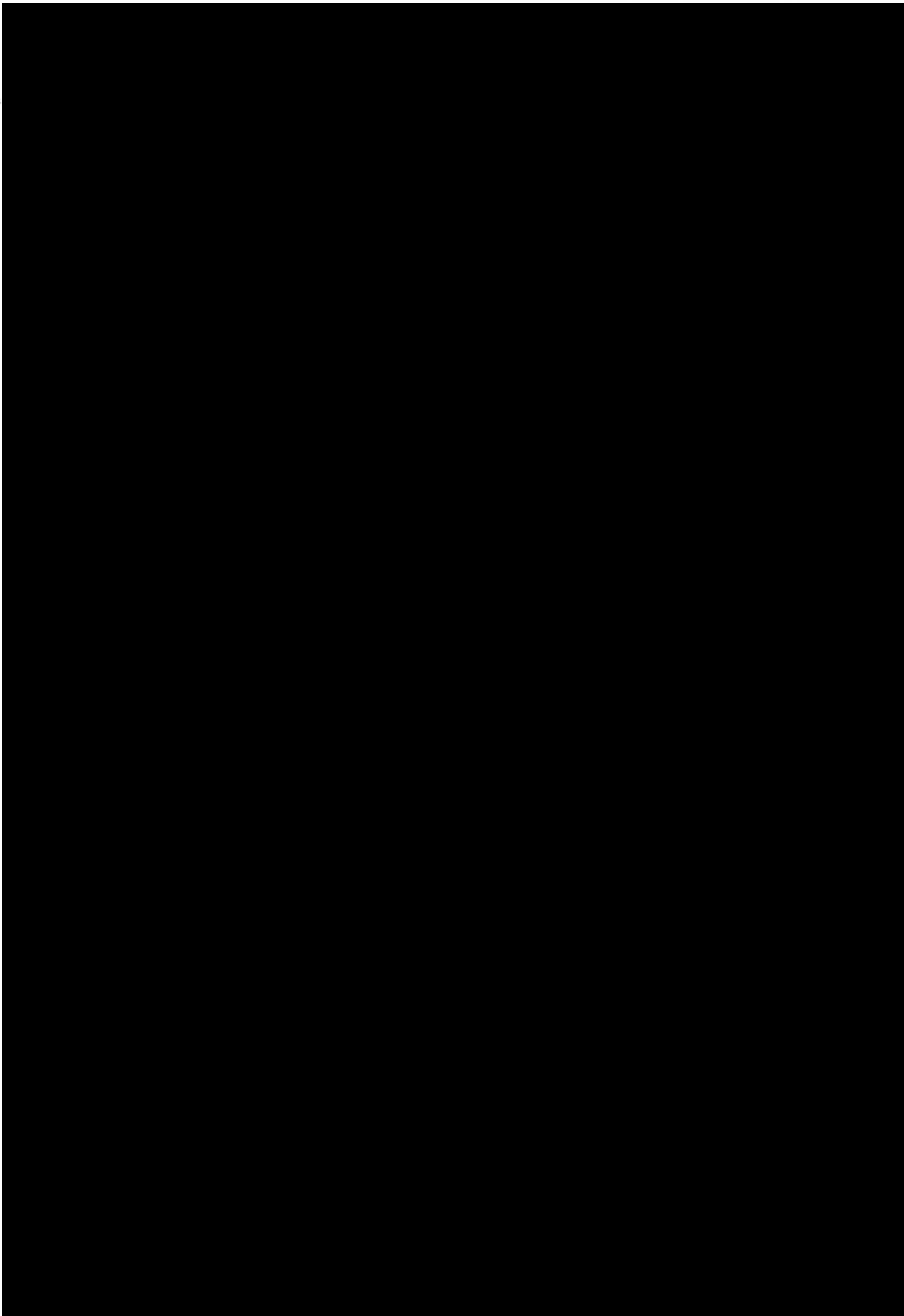


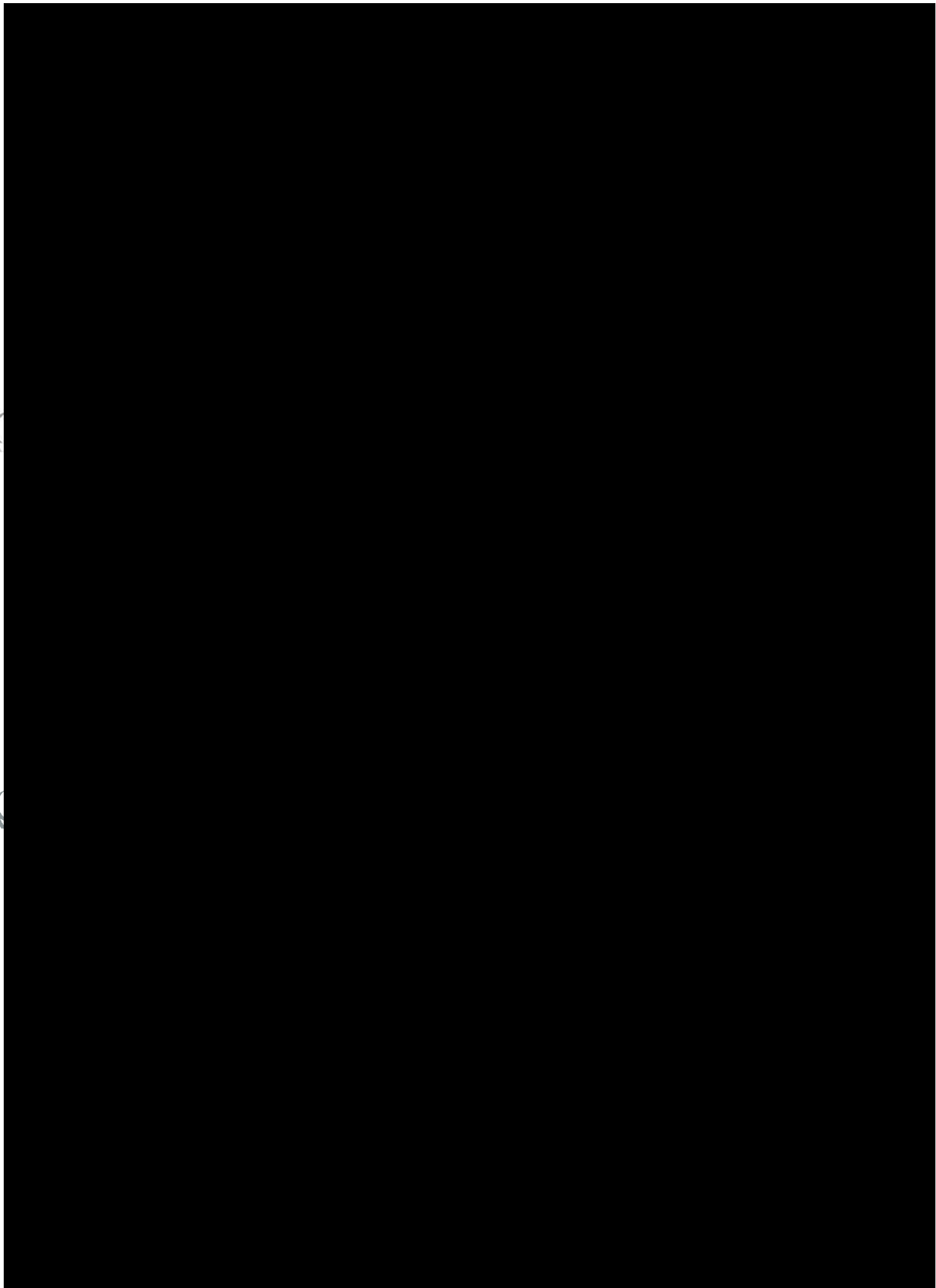




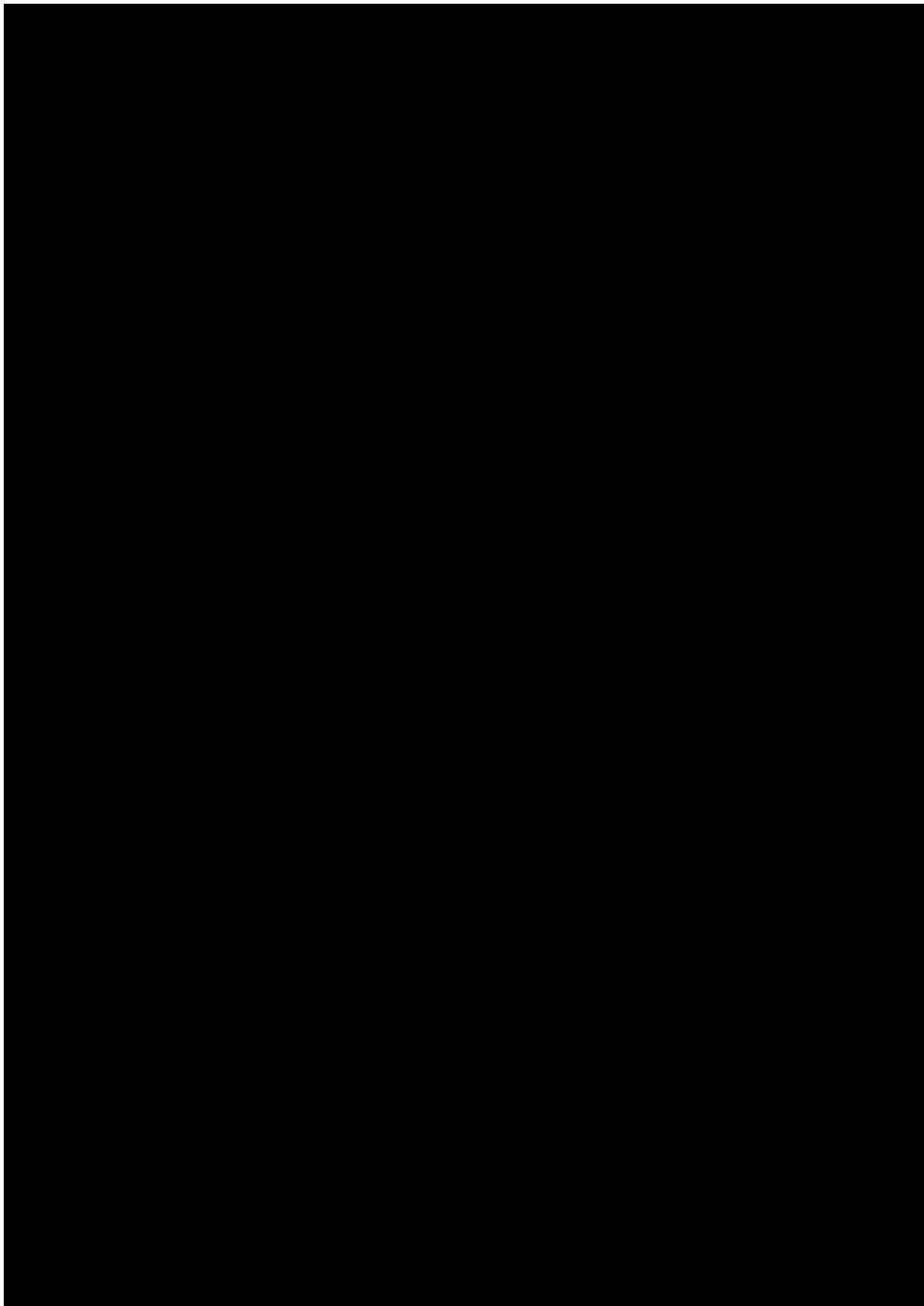


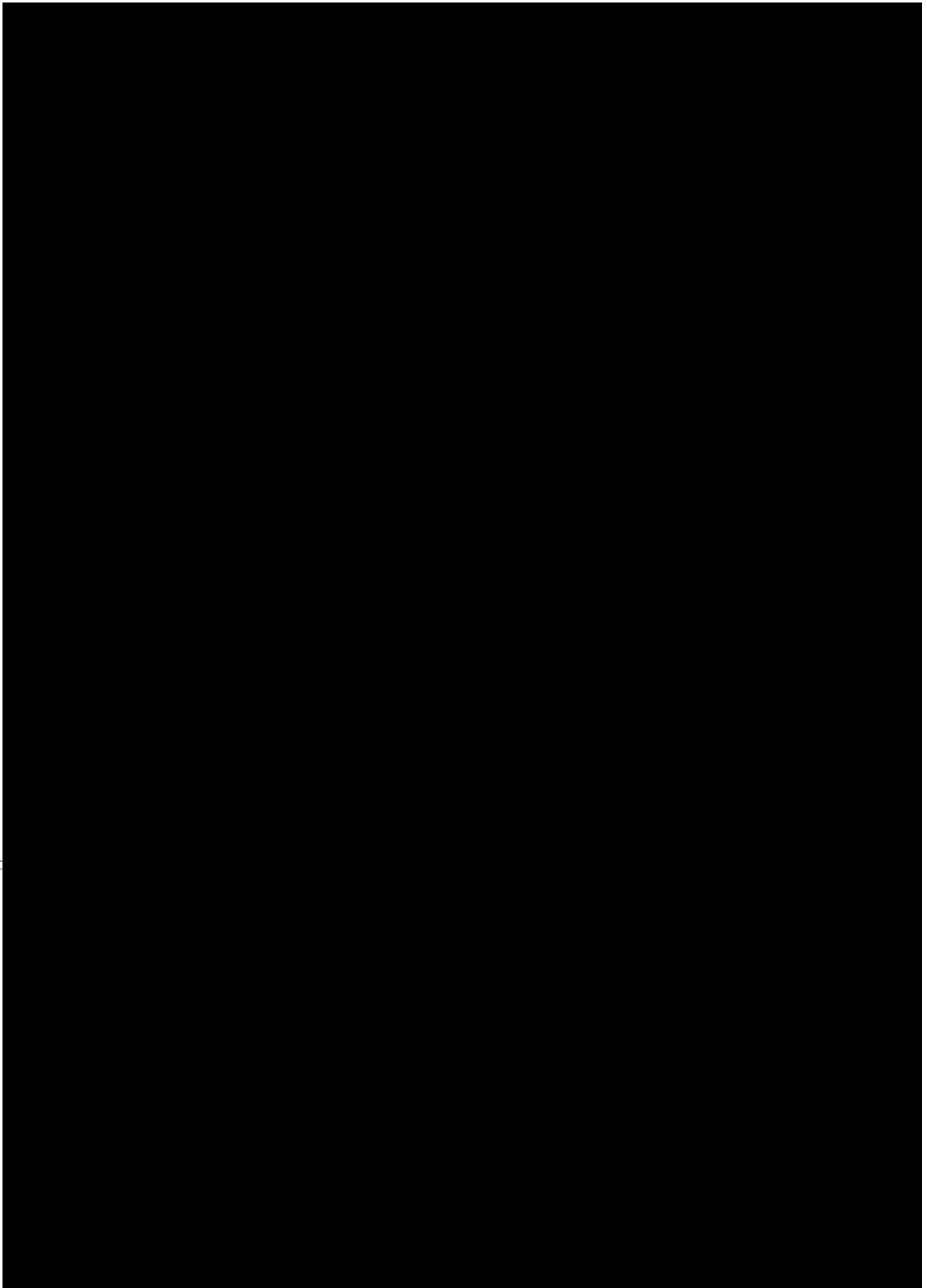


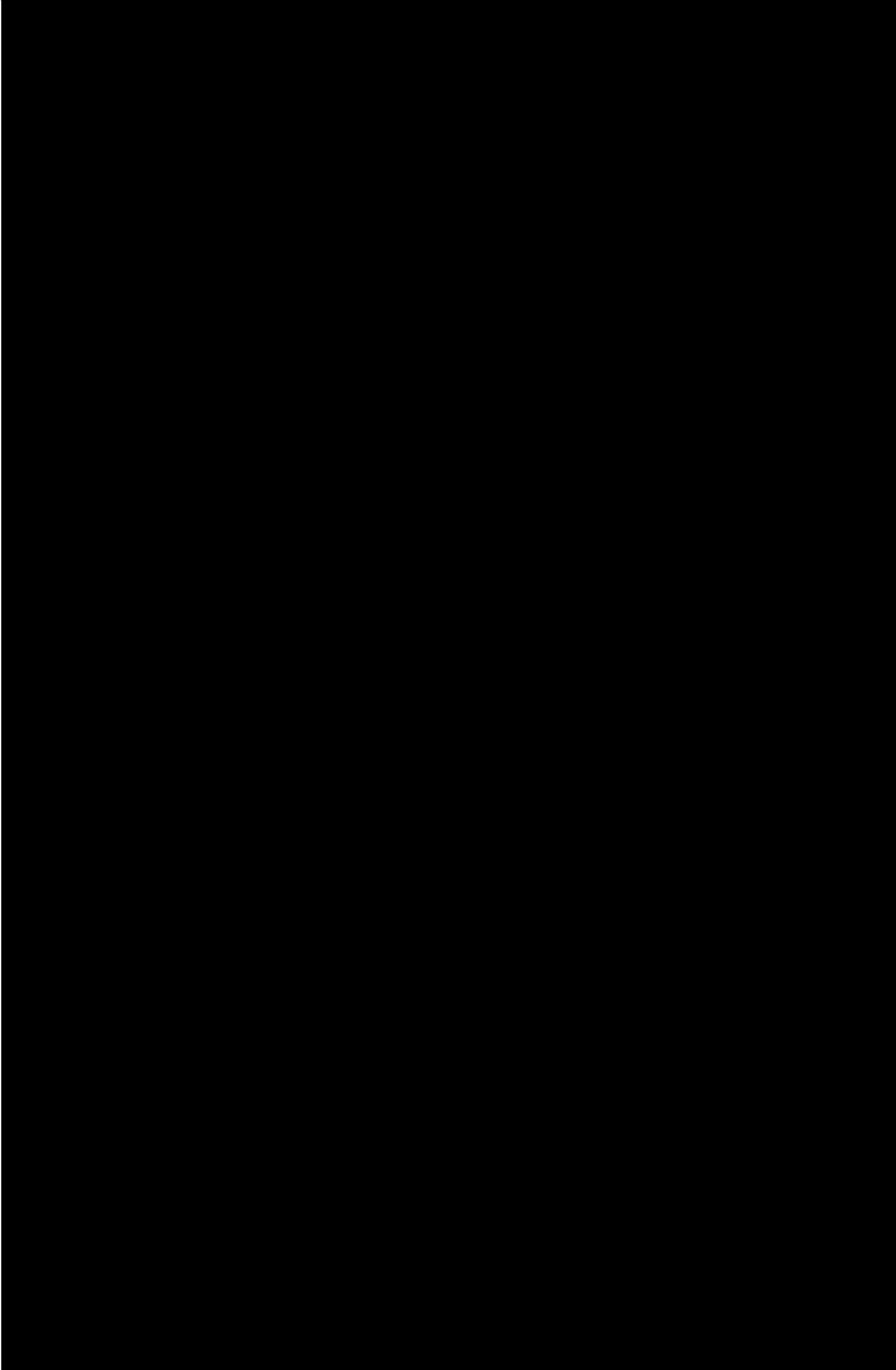






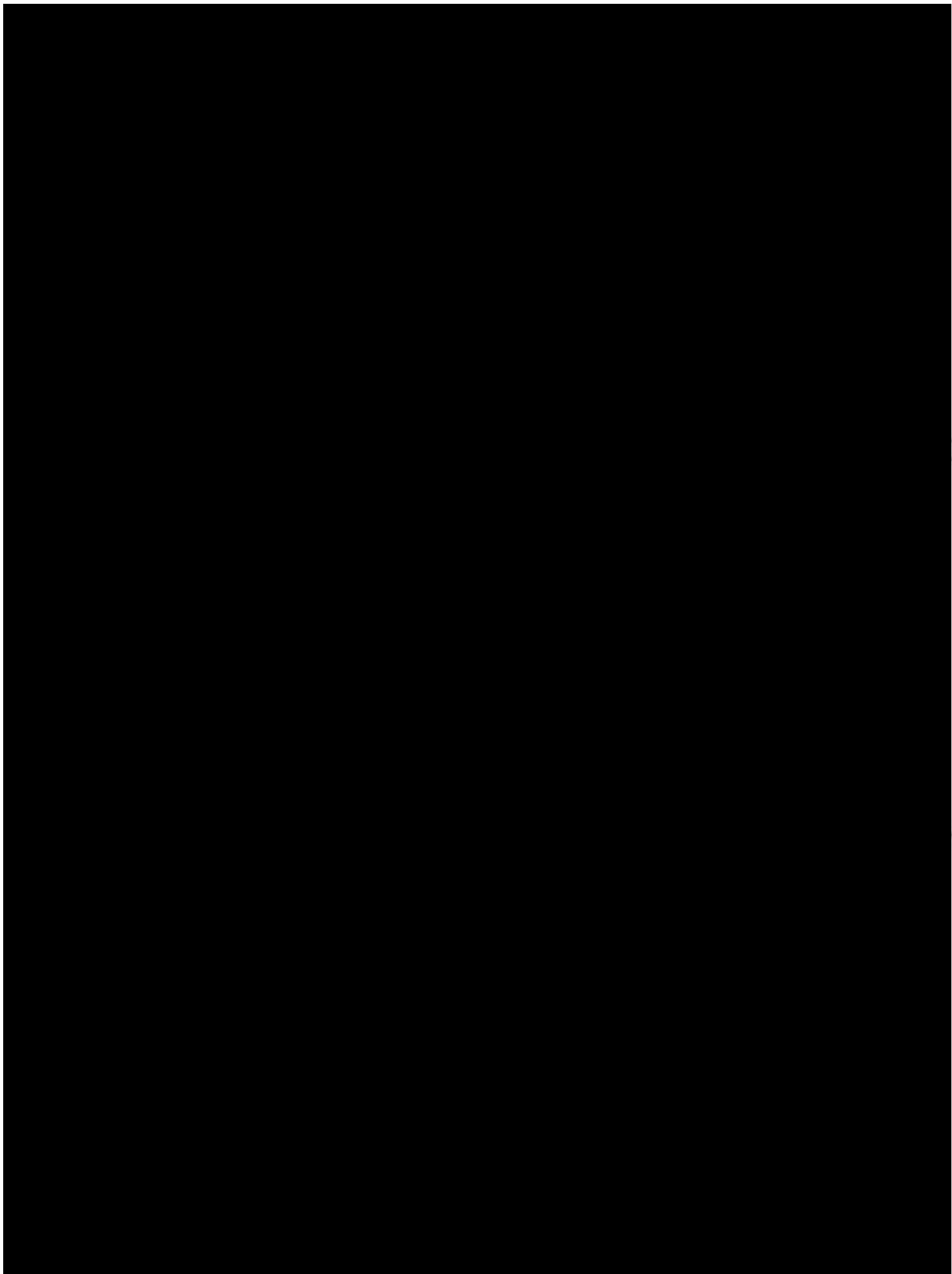


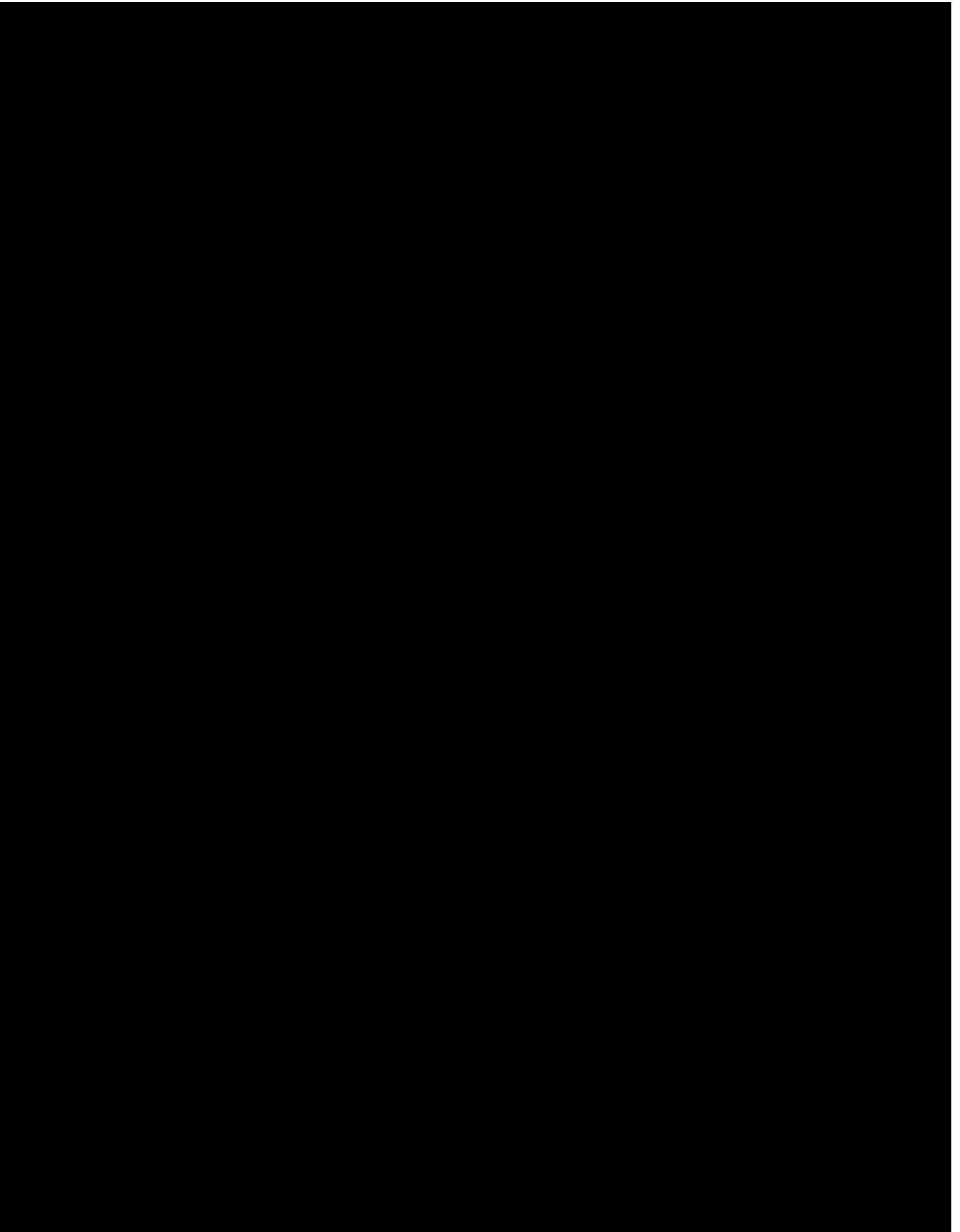


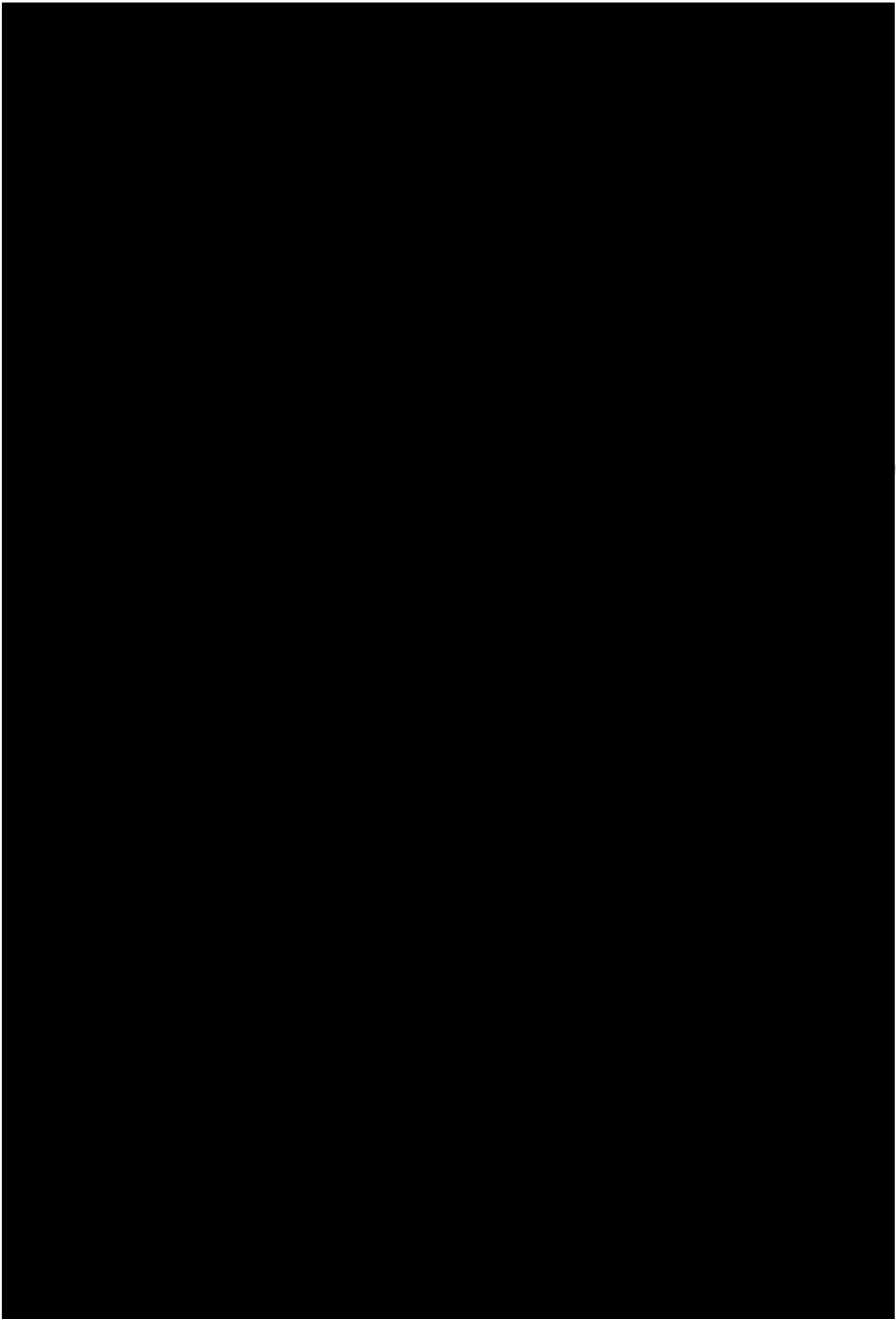


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**SCHEDULE 8**

**Statutory Declaration**

(Clause 9.4(c))

<b>Statutory Declaration</b>	Oaths Act (NSW) Ninth Schedule	
I, ..... .....	<i>insert full name of Declarant</i>	
of ..... .....	<i>insert address</i>	
<i>do solemnly and sincerely declare that:</i>		
1. I am the representative of: ..... <b>("the Contractor")</b>	<i>insert name of Contractor, and ACN if applicable</i>	
in the Office Bearer capacity of: ..... .....	<i>insert position title of Declarant</i>	
2. The Contractor has a contract with the [ ..... ]: ..... <b>("the Contract")</b>	<i>insert name of Contract</i>	
3. I personally know the facts which I have set out in this declaration.		
4. All employees who have at any time been engaged by the Contractor for work done under the Contract: a) have been paid all remuneration and benefits to the date of this declaration payable to them by the Contractor in respect of their employment on work under the Contract, and b) have otherwise had accrued to their account all benefits to which they are entitled from the Contractor as at the date of this declaration in respect of their employment on work under the Contract pursuant to any award, enterprise agreement, act or regulation,		
with the exception of the employees and respective amounts unpaid or not accrued for each employee listed below:	<i>insert names and addresses of the unpaid employees, the amounts unpaid, and whether in respect of wages, allowances, holiday pay, long service leave payments and superannuation</i>	
Employee: Amount unpaid or not accrued: ..... ..... ..... .....		
5. All subcontractors and suppliers to the Contractor have been paid all moneys which as at the date of this declaration have been claimed by		



them to the Contractor for the performance of work under the Contract (as applicable ) and the supply of materials for use in work under the Contract, with the exception of the subcontractors and suppliers and the respective unpaid amounts listed below:

Subcontractor or supplier:

Amount unpaid:

.....  
.....  
.....  
.....  
.....

entitlement etc.

insert names and addresses of the unpaid subcontractors and suppliers, the amounts owing and whether in respect of materials supplied, work performed etc.

6. In all cases where a subcontractor or supplier to the Contractor has provided services and/or materials in respect of the Contract and has submitted a claim to the Contractor for these services or materials which as at the date of this statutory declaration would have been due and payable but which the Contractor disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Contractor prior to the date of this statutory declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the Contractor to the subcontractor or supplier as at the date of this statutory declaration except for the amounts listed in 5 above.

7. The provisions of the Contract relating to the payment of employees, subcontractors and suppliers of the Contractor have been complied with by the Contractor.

8. The Contractor has been informed by each subcontractor to the Contractor (except for subcontracts not exceeding \$25,000 at their commencement) by statutory declaration in equivalent terms to this declaration (made no earlier than the date 14 days before the date of this declaration):

(a) that their subcontracts with their subcontractors and suppliers comply with the requirements of the Contract relating to payment of employees and subcontractors, and

(b) that all their employees and subcontractors, as at the date of the making of such a declaration:

i) have been paid all remuneration and benefits due and payable to them by; or

ii) had accrued to their account all benefits to which they are entitled from;

the subcontractor of the Contractor or from any other subcontractor (except for subcontracts not exceeding \$25,000 at their commencement) in respect of any , and

(c) of details of any amounts due and payable or benefits due to be received or accrued described in 8(b) above which have not been paid, received or accrued,

except for the following subcontractors to the Contractor who have failed to provide such a declaration:

Subcontractor:

Due amount unpaid:

.....  
.....

insert names and addresses of the Contractor's subcontractors who have not submitted a declaration, and unpaid amounts due or otherwise due to each of them by the Contractor in respect of this

.....  
.....  
.....  
.....

claim

9. Where a subcontractor to the Contractor has provided a declaration as in 8 above, and it includes unpaid amounts or benefits either not received or not accrued, details of the subcontractor, details of the affected employees, suppliers and subcontractors of the subcontractor, and the respective amounts or benefits either unpaid or not accrued are as follows:

insert names of the subcontractors, the name and addresses of the unpaid employees, subcontractors and suppliers and amounts listed as unpaid or not accrued to them.

Employee, subcontractor or supplier:  
Amount unpaid or not accrued:

.....  
.....  
.....  
.....

10. In relation to the statutory declaration provided by each subcontractor to the Contractor, I am not aware of anything to the contrary of what is contained therein, and on the basis of the contents of those statutory declarations, I believe that information to be true.

11. Attached to and forming part of this declaration is a "Subcontractor's Statement" given by the Contractor in its capacity as 'subcontractor' (as that term is defined in the Workers Compensation Act 1987, Payroll Tax Act 2007 and Industrial Relations Act 1996) which is a written statement:

- (a) under section 175B of the Workers Compensation Act 1987 in the form and providing the detail required by that legislation;
- (b) under Schedule 2 Part 5 of the Payroll Tax Act 2007 in the form and providing the detail required by that legislation; and
- (c) under section 127 of the Industrial Relations Act 1996 in the form and providing the detail required by that legislation.

12. I personally know the truth of the matters which are contained in this declaration and the attached Subcontractor's Statement.

13. All statutory declarations and Subcontractor's Statements received by the Contractor from subcontractors were:

- (a) given to the Contractor in its capacity as 'principal contractor' as defined in the Workers Compensation Act 1987, the Payroll Tax Act 2007 and the Industrial Relations Act 1996 ("Acts"); and
- (b) given by the subcontractors in their capacity as 'subcontractors' as defined in the Acts.

14. I am not aware of anything which would contradict the statements made in the statutory declarations or written statements provided to the Contractor by its subcontractors, as referred to in this declaration.

*I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act 1900 (NSW). I am aware that I may be subject to punishment by law if I wilfully make a false statement in this declaration.*

Declared at ..... on  
.....  
(place) (day) (month) (year)

.....  
(Signature of Declarant)

Before me:

.....  
(Signature of person before whom the declaration is made)

.....  
(Name of the person before whom the declaration is made)

.....  
(Title\* of the person before whom the declaration is made)

\* The declaration must be made before one of the following persons:

- where the declaration is sworn within the State of New South Wales:

- (i) a justice of the peace of the State of New South Wales;
- (ii) a solicitor of the Supreme Court of New South Wales with a current practising certificate; or
- (iii) a notary public.

- where the declaration is sworn in a place outside the State of New South Wales:

- (i) a notary public; or
- (ii) any person having authority to administer an oath in that place.

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

1. I saw the face of the deponent.

[OR]

I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.

2. I have known the deponent for at least 12 months.

[OR]

I have confirmed the deponent's identity using the following identification document:

[insert description of ID document]

.....  
Signature of witness

**SCHEDULE 9**

**Part A - Completion Notice**

(Clause 5.5(a)(i))

**[ON SYDNEY METRO'S LETTERHEAD]**

[insert date]

MTR  
[Insert address]

Dear [Insert name]

**COMPLETION NOTICE  
OTS2 Early Works Deed**

This Completion Notice is given in accordance with the "Sydney Metro City – OTS2 Early Works Deed" dated [insert] (**Early Works Deed**). Words defined in the Early Works Deed have the same meaning in this notice.

In accordance with clause 5.5(a)(i) of the Early Works Deed, the Principal confirms that Completion of the Early Works has been achieved. The Date of Completion of the Early Works is [insert date].

Yours sincerely

.....  
[insert name]

for and on behalf of the Principal

**Part B – Milestone Completion Notice**

(Clause 5.5(a)(i))

**[ON SYDNEY METRO'S LETTERHEAD]**

[insert date]

MTR  
[Insert address]

Dear [Insert name]

**MILESTONE COMPLETION NOTICE**  
**OTS2 Early Works Deed – Milestone [insert number]**

This Milestone Completion Notice is given in accordance with the "Sydney Metro City – OTS2 Early Works Deed" dated [insert] (**Early Works Deed**). Words defined in the Early Works Deed have the same meaning in this notice.

In accordance with clause 5.5(a)(i) of the Early Works Deed, the Principal confirms that Milestone Completion of Milestone [insert number] has been achieved. The Date of Milestone Completion of the Milestone is [insert date].

Yours sincerely

.....  
[insert name]

for and on behalf of the Principal

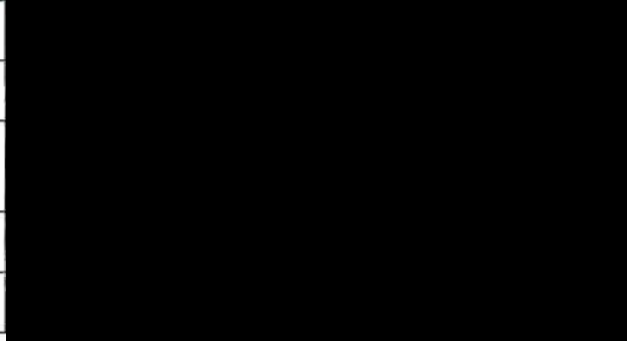
**SCHEDULE 10**

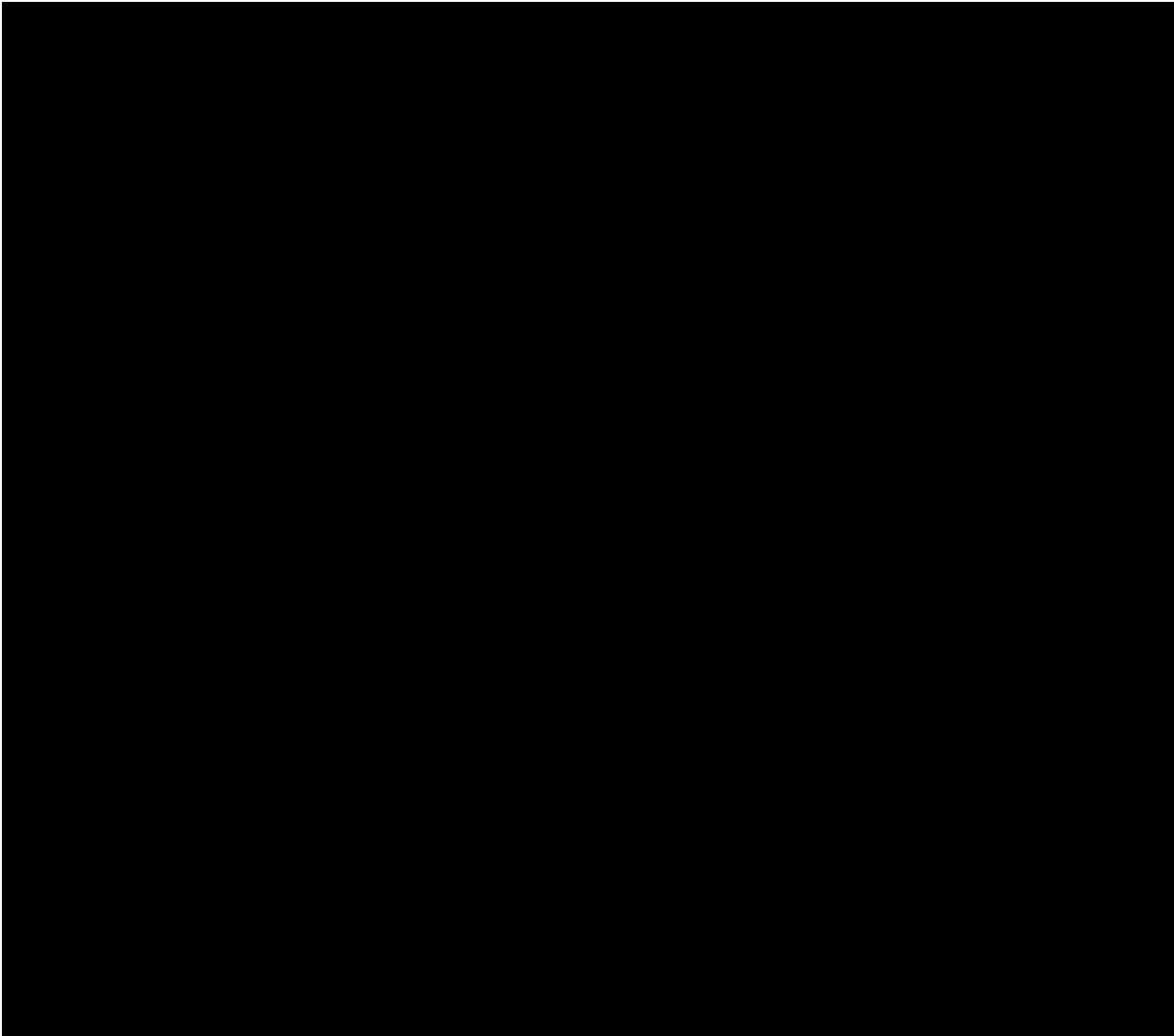
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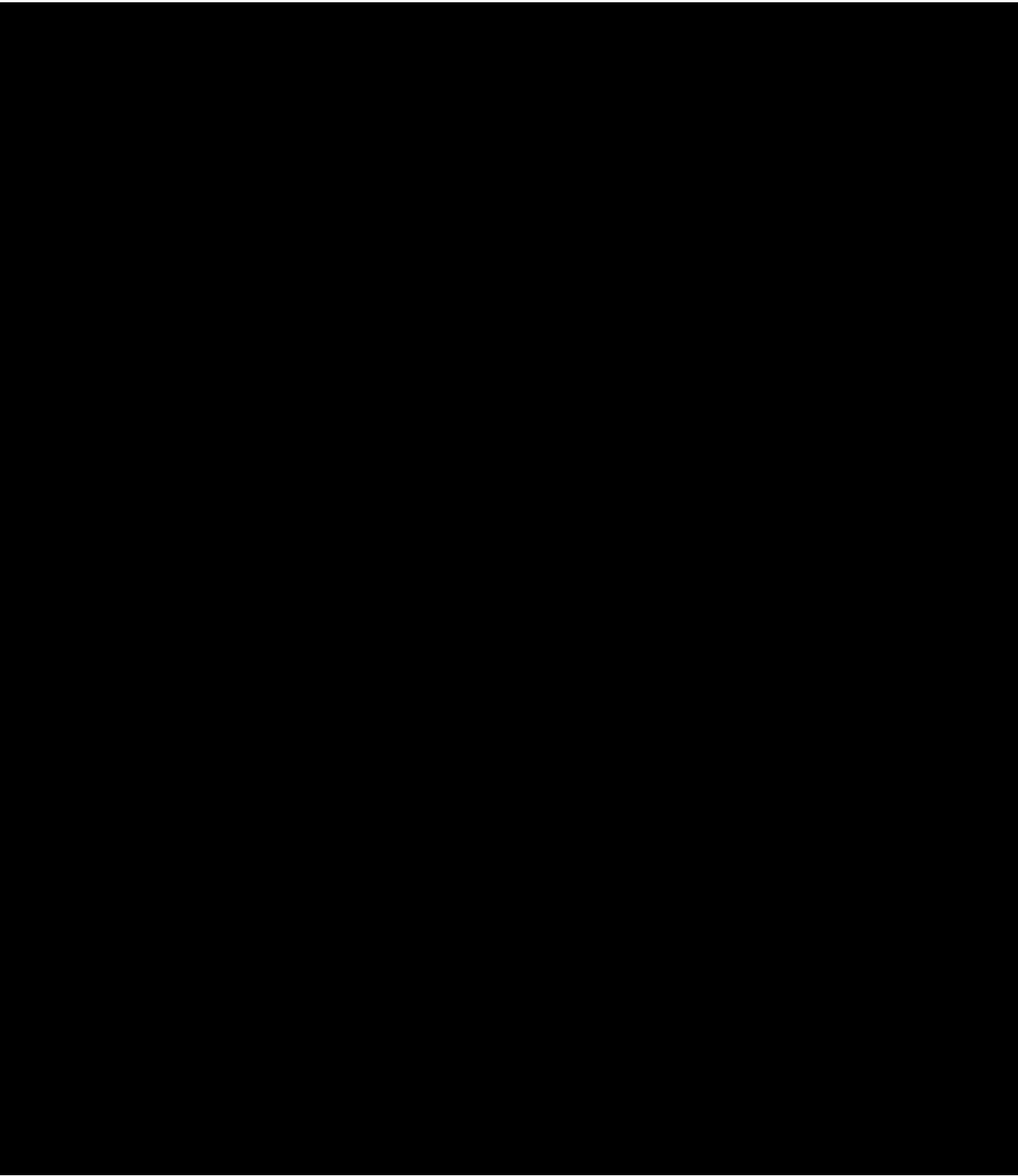
**SCHEDULE 11**

**Nominated Subcontract Work**

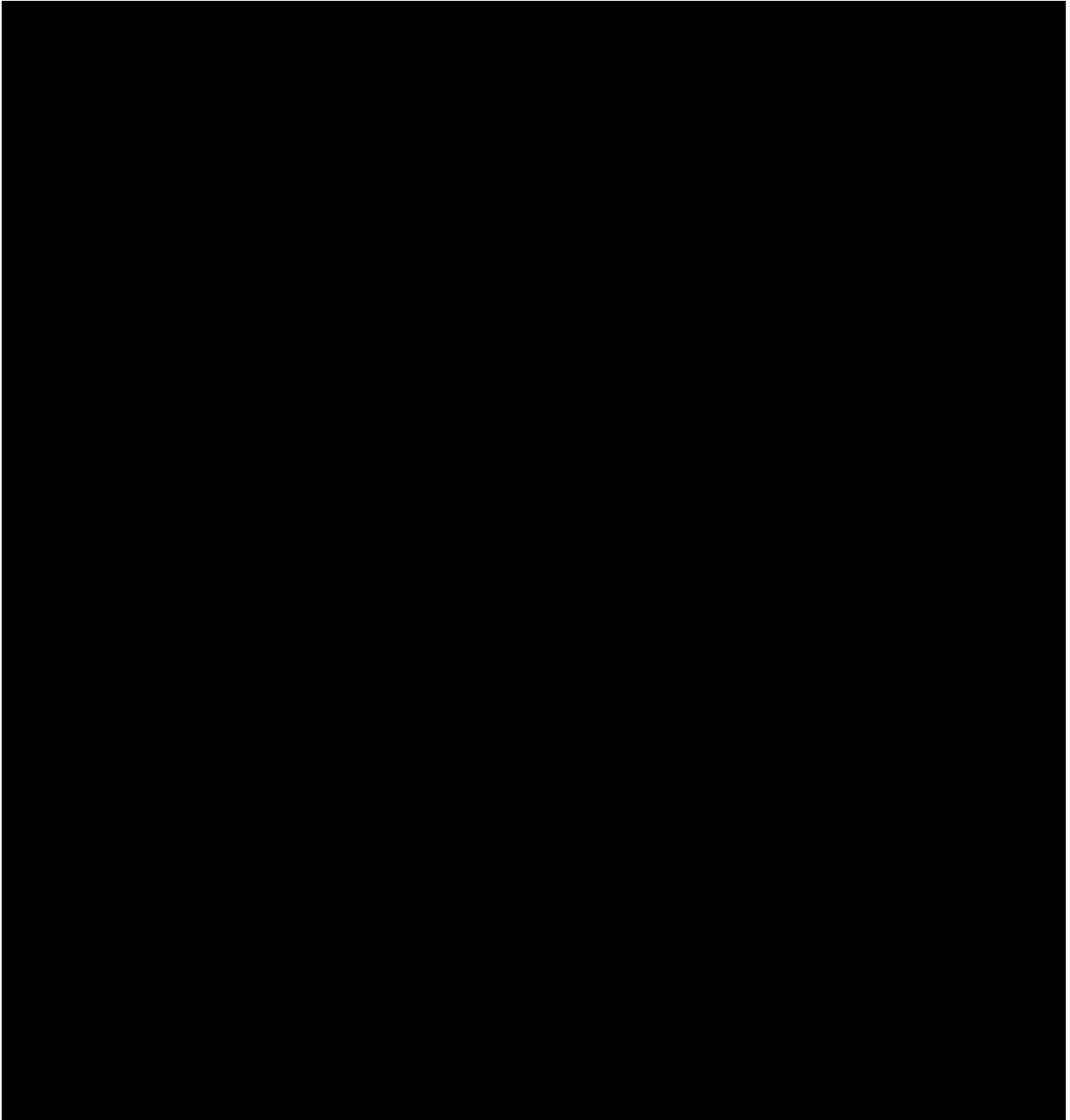
(Clause 12.2)

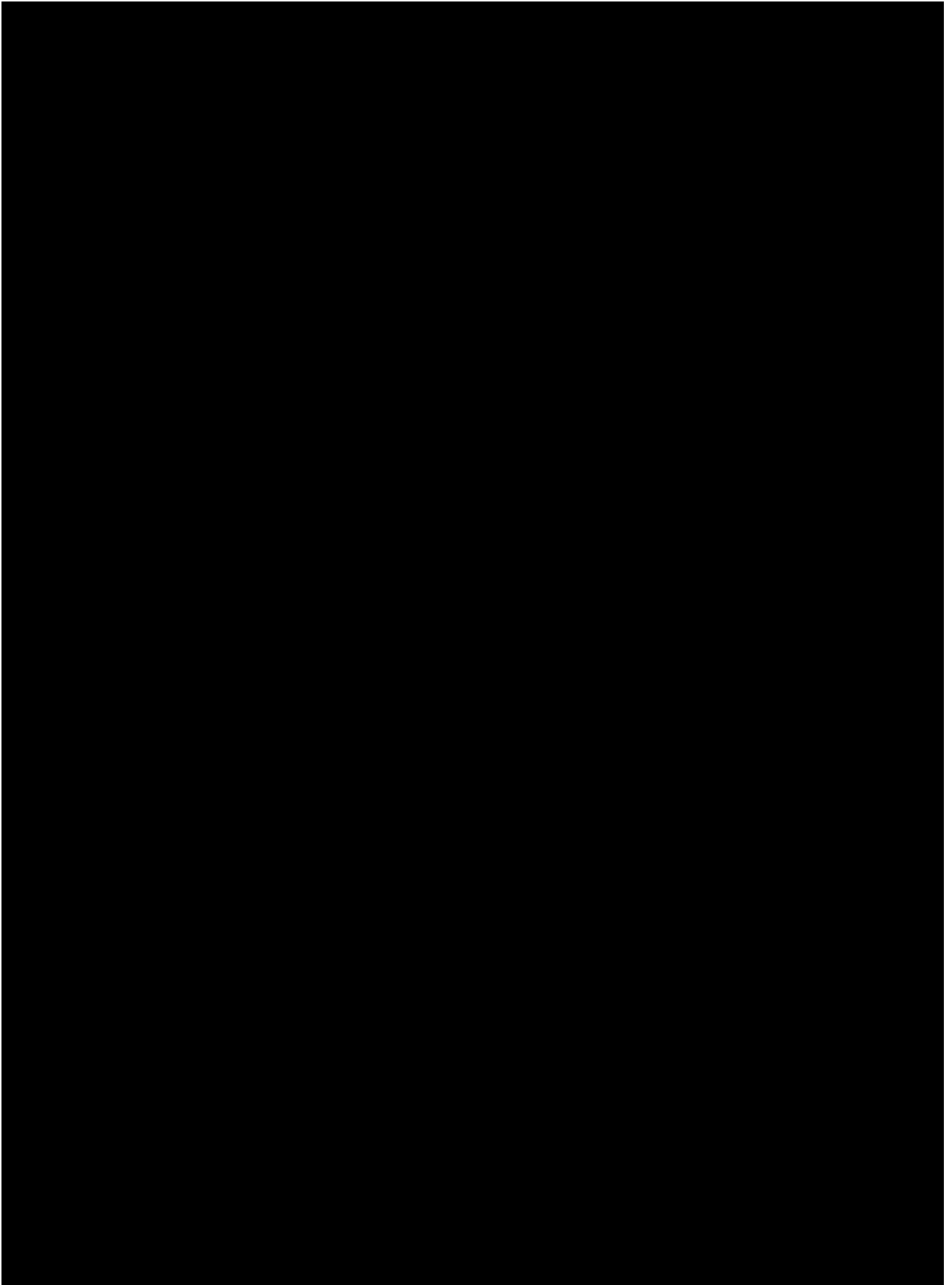
<b>Nominated Subcontractor Work</b>	<b>Nominated Subcontractor</b>
Refer to Section 1 of this Schedule 11	
Refer to Section 2 of this Schedule 11	
Refer to Section 3 of this Schedule 11	
Refer to Section 4 of this Schedule 11	
Refer to Section 5 of this Schedule 11	

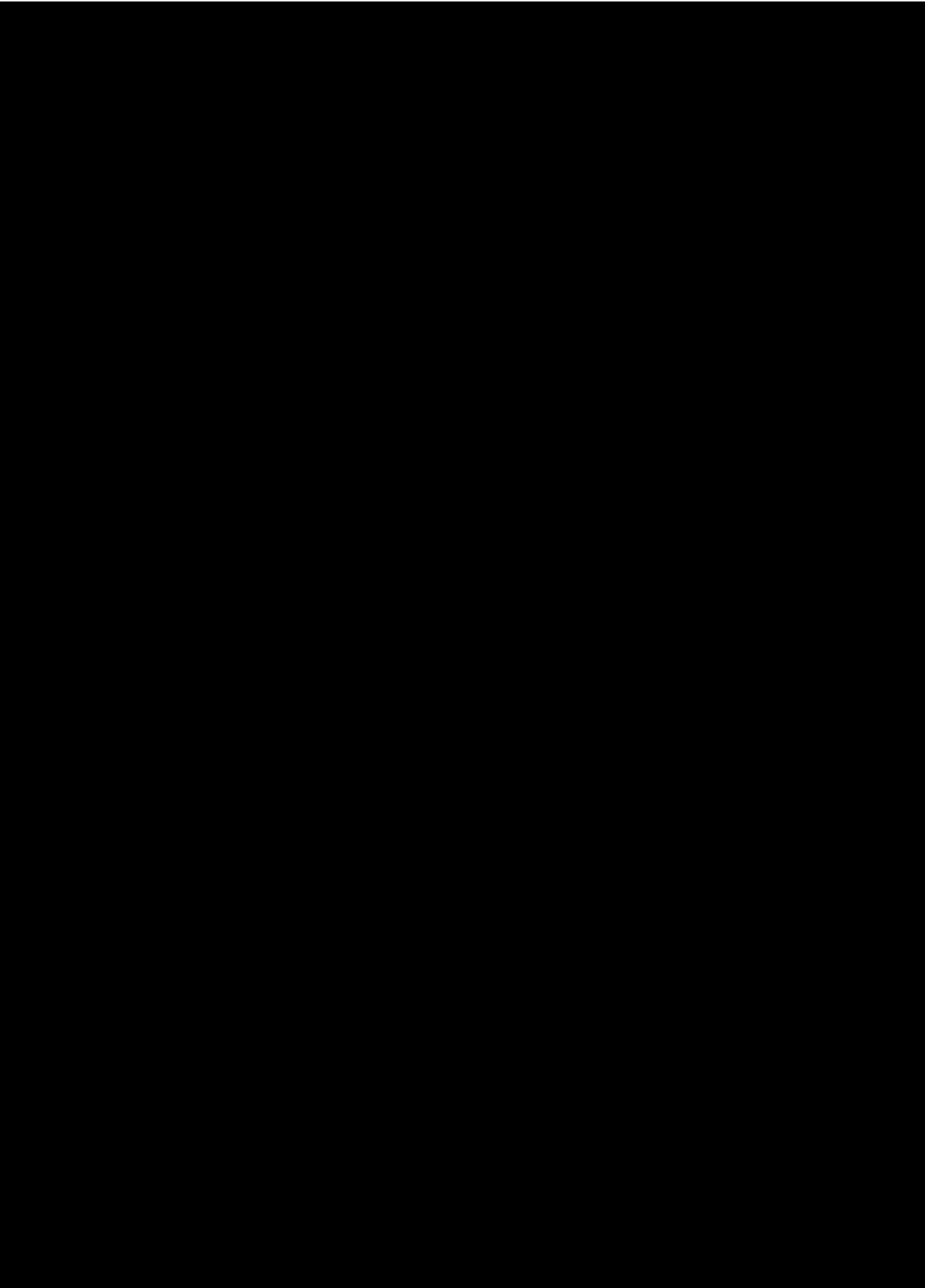


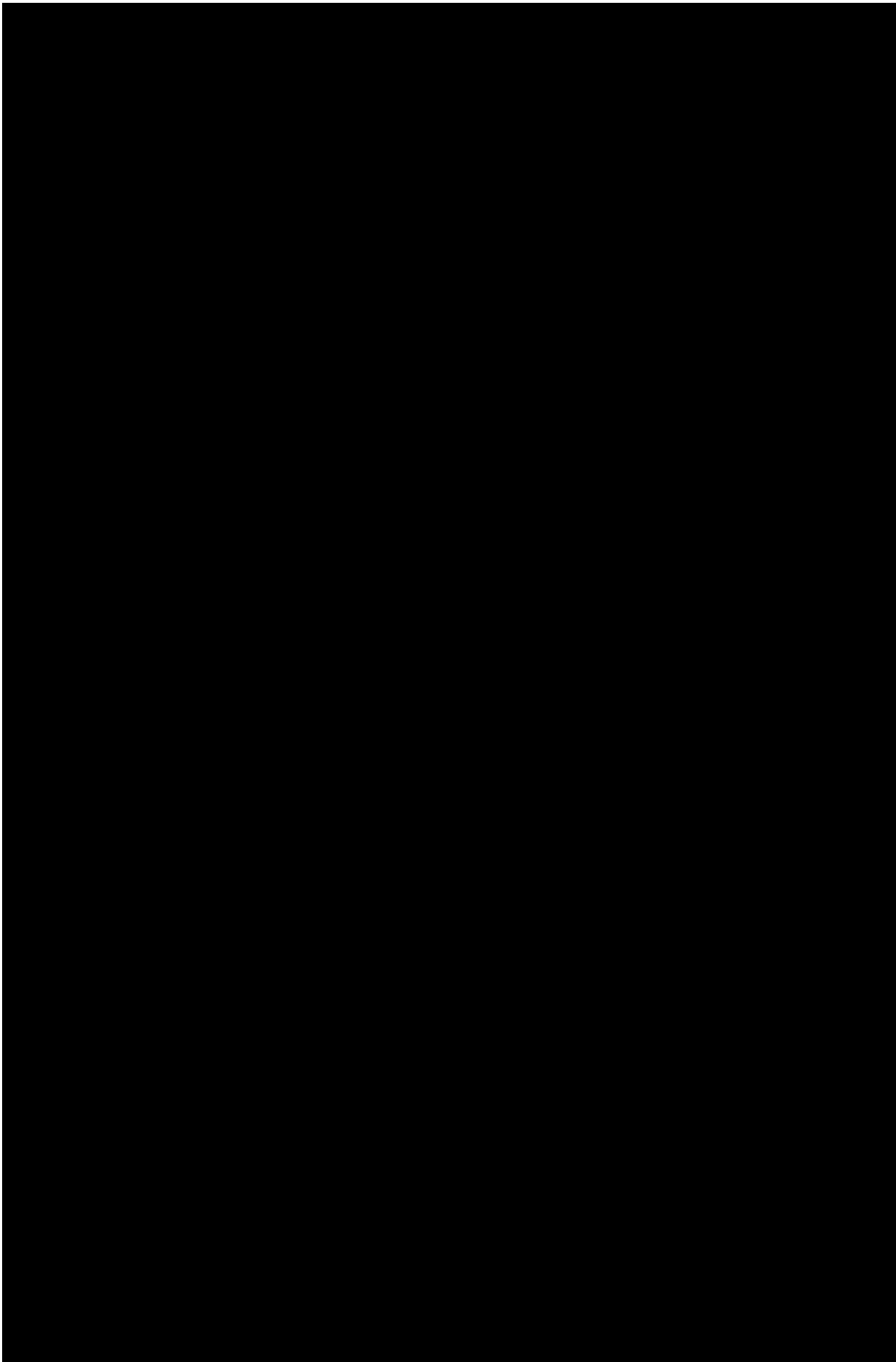






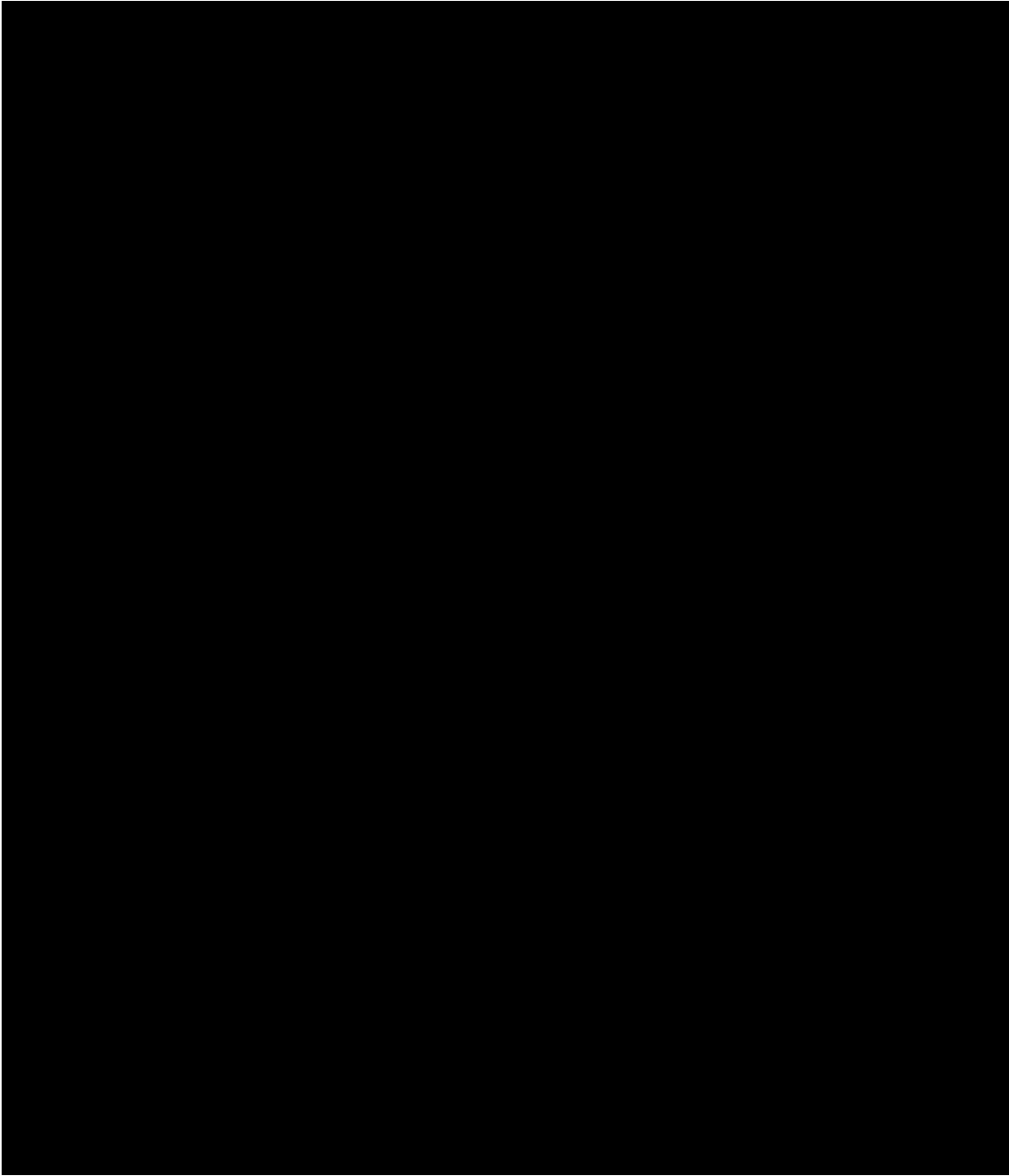


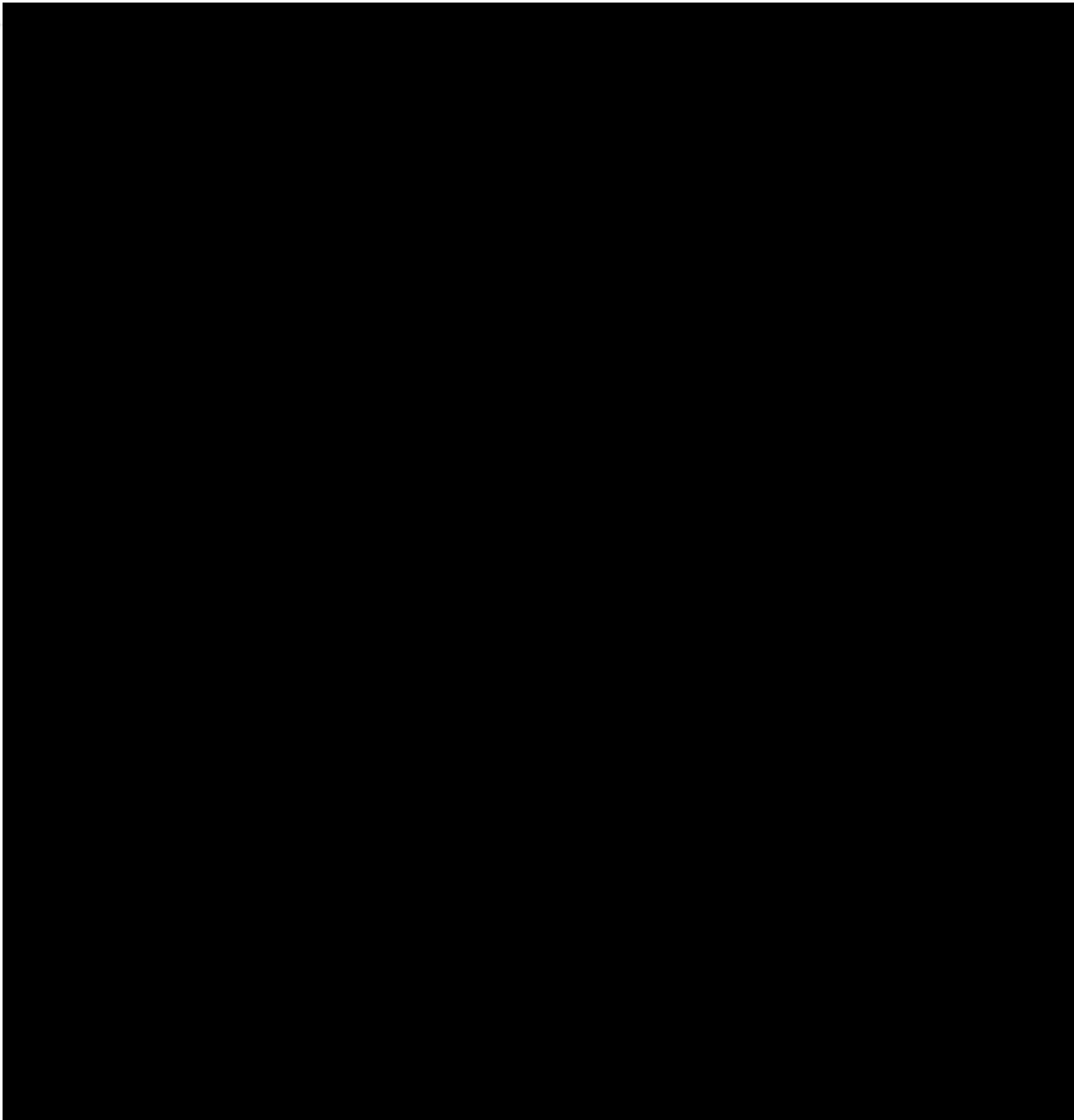


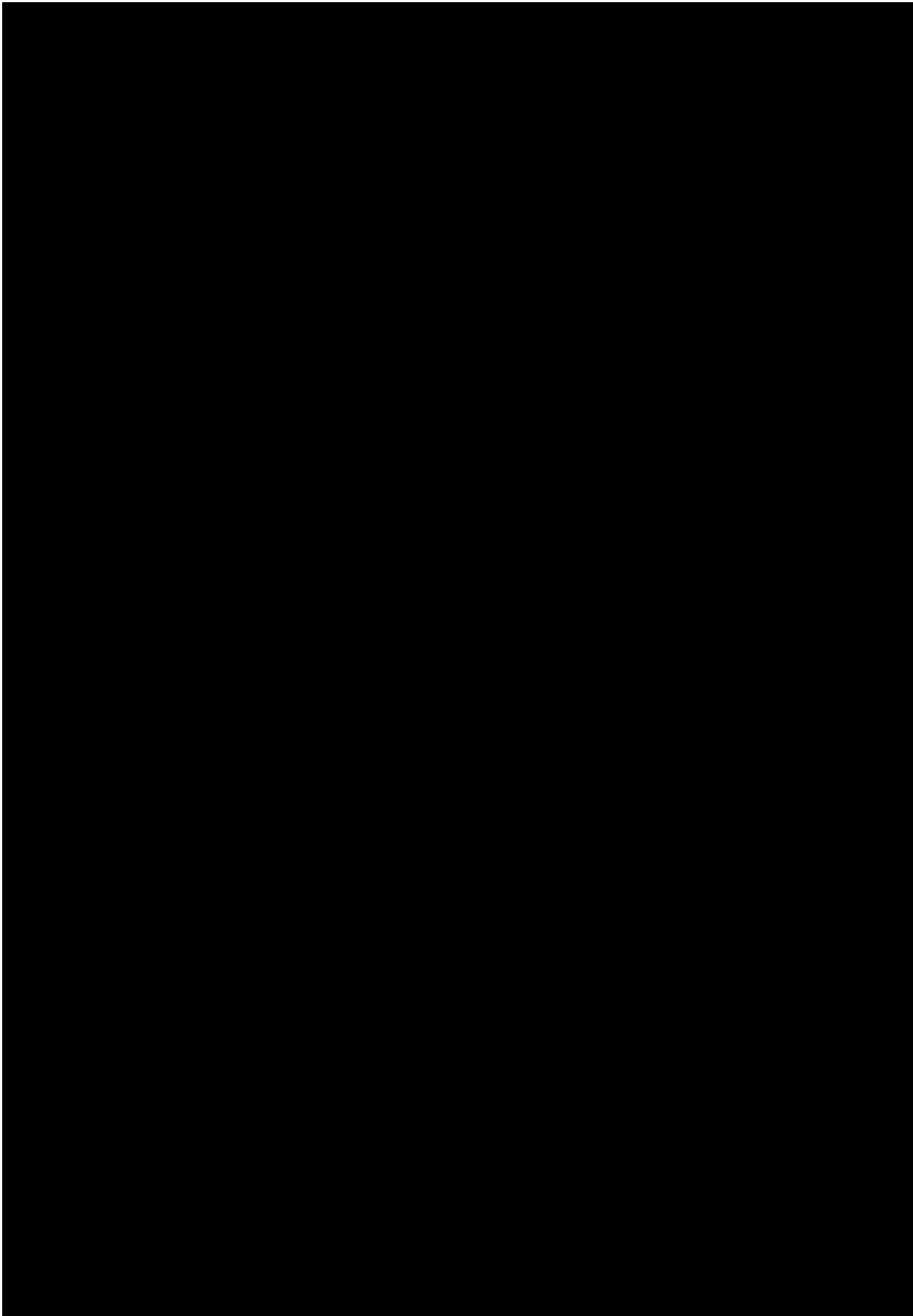


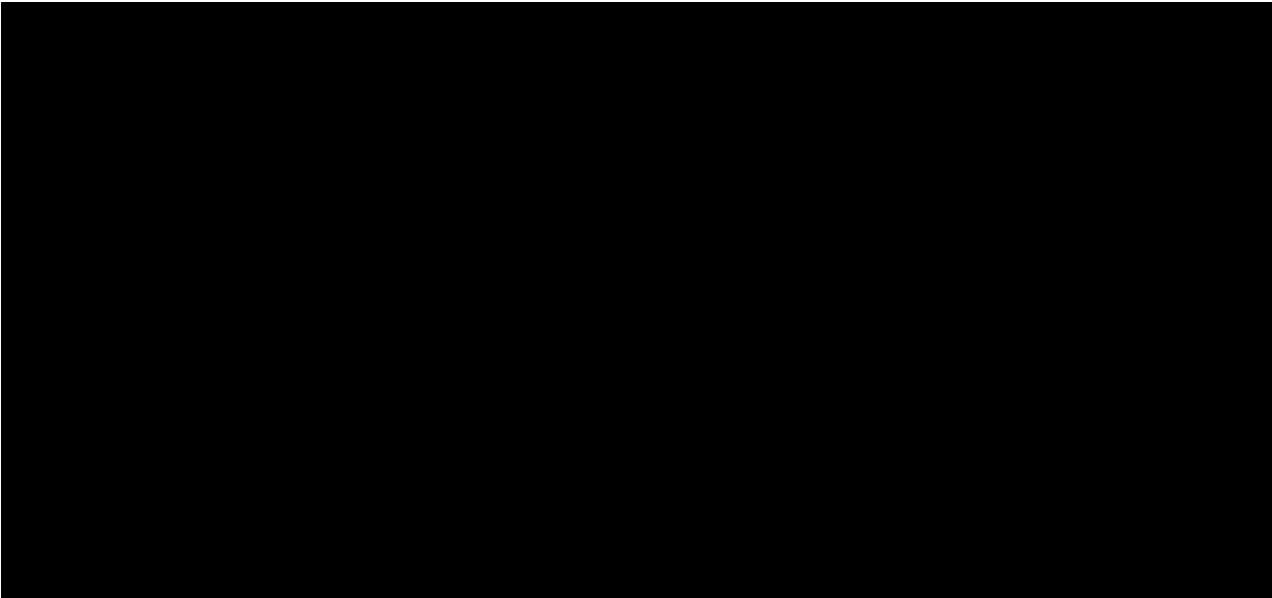
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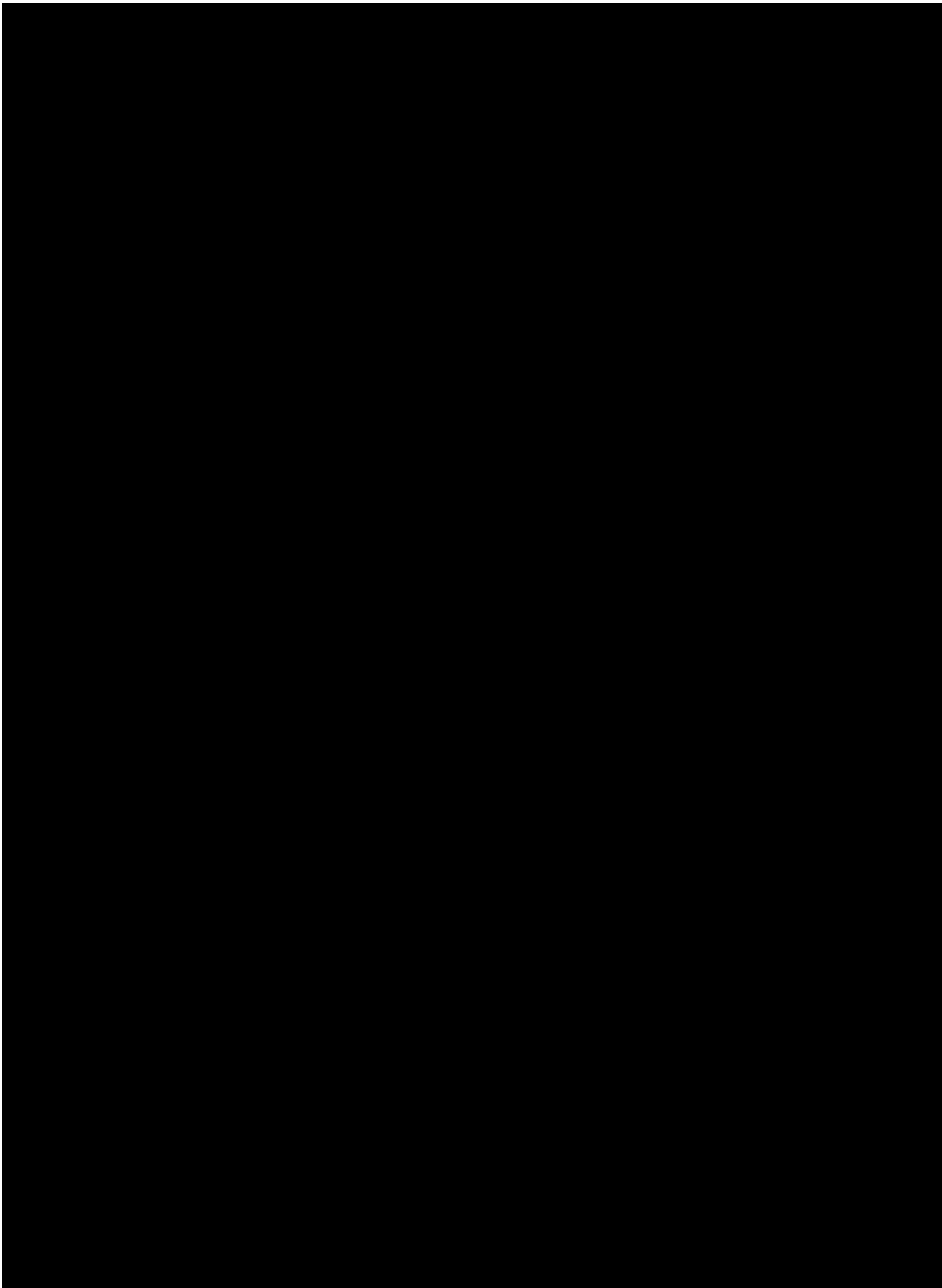


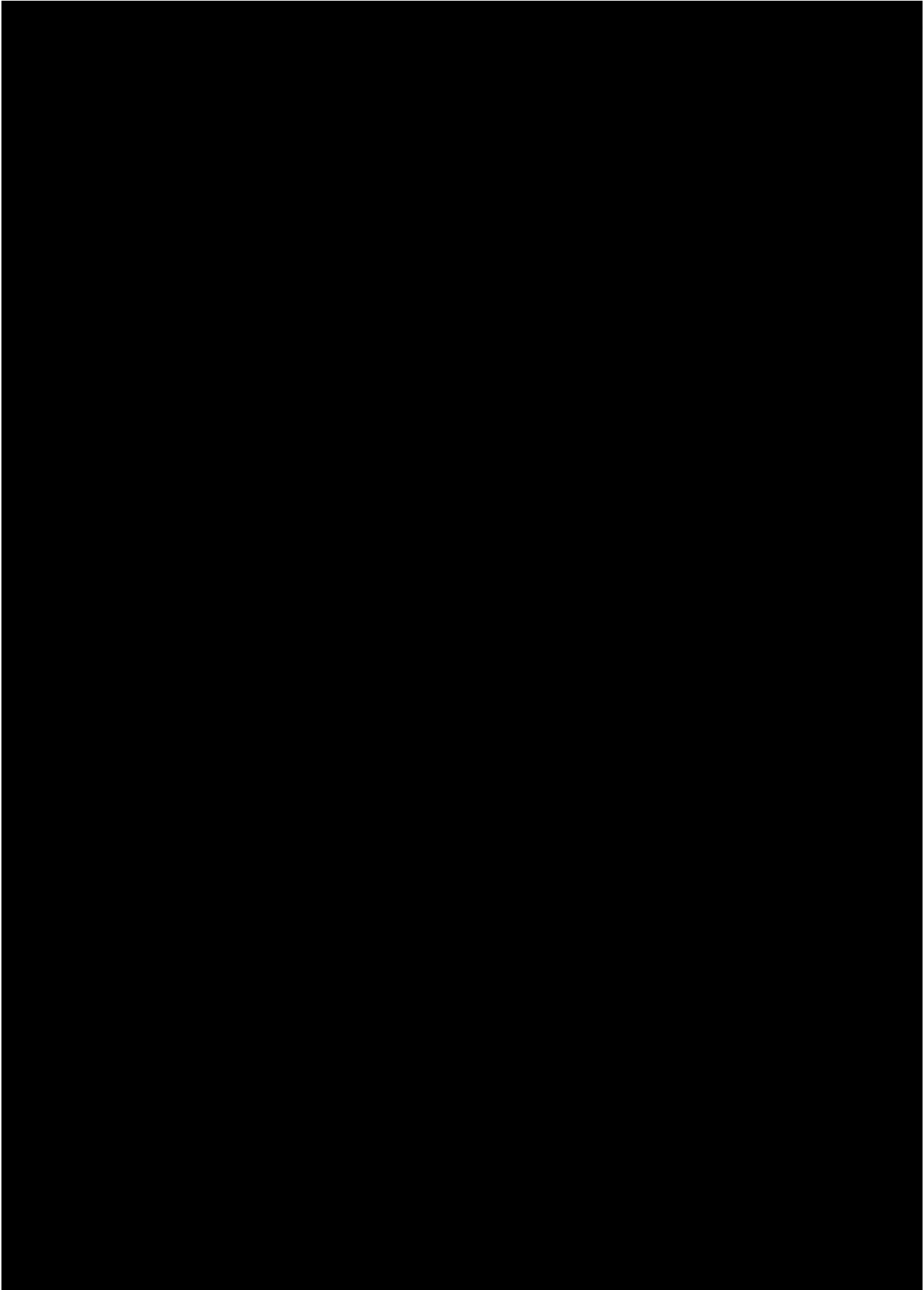


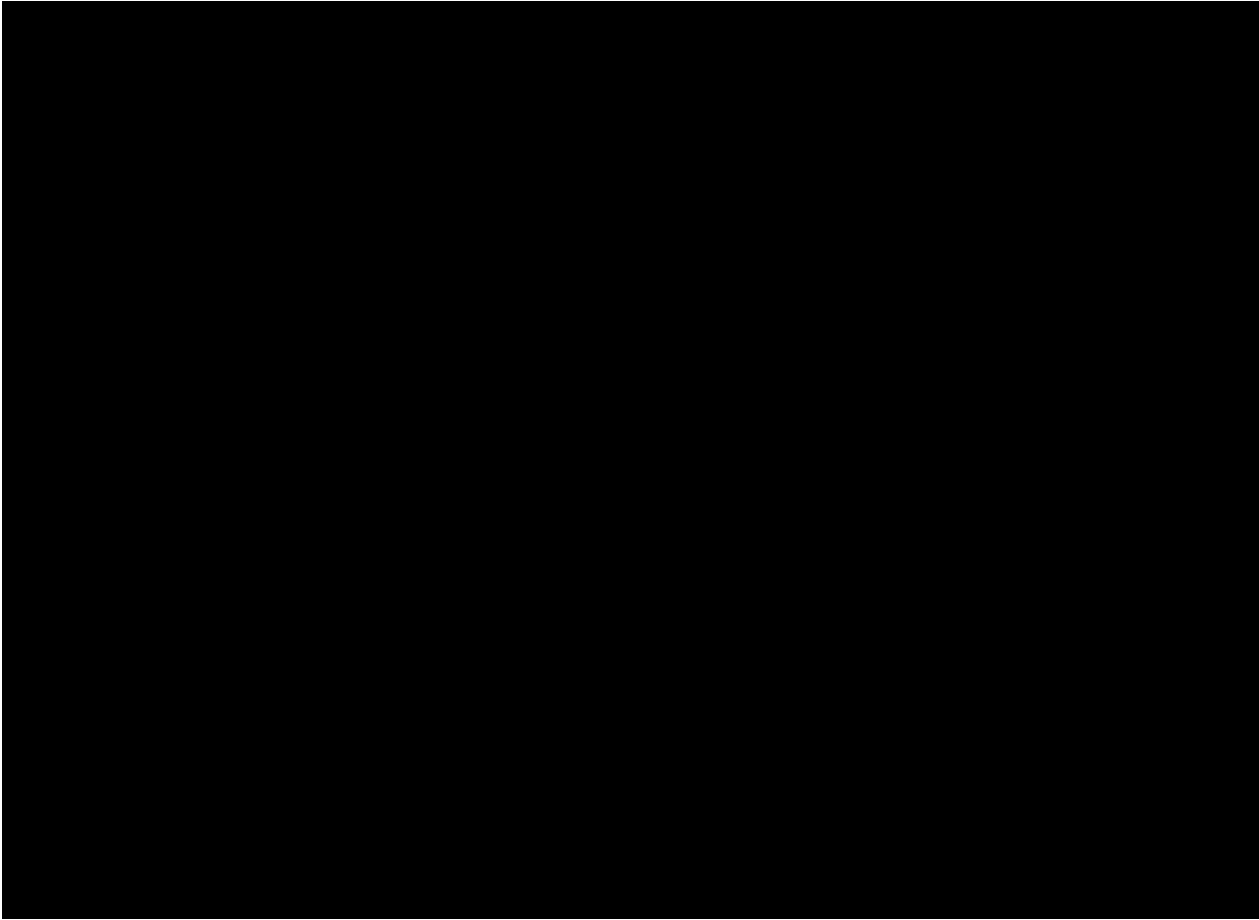


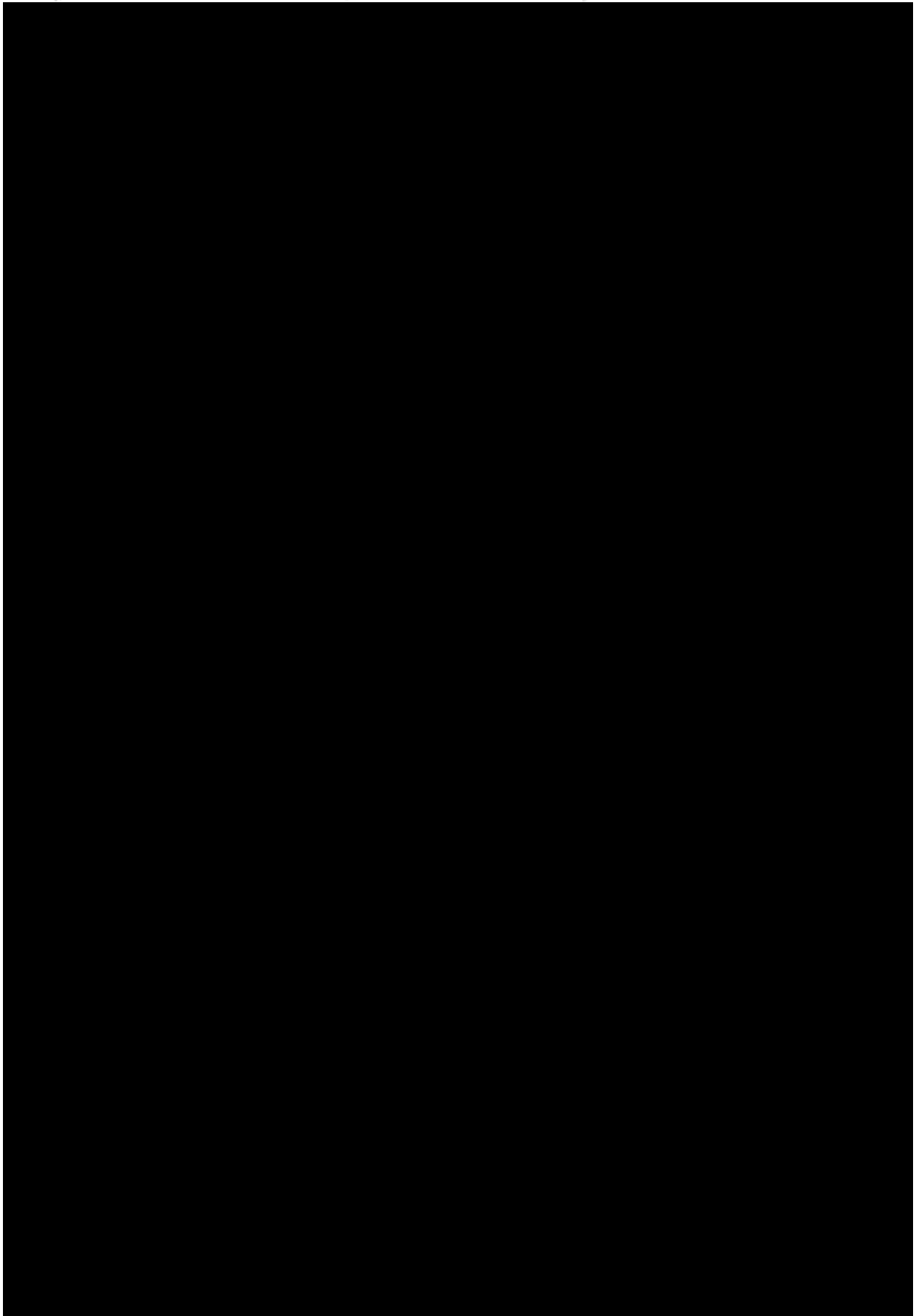




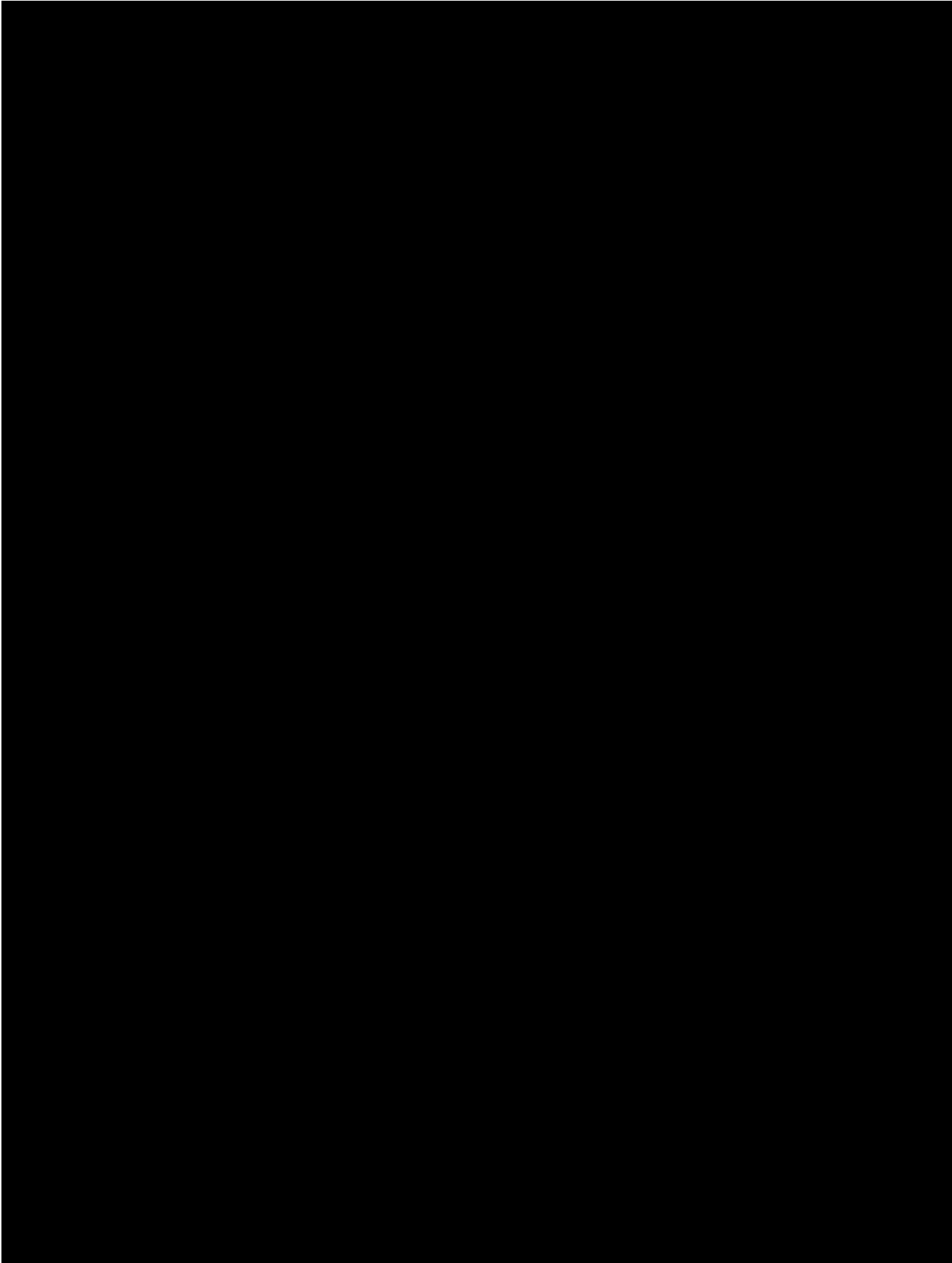


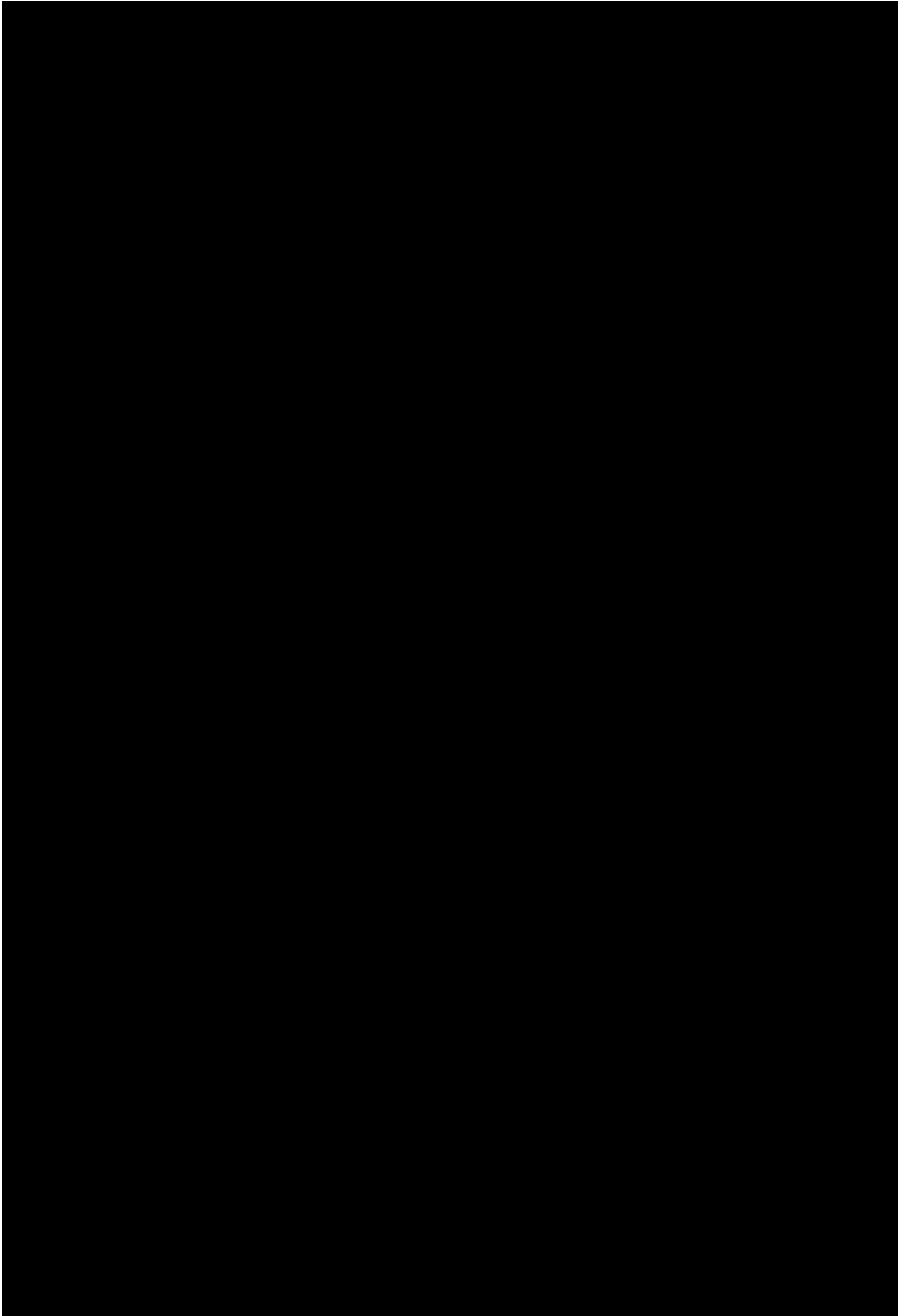


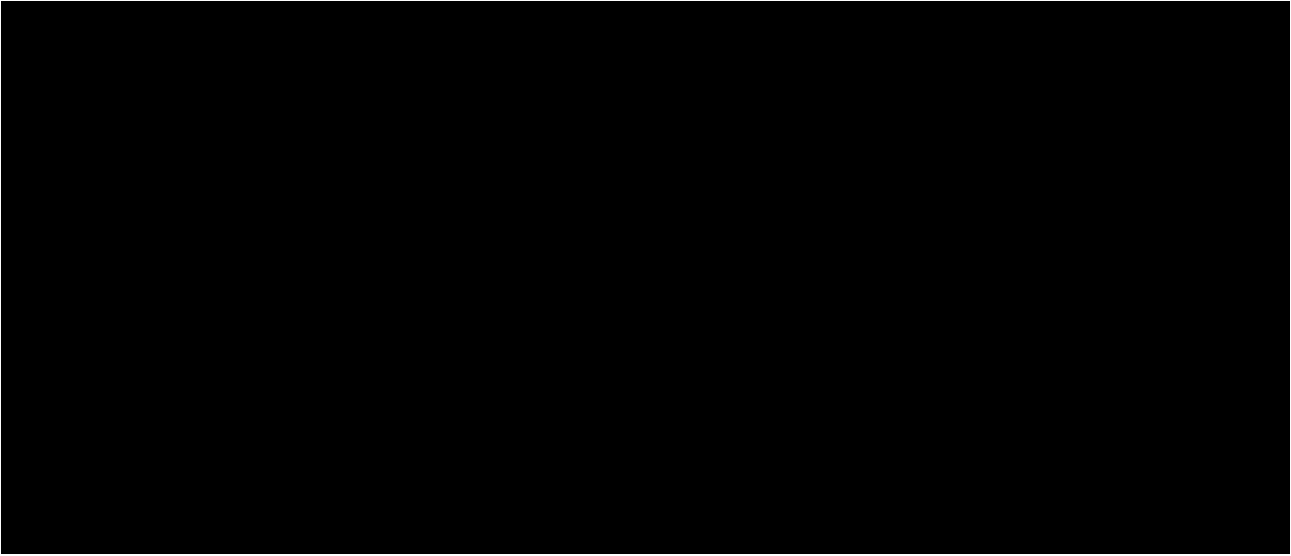




**SCHEDULE 12**







**SCHEDULE 13**

**Commercially Sensitive Information**

