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MEMORANDUM TO CABINET

MÉMOIRE AU CABINET

AMENDMENTS TO THE CANADIAN
HUMAN RIGHTS ACT

AMENDEMENTS À LA LOI
CANADIENNE SUR LES DROITS DE
LA PERSONNE

September , 1986

Le septembre 1986

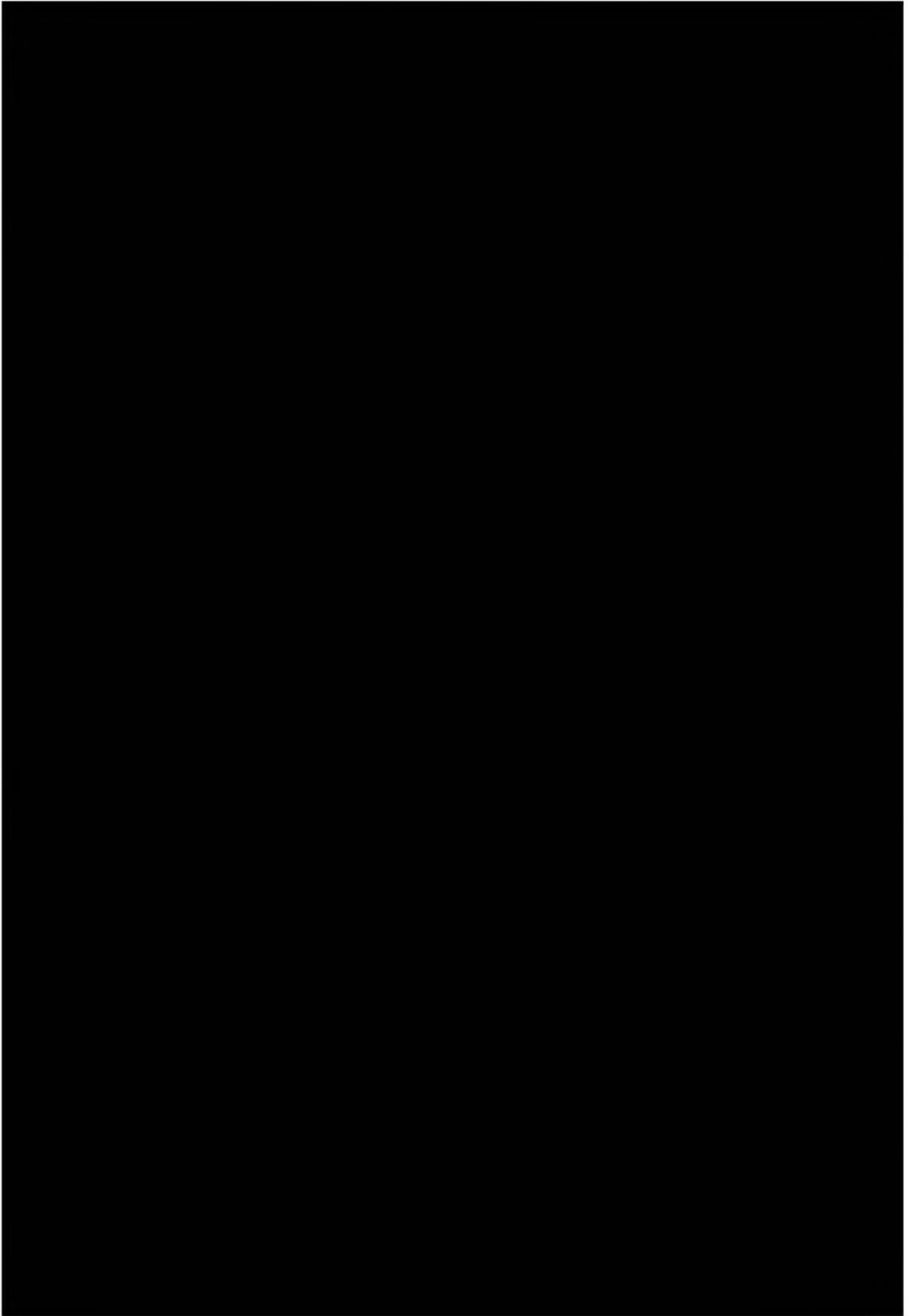
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Ministre de la Justice

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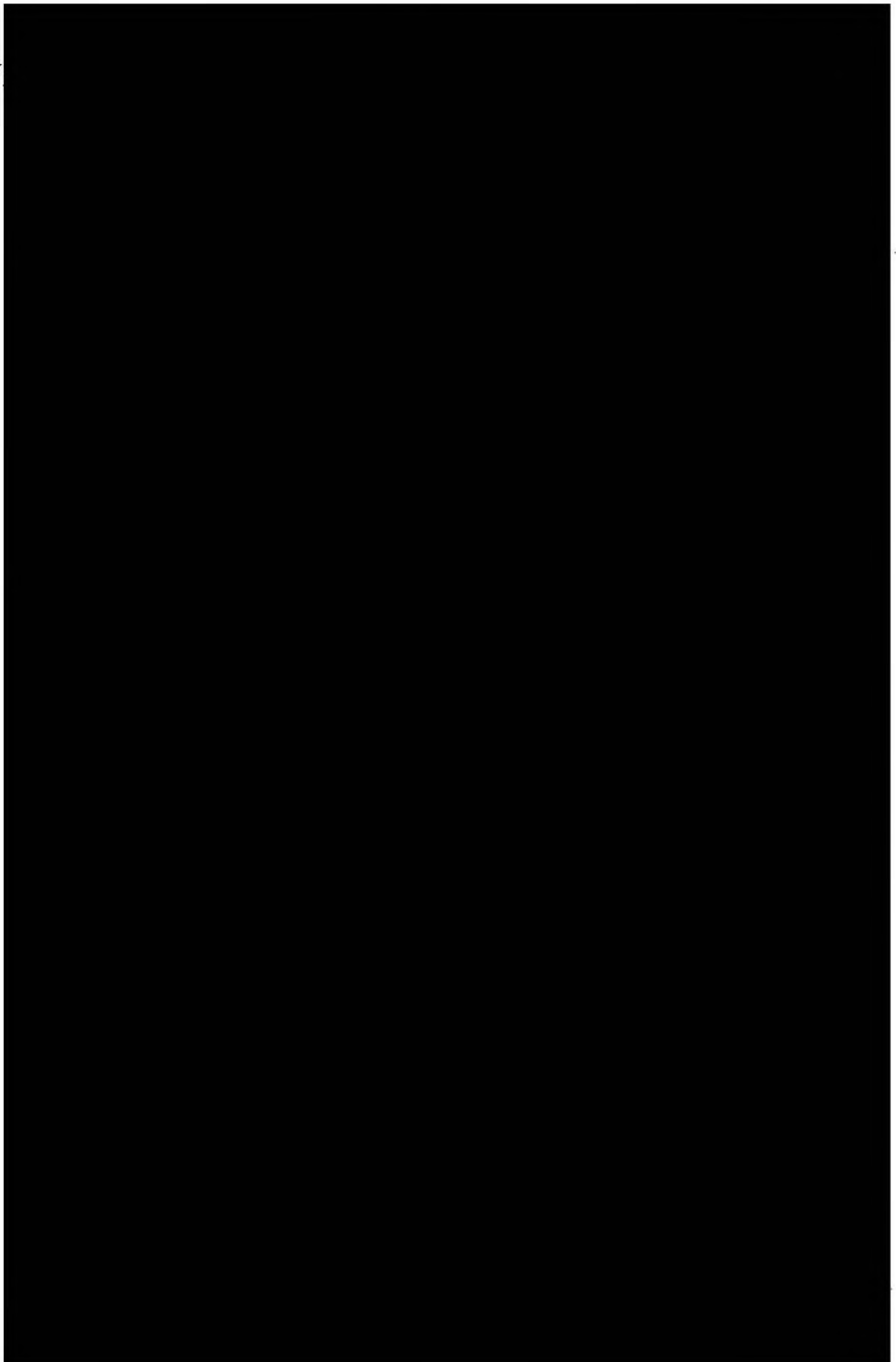
MINISTERIAL RECOMMENDATION



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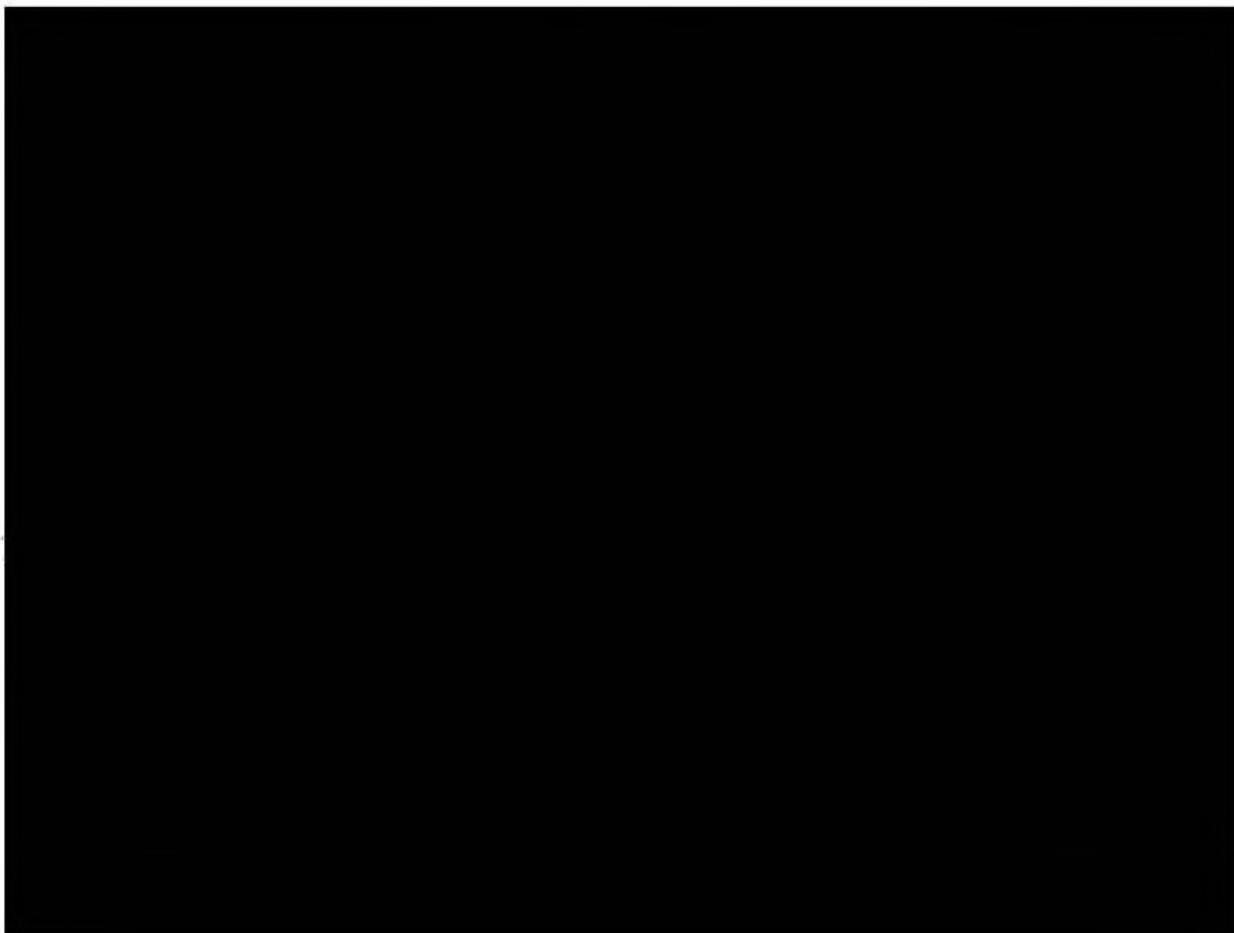
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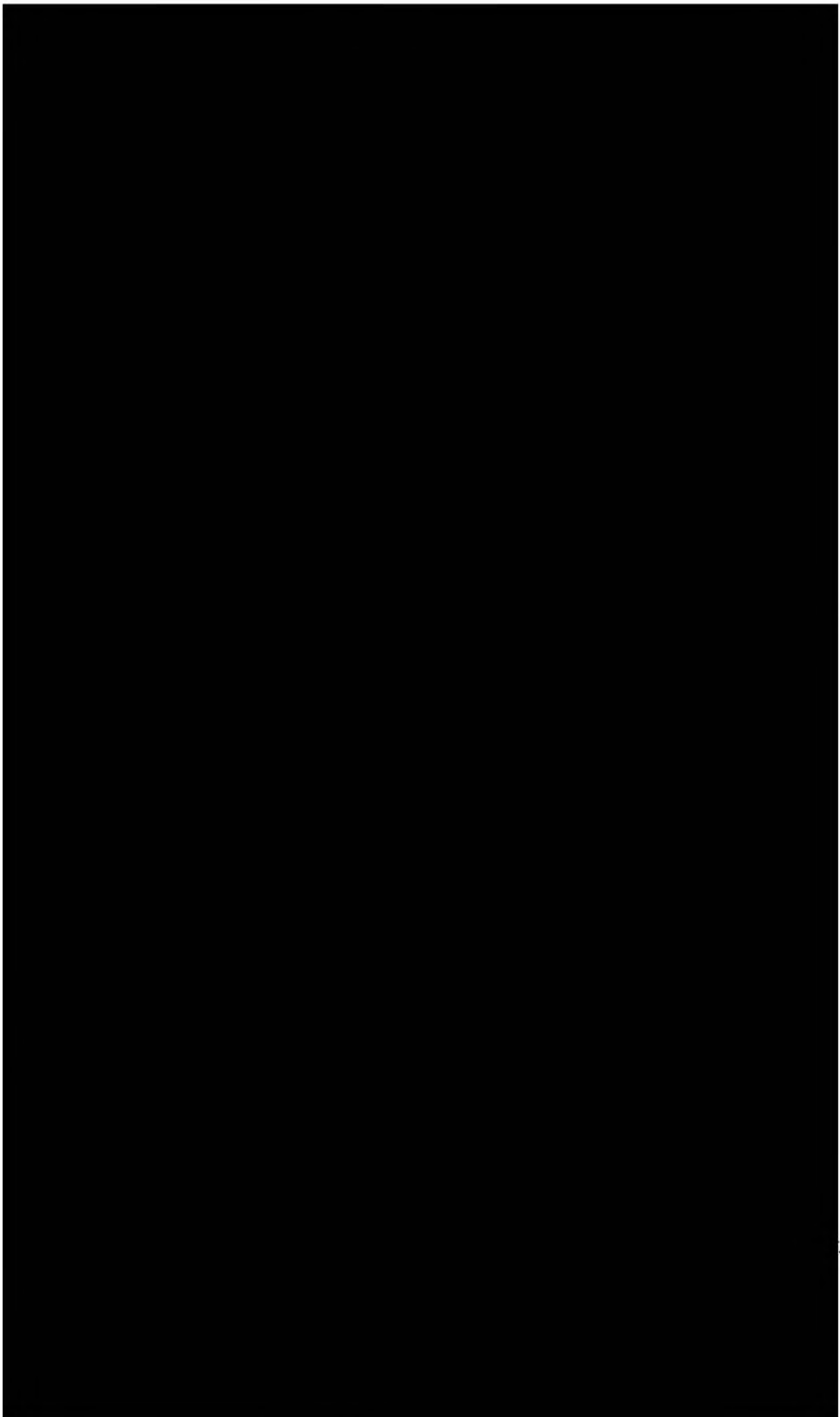


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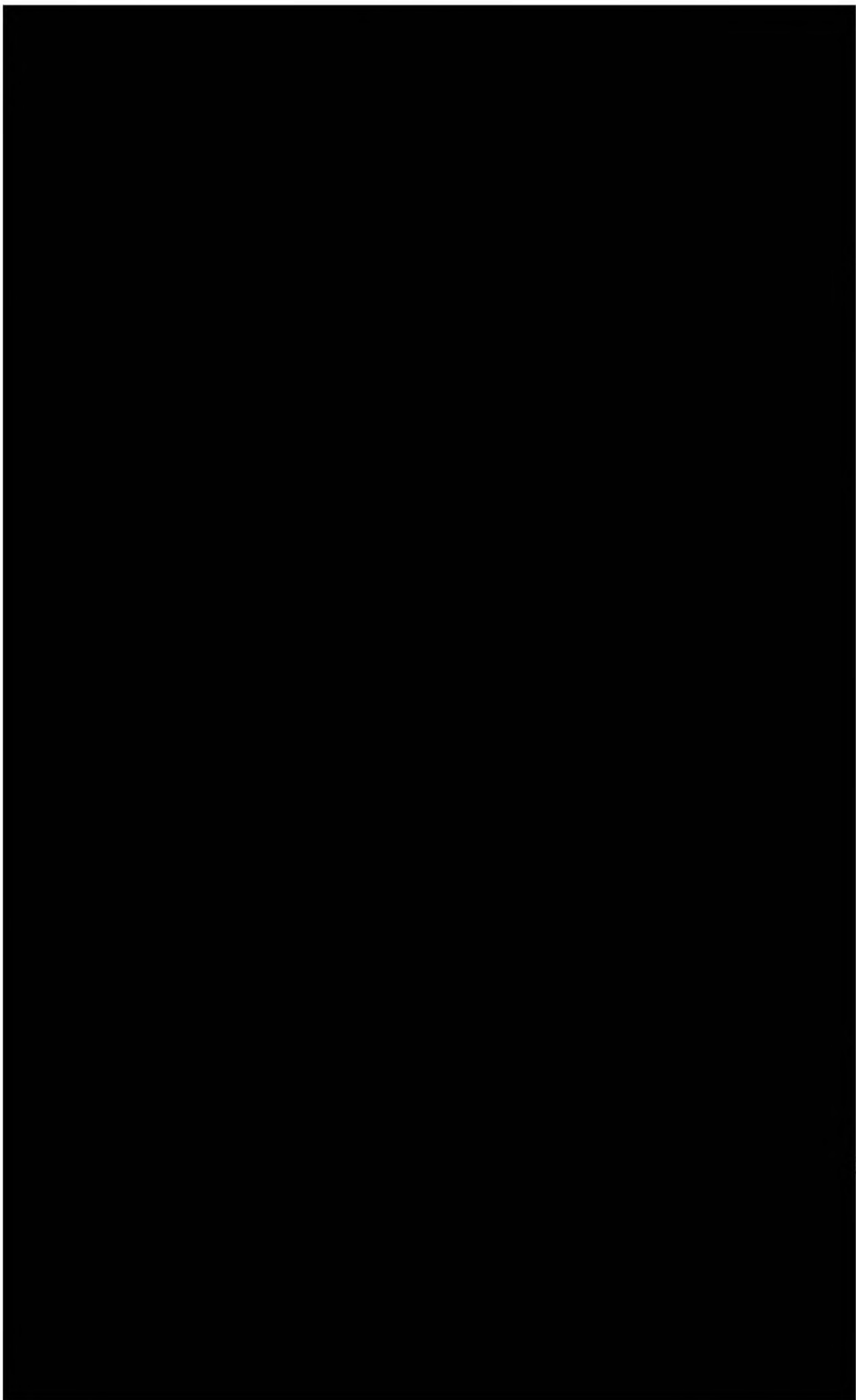
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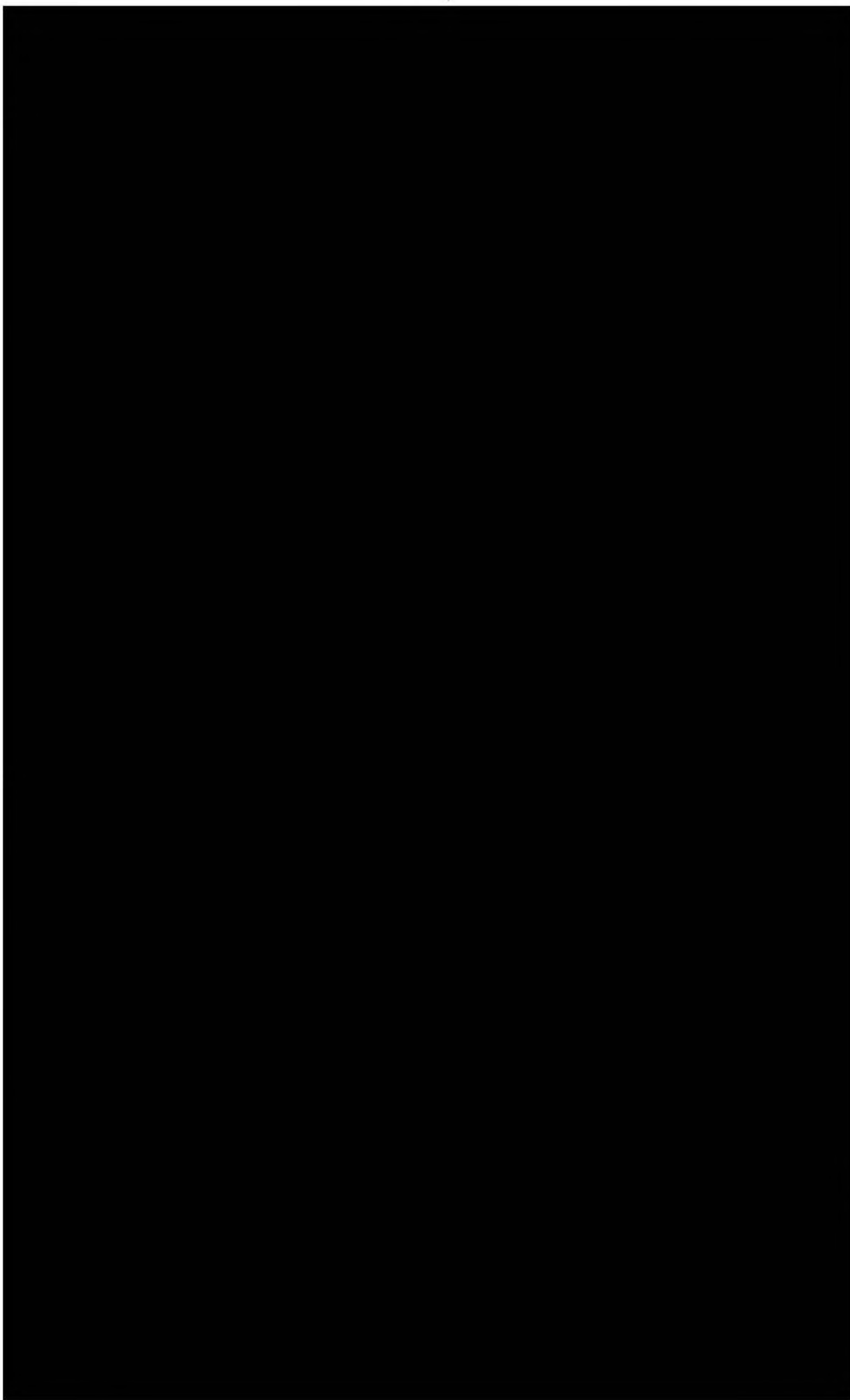
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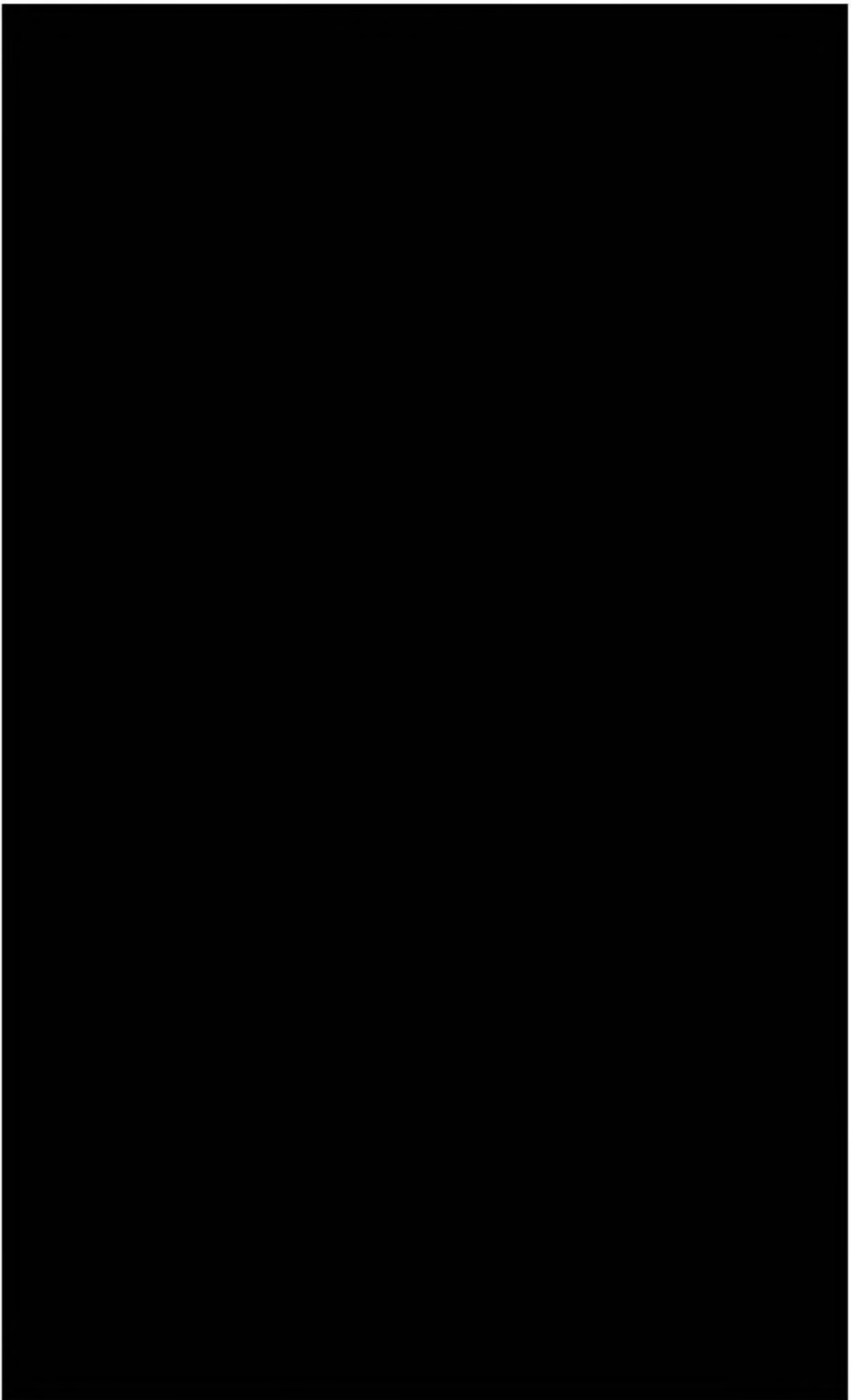
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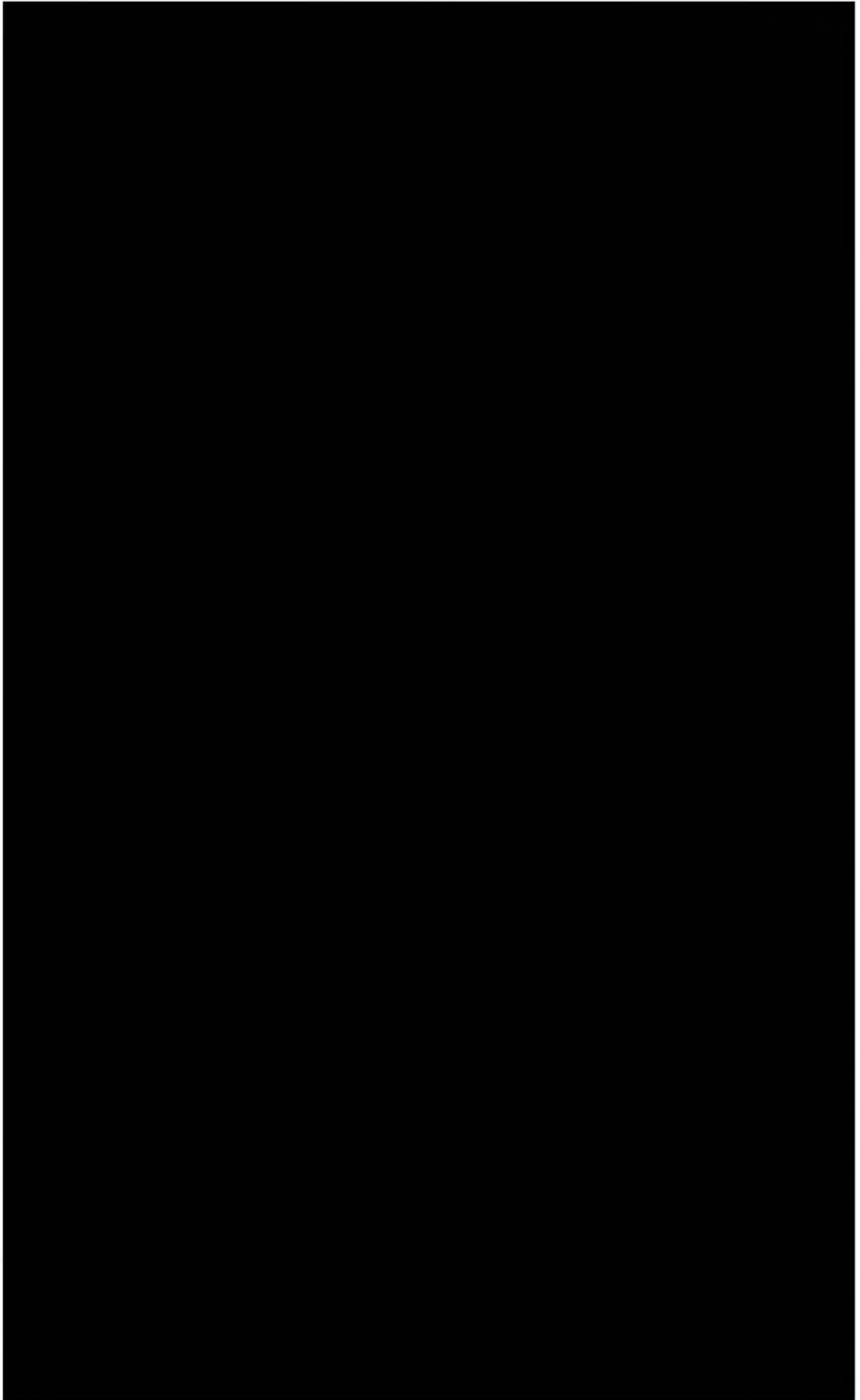
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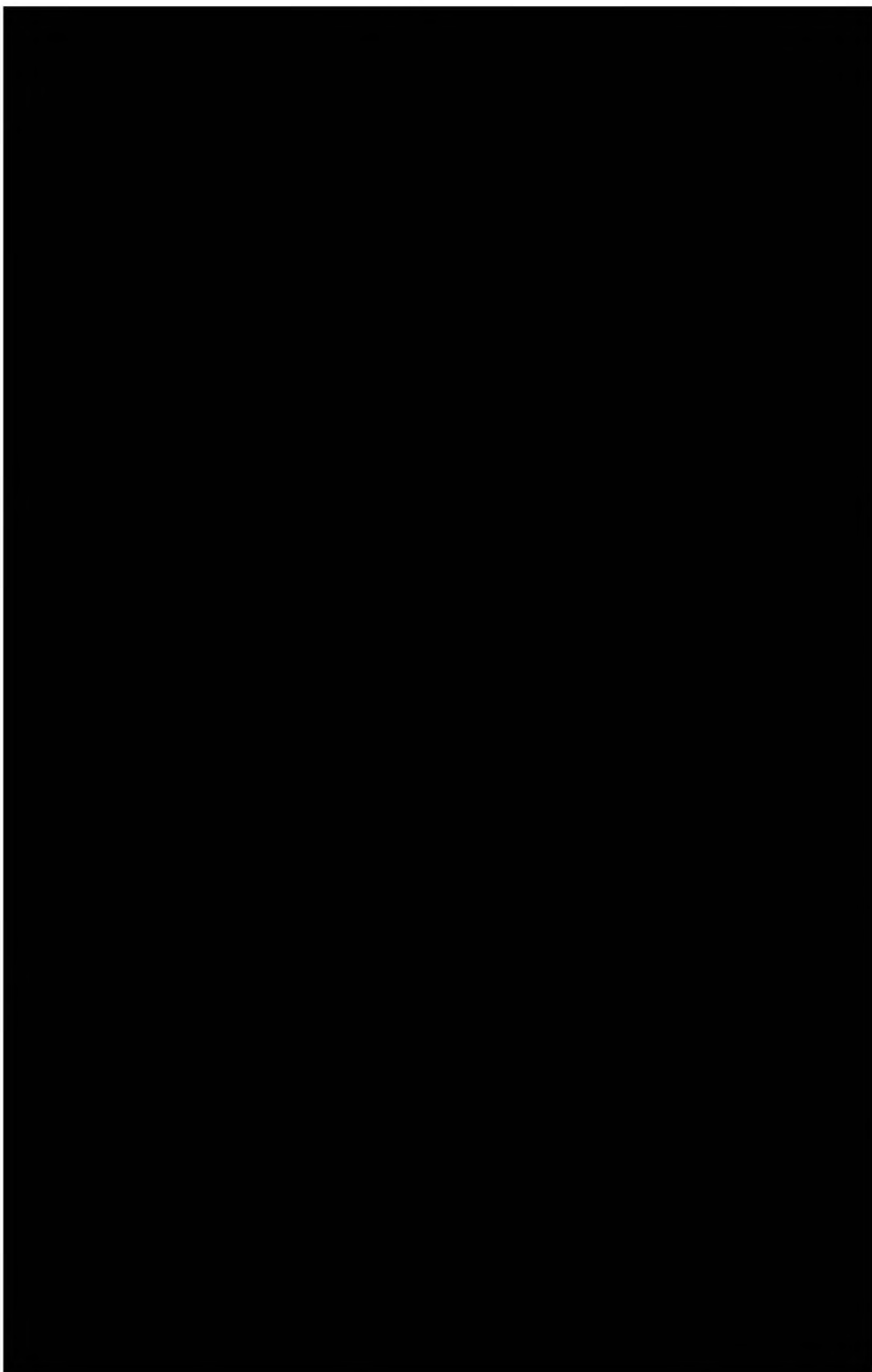


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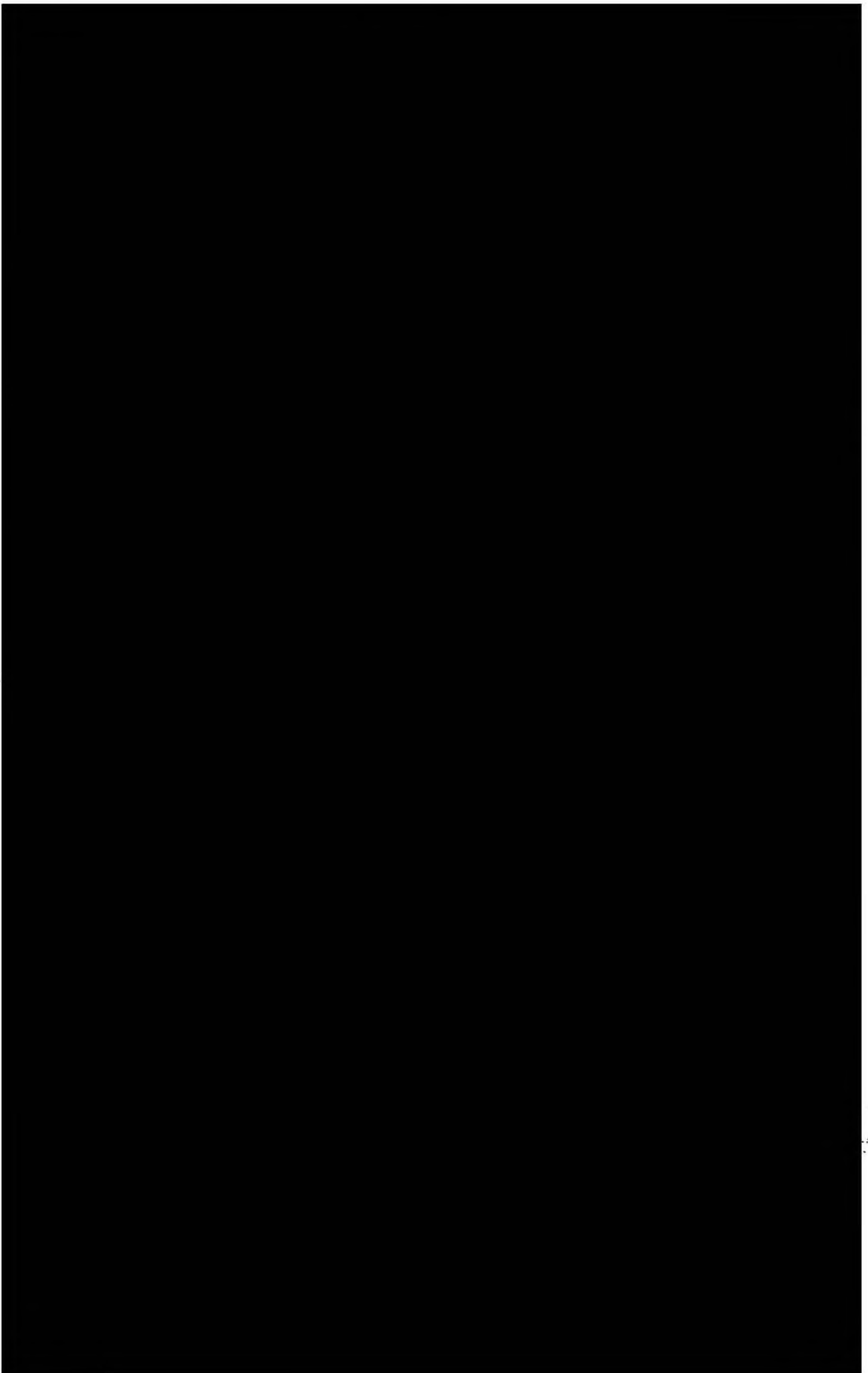
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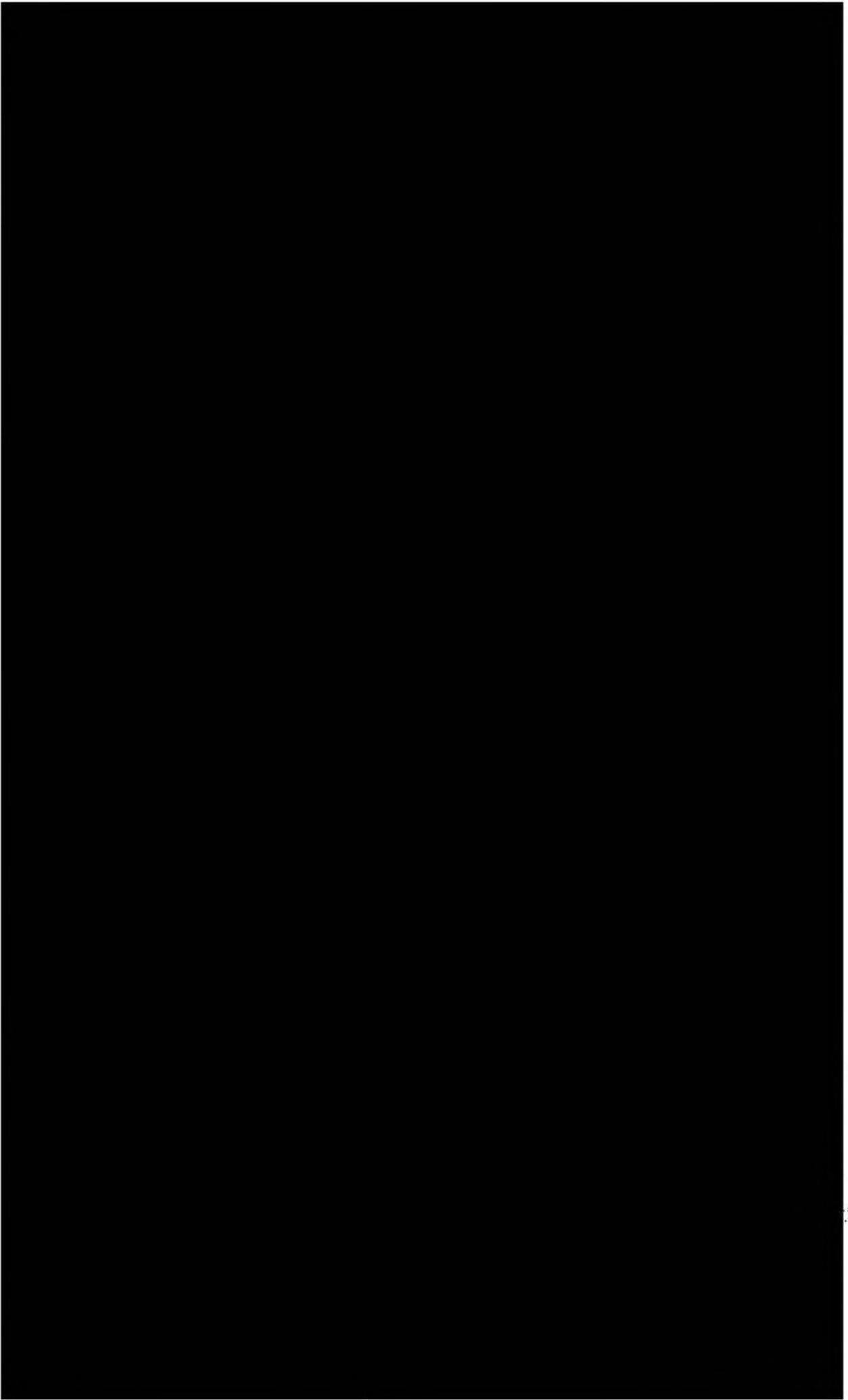
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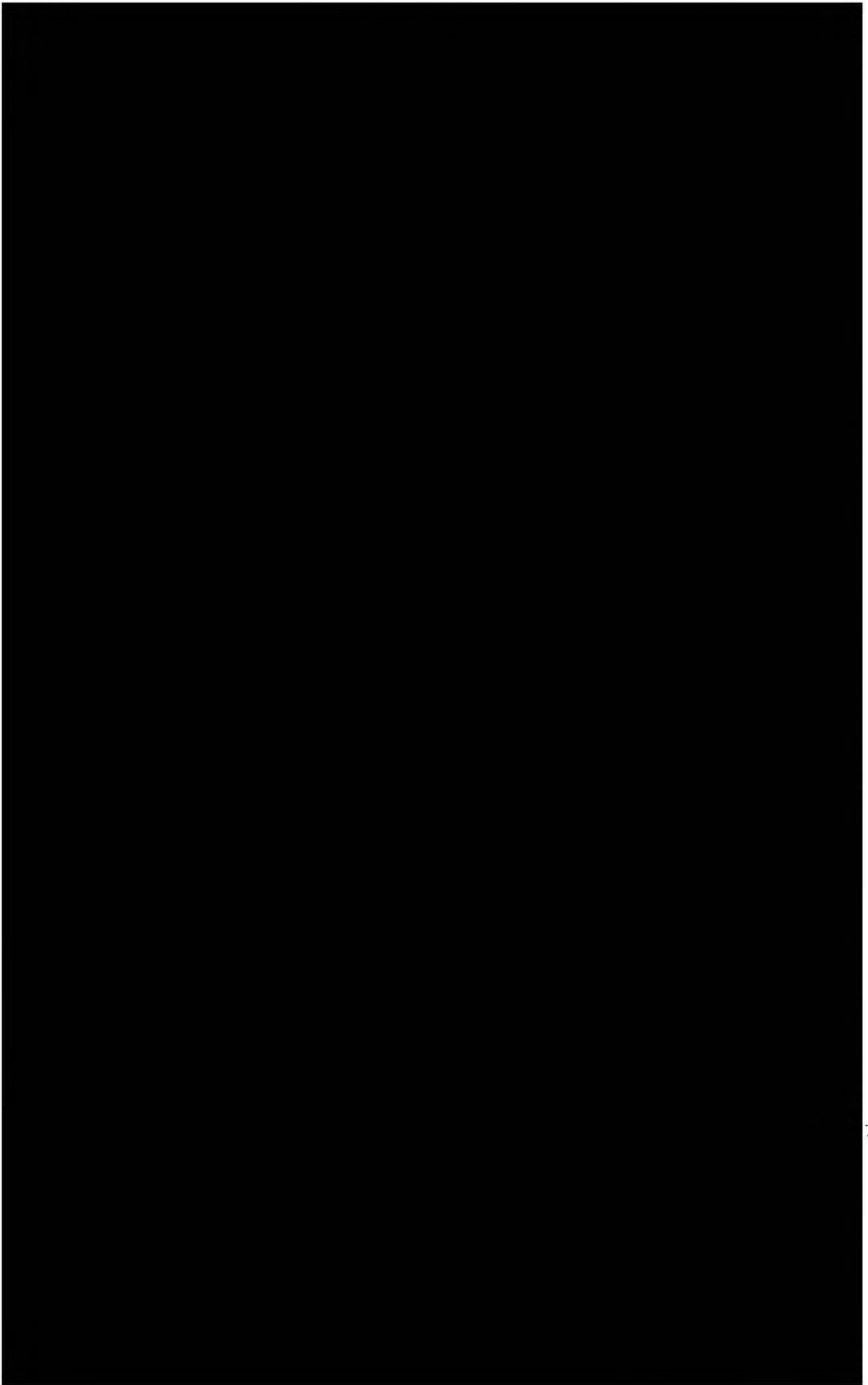
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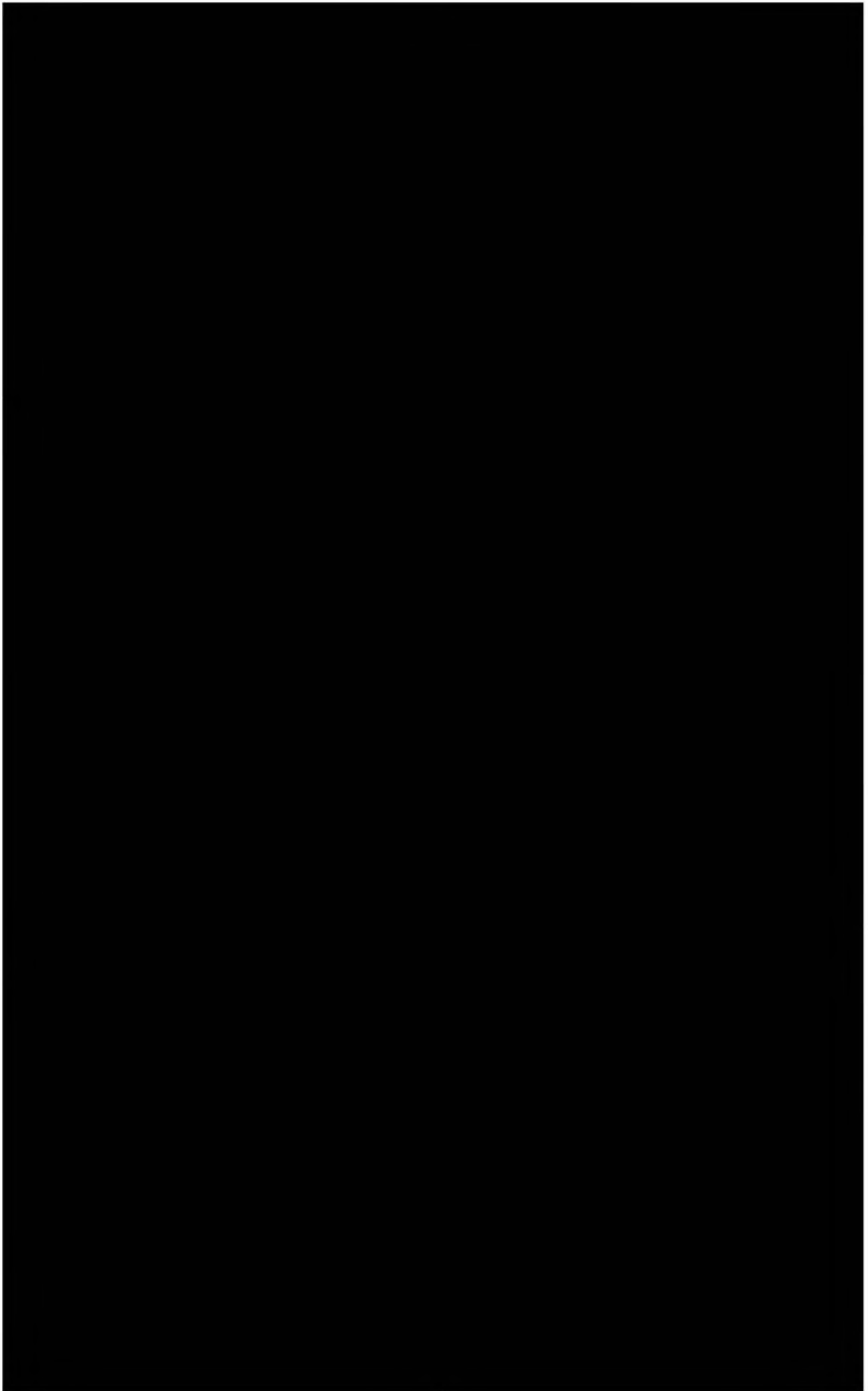
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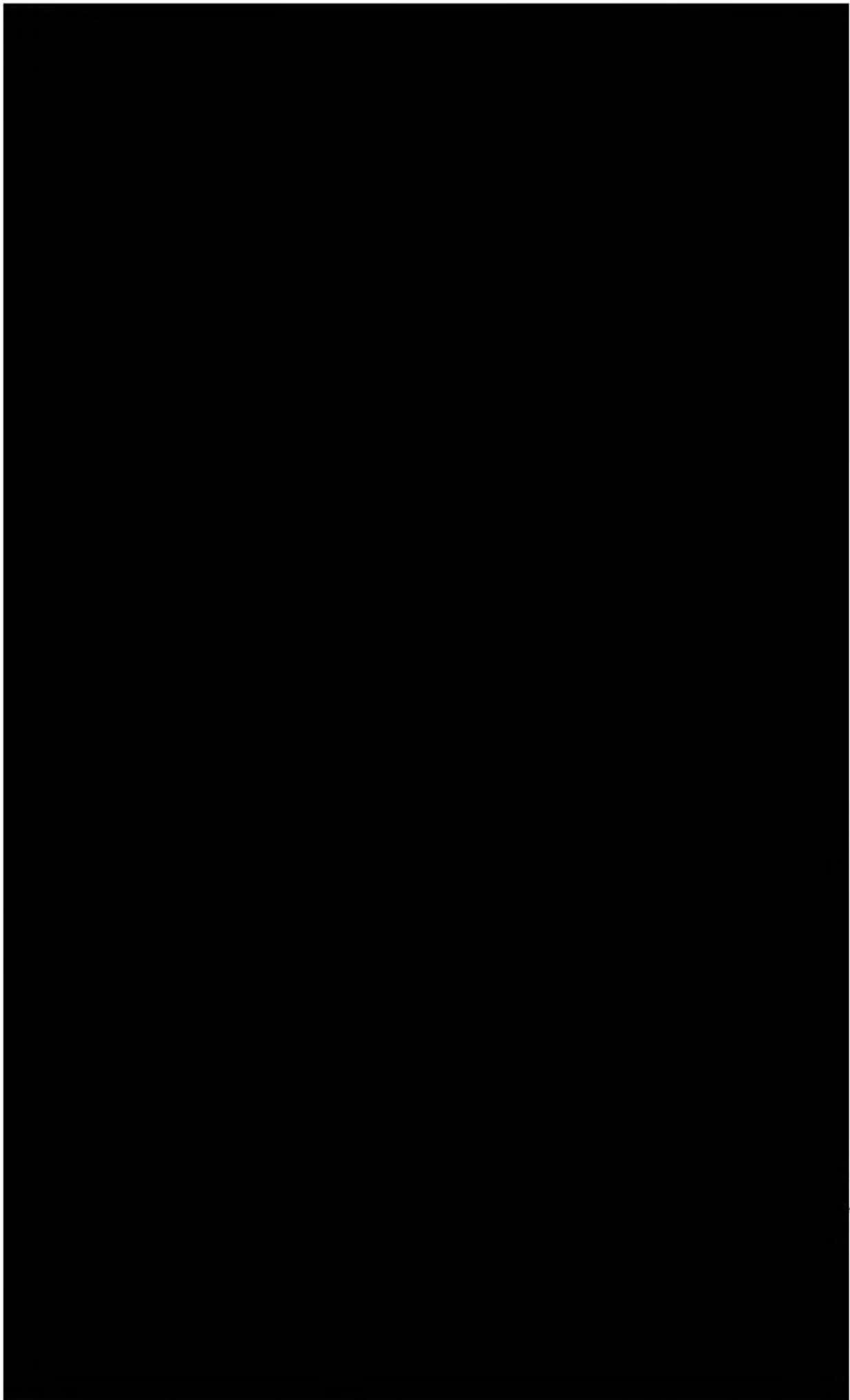
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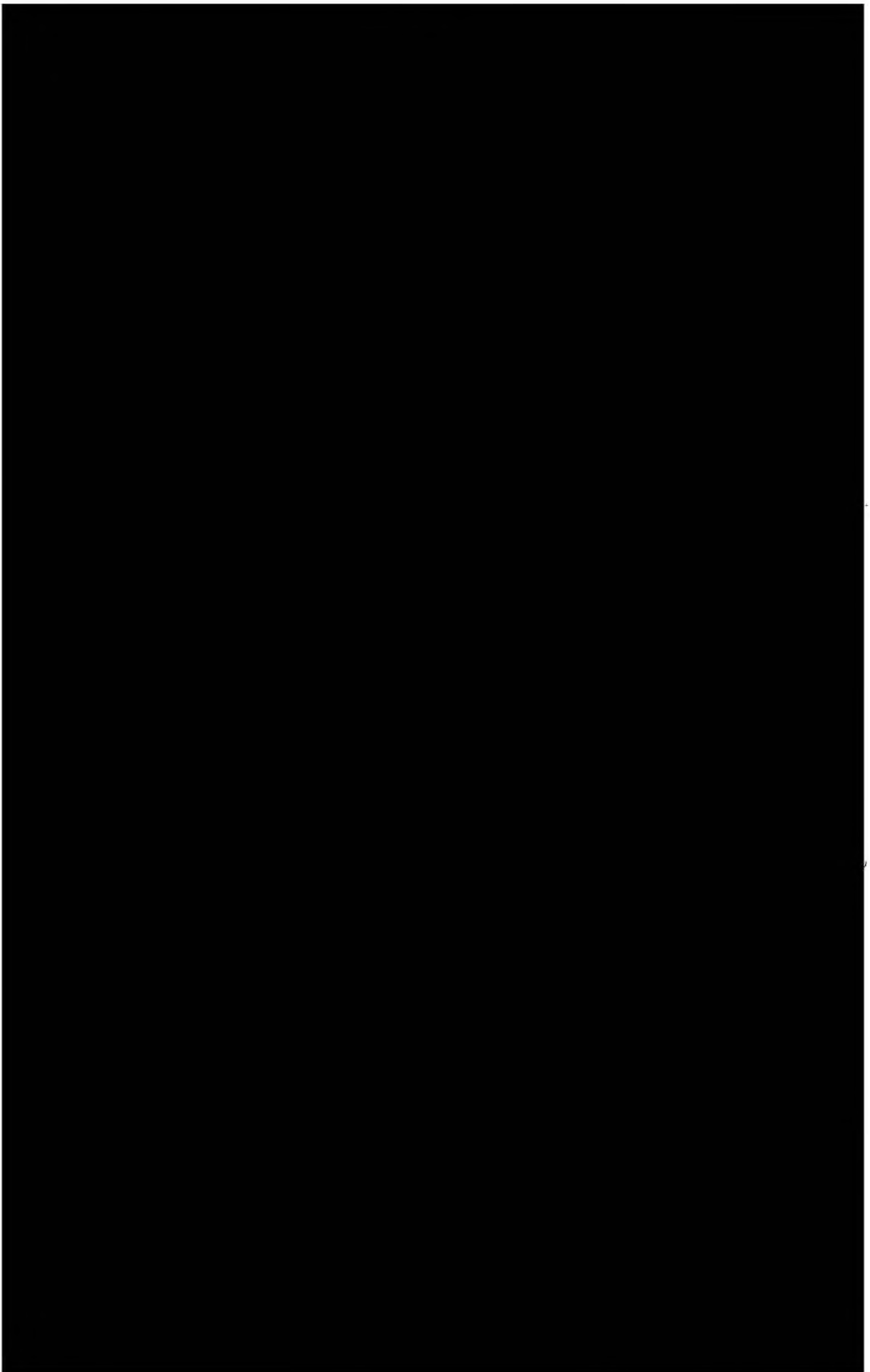
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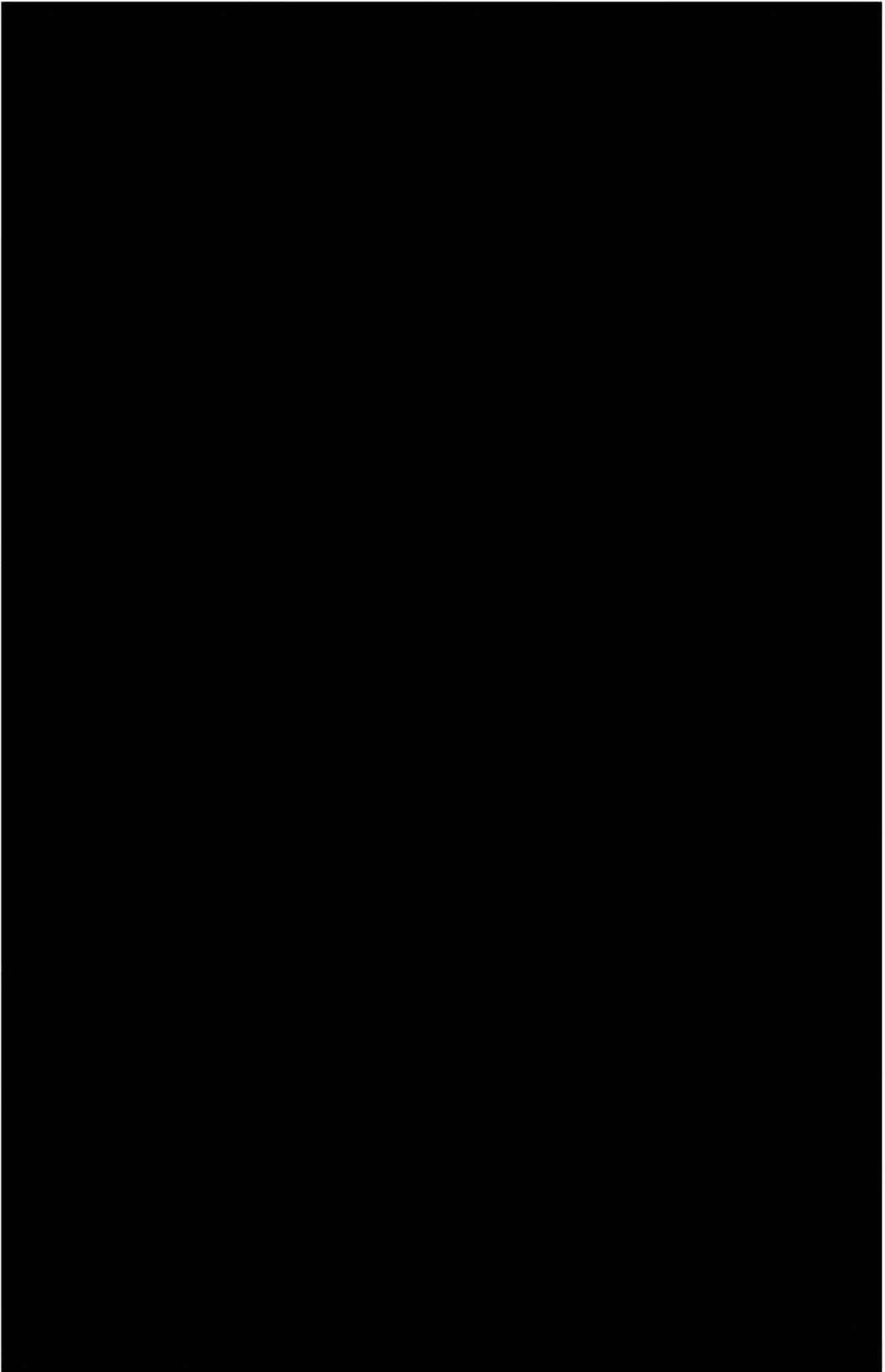
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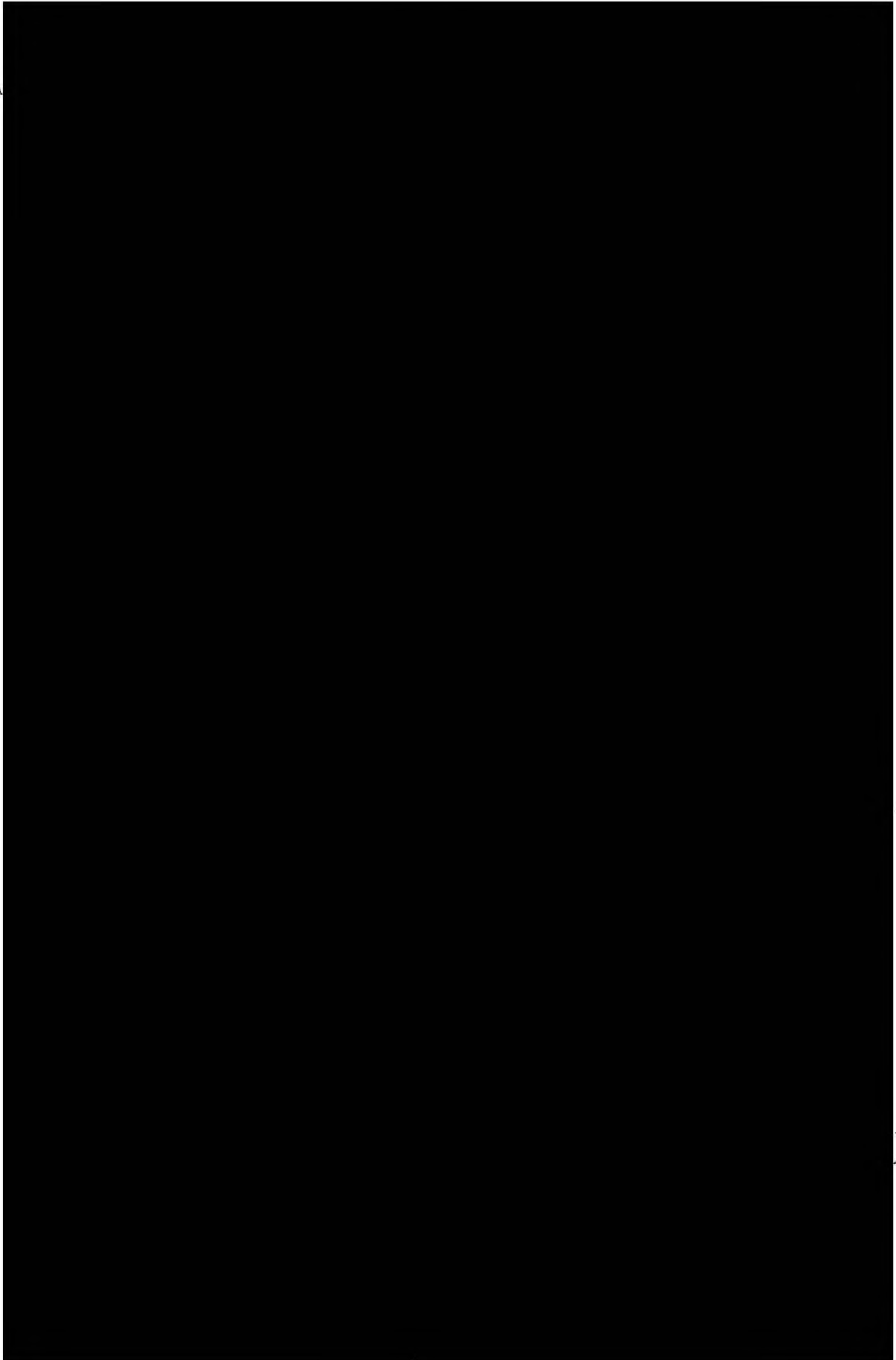
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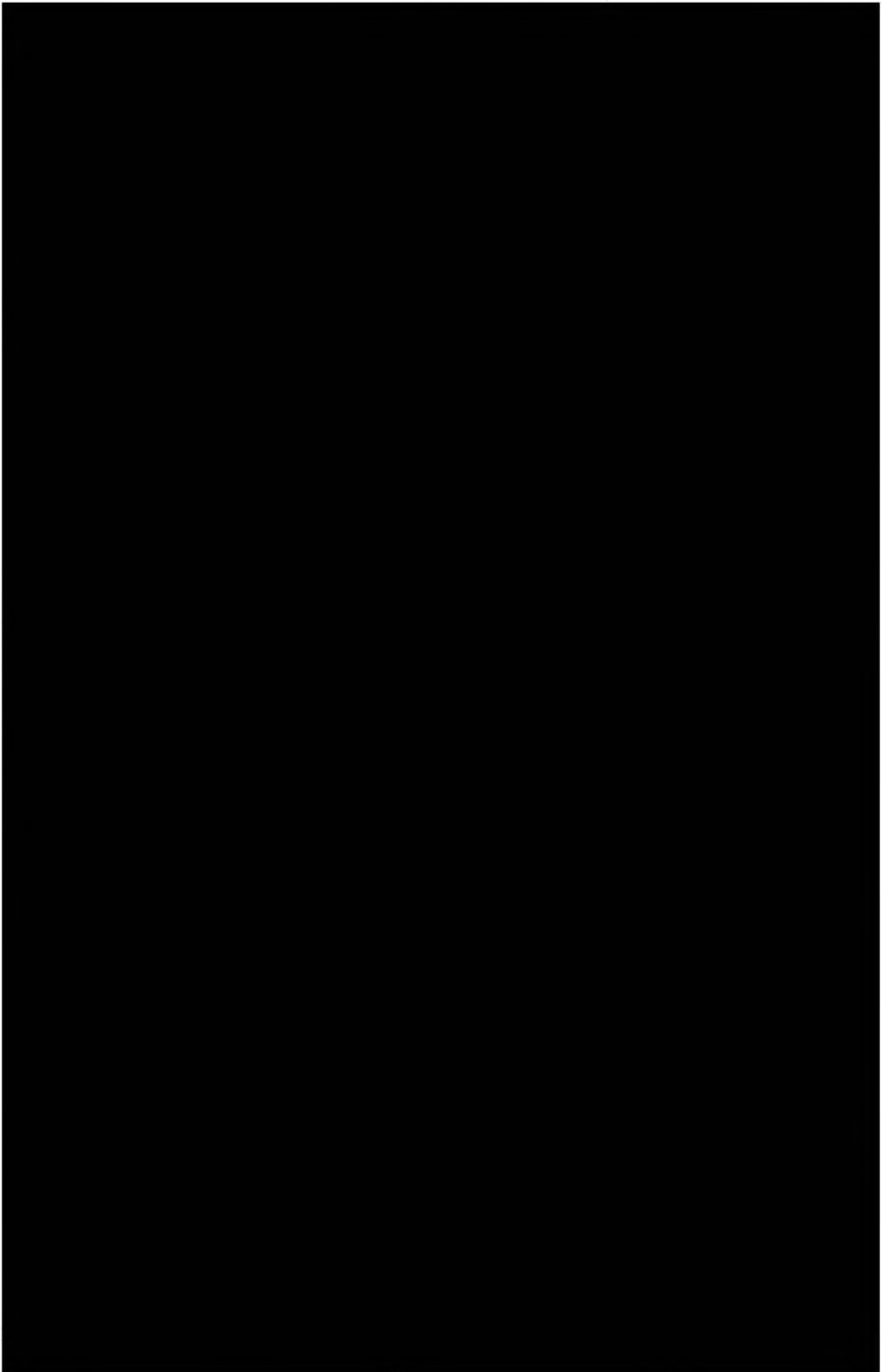
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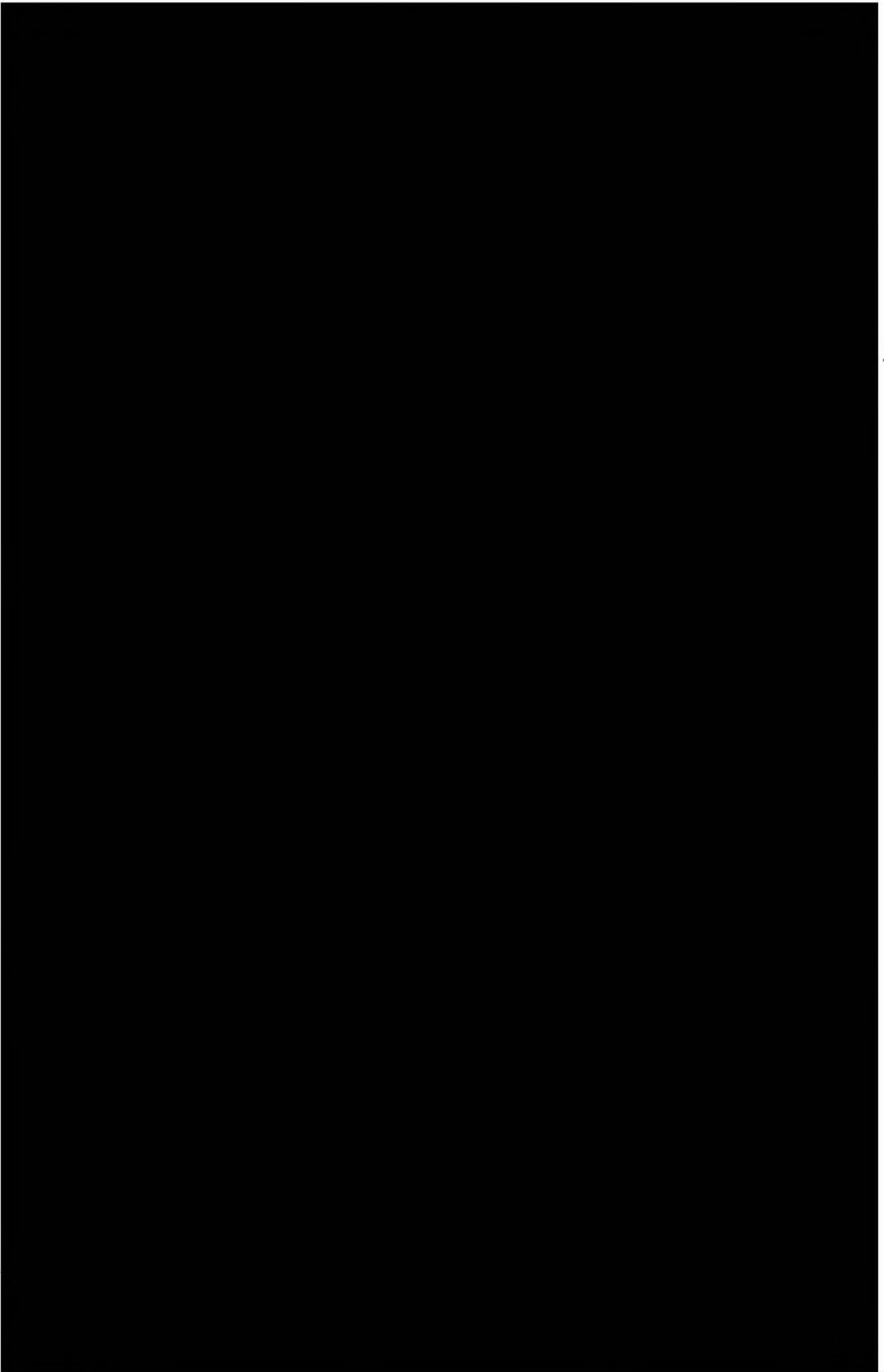


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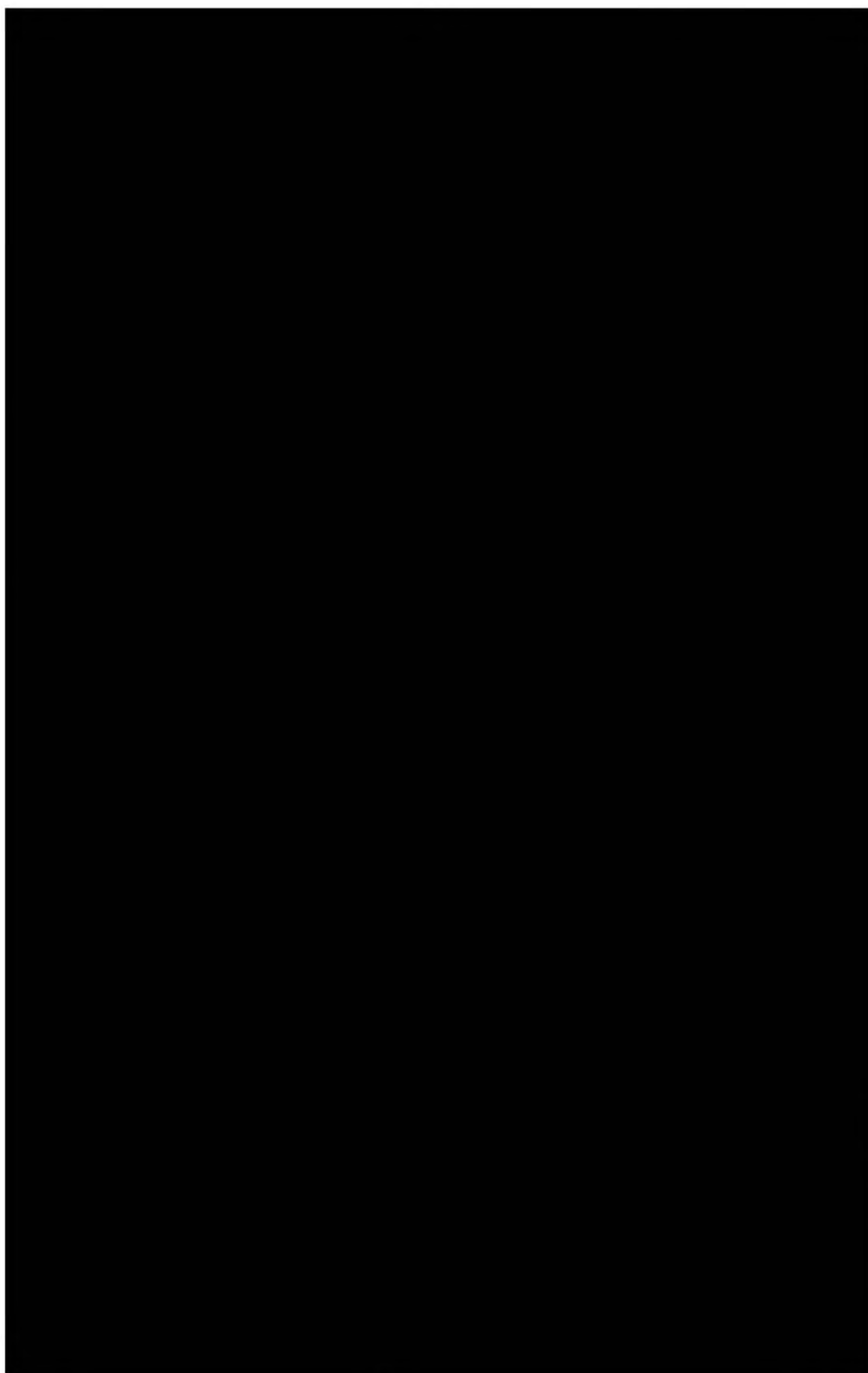
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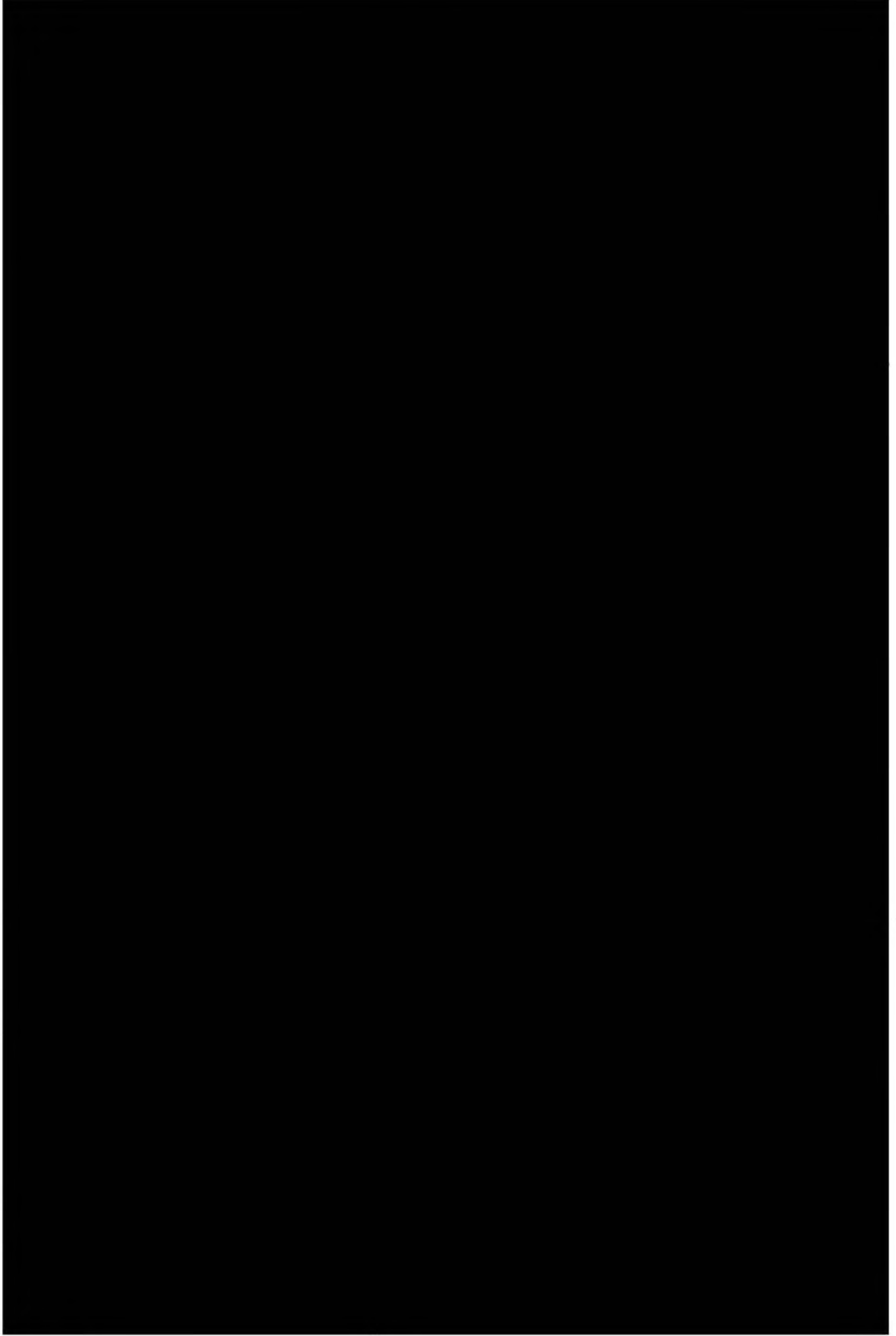
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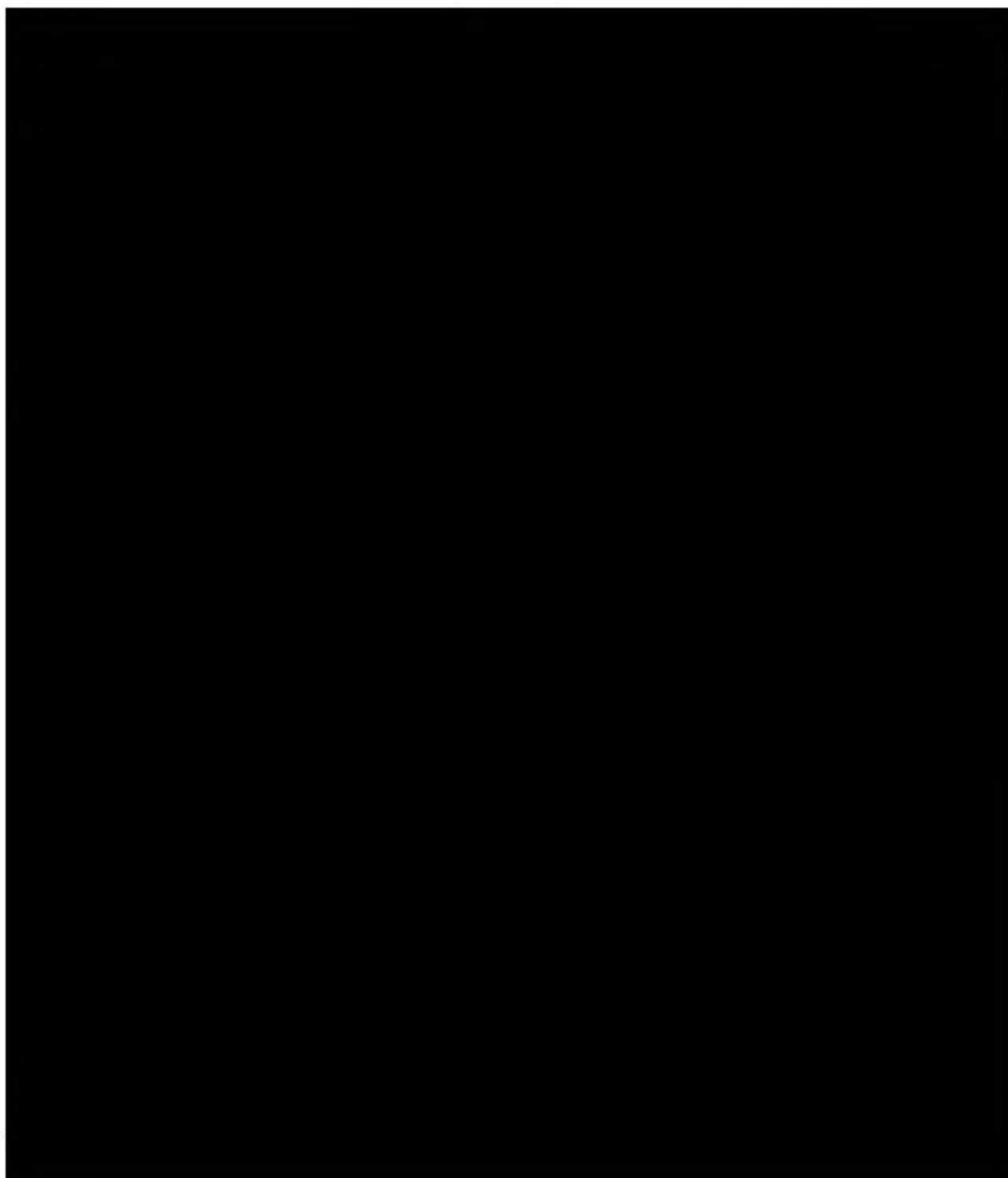
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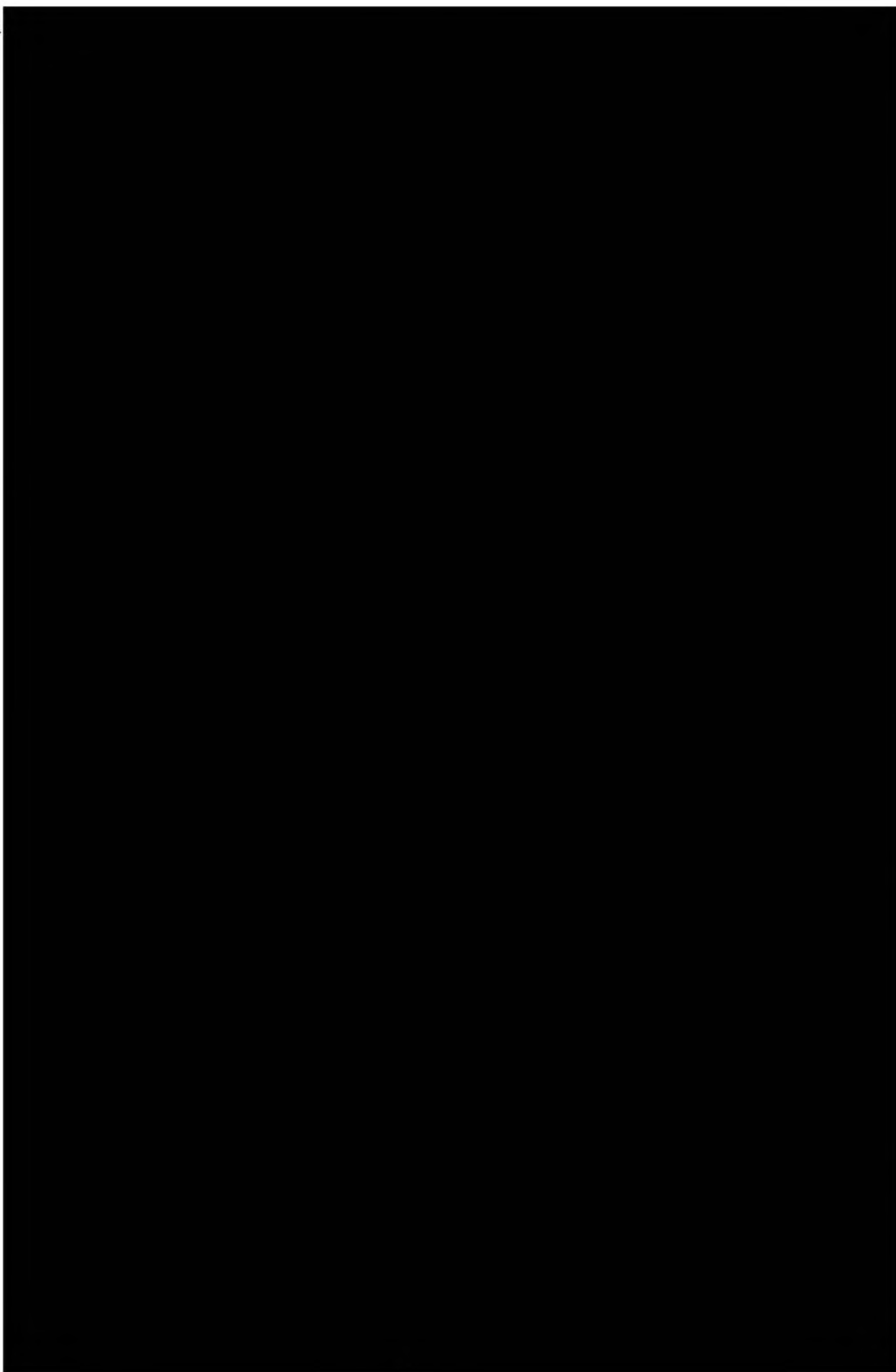
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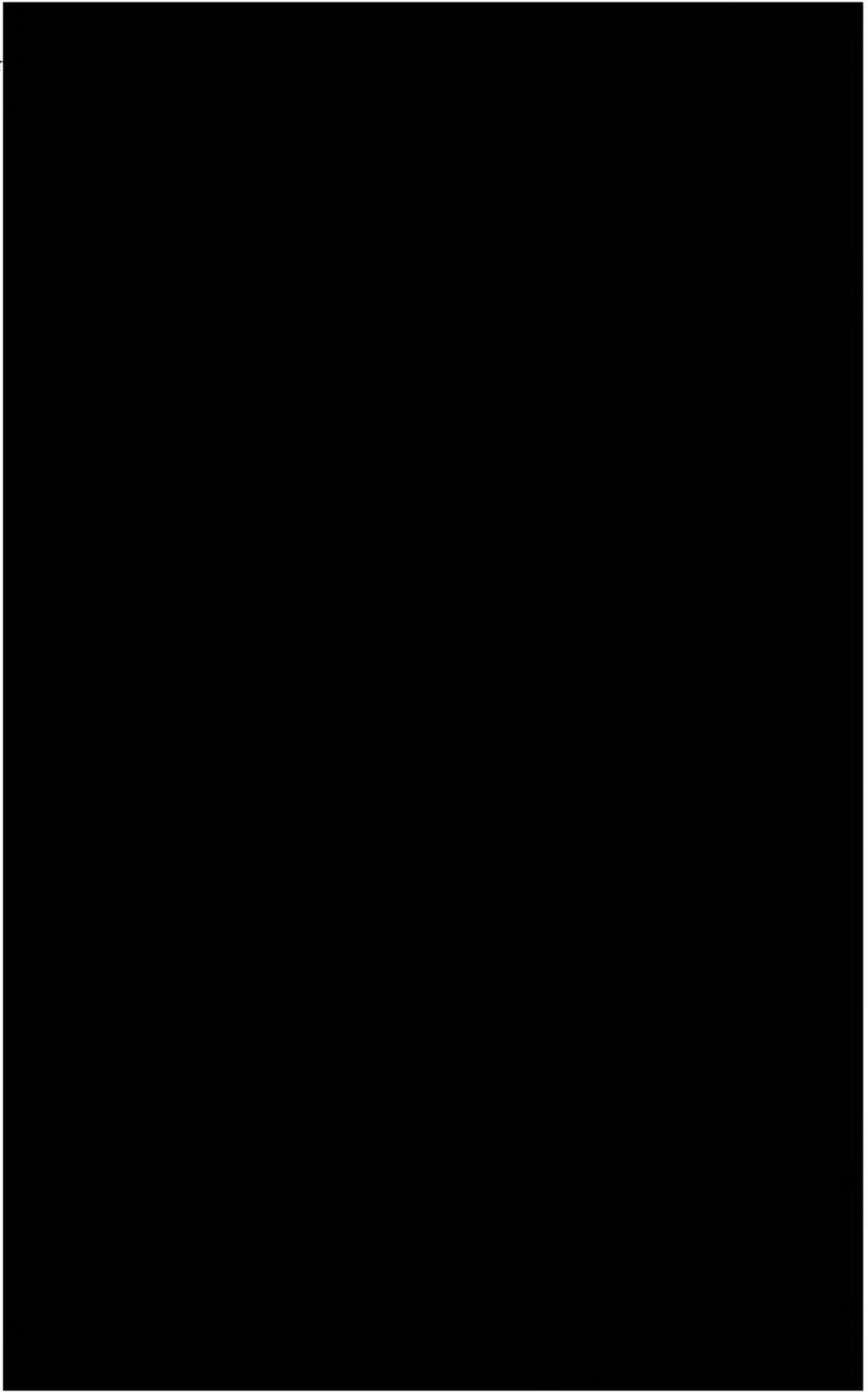


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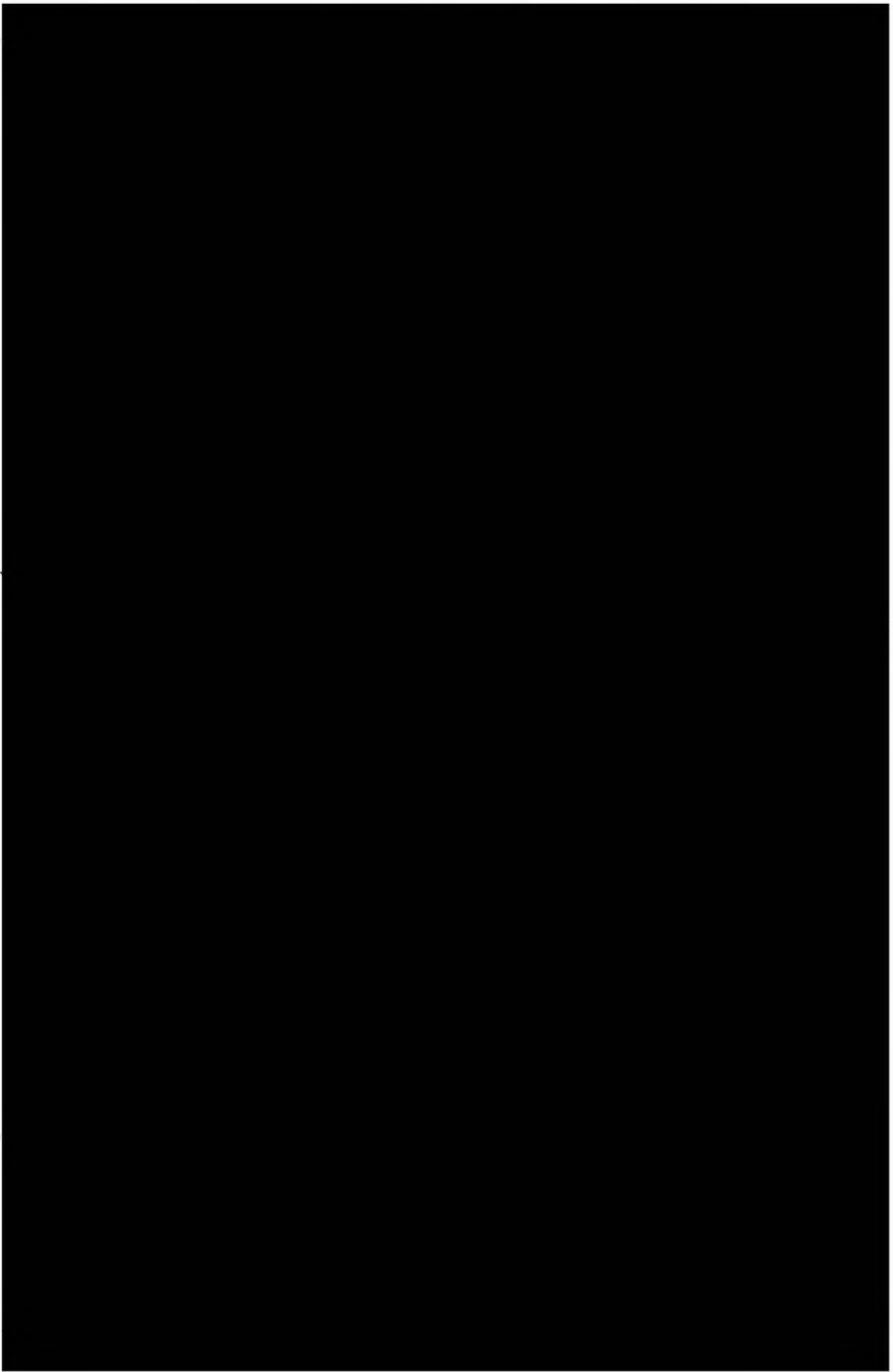


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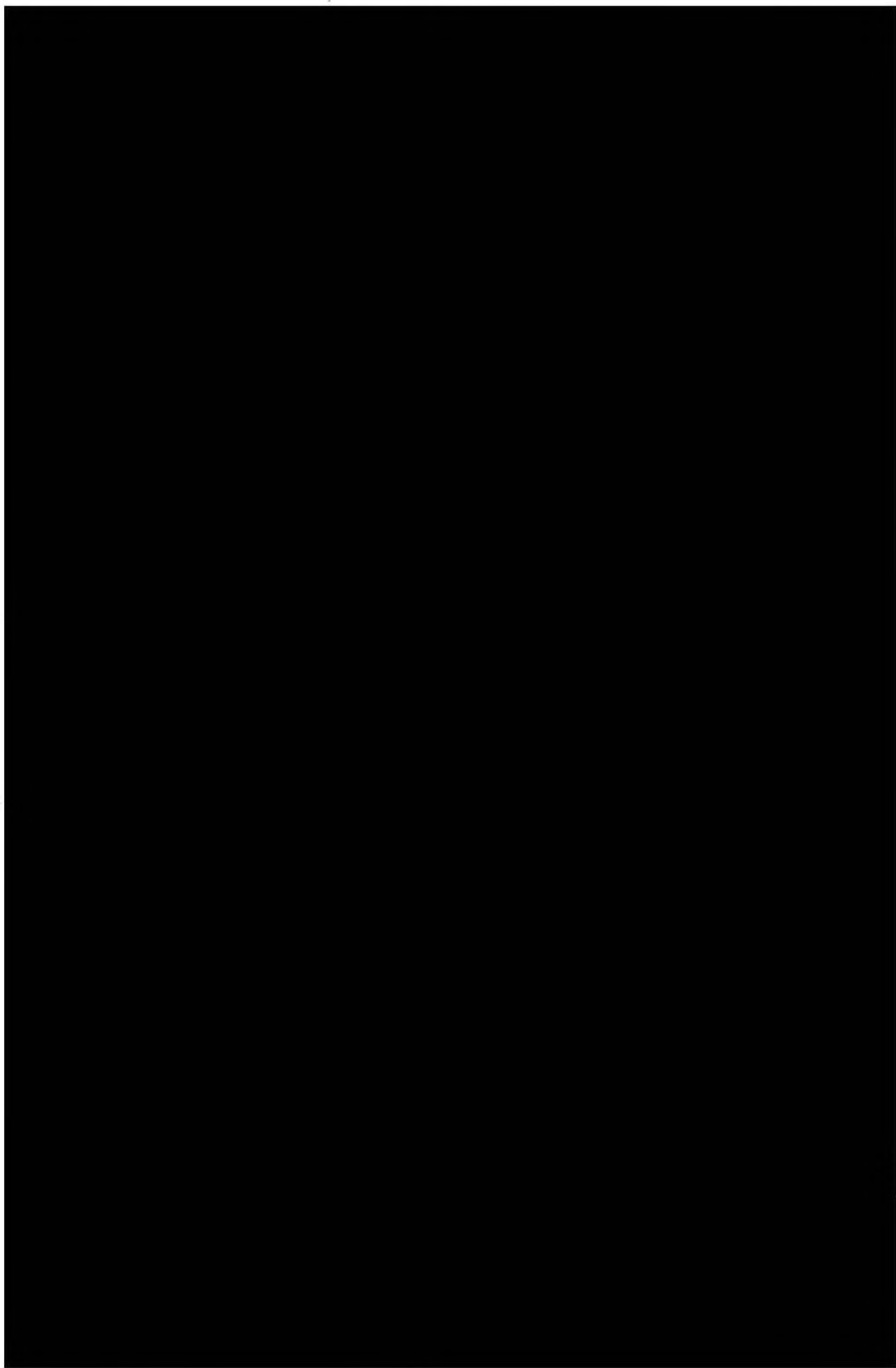


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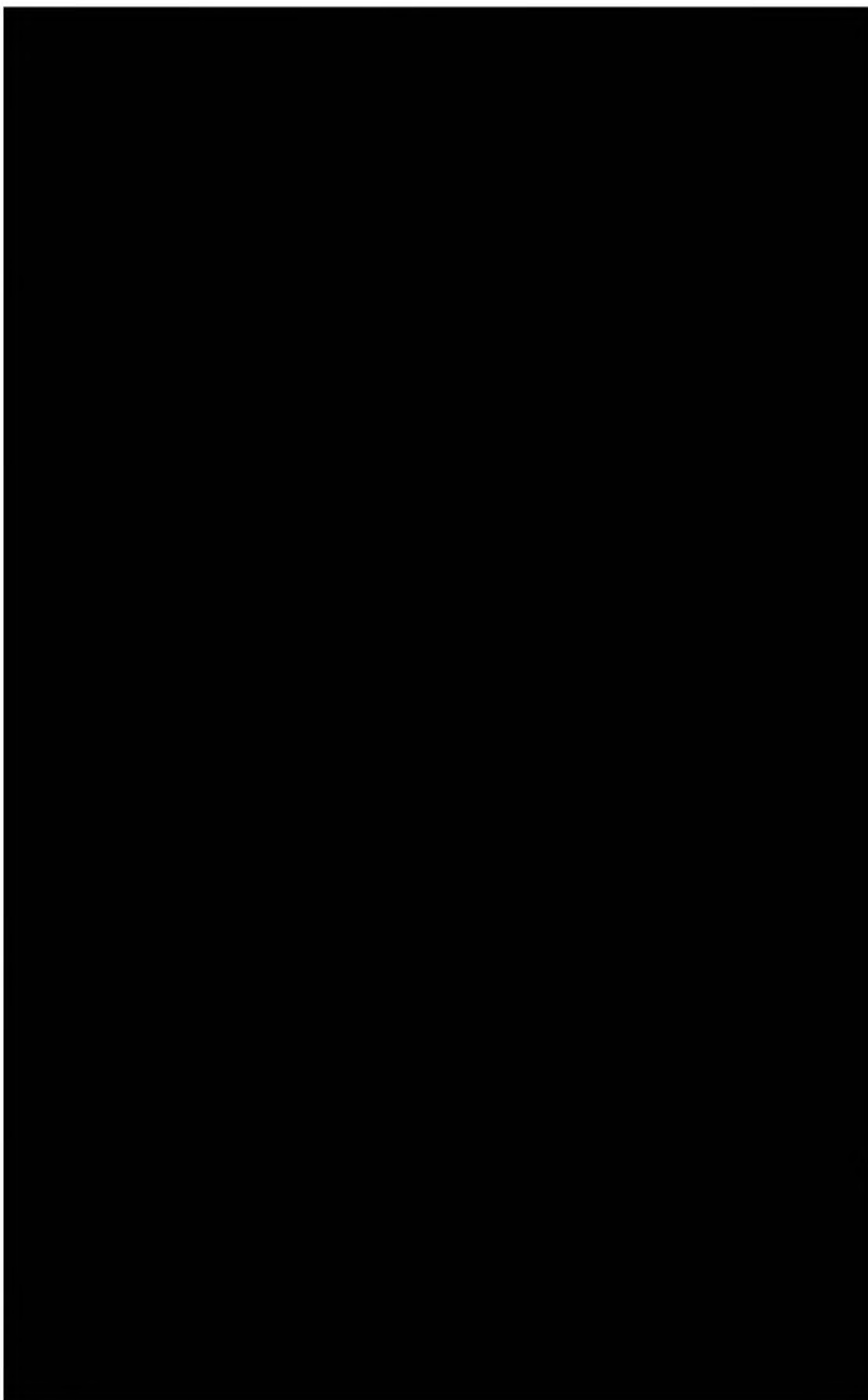


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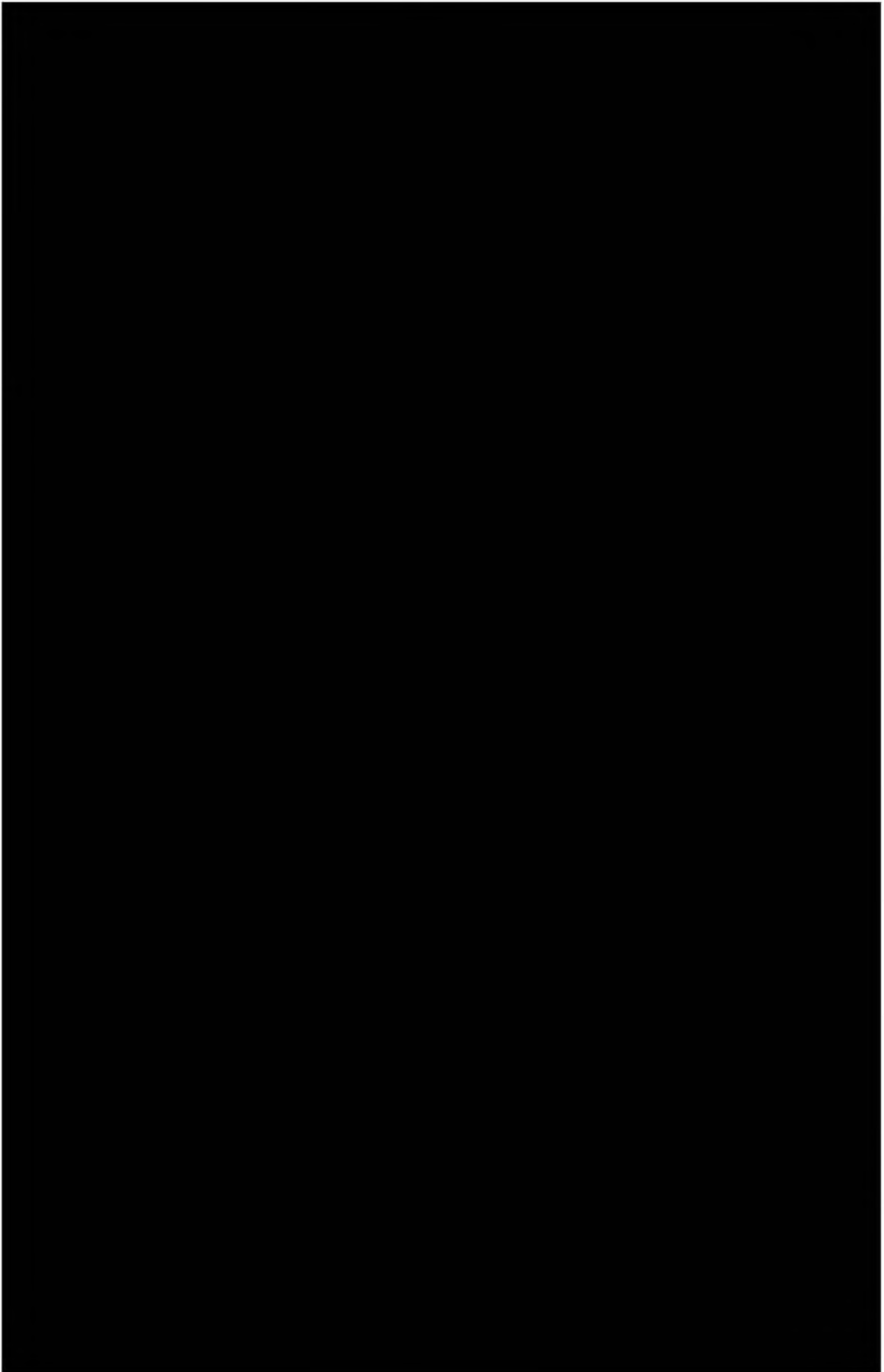


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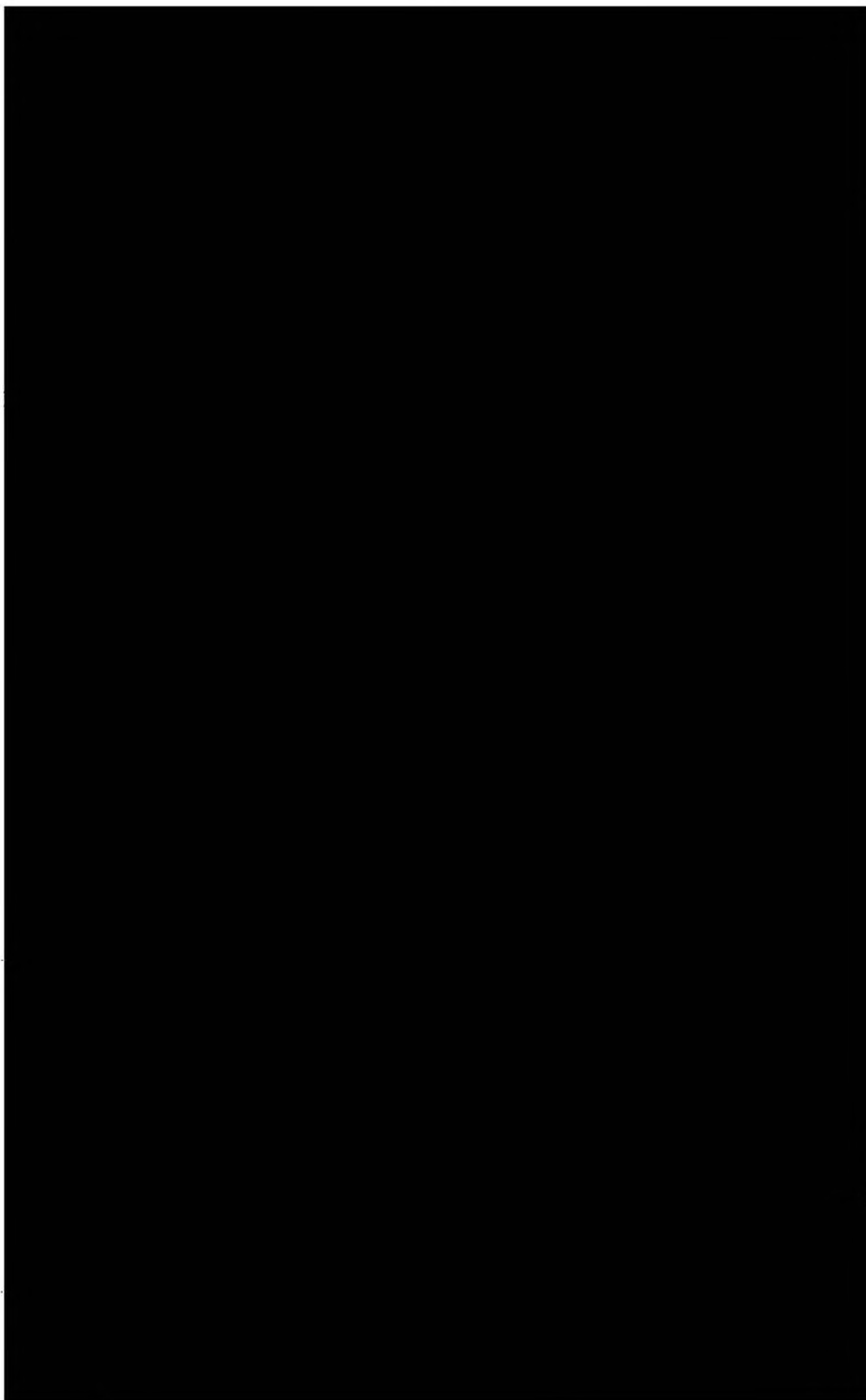
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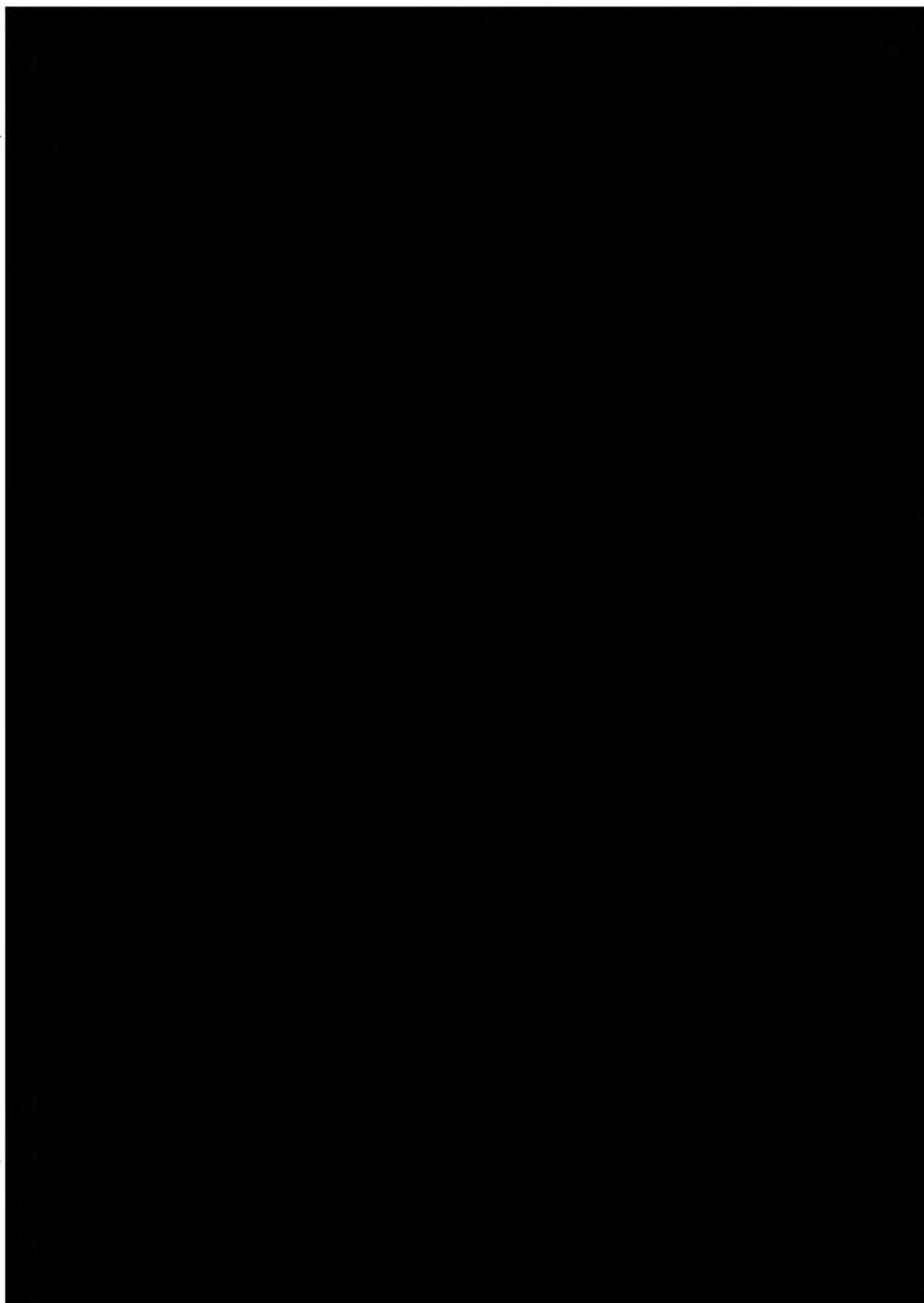
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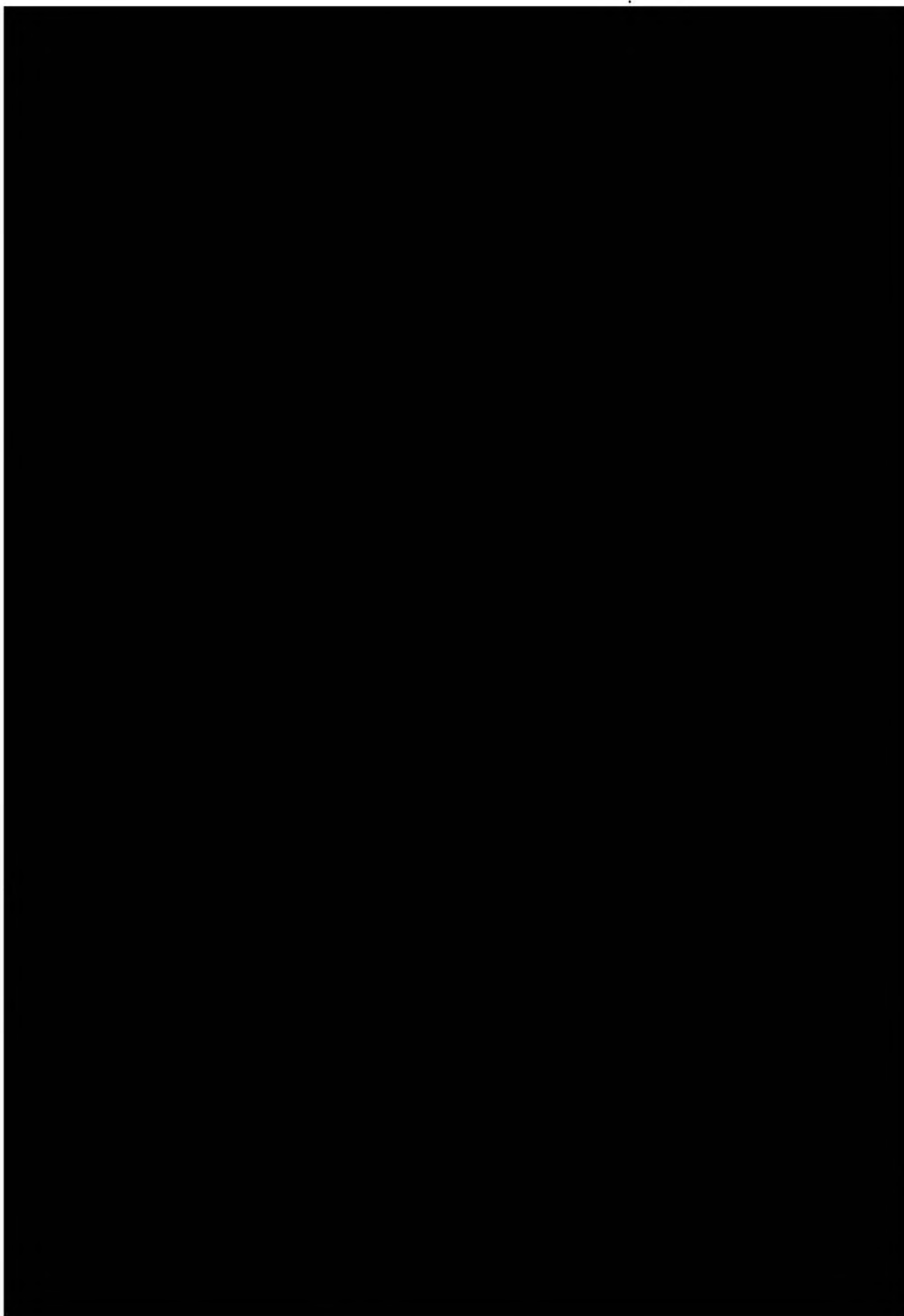
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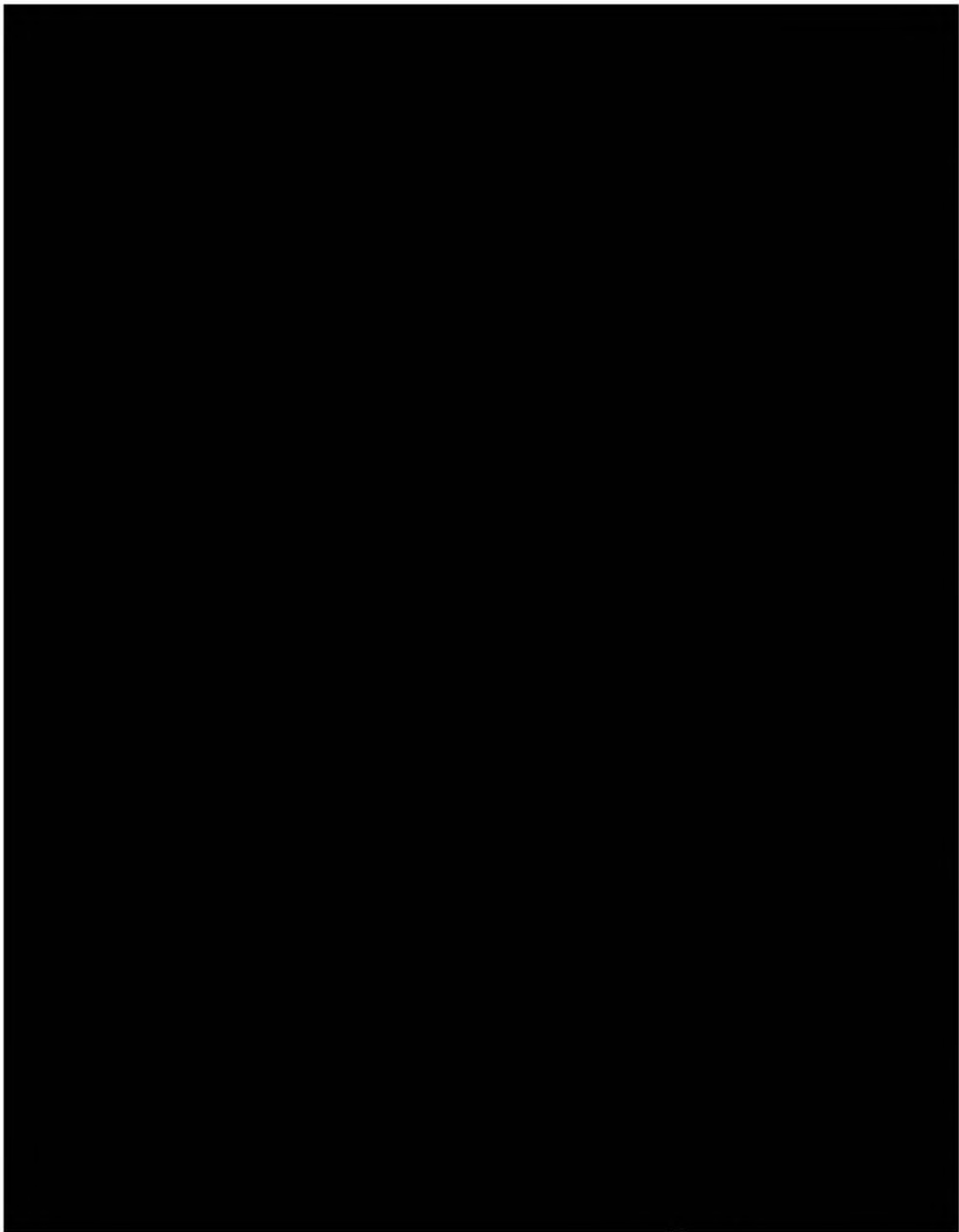
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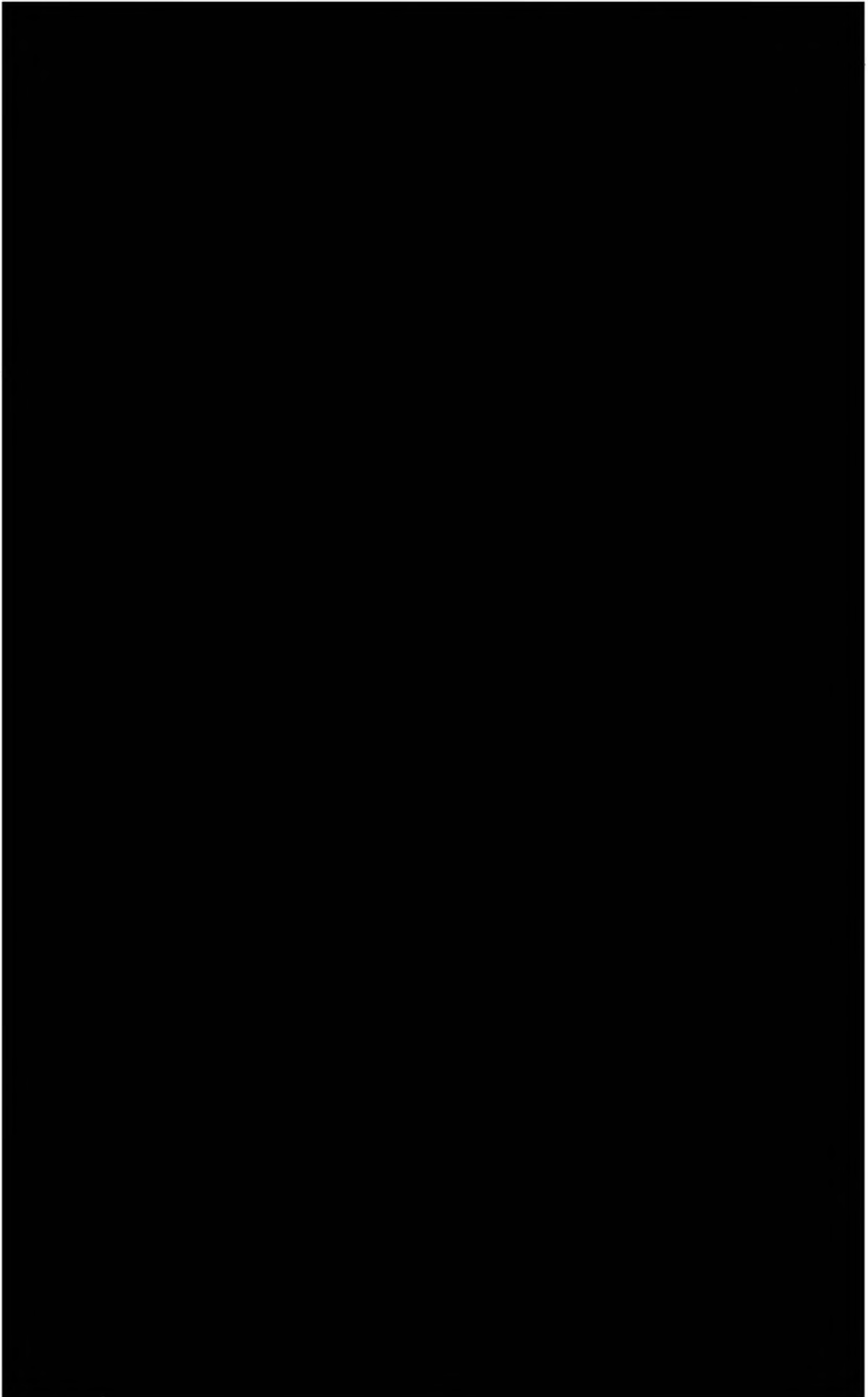


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DETAILED RECOMMENDATIONS

1. It is recommended that the Legislation Section of the Department of Justice be authorized to draft the required legislation to amend the Canadian Human Rights Act and to make any necessary consequential amendments, in order to:

PURPOSE CLAUSE

2. Amend the purpose clause, section 2, to: reflect the Act's application to systemic or adverse effect discrimination; indicate that the purpose of the Act is to provide a fair and expeditious method of resolving complaints of discrimination; and indicate in general terms that the purpose of the Act is to foster recognition of the principles contained therein and to promote respect for the dignity and worth of all individuals and groups.

PRIMACY

3. Amend the Act to:

(a) add a primacy clause providing that where there is a conflict between the CHRA and another federal Act, the Canadian Human Rights Act shall prevail, unless the other Act expressly overrides the Canadian Human Rights Act;

(b) make it clear that the reasonable limits defence under section 1 of the Charter is available, where the alleged discrimination is provided for by statute or by regulation;

(c) ensure that the Act does not have primacy over the Official Languages Act and the Canadian Bill of Rights; and

(d) ensure that remedies and procedures available under other statutes such as the Canada Labour Code are not preempted by the addition of a primacy clause.

GUIDELINES

4. Amend subsection 22(2) to repeal the provision that makes guidelines binding on the Commission and tribunals established pursuant to the Act, but continue to permit the Commission to make guidelines.

ENFORCEMENT PROCESS

With respect to the Commission's enforcement role:

5. Amend the Act to give the Commission wider administrative discretion not to deal with a complaint, in addition to the grounds listed in section 33.

6. Add a new provision giving a complainant whose complaint has been dismissed by the Commission, without an investigation, the right to request the Commission to reconsider its decision in the light of any new facts brought to the attention of the Commission by the complainant within 30 days after being notified of the original decision to dismiss.

7. Add a further provision giving a complainant, whose complaint has been dismissed by the Commissioner, whether or not following a reconsideration, the right to appeal the dismissal to the President of the Tribunal, except where the Commission has dismissed a complaint as having no basis in law.
8. Add a provision stating that if the President, on hearing the appeal, is satisfied that the complaint ought not to have been dismissed by the Commissioner, he may refer the complaint back to the Commission for investigation, or appoint a Board (formerly Tribunal) to enquire into it.
9. Add a provision giving the Board established under recommendation 8 above the power to award costs.
10. Amend subsection 35(4) to require the Commission to make procedural regulations, subject to approval of the Governor in Council.
11. Add a provision requiring an investigator to provide the parties with documentation setting out clearly the steps to be followed in the investigative process and the rights and obligations of all of the parties during the investigation stage, including copies of rules of procedure referred to in recommendation 4 above.
12. Add a provision requiring an investigator, as soon as possible after the conclusion of an investigation, to submit to the parties a copy of his report, together with such other information obtained during the course of the investigation as in the opinion of the investigator is relevant to a decision by a party as to its future course of action with respect to the complaint, with provision for a party to object to the release of such information.
13. Add a provision clarifying that the parties may submit to the Commission comments on the investigator's report, within 30 days after receipt of it.
14. Amend subsections 36(2) and (3) to make it clear that, in determining the proper disposition of a complaint following an investigation, the Commission is to take into account not only the investigator's report, but any comments by the parties pursuant to recommendation 13 above.
15. Add a provision making it clear that, in considering whether to approve a settlement pursuant to subsection 38(1) of the Act, the Commission should accept the views of the parties to the settlement unless, in the view of the Commission, overriding considerations of public interest dictate otherwise.
16. Amend section 46 by eliminating the offence of failing to comply with the settlement of a complaint provided for by paragraph (1)(a); and add a provision for enforcement in the Federal Court of settlements made prior to the establishment of a Board.
17. Amend section 32 to make it clear that, for the purposes of subsection 32(5), a "victim" in relation to immigration matters refers to the person or persons seeking admission into Canada.

ADJUDICATION PROCESS

18. Replace the current provisions of the Act establishing the Human Rights Tribunal Panel, Human Rights Tribunals and Review Tribunals with new provisions establishing a permanent Human Rights Tribunal consisting of a President and Vice-President, and such other members, the total not to exceed 10, as may be appointed from time to time by the Governor in Council on the recommendation of the Minister of Justice.

19. Add a new provision empowering the Governor in Council to establish an advisory council to assist the Minister of Justice with respect to appointments of members of the Tribunal, with the Council being composed of not more than 10 members who are knowledgeable in fields of endeavour relevant to human rights, for example, representatives of employers, employees, women, ethnic groups, visible minorities and the disabled and with the requirement that, once established, the Minister is required to consult with the council prior to making a recommendation with respect to an appointment to the Tribunal.

20. With respect to the Tribunal, to make provision:

(a) for the President and Vice-President to be appointed as full-time members of the Tribunal, and the other members on a full or part-time basis at the discretion of the Governor in Council;

(b) for the President and Vice-President to hold office during good behaviour for terms not exceeding 7 years, and the other members for terms not exceeding 5 years, subject to removal by the Governor in Council for cause;

(c) for the possibility of reappointment of members on the expiration of terms;

(d) for the President to act as Chief Executive Officer of the Tribunal, with supervision over the direction of work and staff of the Tribunal;

(e) for the Vice-President to act in the absence or incapacity of the President;

(f) for full-time members to be paid salaries, and part-time members fees or other remuneration, in each case fixed by the Governor in Council;

(g) for each member of the Tribunal to be paid reasonable travel and living expenses;

(h) for the principal office of the Tribunal to be in the National Capital Region;

(i) for the Tribunal or any member to sit at times and places determined by the President;

(j) for employees to be employed in accordance with the Public Service Employment Act, who shall be deemed to be employed in the Public Service for the purposes of the Public Service Superannuation Act;

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(k) empowering the Tribunal to appoint and, subject to the approval of Treasury Board, fix the remuneration of experts or persons having technical or special knowledge to assist the Tribunal in any matter; and

(l) establishing the Tribunal's fiscal and reporting year as beginning on April 1 of each year and providing for an annual report to be laid before Parliament.

21. Add a provision requiring the Tribunal, subject to the approval of the Governor in Council, to make rules to govern the carrying out of the affairs of the Tribunal and the practice and procedure in connection with matters dealt with by it and in this context empowering the Tribunal to make rules governing examination for discovery, production of documents, pre-hearing conferences and the introduction of evidence.

22. Add a provision requiring the President, in determining whether to appoint a Board of one or three members and in determining the membership of that Board, to take into account, among other things, both the complexity of the issues to be addressed by the Board and the expertise required by it in respect of those issues.

23. Add a provision stipulating that, in all cases where a Board consists of more than one member, the Chairman must be a lawyer.

24. Add a provision requiring the Commission to pay the costs of separate legal representation for a complainant where the position to be taken by the Commission before a Board is not consistent with the submissions of the complainant, with payment to be in accordance with schedules of fees and costs published by the Commission, subject to approval by the Governor in Council.

25. Add a provision establishing the Board as a Court of Record.

26. Include a provision stipulating that all proceedings before the Board shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

27. Add a provision providing for an appeal from a decision of a Board to the Federal Court of Canada.

GROUND OF DISCRIMINATION

28. Amend the Act to add sexual orientation as a prohibited ground of discrimination, but to otherwise maintain the current list of prohibited grounds of discrimination.

29. Amend the Act to ensure that discrimination is prohibited in the area of personal service contracts.

MANDATORY RETIREMENT

30. Repeal section 9(2) of the CHRA so as to eliminate the defence to a complaint of age discrimination that an individual whose membership in an employee organization is excluded or

terminated has reached the normal age of retirement for individuals working in positions similar to the position of that individual.

31. Repeal section 14(b)(ii) of the CHRA to eliminate the defence to a complaint of age discrimination that an individual whose employment is refused or terminated has reached the maximum age that applies to that employment by law or under regulations, which may be made by the Governor in Council.

32. Repeal section 14(c) of the CHRA so as to eliminate the defence to a complaint of age discrimination that an individual whose employment is terminated has reached the normal age of retirement for employees working in positions similar to the position of that individual.

33. Provide transitional rules with respect to the repeal of sections 9(2) and 14(c) of the CHRA. Such transitional rules should allow a two year transition period from the date the amendment repealing sections 9(2) and 14(c) of the CHRA receives royal assent.

34. Provide in the Act to amend the Canadian Human Rights Act that the Department of Labour is directed to undertake an appropriate study assessing the effects of the repeal of sections 9(2) and 14(c) of the CHRA; the Department of Labour should further be directed to report their findings by tabling two reports on that subject in the House of Commons, the first report not later than 3 years after the coming into force of these amendments and the second, not later than 6 years.

REASONABLE ACCOMMODATION

35. Amend the Act to:

(a) make reasonable accommodation applicable to employment and the provision of goods, services, facilities, accommodation and commercial premises by incorporating the concept of reasonable accommodation in the bona fide occupational requirement and bona fide justification defences;

(b) provide for reasonable accommodation except where this would cause undue hardship to the employer or purveyor;

(c) provide that, among other things, the cost, business inconvenience, outside sources of funding, if any, health and safety requirements, if any, and the effect on other persons be considered in determining whether reasonable accommodation can be made without undue hardship; and

(d) empower the Governor in Council to issue regulations, on the advice of the Minister of Justice, prescribing standards for assessing what is undue hardship to ensure that additional criteria can be added if necessary.

SPECIAL PROGRAMS

36. Repeal paragraph 15(2)(b) in order to eliminate the power of the Commission to provide advice regarding specific special (affirmative action) programs; and amend the Act to provide that the Commission and Boards should take into consideration that an employer has sought, received and followed advice from the

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Employment and Immigration Commission under the Employment Equity Act when they are examining complaints.

AFFIRMATIVE ACTION

37. Amend section 41(2)(a) of the CHRA to make it clear that a Board could take into consideration past discriminatory practices when ordering adoption of a special program, plan or arrangement.

38. Amend section 41(2)(a) of the CHRA to make it clear that the Board could order that the respondent and the Commission consult with respect to the details of a plan and return to the Board for a final order.

FINES AND COMPENSATION

39. Amend subsection 41(3) to increase the maximum limit of compensation for suffering in respect of feelings or self-respect or for wilful or reckless discrimination, from \$5,000 to \$10,000.

40. Amend subsection 46(2) to eliminate the provisions whereby employers, employer associations and employee organizations are subject to a maximum fine of \$50,000 and all others are subject to a maximum fine of \$5,000, and to provide a uniform maximum fine of \$50,000 for any person who commits an offence under subsection 46(1).

ANNUAL REPORTS

41. Amend section 47 to provide for the Commission to make annual reports based on the Commission's fiscal year rather than the calendar year.

INTERIM ORDERS

42. Amend the Act to empower the Tribunal to make interim orders such as injunctions.

EQUAL PAY

43. To amend the Act to empower the Governor in Council, on the advice of the Minister of Justice, to make regulations defining any word or expression not expressly defined in section 11, and generally providing for the application of section 11.

CONSEQUENTIAL AMENDMENTS