

**SCHEDULE 19  
MARKET TESTING PROCEDURE**

**1. DEFINITIONS**

In this Schedule 19, in addition to the terms defined in Schedule 1 [Definitions and Interpretation]:

**“Draft Market Testing Proposal”** has the meaning given in Section 3.2(a) of this Schedule 19;

**“Market Testing”** means the process described in Section 3 of this Schedule 19;

**“Market Testing Date”** means the date that is 30 months prior to the tenth anniversary of the Effective Date and the date that is 30 months prior to the twentieth anniversary of the Effective Date;

**“Market Testing Meeting”** means a meeting convened in accordance with Section 3 of this Schedule 19;

**“Market Testing Proposal”** means the final version of the Draft Market Testing Proposal, as agreed by the parties or as determined, in either case, in accordance with this Schedule 19;

**“Preferred Service Tenderer”** means, following a Market Testing, the Service Tenderer selected to provide the Services and undertake the relevant System Refresh in accordance with the provisions of Section 3.5 of this Schedule 19;

**“Project Co Proposal”** has the meaning given in Section 3.1(b) of this Schedule 19;

**“Project Co Proposal Validity Period”** has the meaning given in Section 3.1(b) of this Schedule 19;

**“Prospective Service Tenderers”** means those persons who express an interest in being requested, or are identified by the parties pursuant to Section 3.3(a) of this Schedule 19, to prepare and submit tenders for the Services and the relevant System Refresh;

**“Qualifying Service Tender”** means a tender received from a Service Tenderer which complies with the Service Tender Requirements;

**“Service Tender Requirements”** means the form and requirements of the tender documents to be sent to Service Tenderers as agreed or determined in accordance with the provisions of this Schedule 19;

**“Service Tenderers”** means those of the Prospective Service Tenderers selected to submit tenders in accordance with Section 3.3 of this Schedule 19;

**“Service Tender Validity Period”** means the period within which tenders from the Service Tenderers are to be valid, which period shall exceed the Project Co Proposal Validity Period; and

**“System Refresh Baseline Requirements”** has the meaning given in Section 3.1(a)(2) of this Schedule 19.

## 2. GENERAL OBLIGATIONS

### 2.1 Market Testing Dates

- (a) The Market Testing of the Services and the relevant System Refresh shall be the responsibility of Project Co and shall be carried out in accordance with this Schedule 19 so that the Preferred Service Tenderer shall, if appointed to act as the service provider for purposes of providing the Services and undertaking the relevant System Refresh, commence provision of the Services on (i) the earlier of completion of the First System Refresh (provided that such date is not earlier than the date that is 10 years from the Effective Date) and the date that is 11 years from the Effective Date to the earlier of completion of the Second System Refresh and the date that is 21 years from the Effective Date or (ii) the earlier of completion of the Second System Refresh and the date that is 21 years from the Effective Date to the Expiration Date, as applicable, and the relevant System Refresh on the relevant Market Testing Date (or such other date as the parties may agree in accordance with the transition provisions contemplated in Section 3.1(a)(3)).
- (b) Subject to the provisions of Section 8 (Supervening Events), if, for any reason, the applicable Market Testing is not complete on the relevant Market Testing Date, Project Co shall remain responsible to ensure the continued provision of the Services (but not, for greater certainty, the relevant System Refresh), and the Authority shall be responsible to continue to pay Project Co as provided in this Project Agreement for the continued provision of the Services pending completion of the applicable Market Testing. The pricing of such Services shall, pending the establishment of new pricing as contemplated under this Schedule 19, be the same pricing as prevailed before the relevant Market Testing commenced and shall be paid in accordance with Schedule 8 [Payments].

## 3. MARKET TESTING

### 3.1 Preparing for Market Testing

- (a) At least 24 months before each Market Testing Date, the parties shall hold Market Testing Meetings in respect of the Services and the First System Refresh or the Second System Refresh, as applicable, to:
  - (1) review the Services Specifications and other applicable provisions of this Project Agreement related to the Services, including, without limitation, the provision of Schedule 5 [Insurance Requirements], and agree on appropriate amendments to such provisions having reference to Customary Industry Practice and prevailing market standards in effect at that time;
  - (2) establish the specifications for the First System Refresh or the Second System Refresh, as applicable, having reference to the existing Services Specifications and prevailing market standards in effect at that time (the “**System Refresh Baseline Requirements**”);

- (3) agree on appropriate transition provisions in the event that the Authority does not accept a Project Co Proposal and a Preferred Service Tenderer is appointed to provide the Services and undertake the relevant System Refresh; and
  - (4) agree on revised Service Specifications and specifications for the First System Refresh or the Second System Refresh, as applicable, within 12 months of the initial Market Testing Date, including the preparation of the Draft Market Testing Proposal.
- (b) If the parties agree on revised Services Specifications and the System Refresh Baseline Requirements for the First System Refresh or Second System Refresh, as applicable, Project Co shall, within 20 Business Days of such agreement, submit a proposal to the Authority (a "**Project Co Proposal**") setting out the price at which the Service Provider then providing the Services would agree to continue providing the Services from (i) the earlier of completion of the First System Refresh (provided that such date is not earlier than the date that is 10 years from the Effective Date) and the date that is 11 years from the Effective Date to the earlier of completion of the Second System Refresh and the date that is 21 years from the Effective Date or (ii) the earlier of completion of the Second System Refresh and the date that is 21 years from the Effective Date to the Expiration Date, as applicable, and undertake the First System Refresh or Second System Refresh, as applicable, including, without limitation, the price of any insurances to be provided by either Operations Co or the Service Provider in respect of such Services and the First System Refresh or Second System Refresh, as applicable, which proposal will remain valid for a period of 60 days following delivery thereof (the "**Project Co Proposal Validity Period**").
  - (c) The Authority will notify Project Co and Operations Co within 15 Business Days of receipt a Project Co Proposal whether or not such Project Co Proposal is acceptable to the Authority.
  - (d) If the Project Co Proposal is acceptable to the Authority, then Project Co shall confirm the appointment of the Service Provider then providing the Services to continue providing the Services at the pricing set out in the Project Co Proposal and undertake the First System Refresh or Second System Refresh, as applicable, for the price set out set out in the Project Co Proposal.
  - (e) If the Project Co Proposal is not acceptable to the Authority, then the parties shall hold Market Testing Meetings to discuss and seek to agree upon the Service Tender Requirements, which shall be in sufficient detail to allow Project Co to determine the Preferred Service Tenderer and shall include, without limitation:
    - (1) the delivery date by which a Qualifying Service Tenderer is required to submit a Qualifying Service Tender;
    - (2) a statement of the Service Tender Validity Period;
    - (3) details of the tender evaluation criteria;
    - (4) the information Service Tenderers are required to provide; and

- (5) details of the required financial capacity and performance security/guarantees to be provided to support the Preferred Service Tenderer's obligations.
- (f) Any tender evaluation criteria established by Project Co and made available to the Service Tenderers as part of the Service Tender Requirements must be objective and impartial.
- (g) Project Co shall provide at least one month's prior written notice to the Authority of the time, place and agenda for the first Market Testing Meeting. Thereafter, each subsequent Market Testing Meeting shall be convened on not less than 7 days' notice, with such notice identifying the agenda items to be discussed at the Market Testing Meeting. In an emergency, a Market Testing Meeting may be called at any time on such notice as may be reasonable in the circumstances. The parties shall hold Market Testing Meetings as often as necessary.
- (h) If Project Co and the Authority are unable to agree on any matter referred to in this Section 3.1, either party may refer the matter for resolution in accordance with Schedule 13 [Dispute Resolution Procedure].

### **3.2 Market Testing Proposal**

- (a) Project Co shall prepare and deliver to the Authority, no later than 12 months before the relevant Market Testing Date, a draft market testing proposal (the "**Draft Market Testing Proposal**") describing in detail Project Co's proposals for the Market Testing. The Draft Market Testing Proposal shall describe all of the matters referred to in, and agreed pursuant to, Section 3.1 of this Schedule 19 and the form of contract which the Preferred Service Tenderer will be required to accept.
- (b) The Authority may, within 10 days of the Authority's receipt of the Draft Market Testing Proposal, provide comments and request amendments to the Draft Market Testing Proposal.
- (c) If Project Co and the Authority are unable to agree on any matter relating to the Draft Market Testing Proposal within 30 days of the Authority's receipt of the Draft Market Testing Proposal, either party may refer the matter for resolution in accordance with Schedule 13 [Dispute Resolution Procedure].
- (d) It shall be a principle of the Market Testing Proposal that, unless otherwise agreed by the parties, the allocation of risk to the Preferred Service Tenderer, if appointed to act as the service provider, shall not be materially greater or materially less than such allocation to the service provider whom the Preferred Service Tenderer is to replace.

### **3.3 Selection of Service Tenderers**

- (a) Project Co shall be responsible for compiling the list of Prospective Service Tenderers, which may include the current Service Provider.

- (b) Project Co shall be responsible for selecting the Service Tenderers from the list of Prospective Service Tenderers on the basis of relevant criteria, including:
  - (1) the financial standing of the Prospective Service Tenderers;
  - (2) the technical, managerial and other relevant experience and ability of the Prospective Service Tenderers, taking into account any relevant customer references; and
  - (3) any other basis or Service Tender Requirements identified pursuant to Section 3.1(e) of this Schedule 19.
- (c) Project Co shall not select any person as a Prospective Service Tenderer if such person does not, or could not reasonably be considered to, comply with and meet any of the criteria referred to in Section 3.3(b) of this Schedule 19.

### 3.4 Service Tendering Process

- (a) Project Co shall be responsible for managing and coordinating the Market Testing in an efficient and fair manner in accordance with the Market Testing Proposal (and in particular, but without limitation, the Service Tender Requirements) and shall ensure that only Service Tenderers selected in accordance with this Schedule 19 are invited to submit tenders.
- (b) All tenders will be assessed on the basis of relevant criteria, including their compliance with the Service Tender Requirements and the value for money that the tenders represent for the Authority.
- (c) Project Co shall bear all costs, fees and expenses associated with Market Testing.
- (d) The Authority may, at its own cost, appoint a monitor for the purpose of monitoring and reporting to the Authority on Project Co's compliance with all requirements for Market Testing. Such monitor shall be entitled to attend all meetings and processes relating to Market Testing, including, without limitation, evaluation meetings and processes, and inspect copies of all the tender documentation, bids and evaluation documentation.
- (e) In the event that Project Co does not comply with all requirements for Market Testing, then, without limiting any other remedies of the Authority under this Project Agreement or otherwise, Project Co shall re-perform the relevant Market Testing in accordance with such requirements.

### 3.5 Preferred Service Tenderers

- (a) Following expiry of the Service Tender Validity Period, Project Co shall, subject to the provisions of this Section 3.5, determine which Service Tenderer (the "**Preferred Service Tenderer**") offers the Qualifying Service Tender in respect of the Services and the relevant System Refresh, that represents, as the case may be, the best value for money for the Authority.

- (b) Immediately upon making the aforesaid determination of the Preferred Service Tenderer, Project Co shall supply to the Authority a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable the Authority to analyze and understand the basis for Project Co's determination.
- (c) If the Authority does not agree with Project Co's determination in the case of any Qualifying Service Tender, the Authority may, within 30 days of being provided with the tender evaluation, dispute such determination and, if the parties do not resolve such Dispute within a further 30 days, the Dispute shall be referred for resolution in accordance with Schedule 13 [Dispute Resolution Procedure].

### **3.6 Appointment**

- (a) Project Co shall ensure that the Preferred Service Tenderer is appointed to provide and enter into contracts to provide the Services and undertake the relevant System Refresh on the basis set out in its Qualifying Service Tender.
- (b) Where Project Co believes that only one Qualifying Service Tender is likely to be submitted, or where only one Qualifying Service Tender is in fact submitted, then Project Co will provide notice thereof to the Authority. If the parties conclude that such Market Testing was adequate, then Project Co shall confirm the appointment of such Qualifying Service Tender to provide the Services and the relevant System Refresh.
- (c) Project Co shall provide any Service Tenderer which is unsuccessful in being selected as a Preferred Service Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the party in question.

### **3.7 Adjustments to Project Agreement**

- (a) On the acceptance of a Project Co Proposal or appointment of a Preferred Service Tenderer, the Project Agreement will be amended to reflect the revised Services Specifications and the System Refresh Baseline Requirements for the First System Refresh or Second System Refresh, as applicable, and any other changes necessary to reflect the Market Testing.
- (b) Without limiting the generality of the foregoing, the Availability Payments shall be adjusted in accordance with Schedule 8 [Payments] and Schedule 8 [Payments] shall be amended to reflect payment by the Authority for the relevant System Refresh.
- (c) Any alteration to the Availability Payments or Schedule 8 [Payments] shall take effect on the earlier of completion of the First System Refresh (provided that such date is not earlier than the date that is 10 years from the Effective Date) and the date that is 11 years from the Effective Date or the earlier of completion of the Second System Refresh and the date that is 21 years from the Effective Date, as applicable.

### **3.8 Information Requirements**

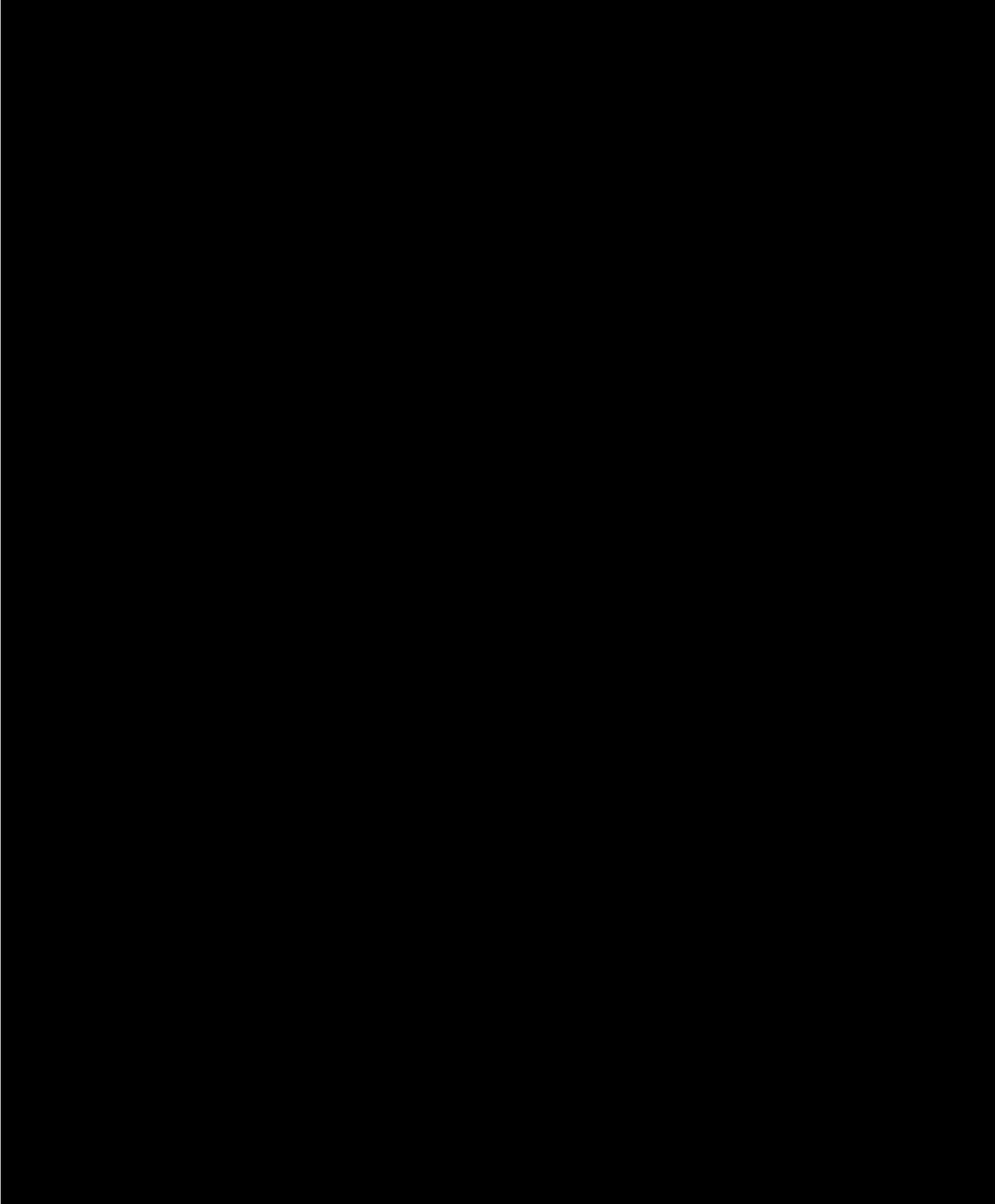
- (a) Without prejudice to any of Project Co's other obligations under this Project Agreement, including, without limitation, under Schedule 14 [Records and Reports], Project Co shall:
- (1) maintain a full record and audit trail of each Market Testing and make all such records, including details of all tenders received, available for inspection by the Authority, the Authority Representative and other authorized representatives on reasonable notice from the Authority;
  - (2) provide to the Authority, in a comprehensive and accurate manner, all information necessary to enable the Authority to review and assess all matters relating to the Market Testing; and
  - (3) certify to the Authority within 30 days of expiry of the Service Tender Validity Period that there has been full compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Service Tenderers.

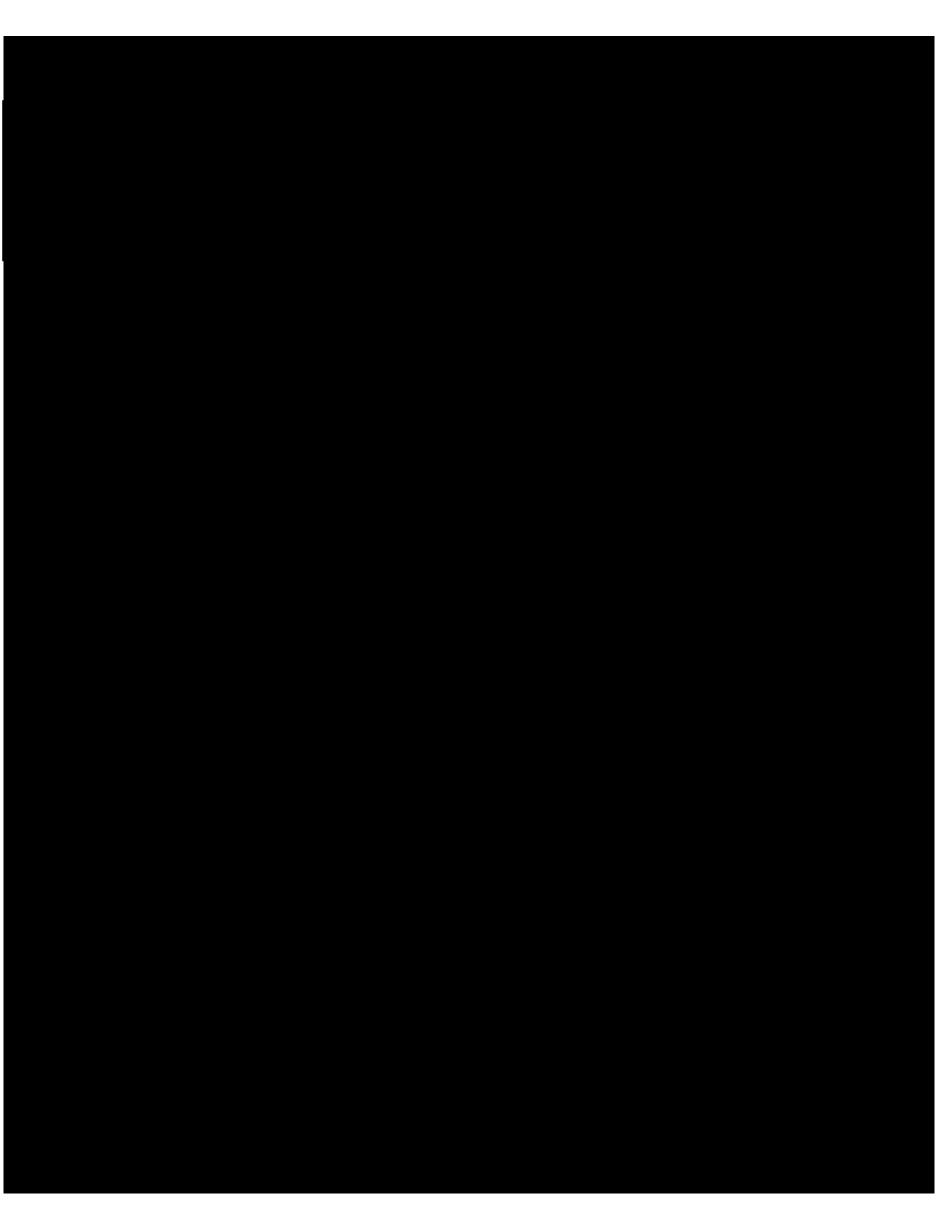
**SCHEDULE 20  
THIRD PARTY INFRASTRUCTURE TERM SHEETS**

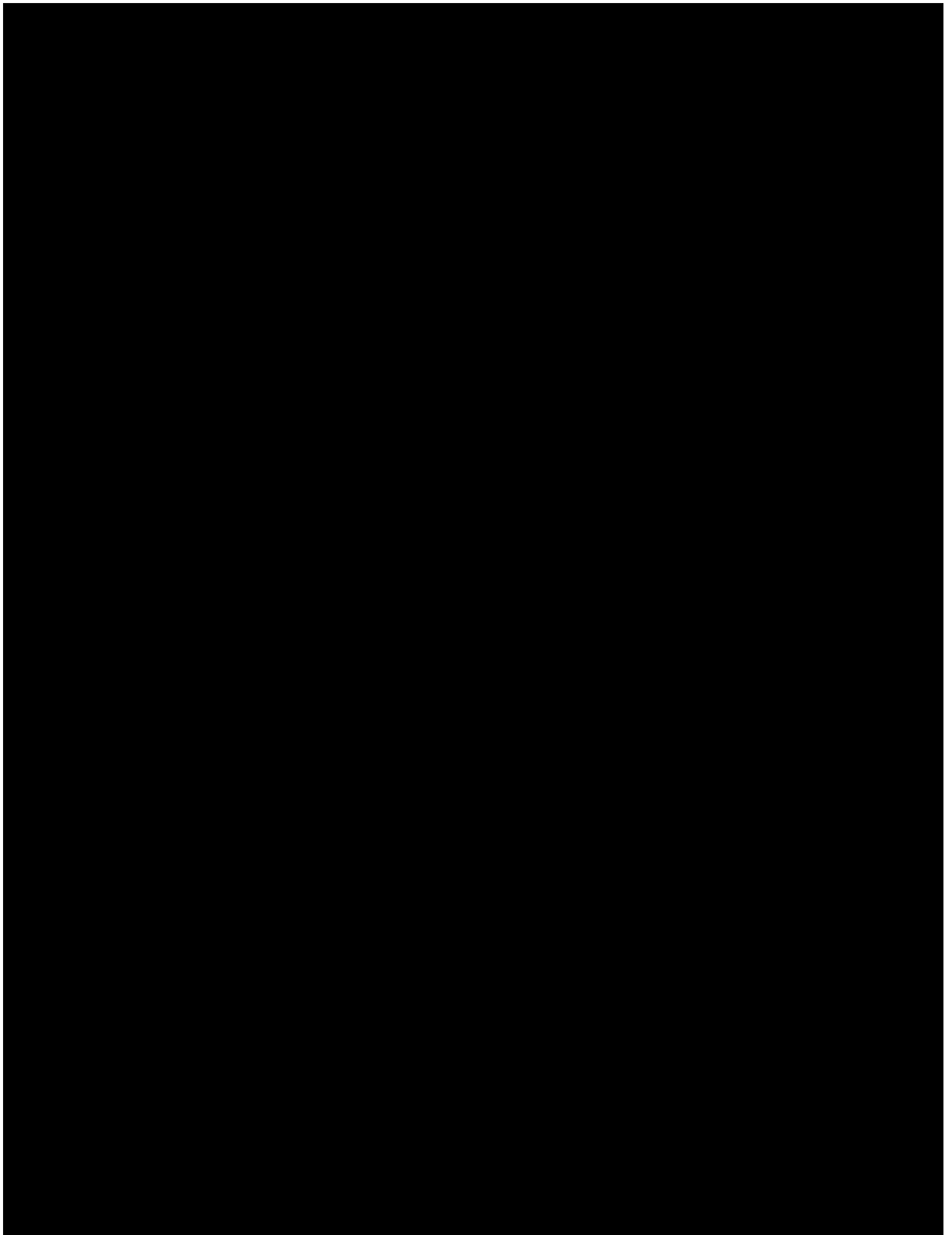
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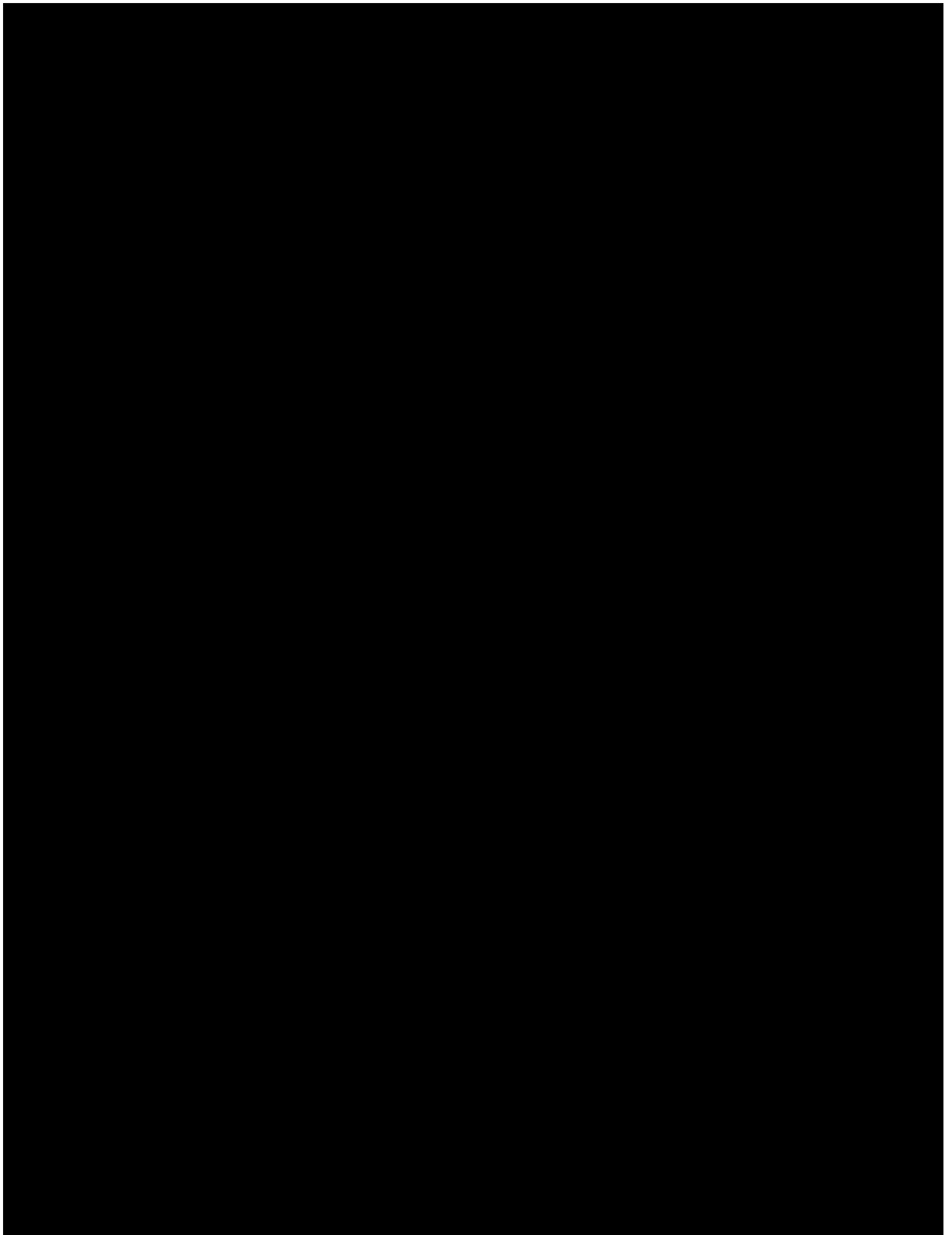


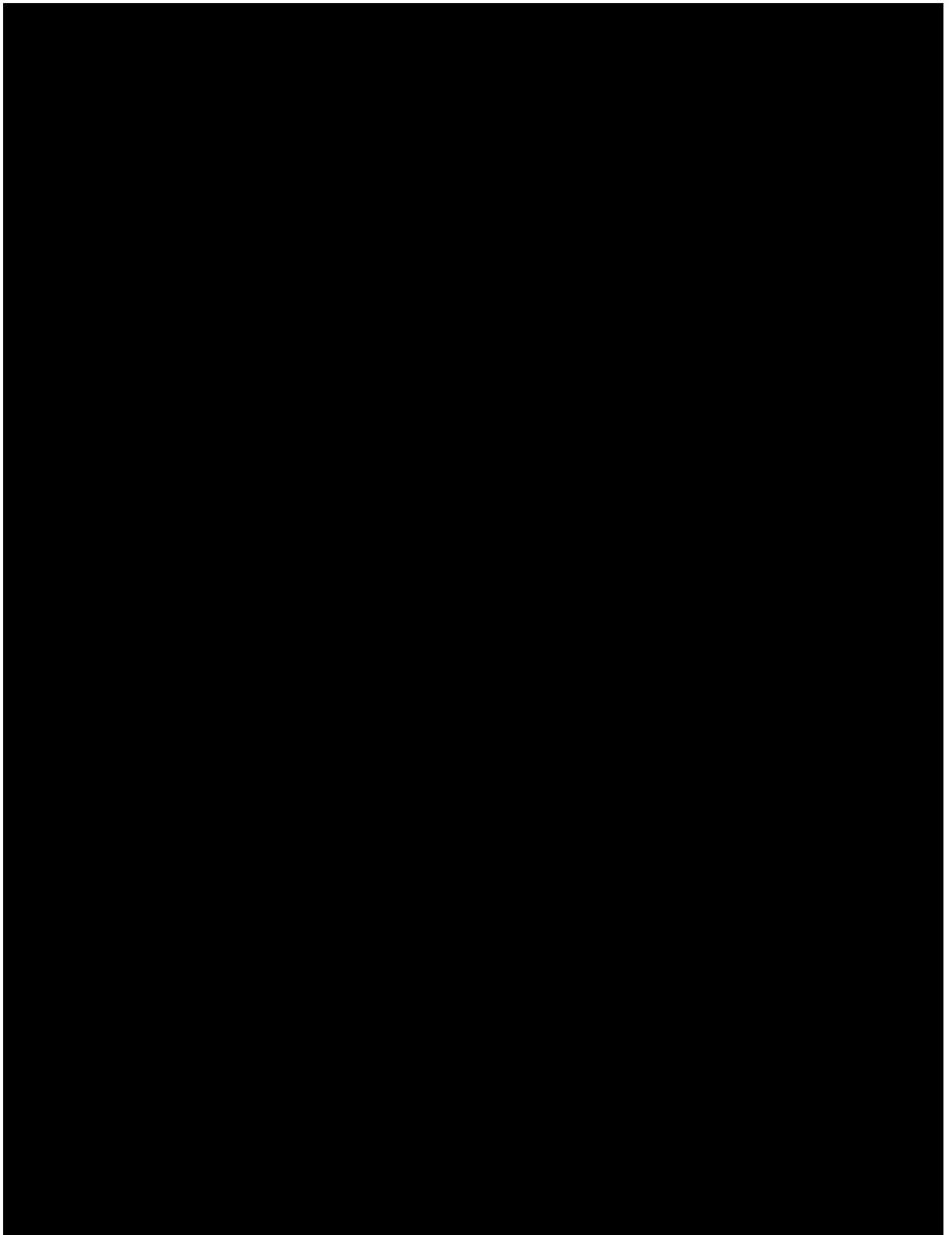
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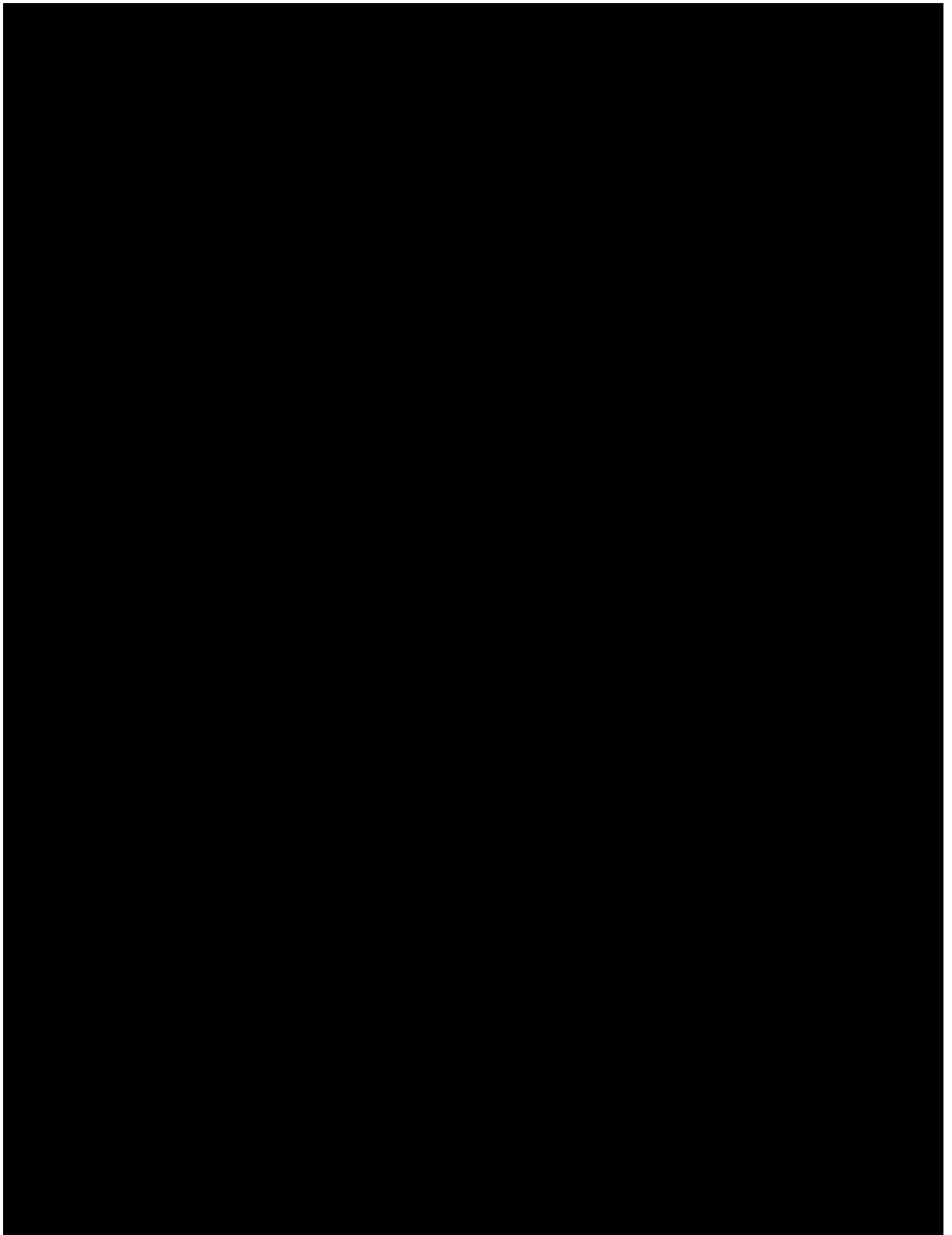


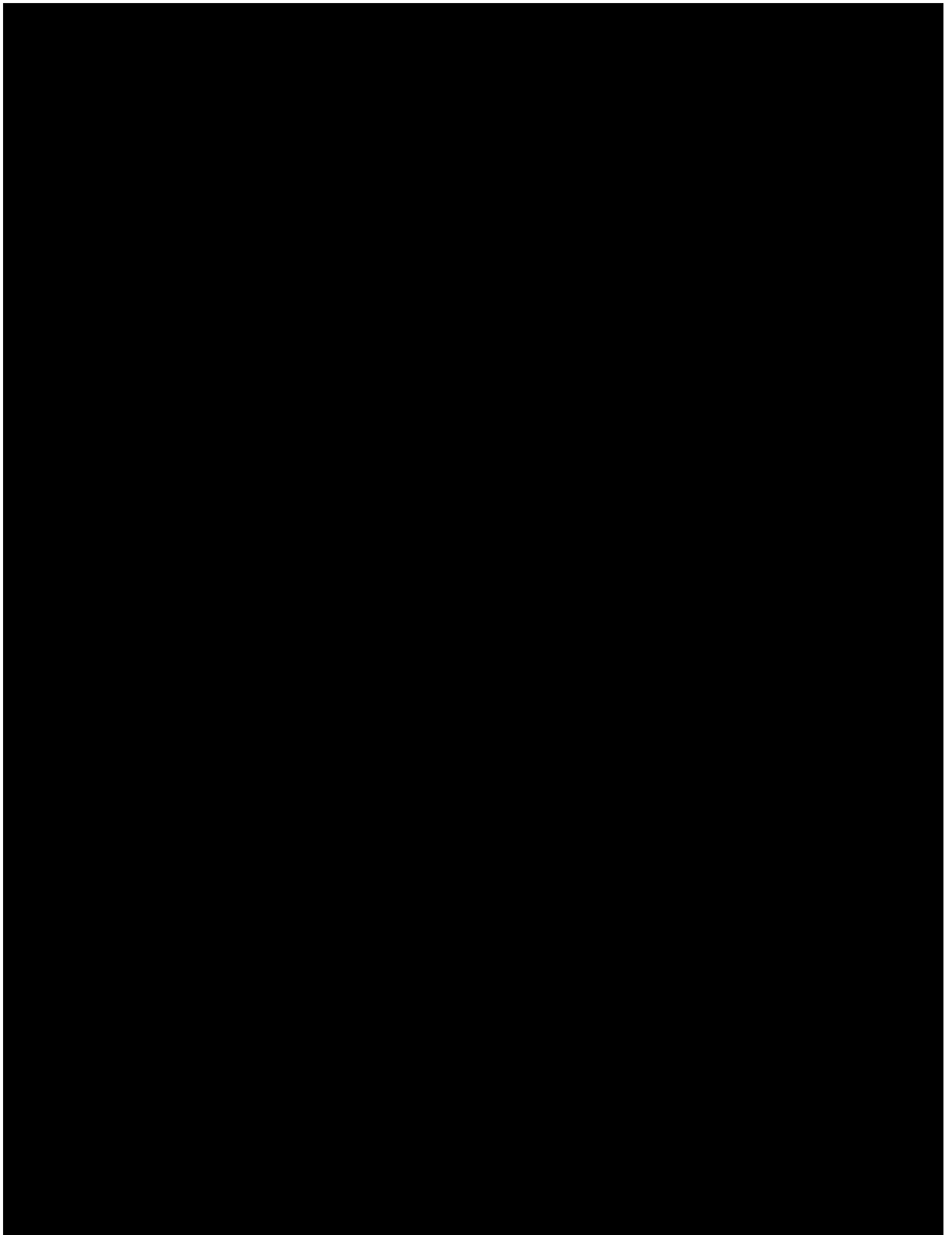


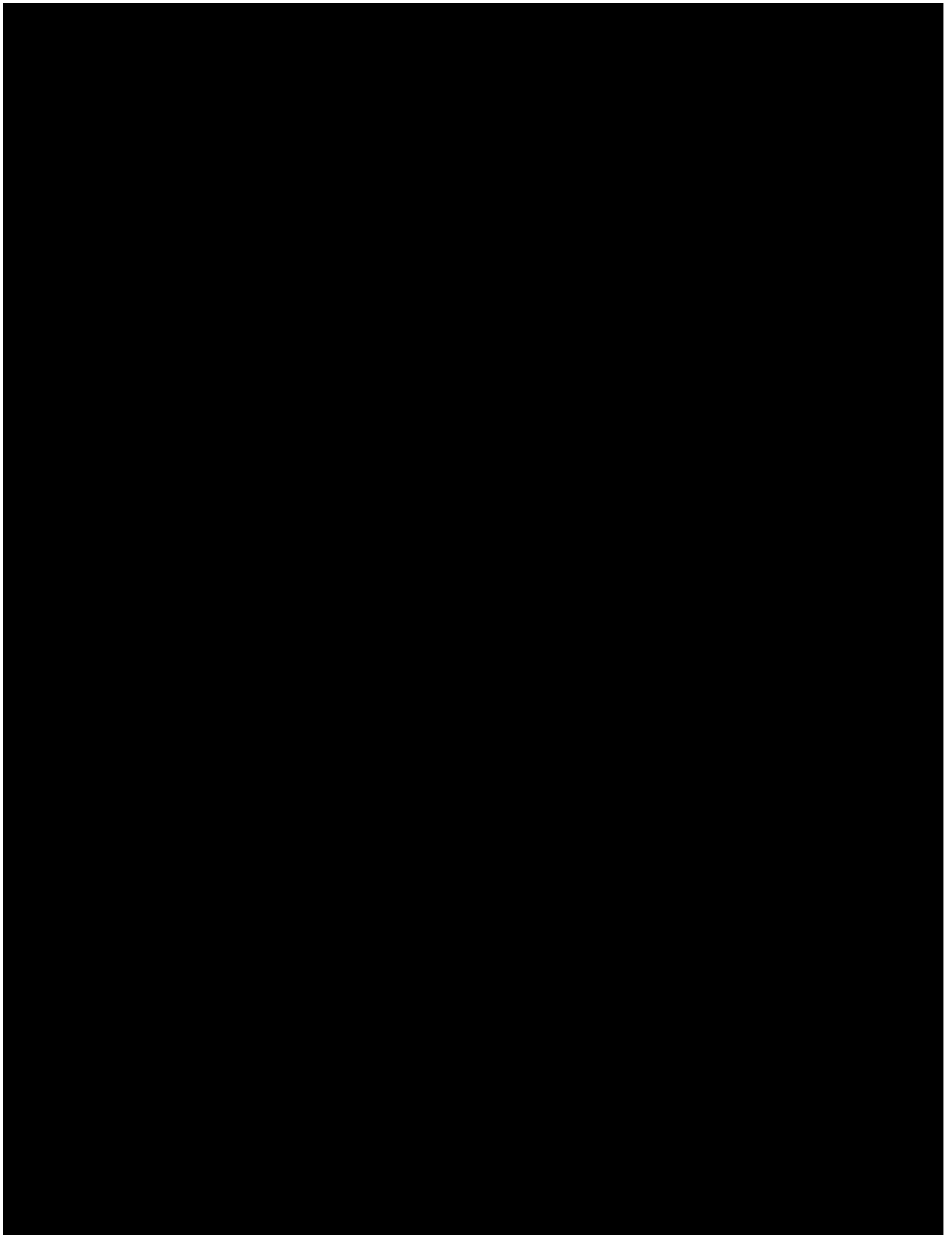




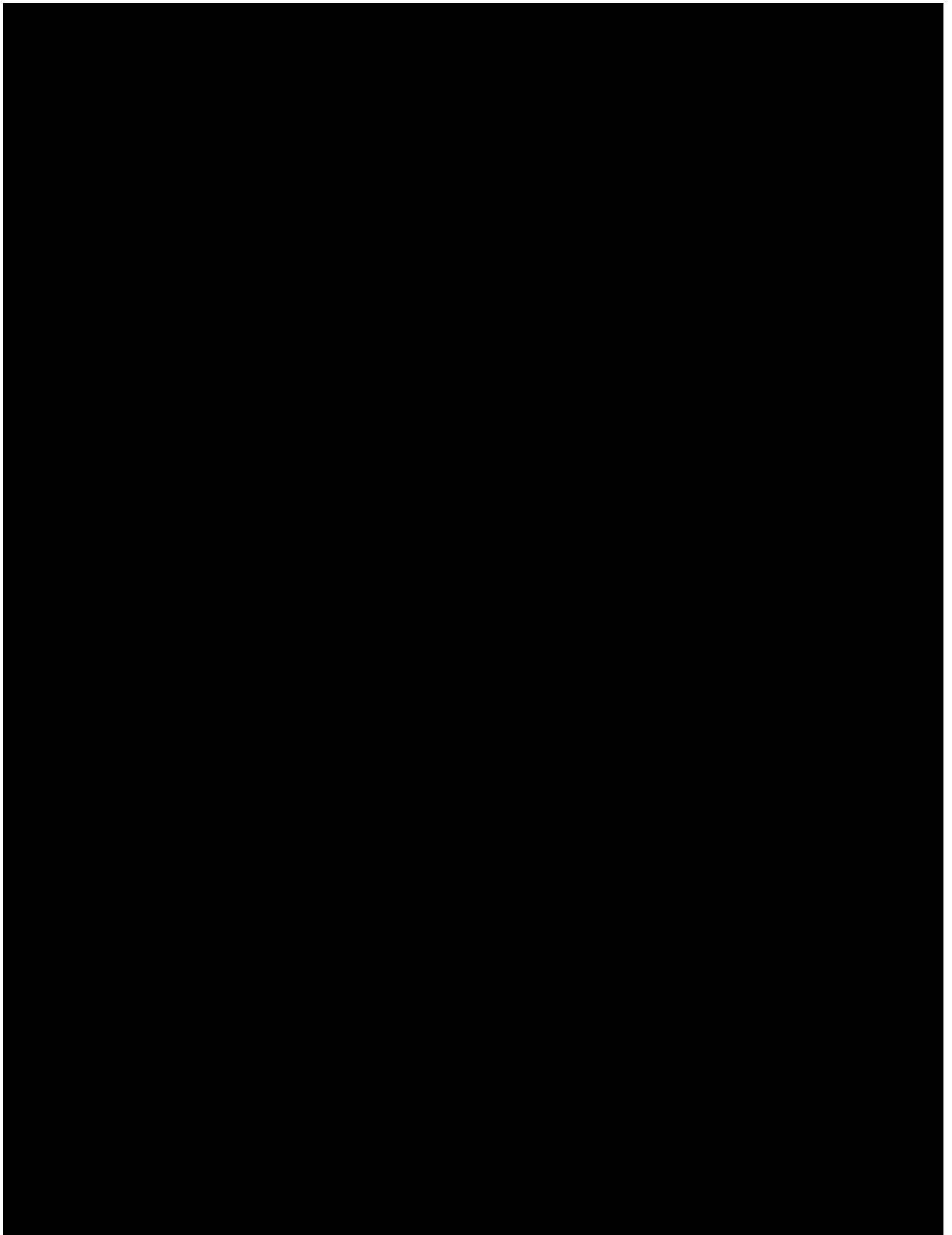


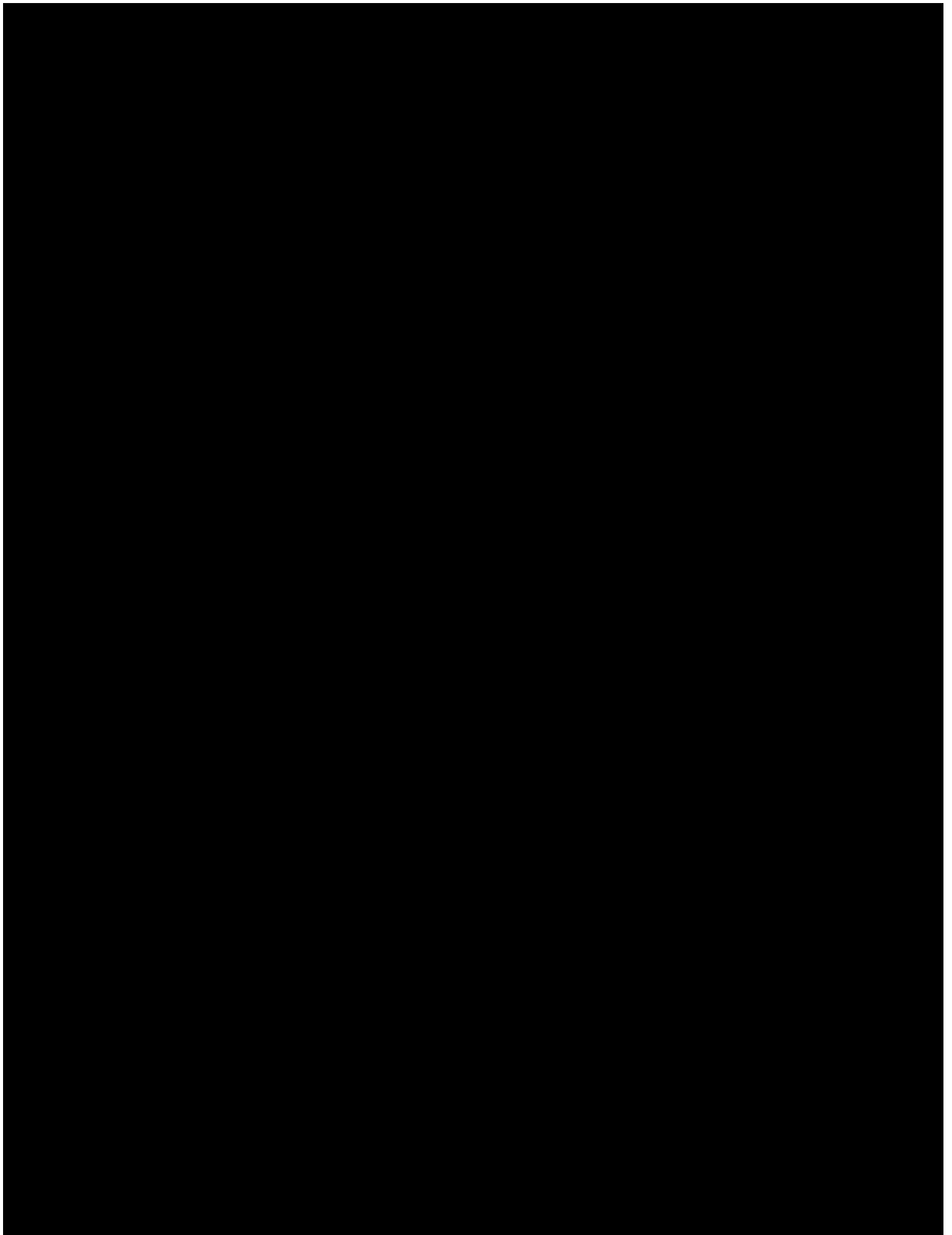


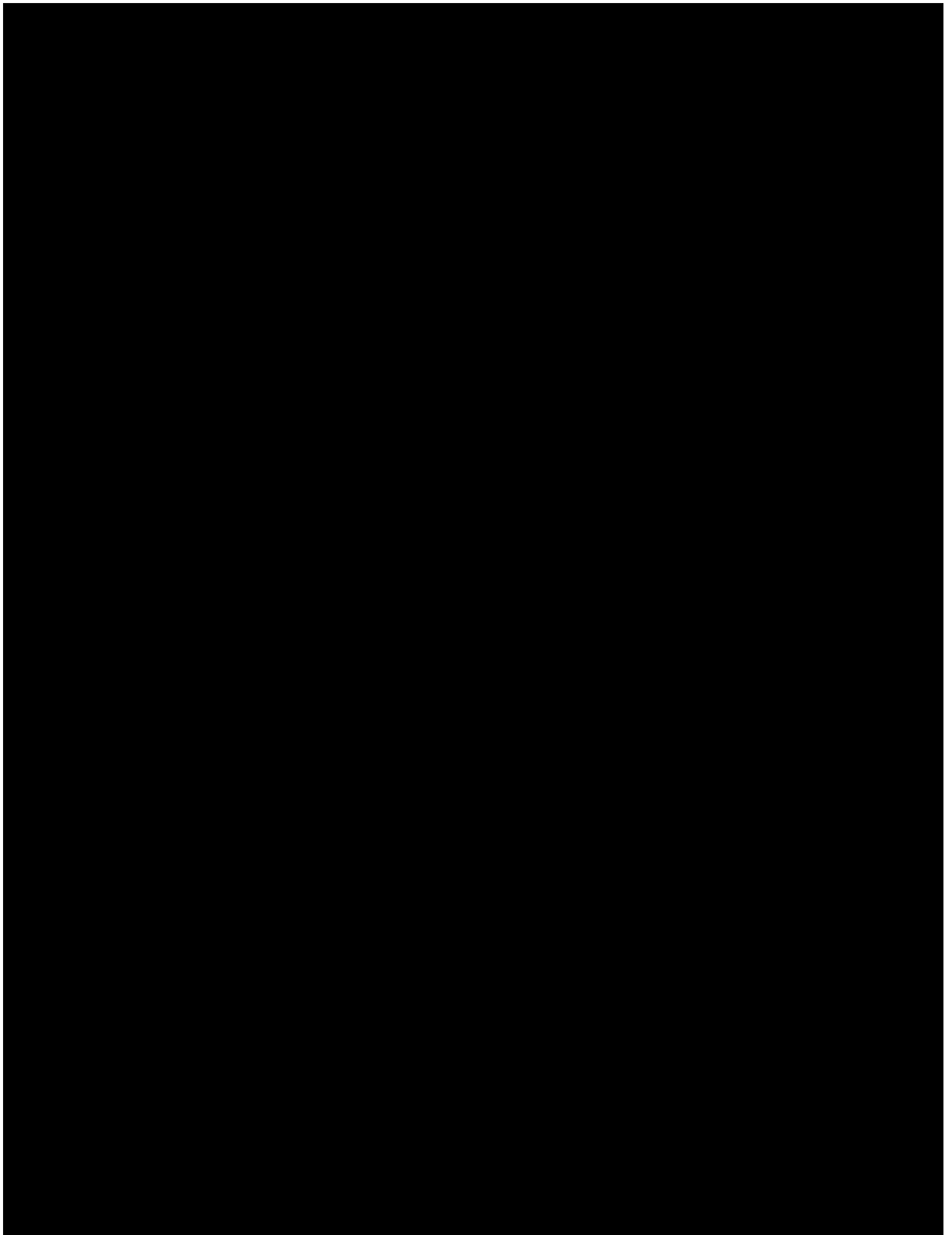


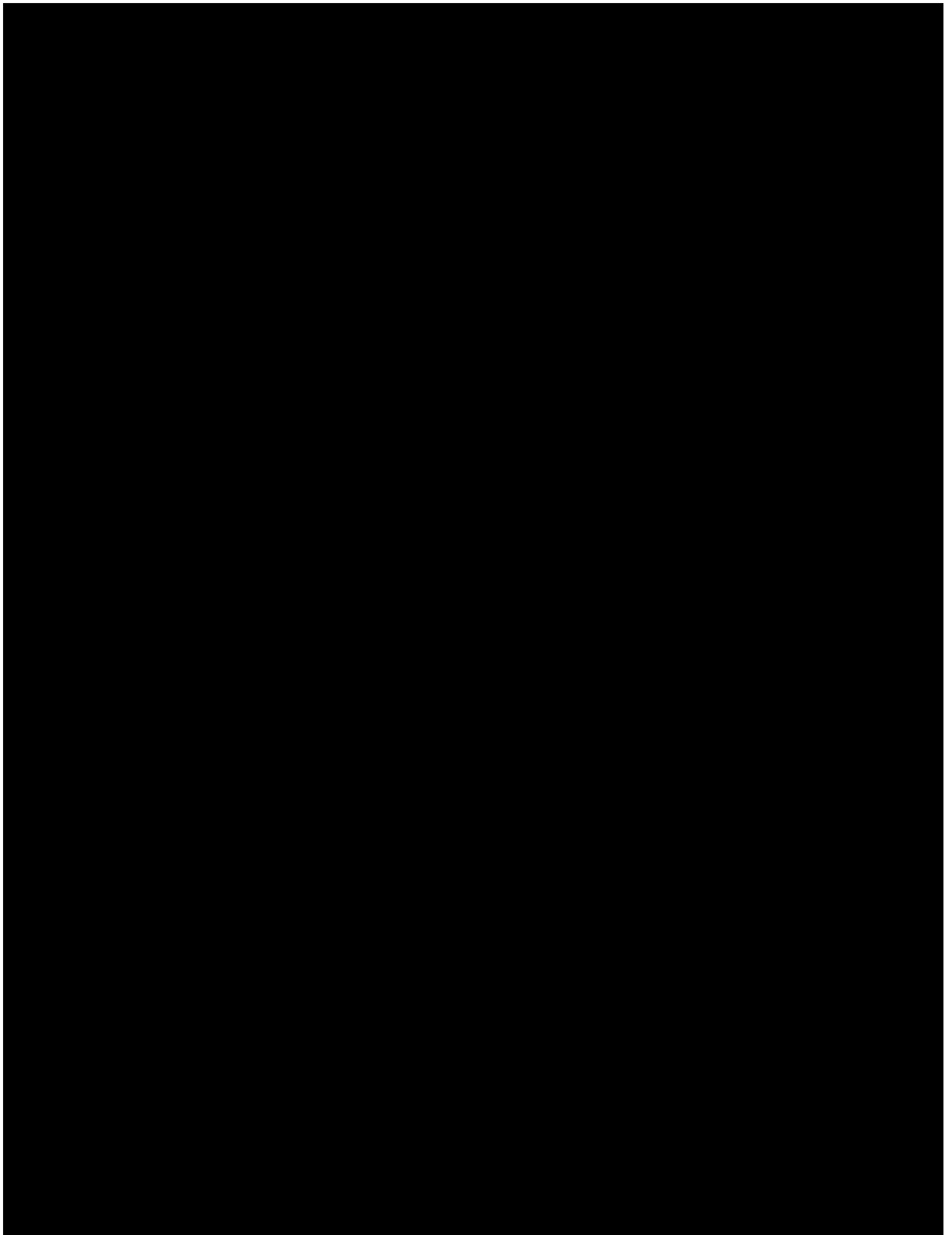


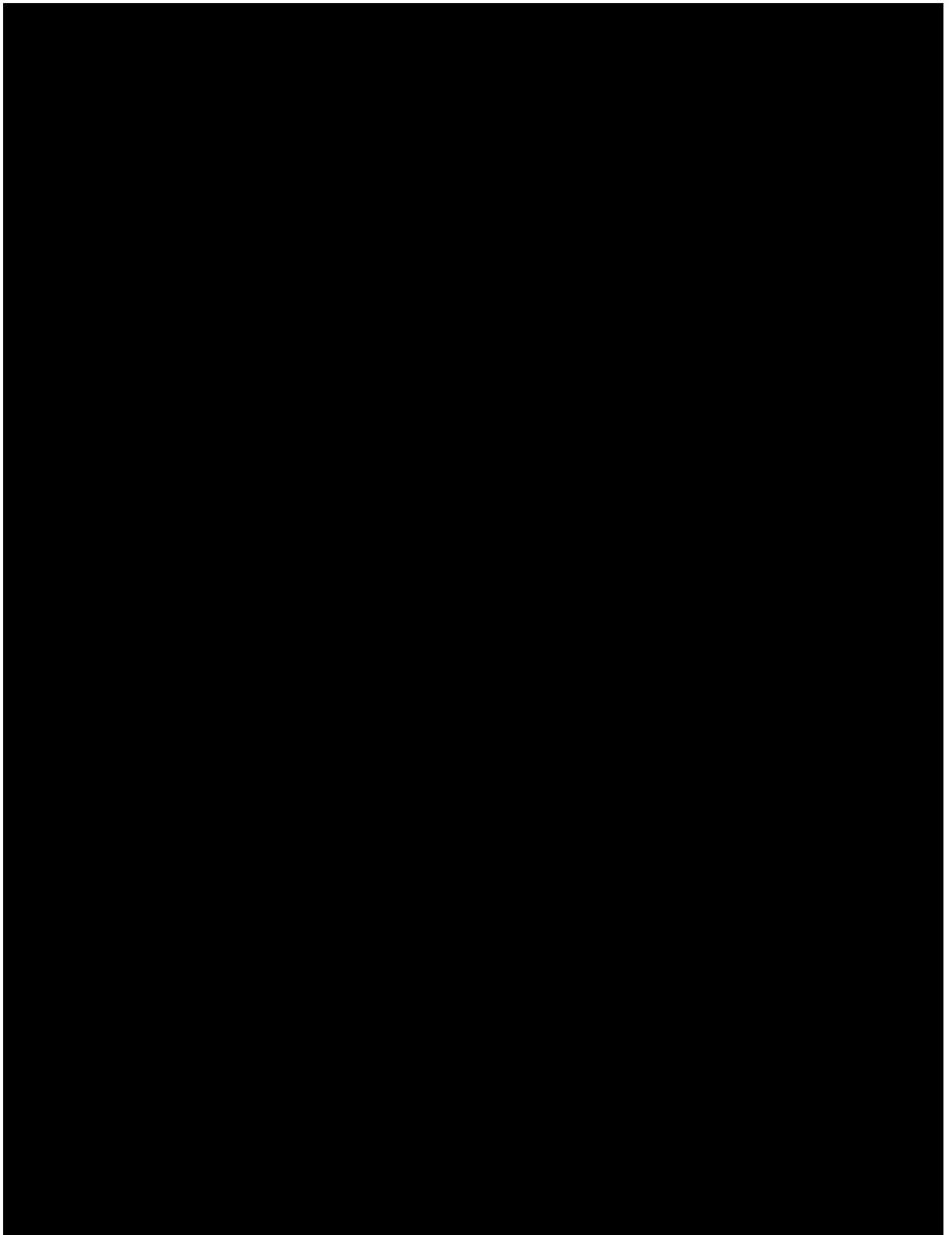


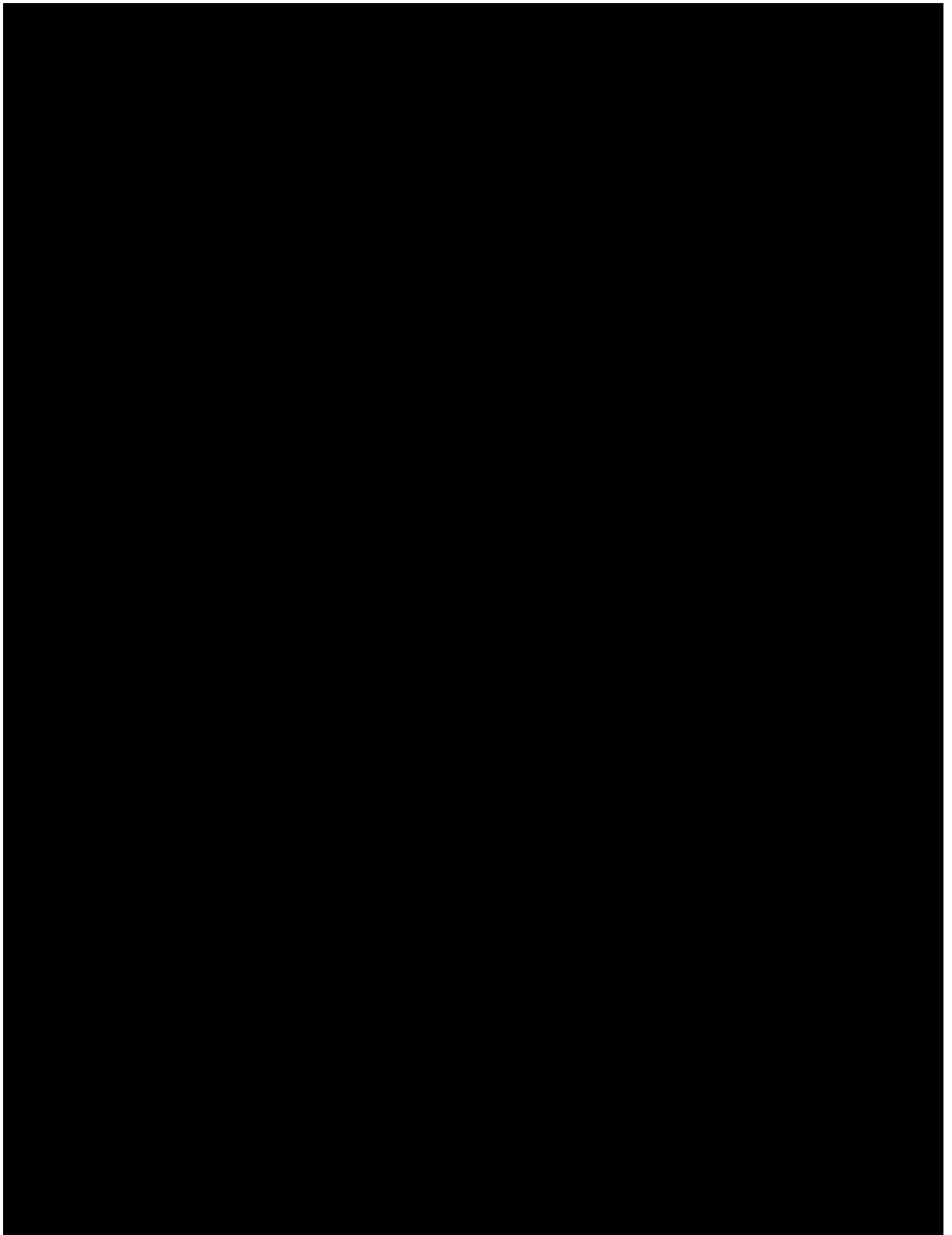


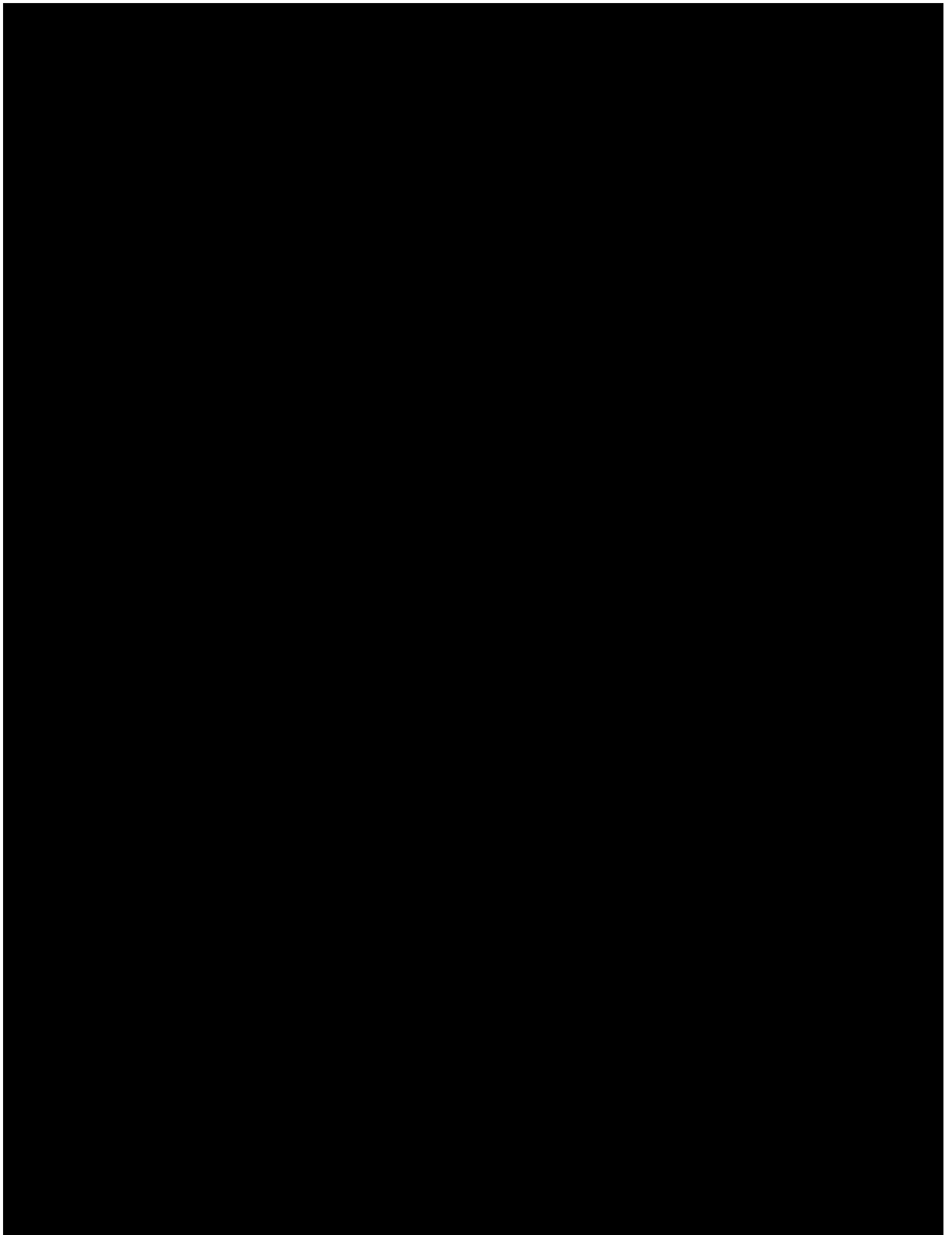


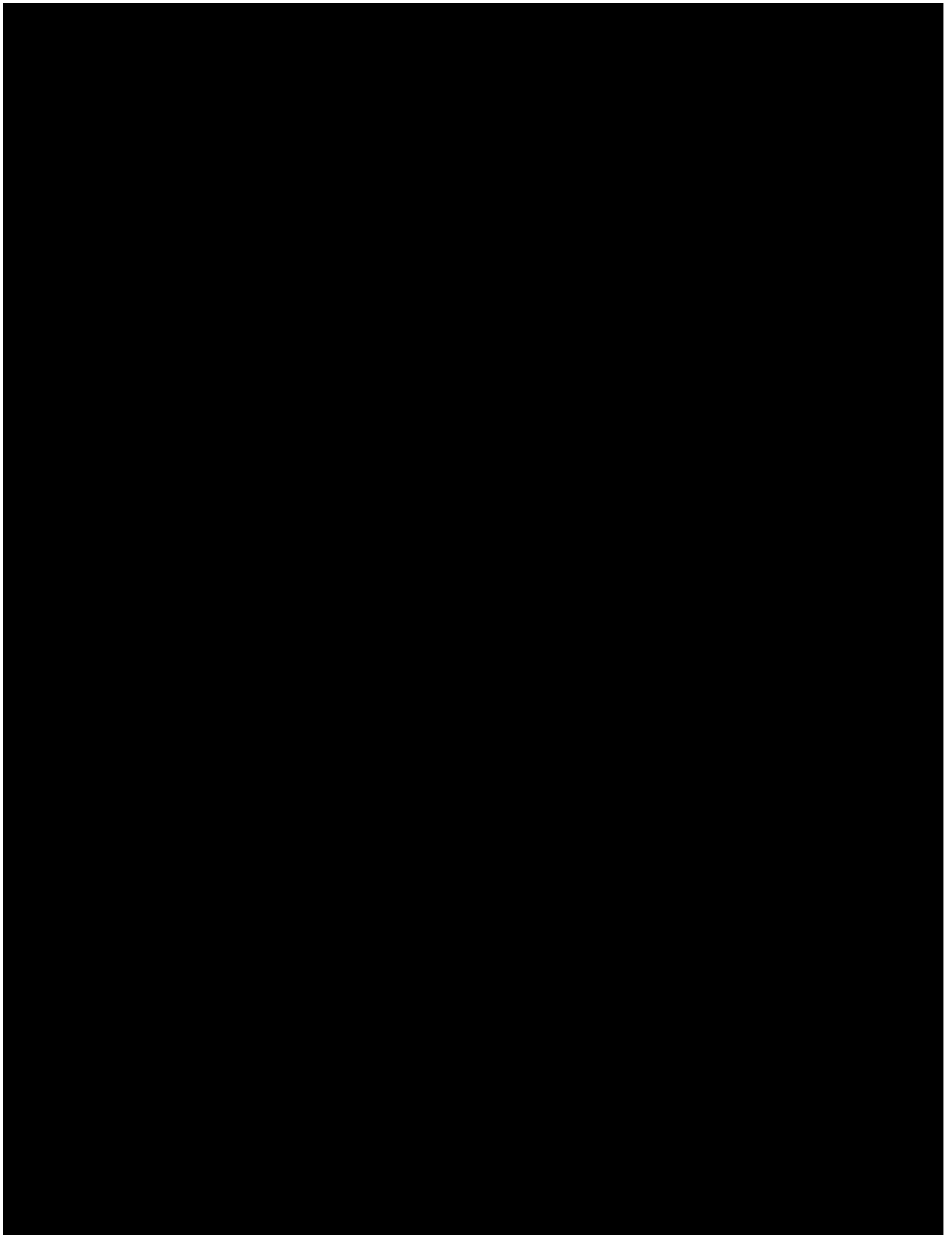




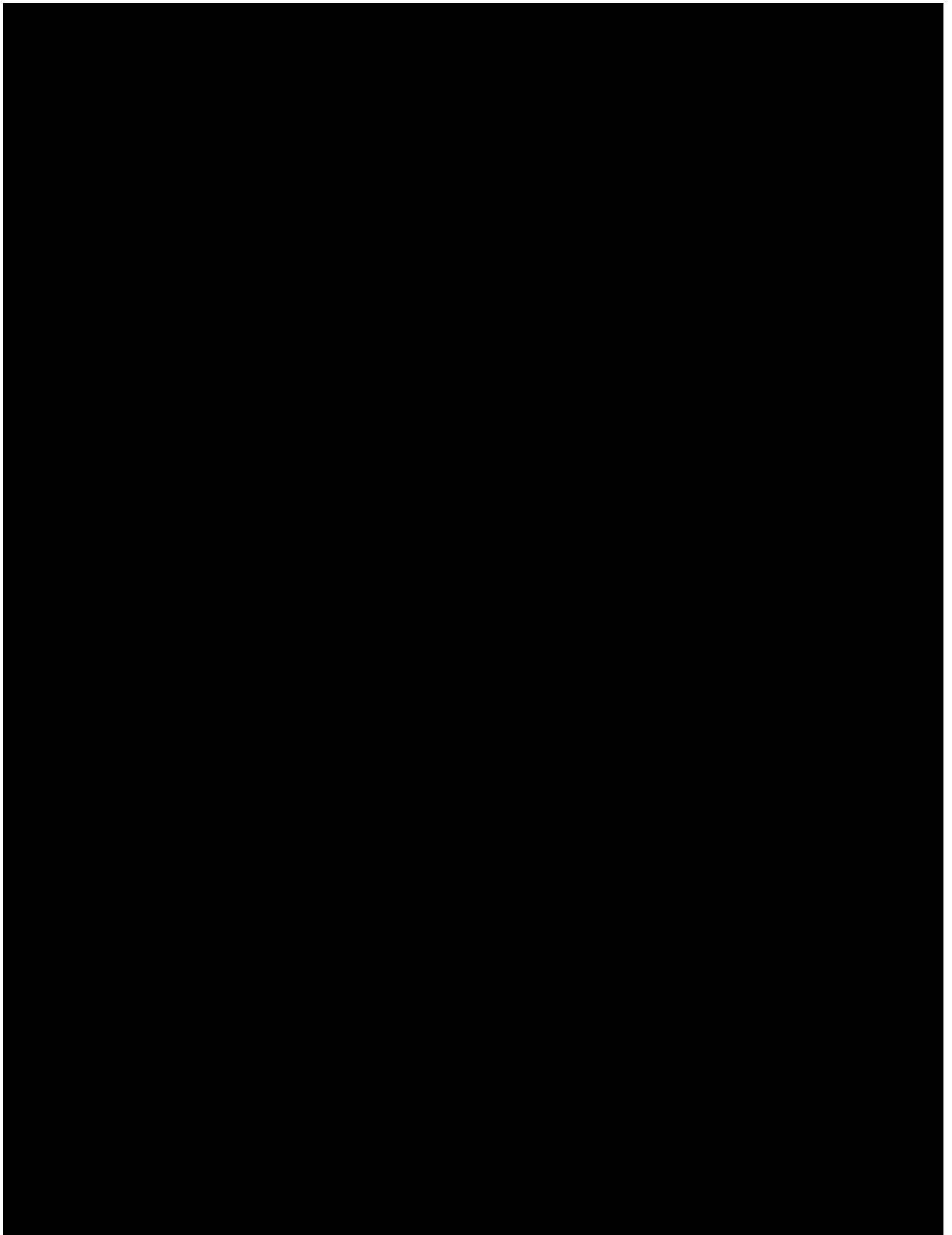


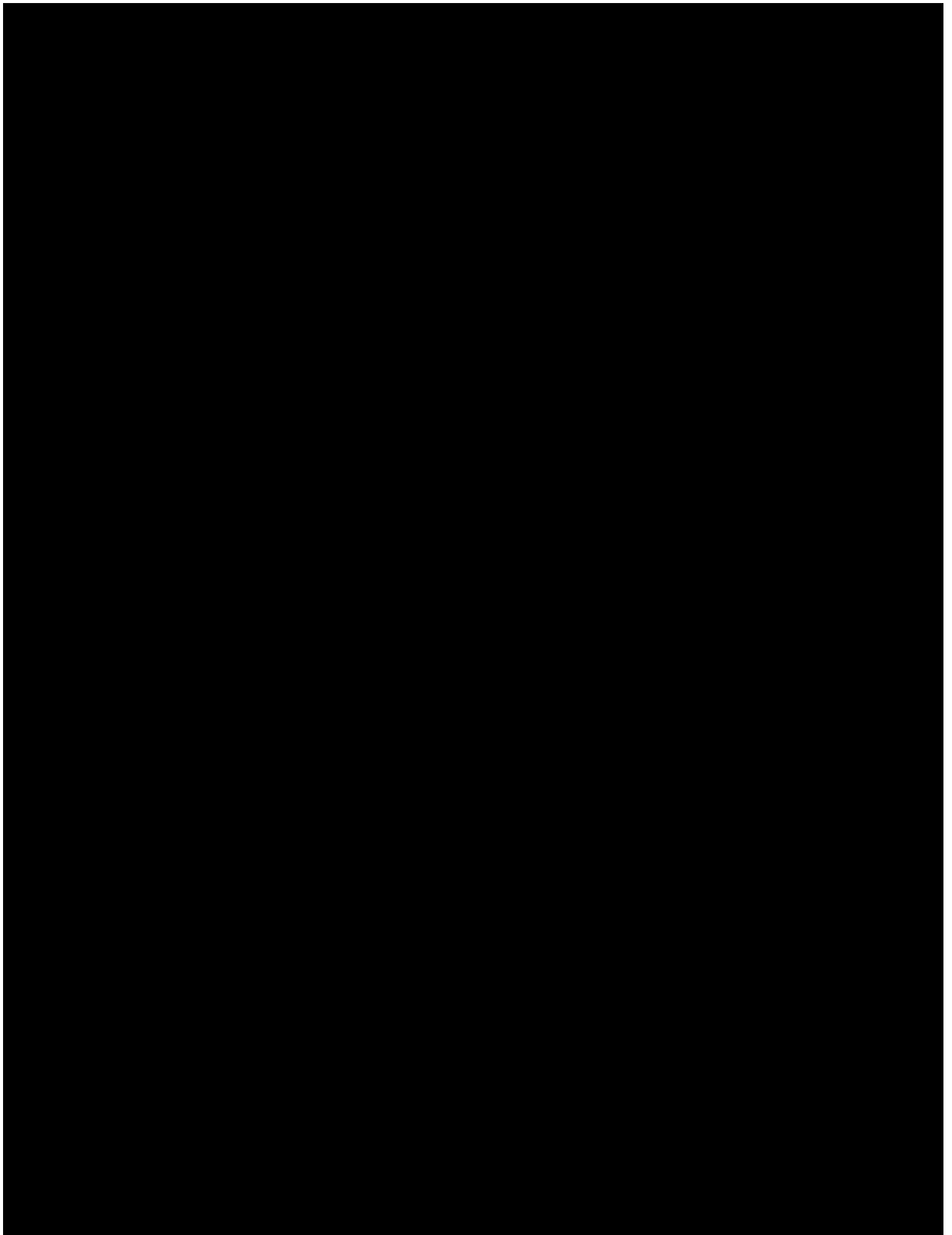


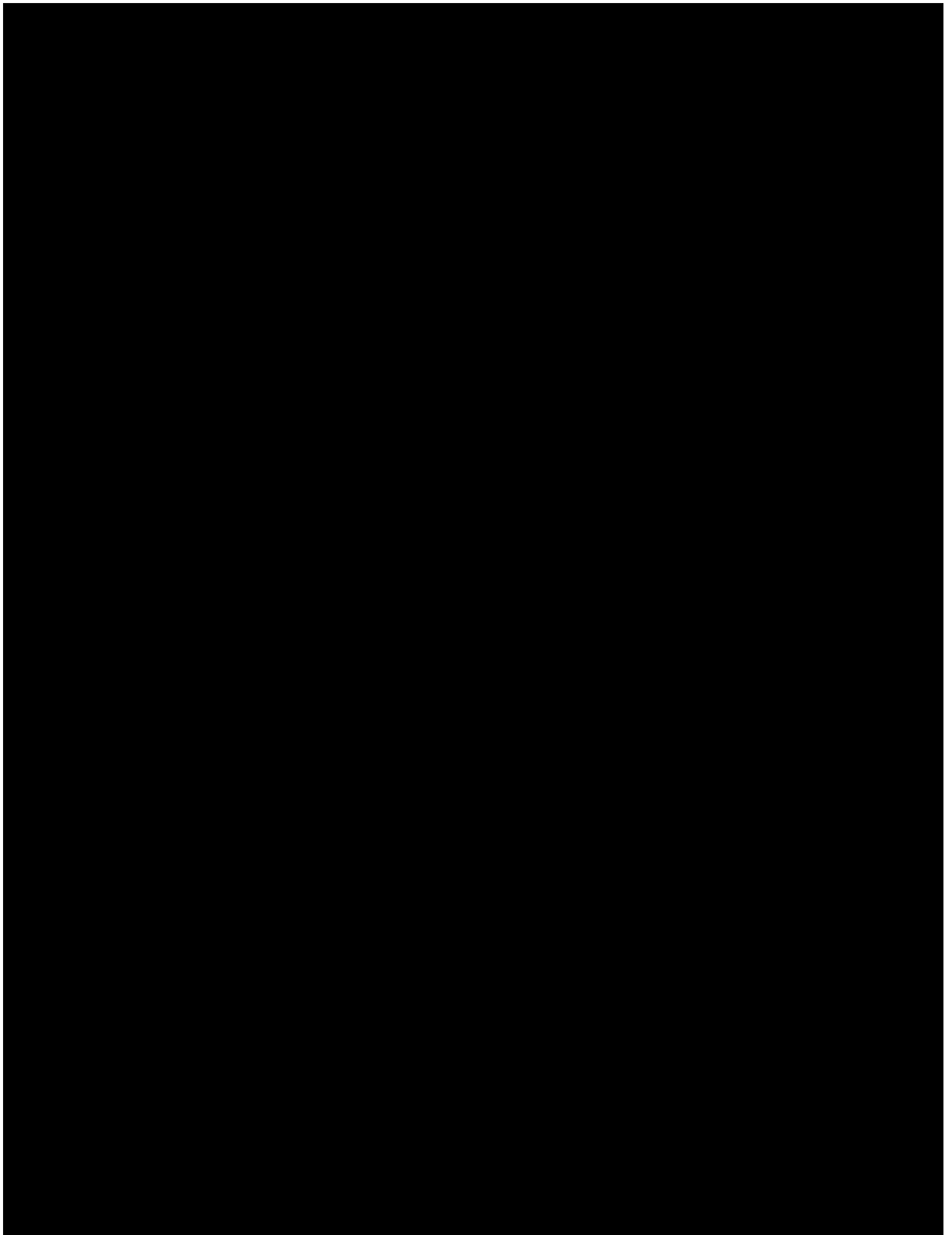


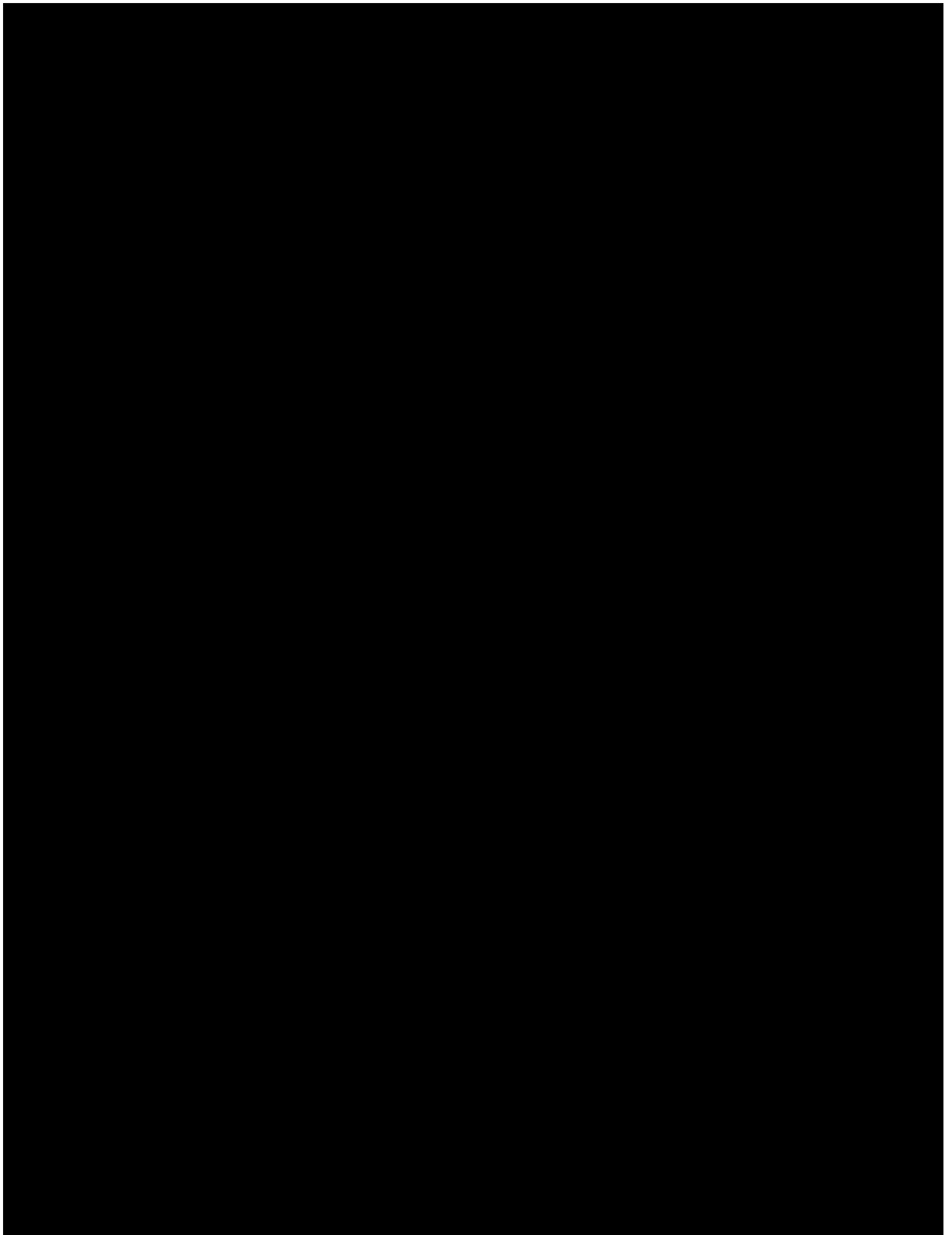


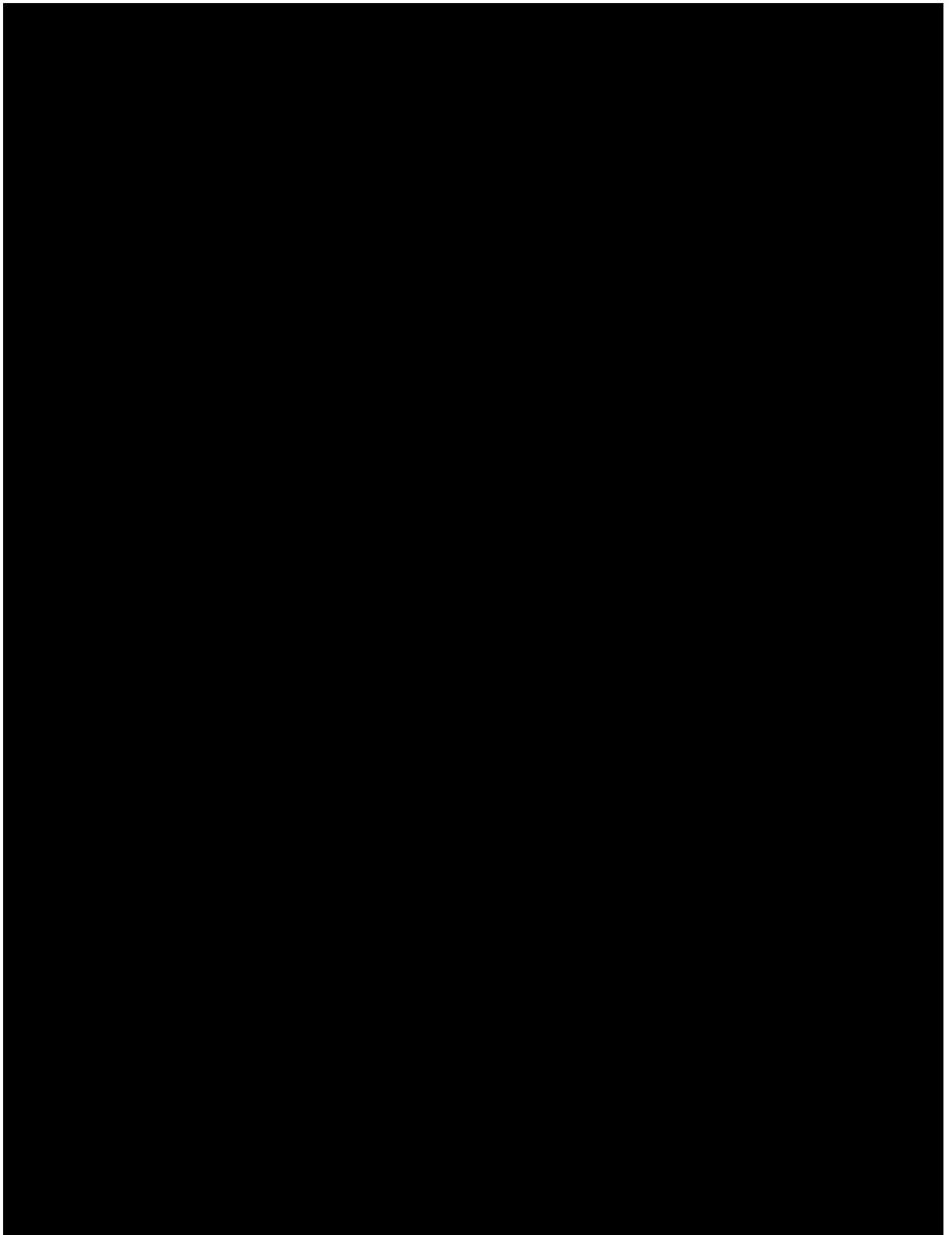


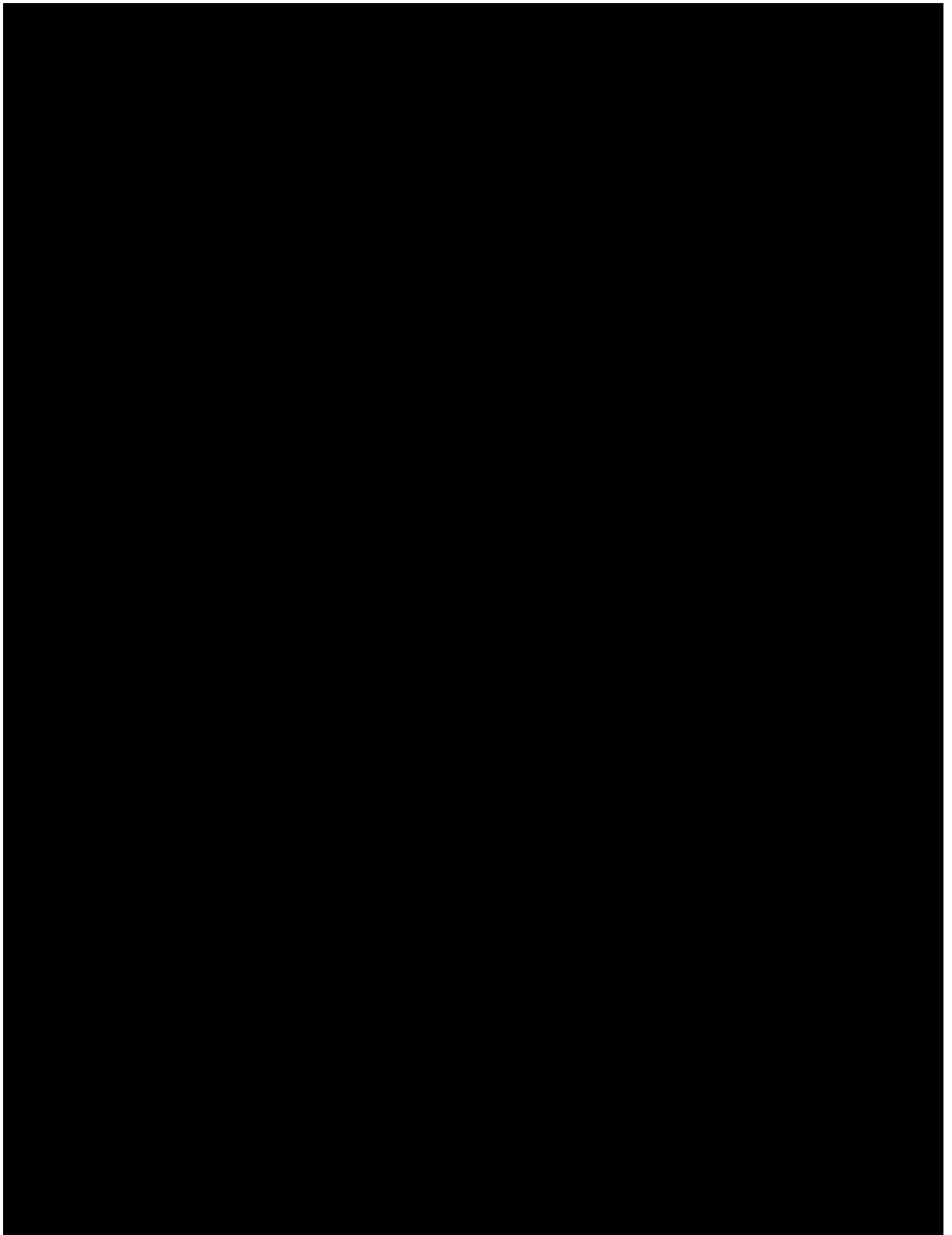


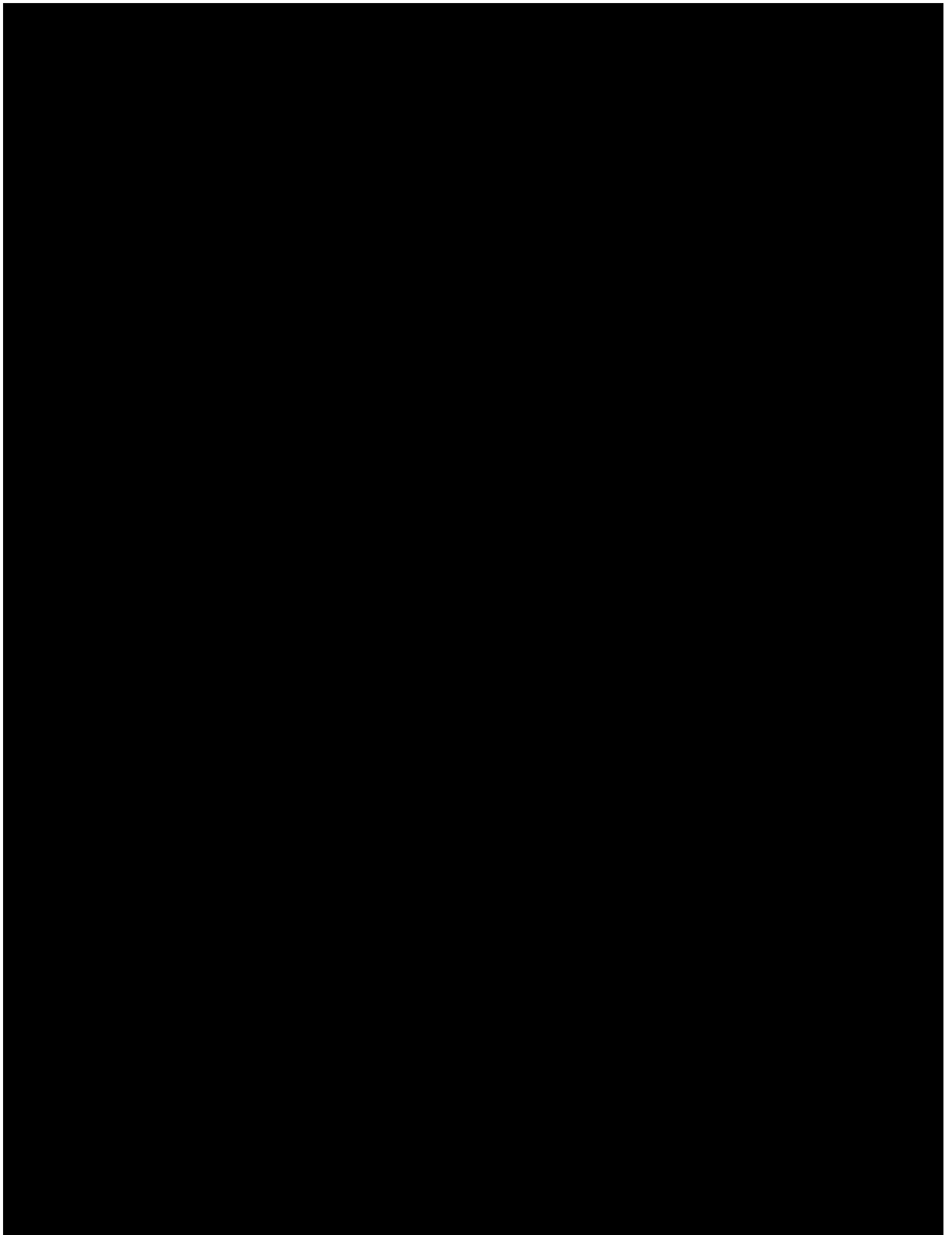


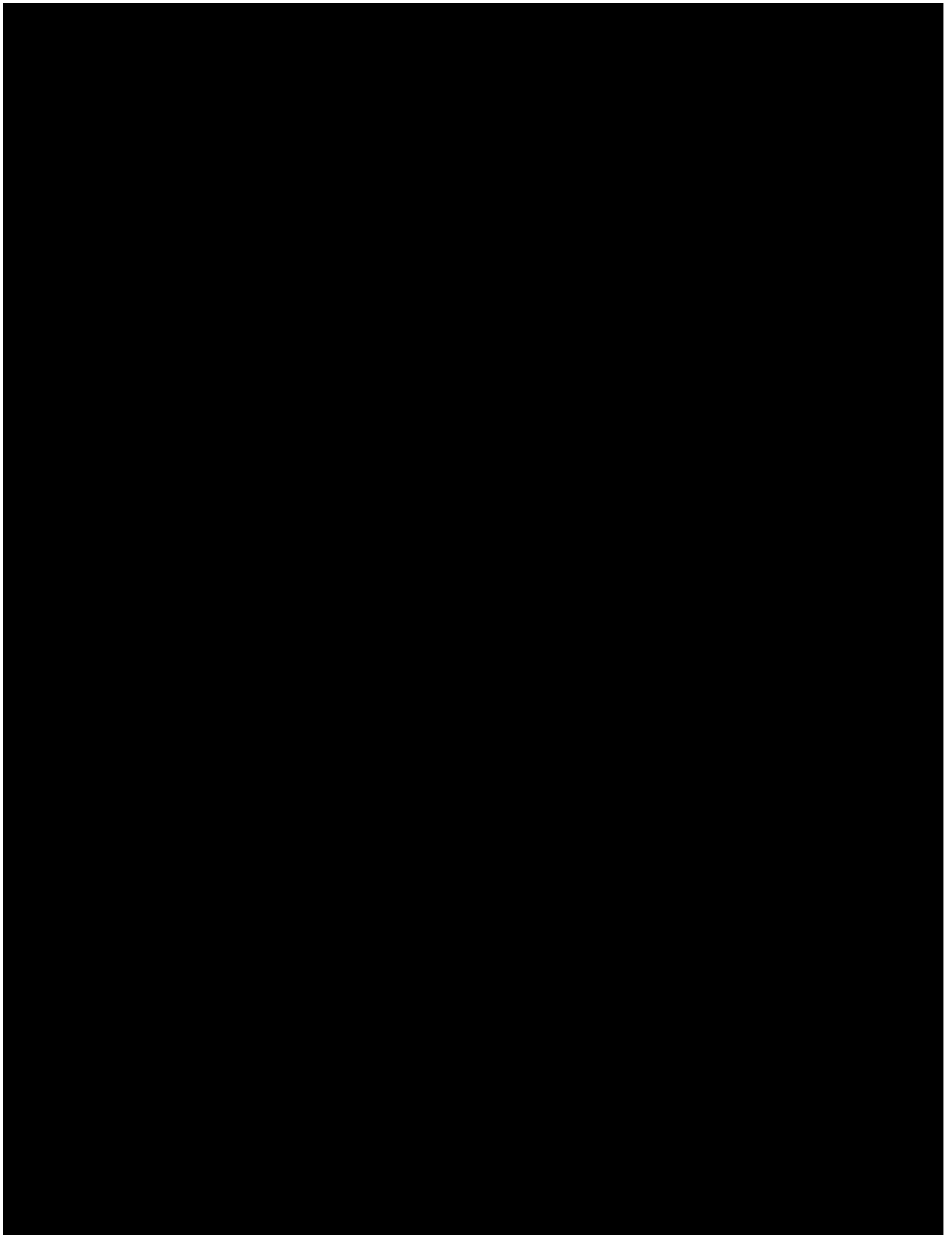




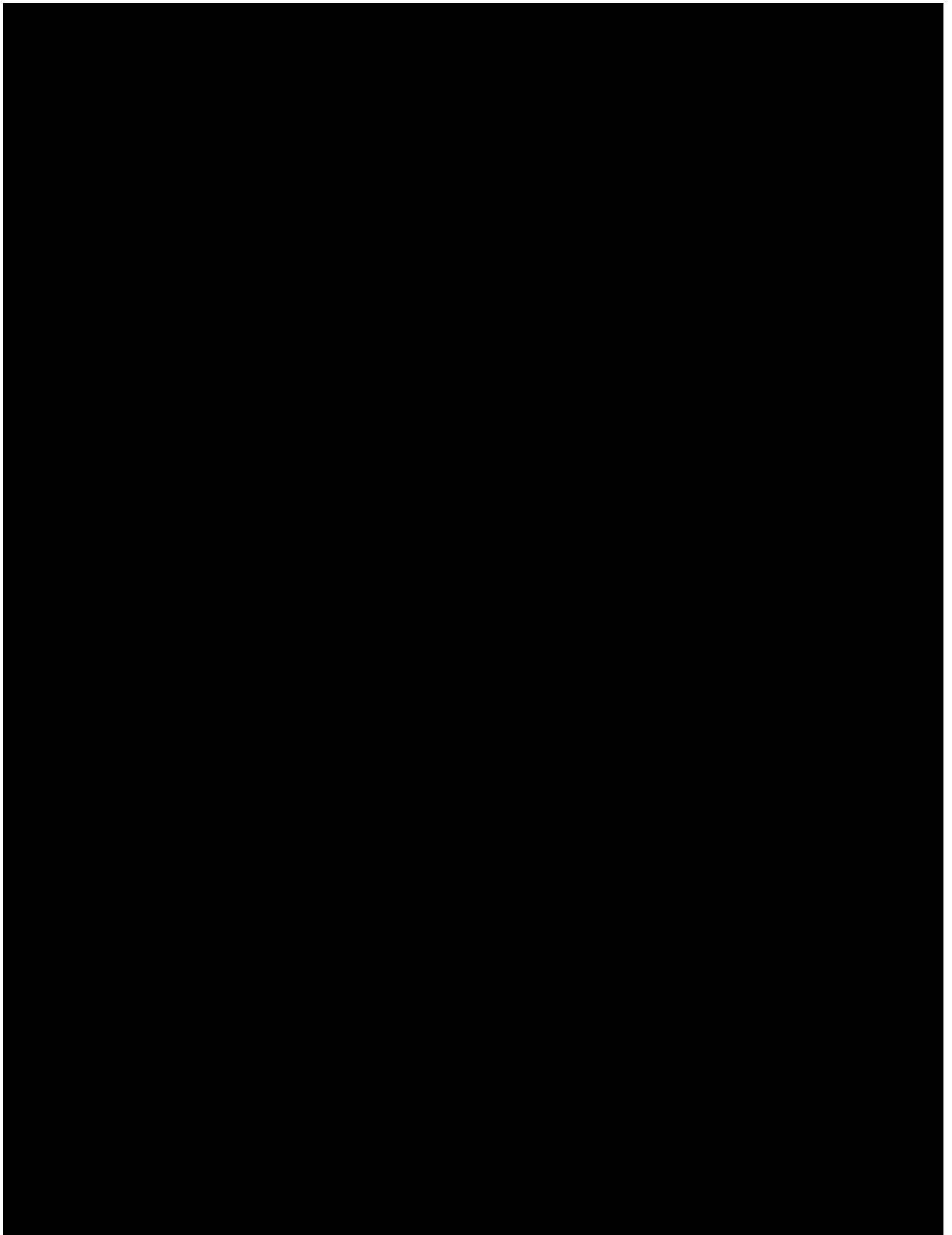


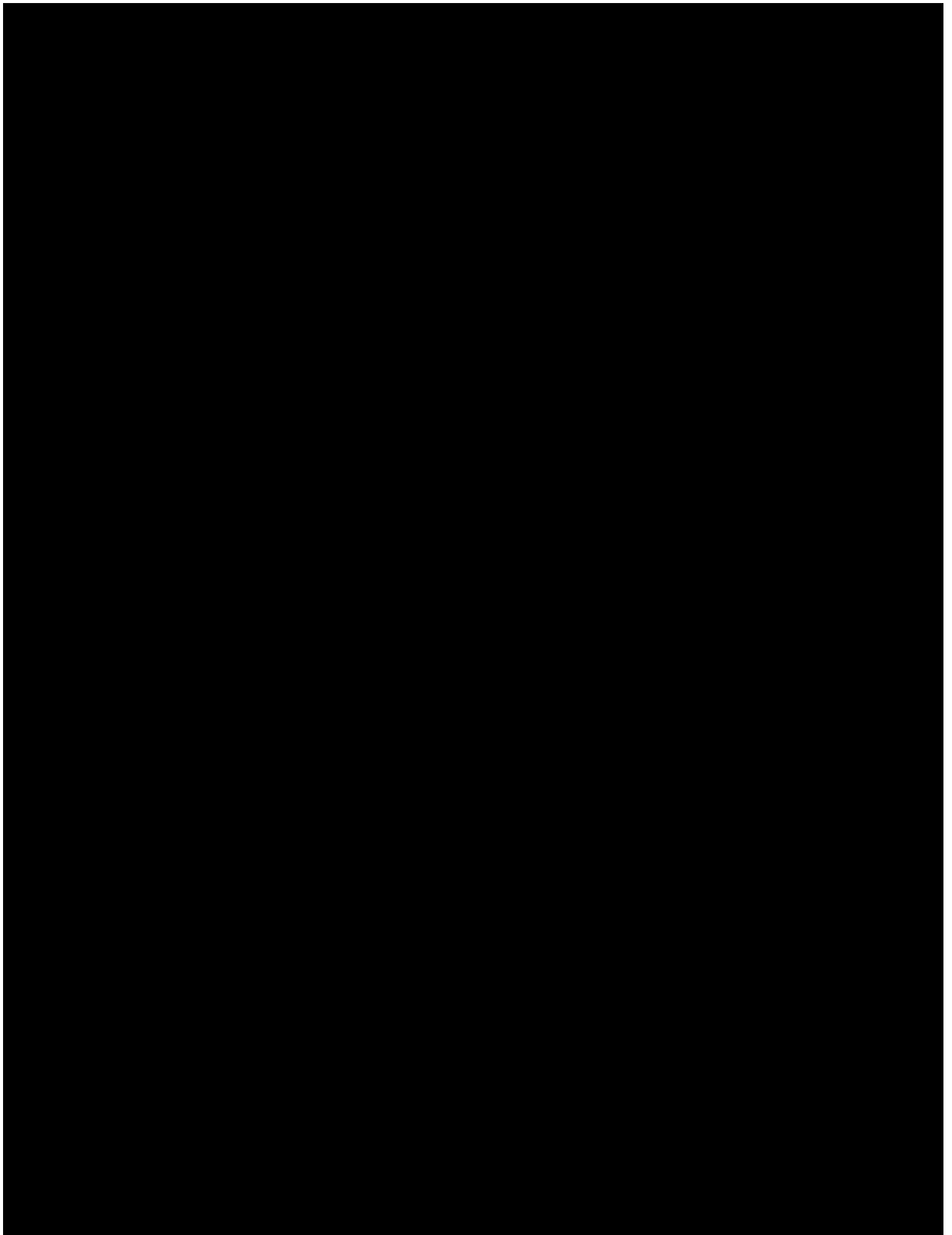


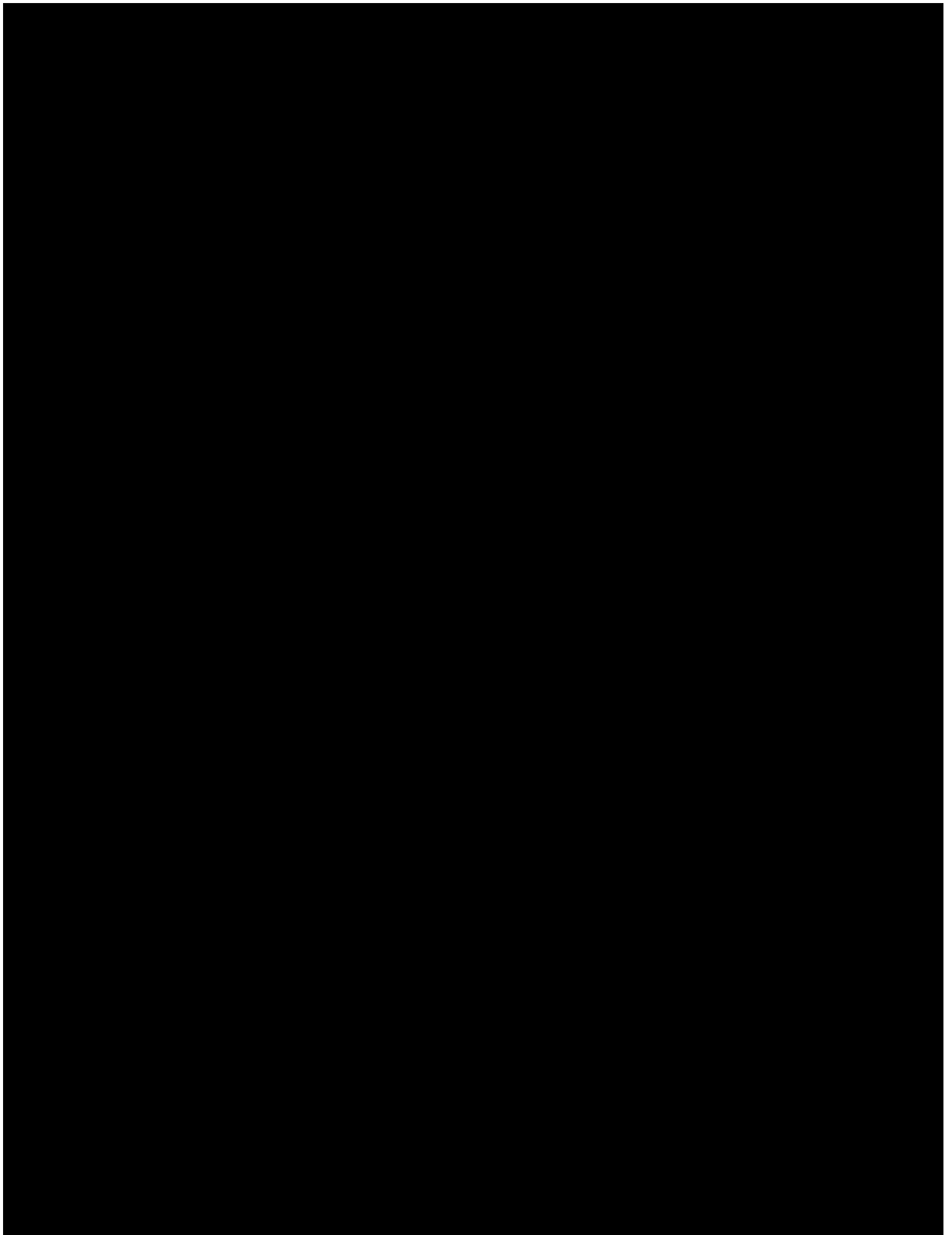


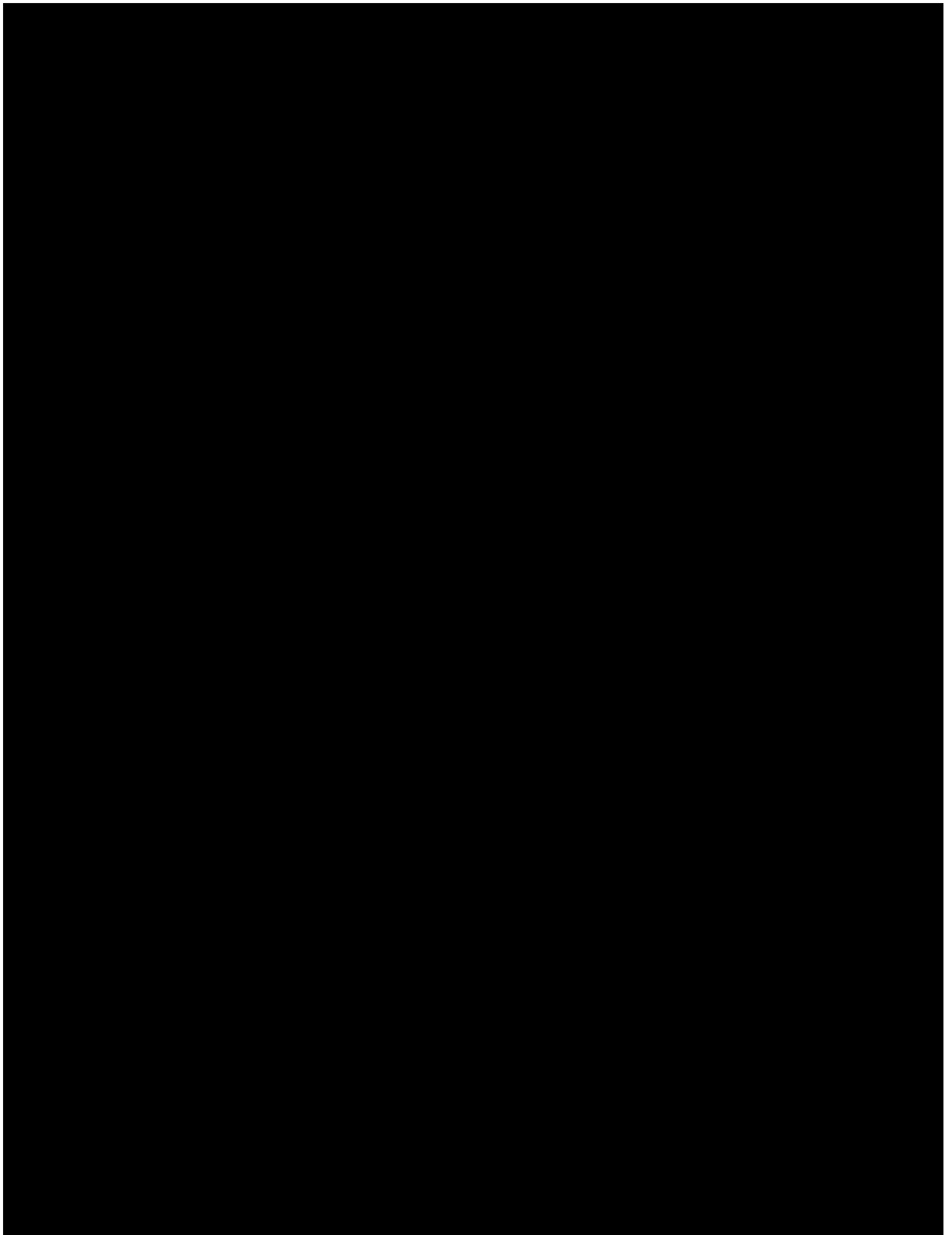


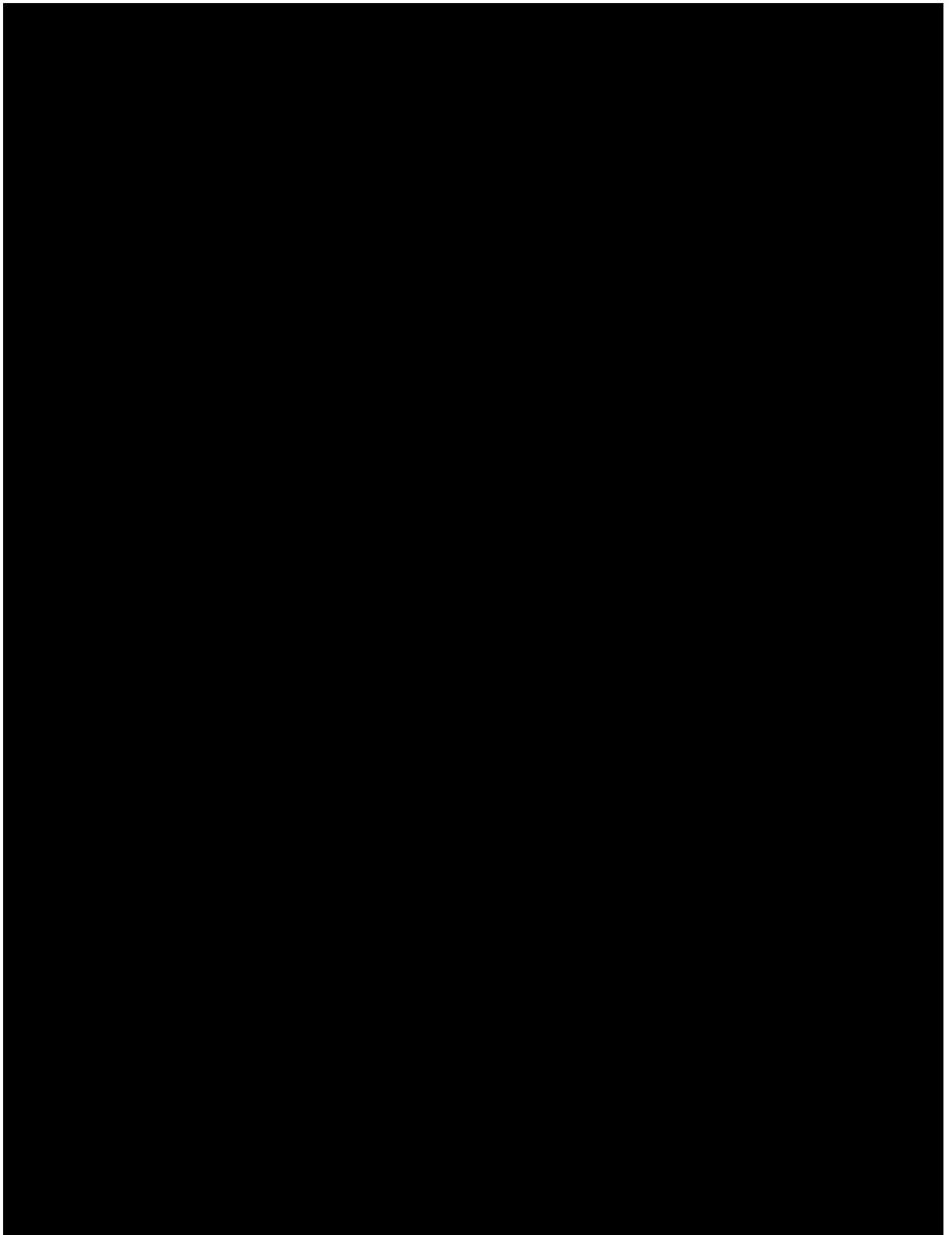


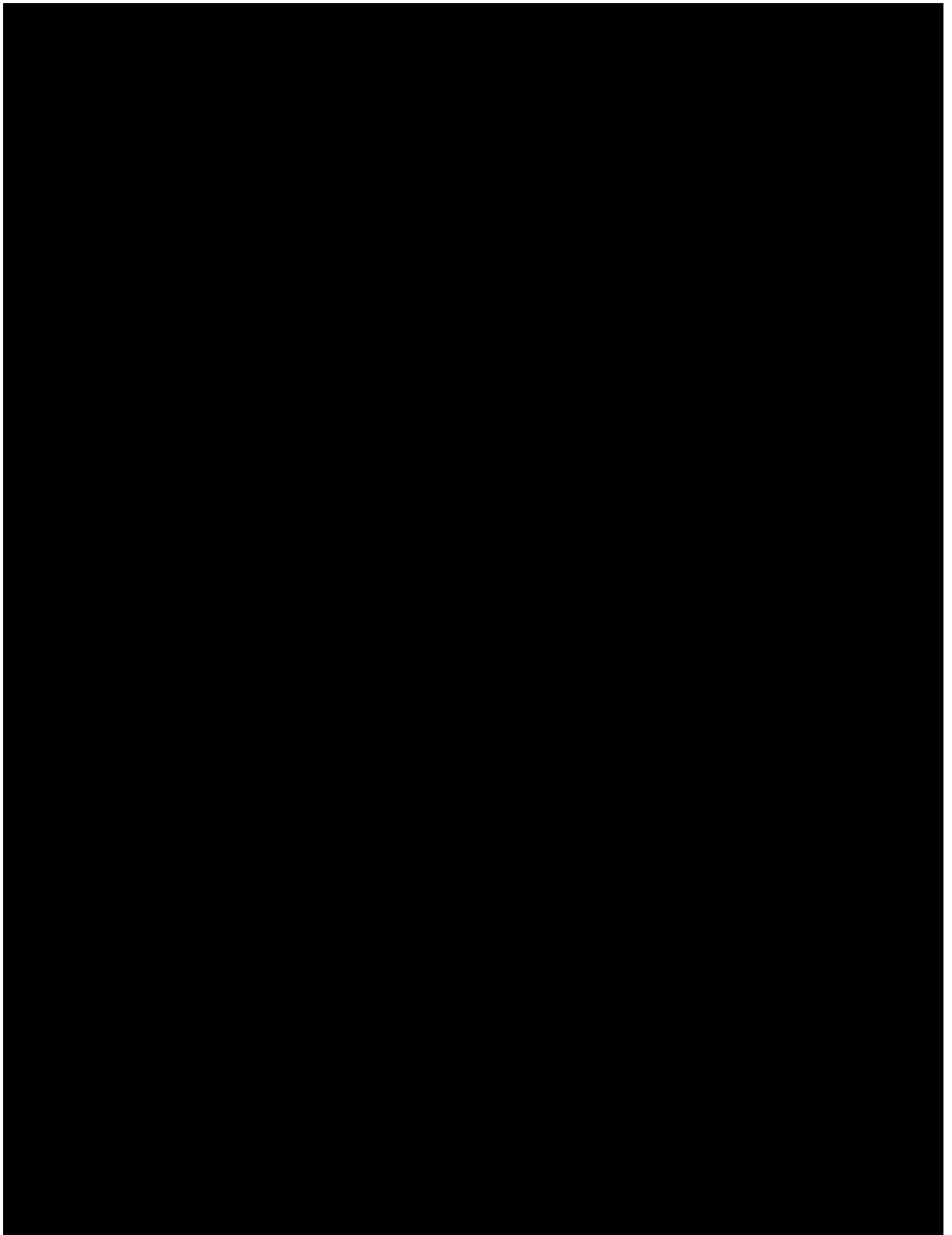


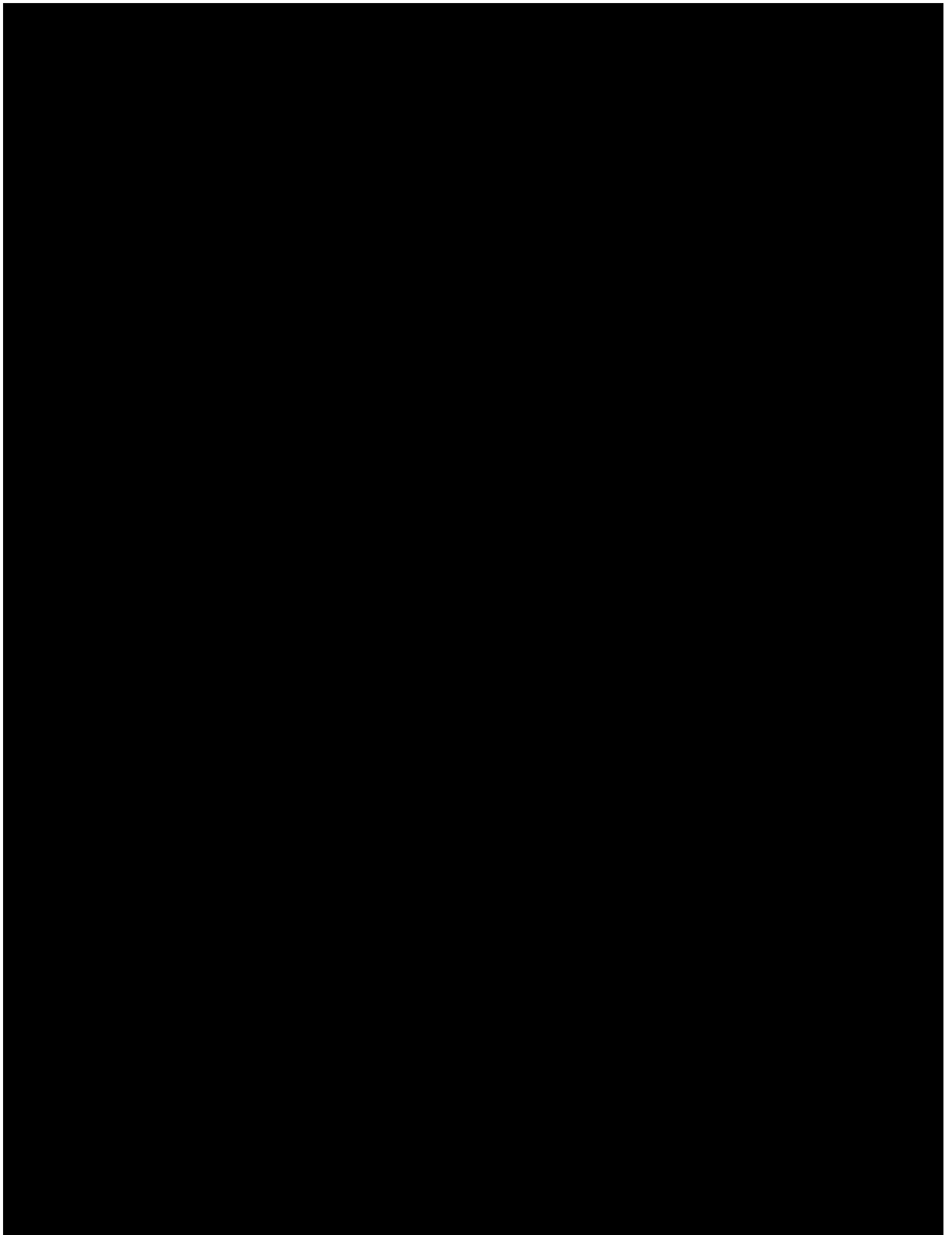


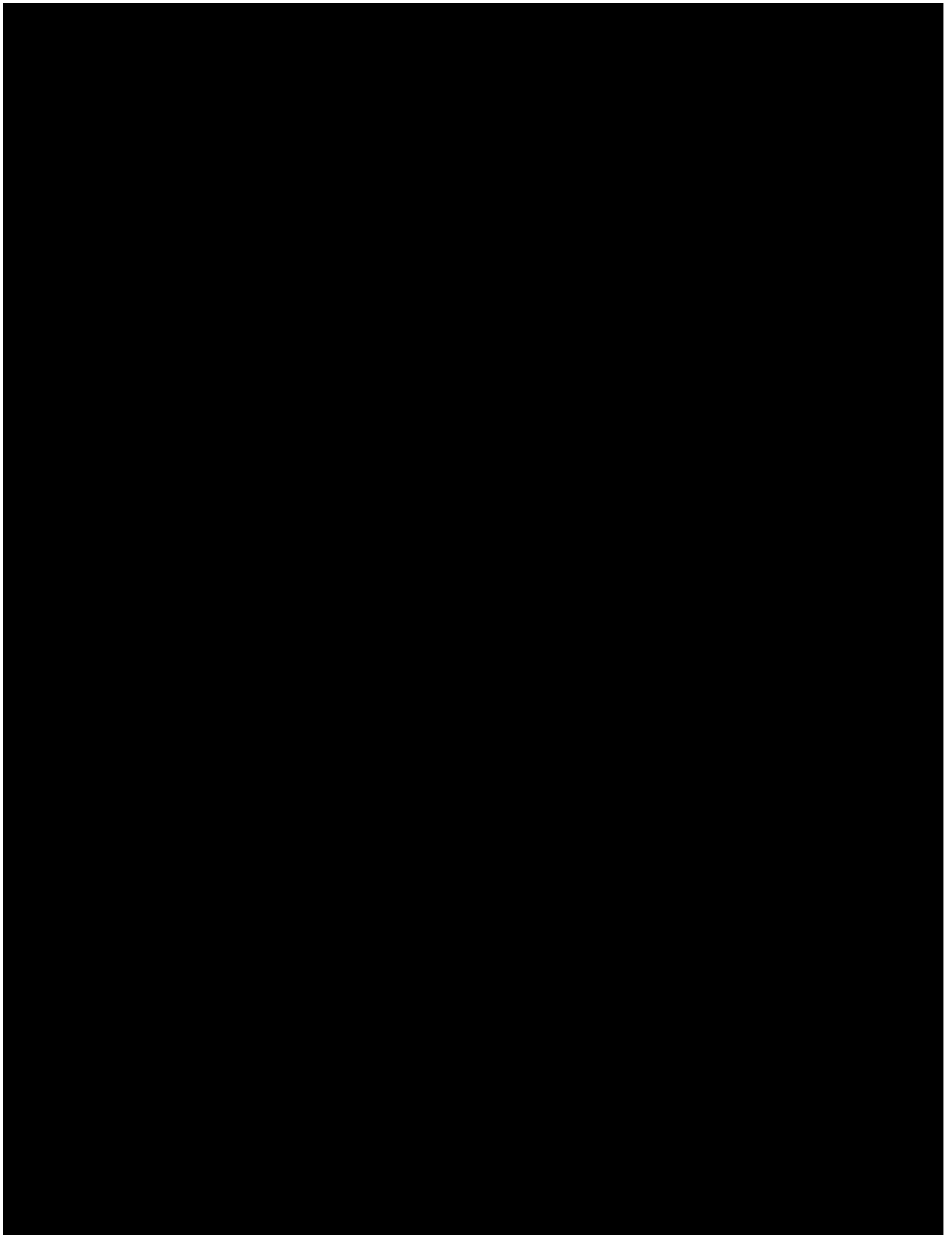




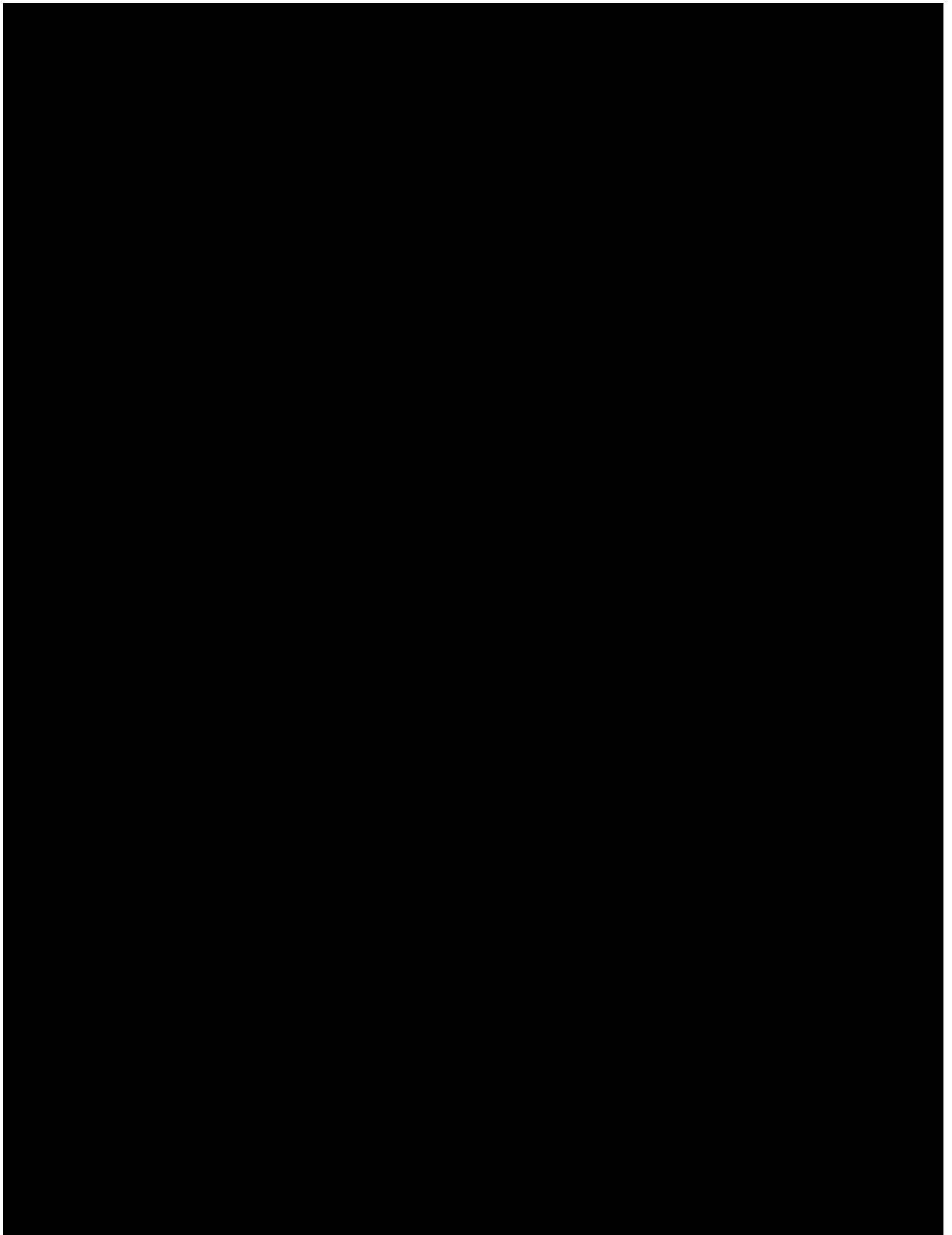


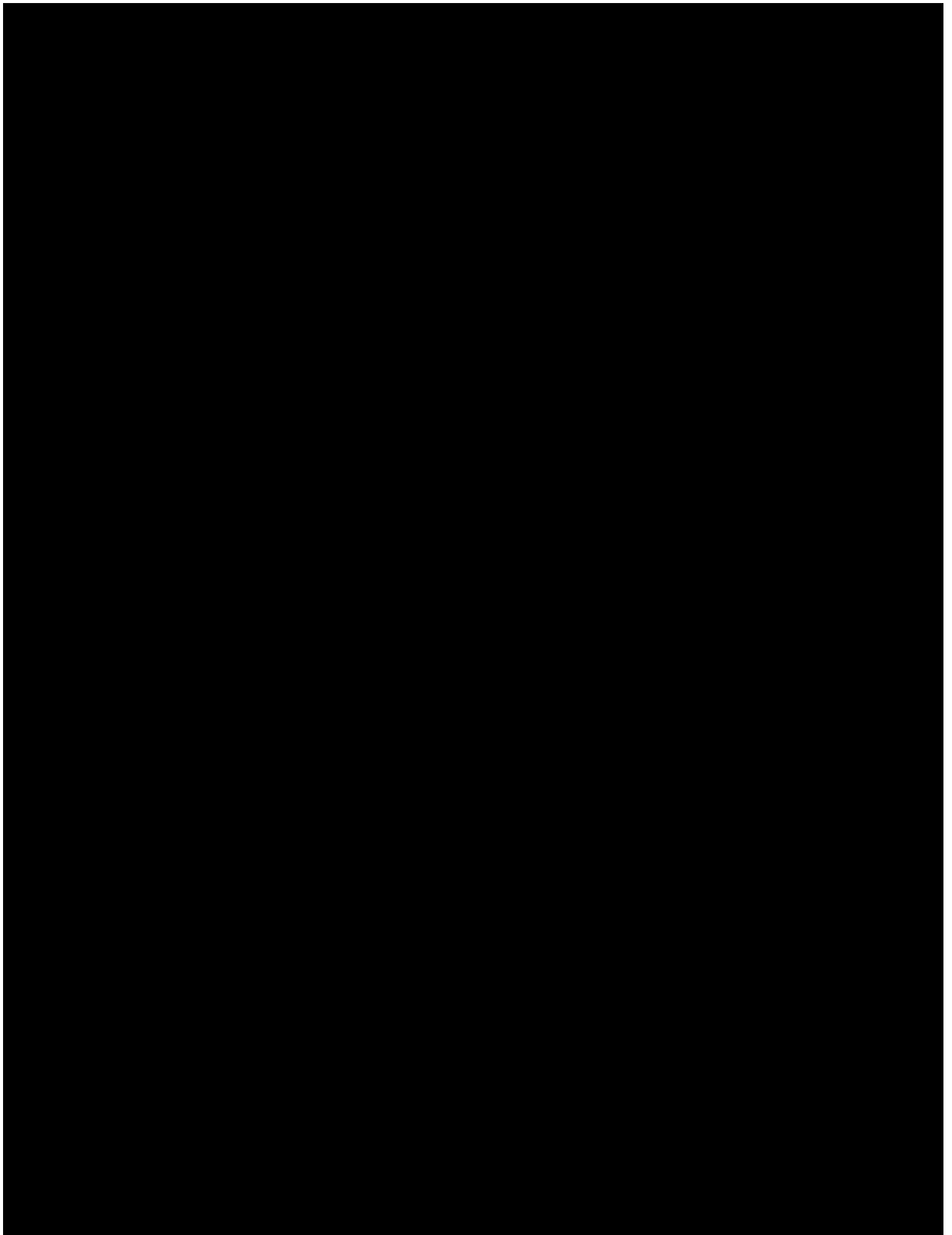


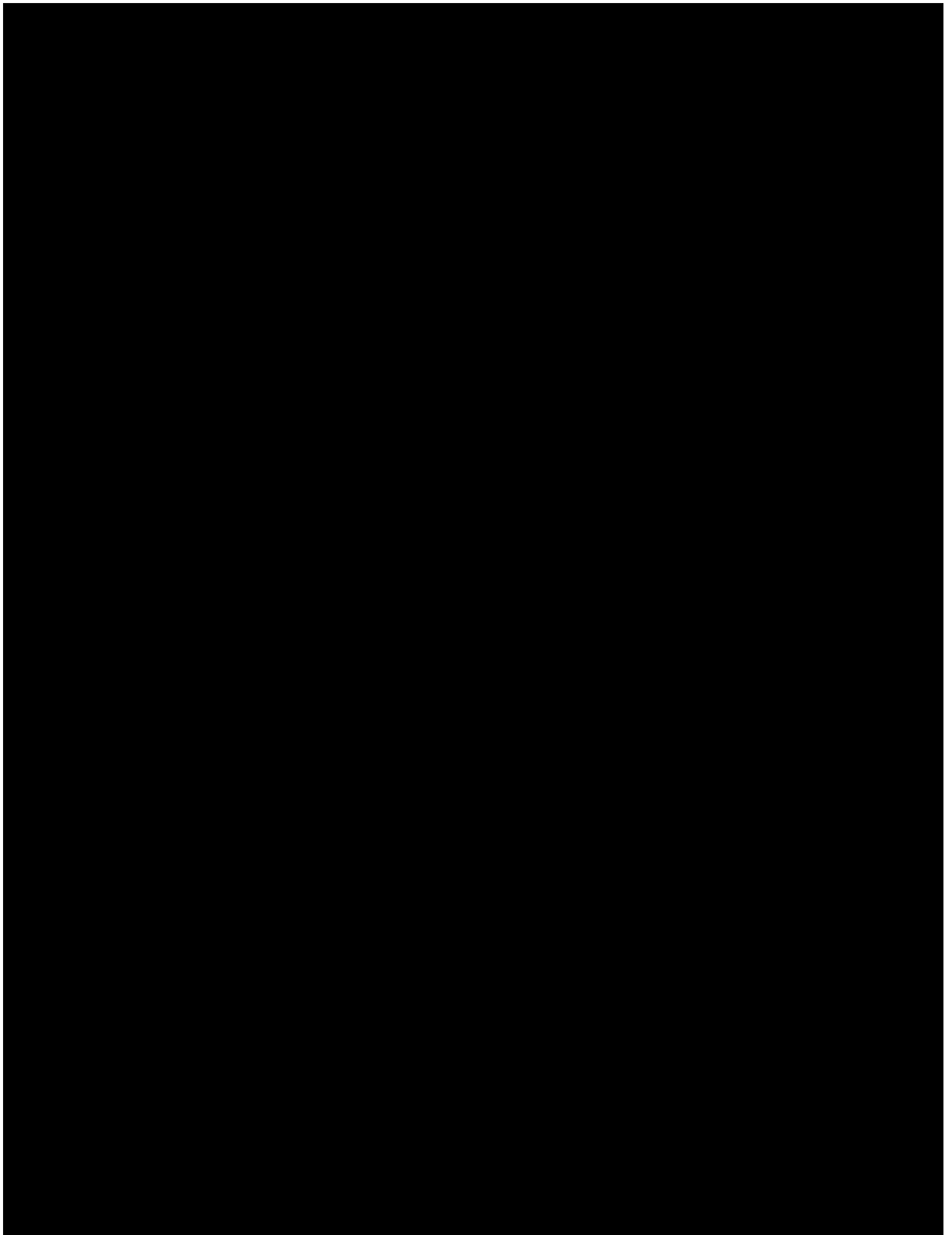


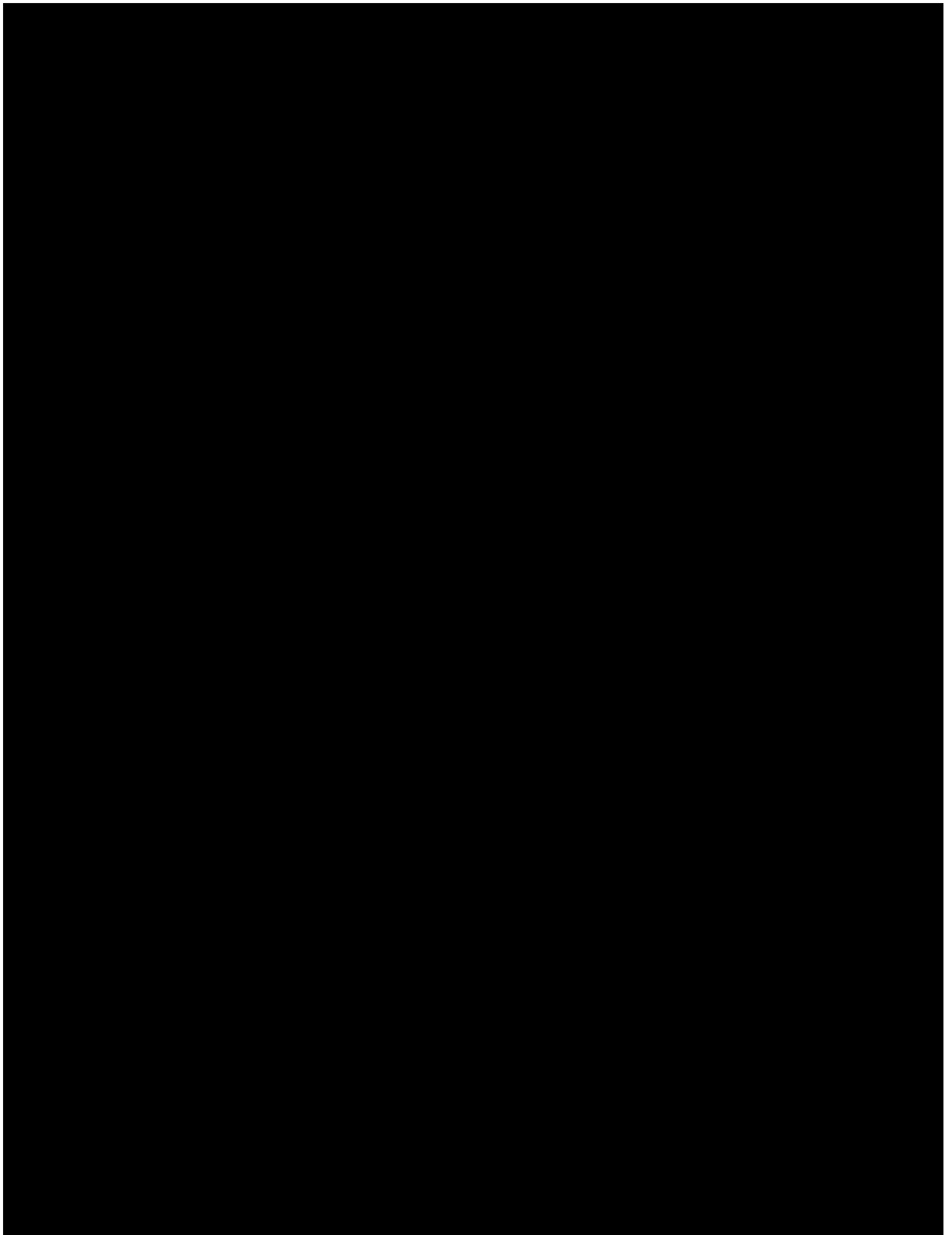


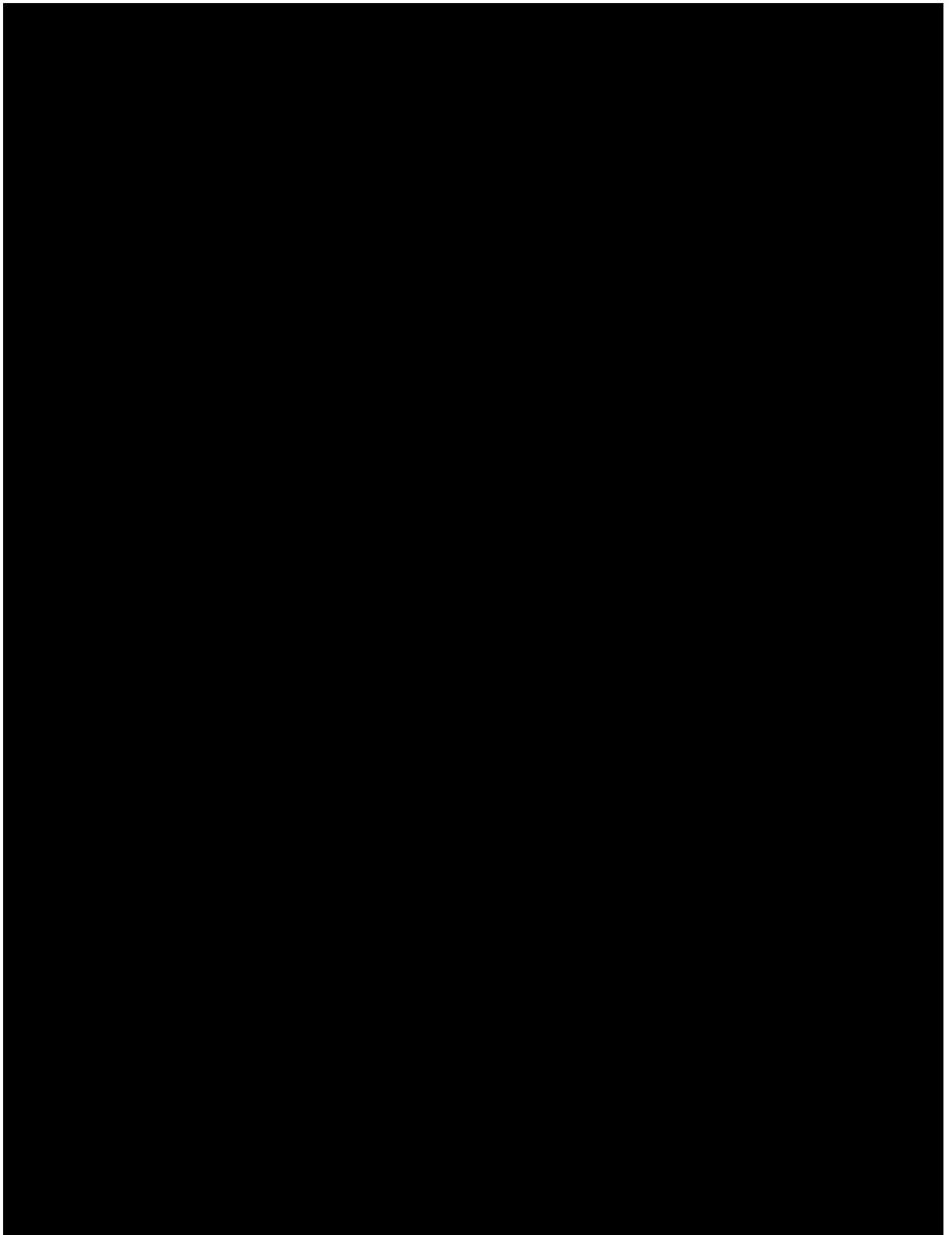


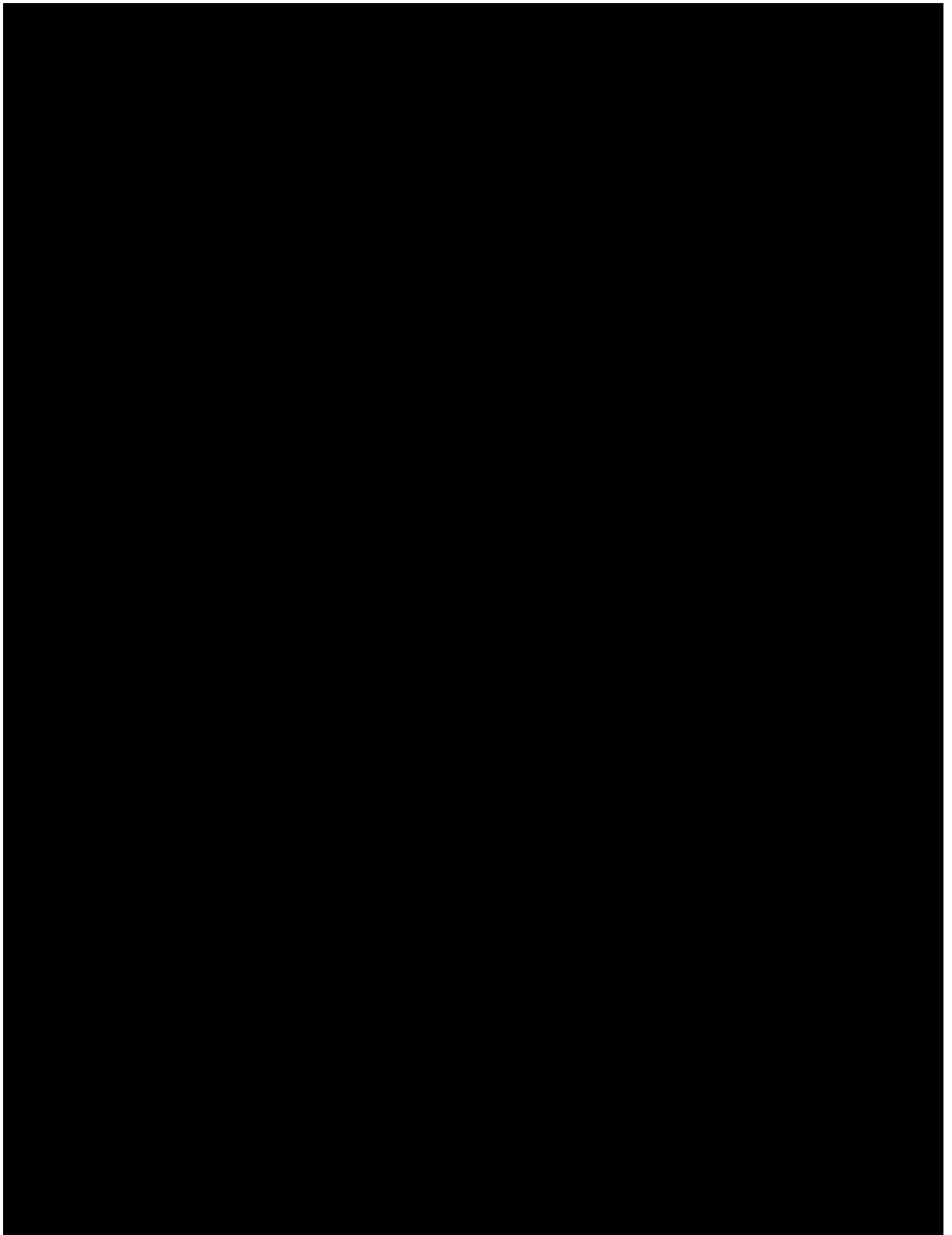


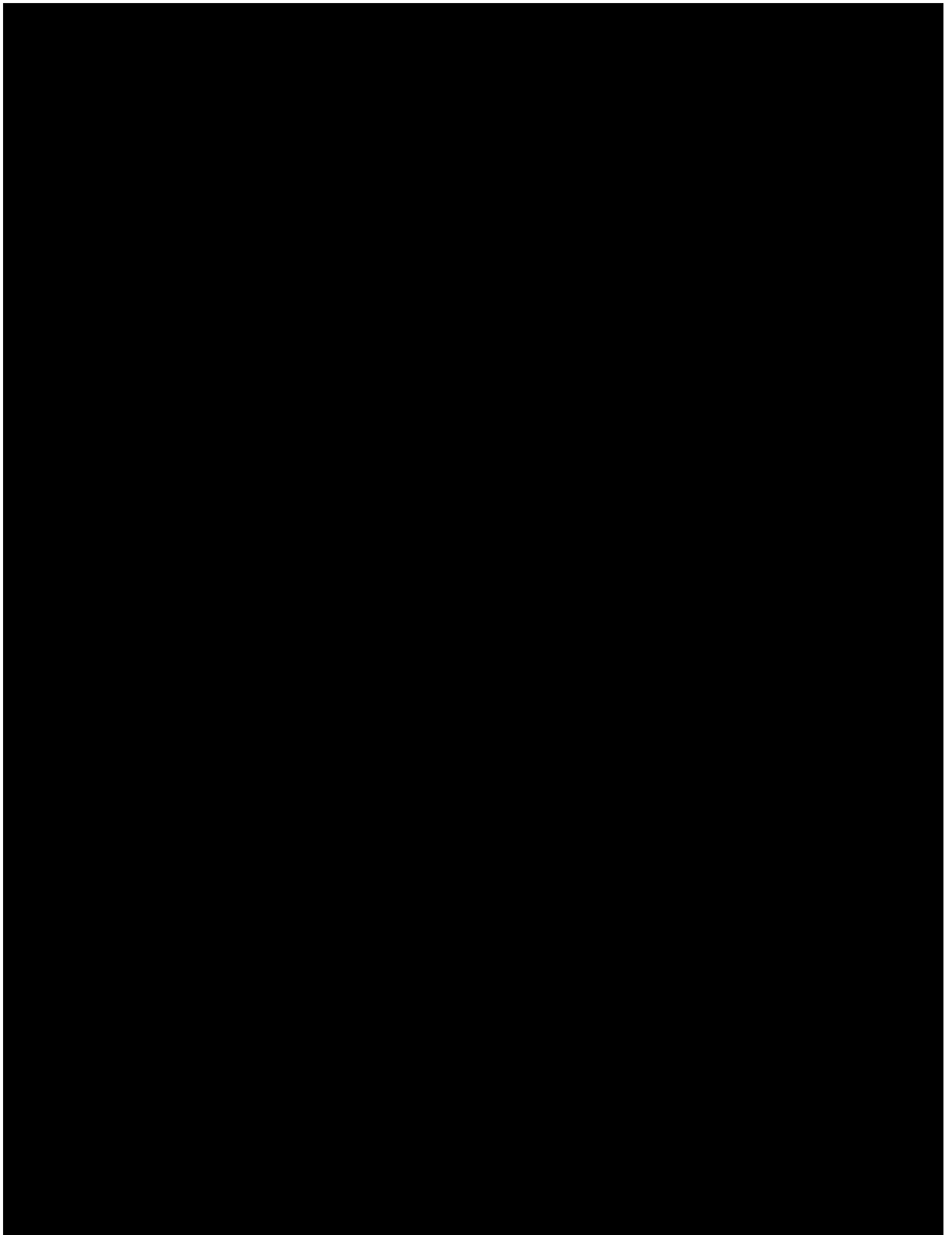


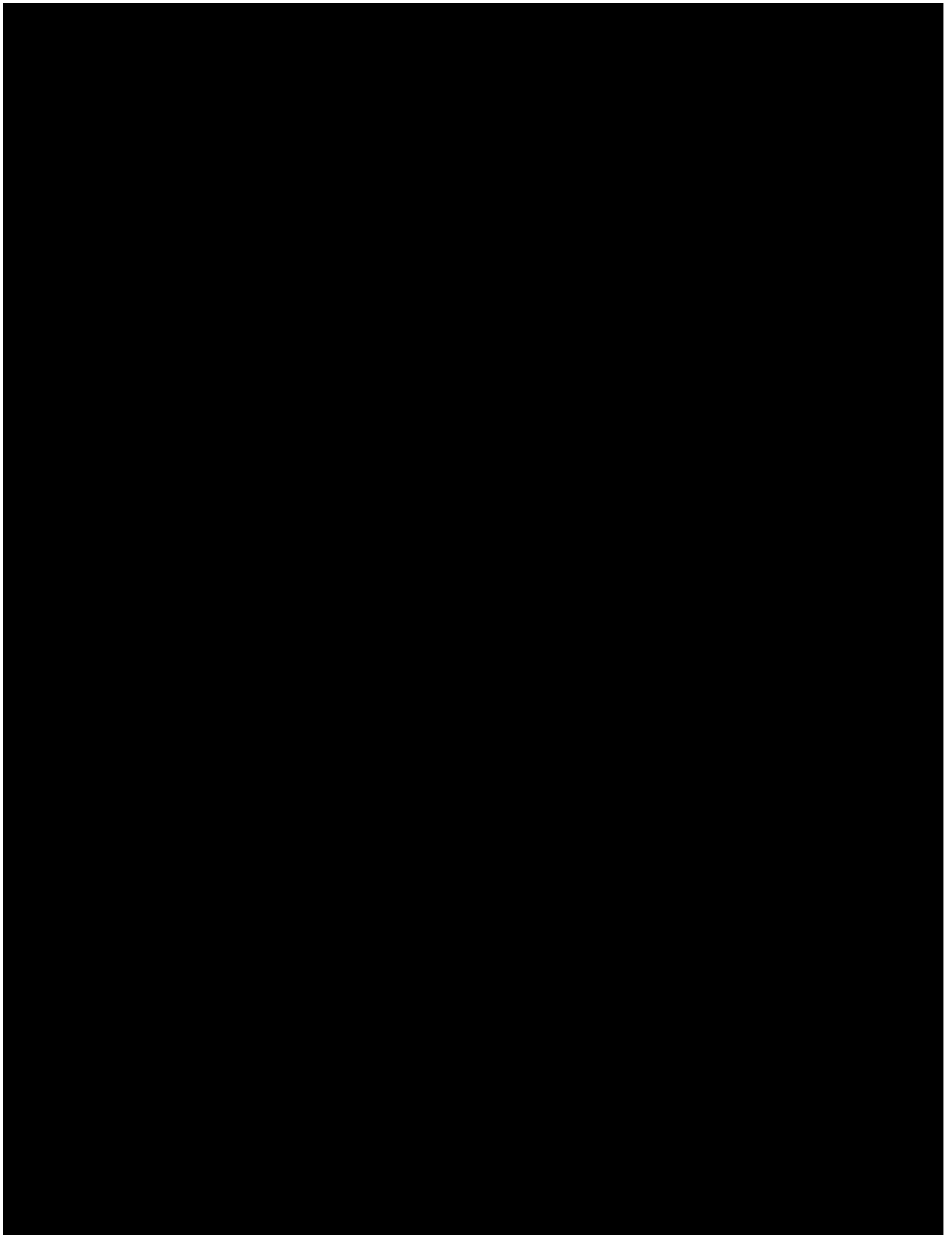




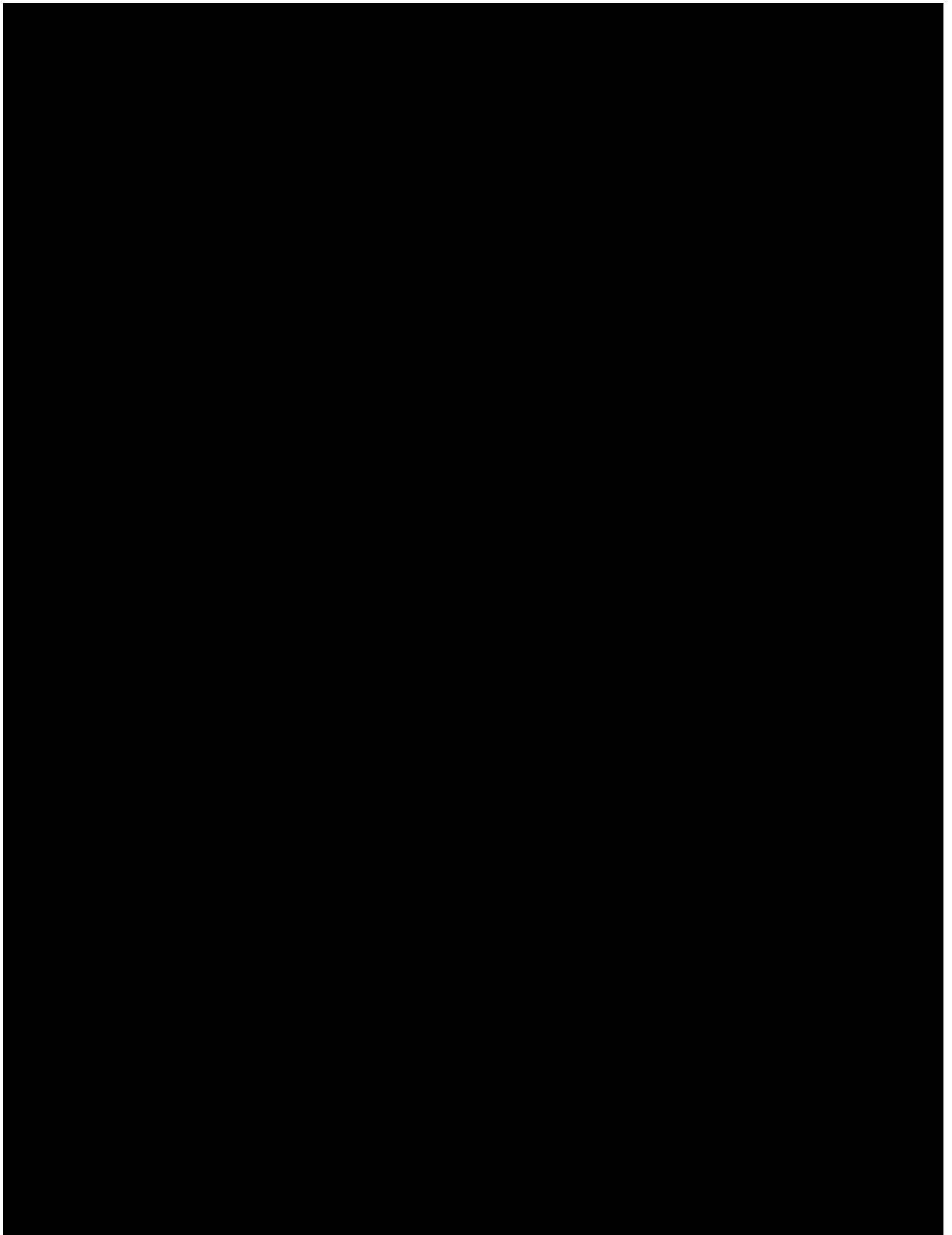


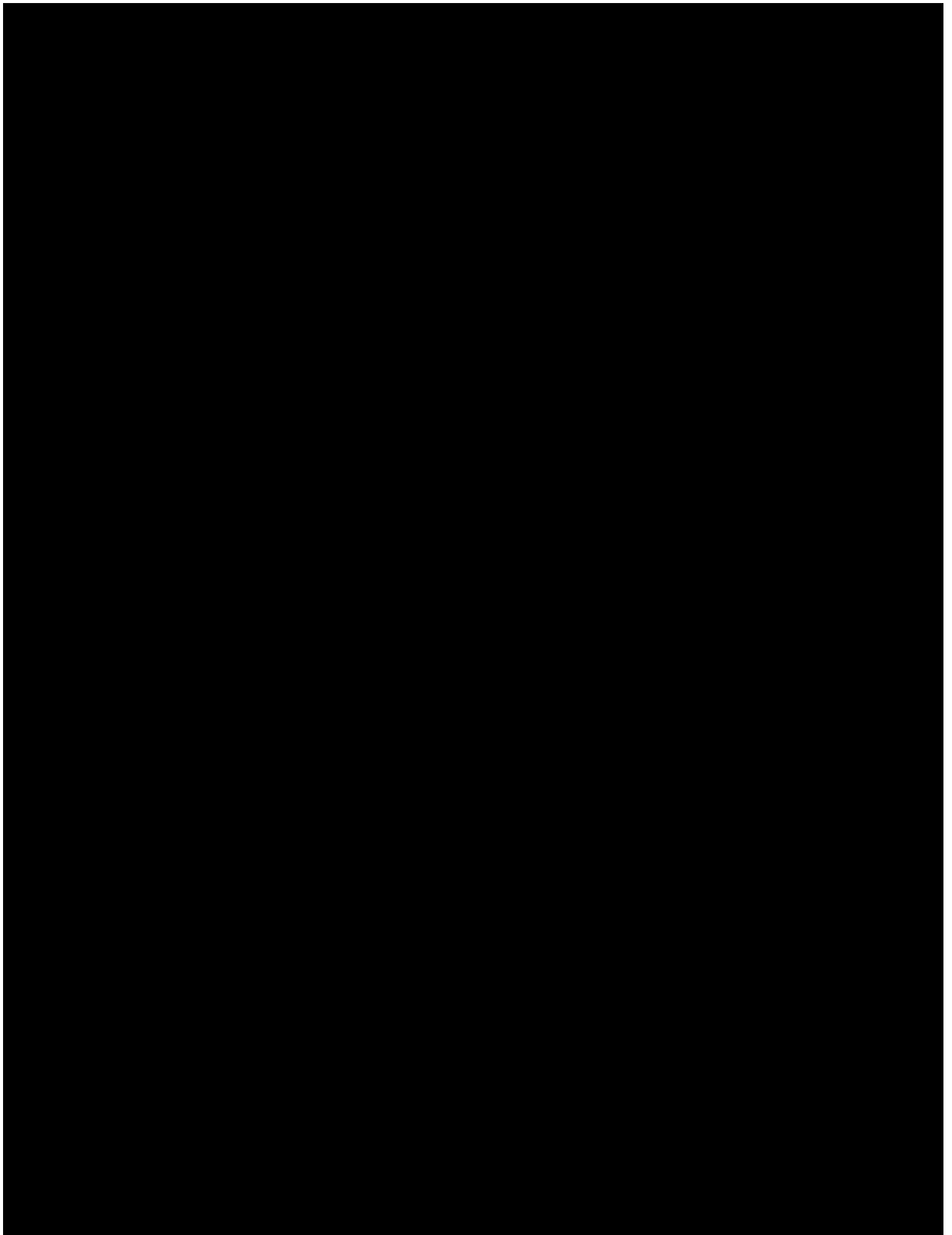


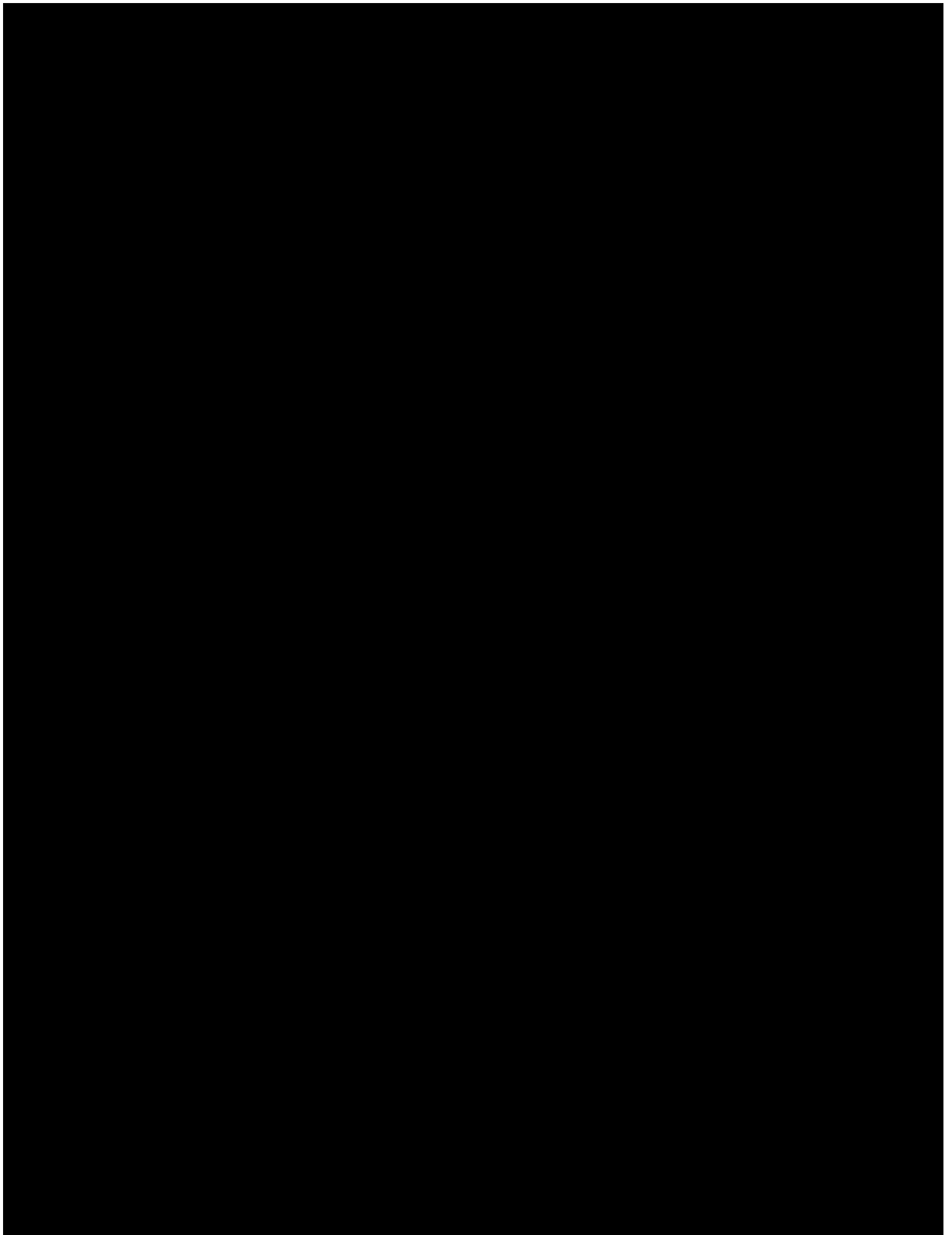


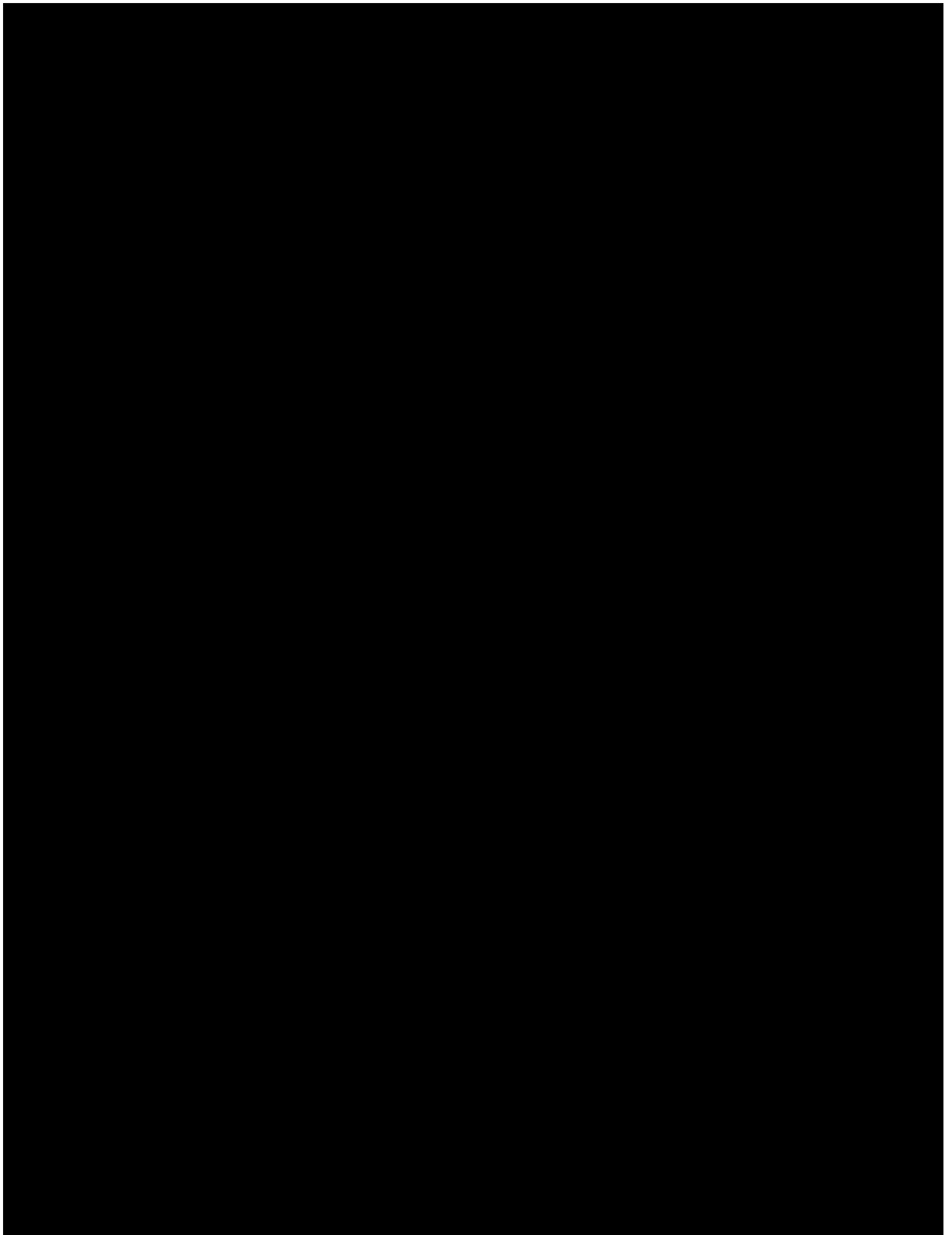


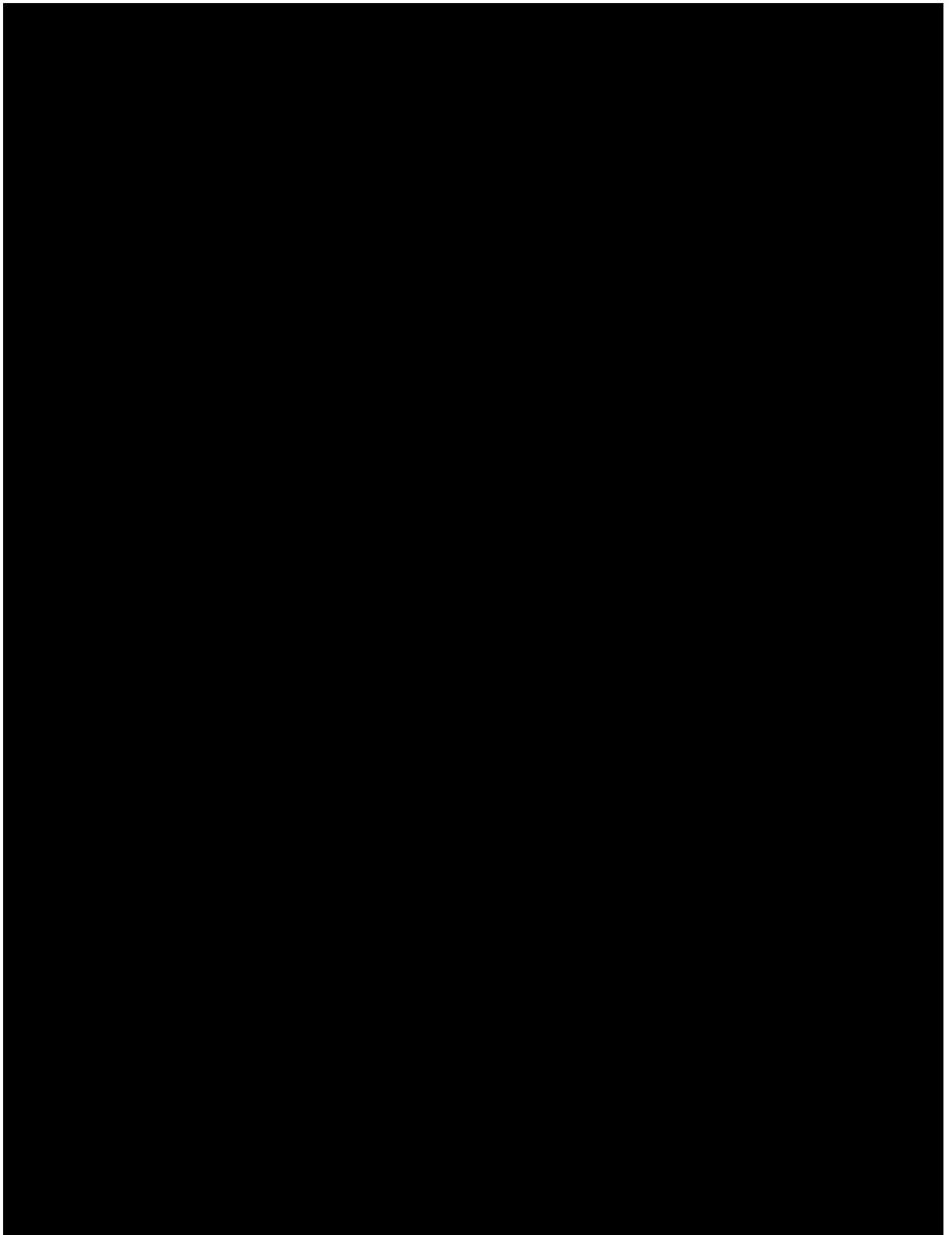


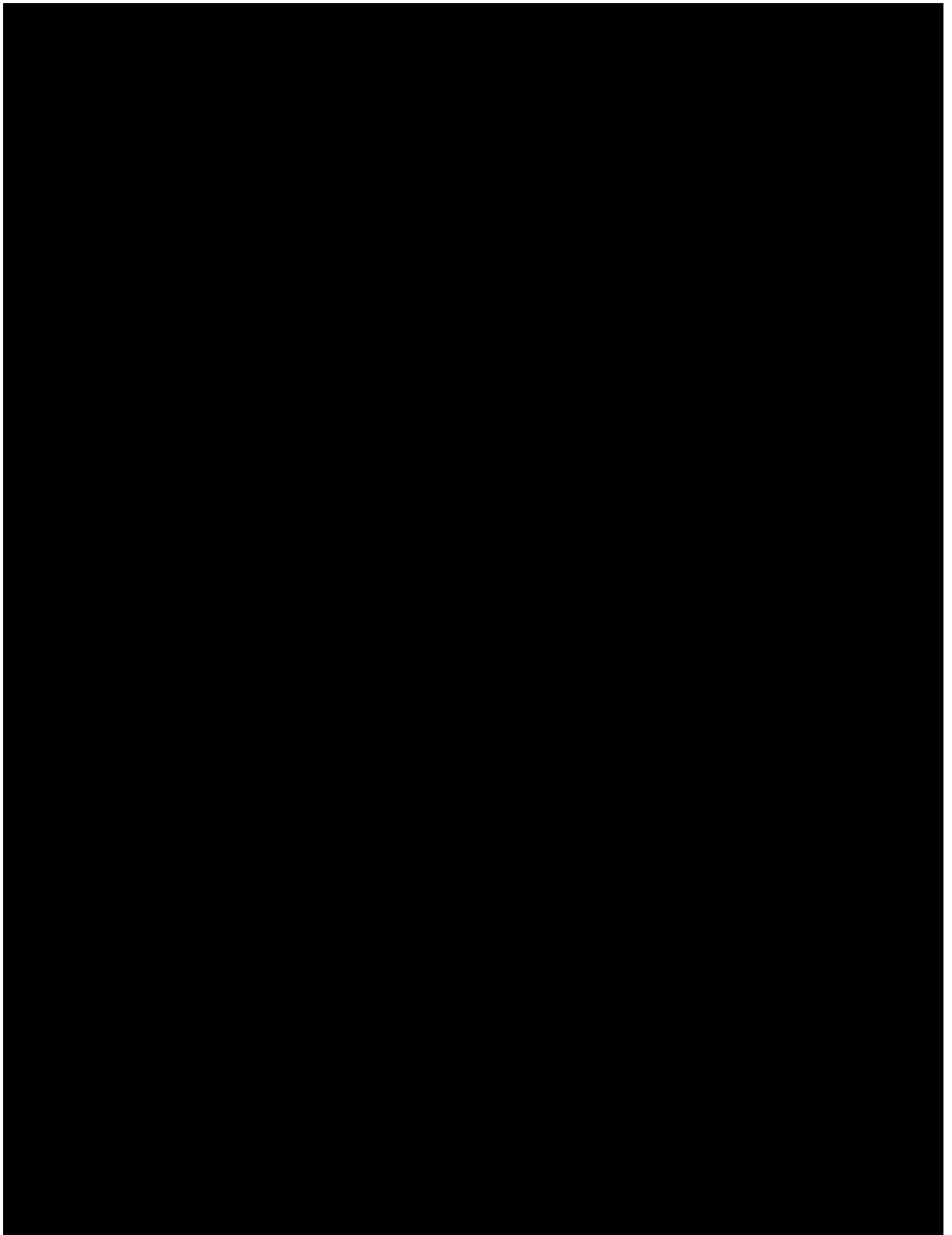


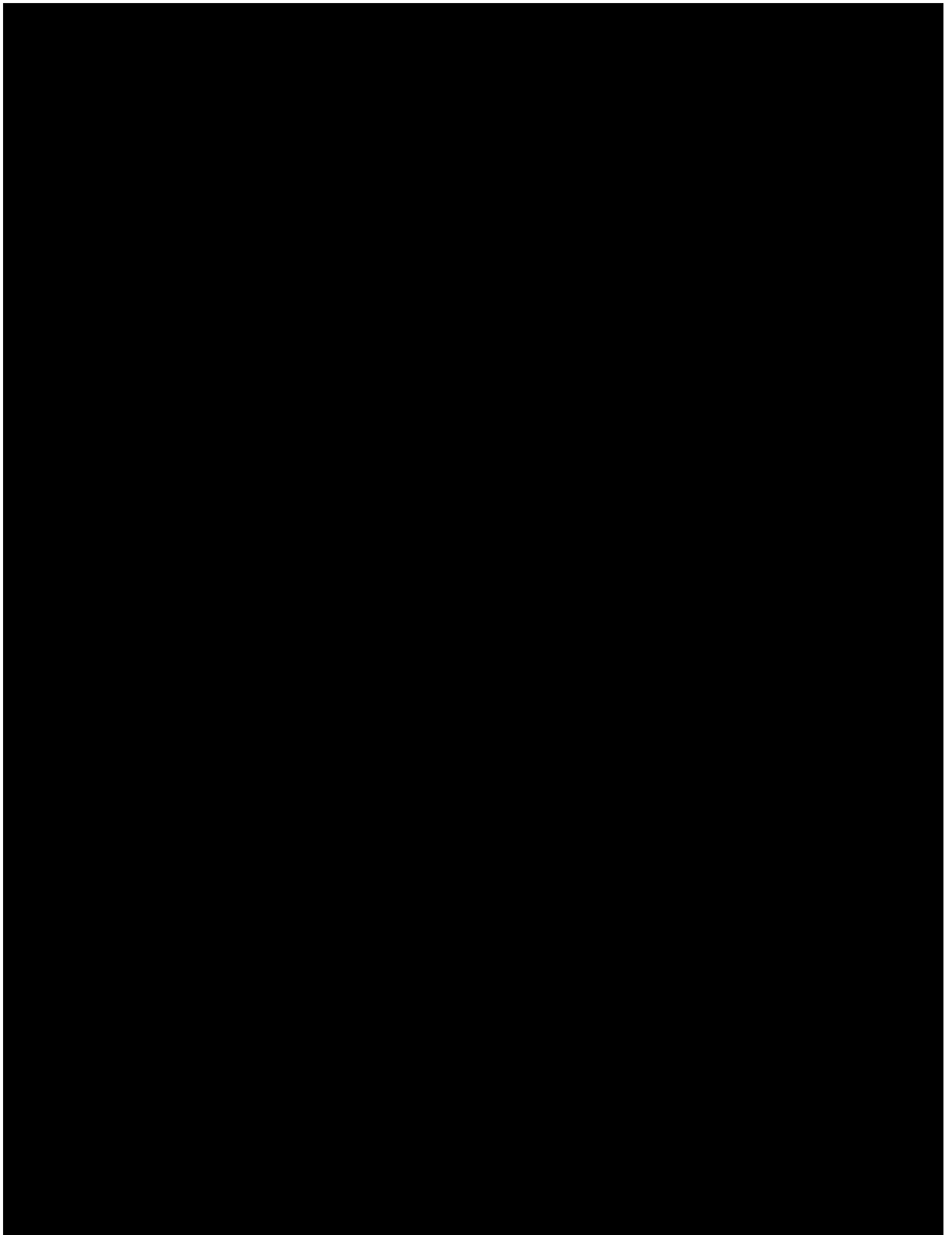


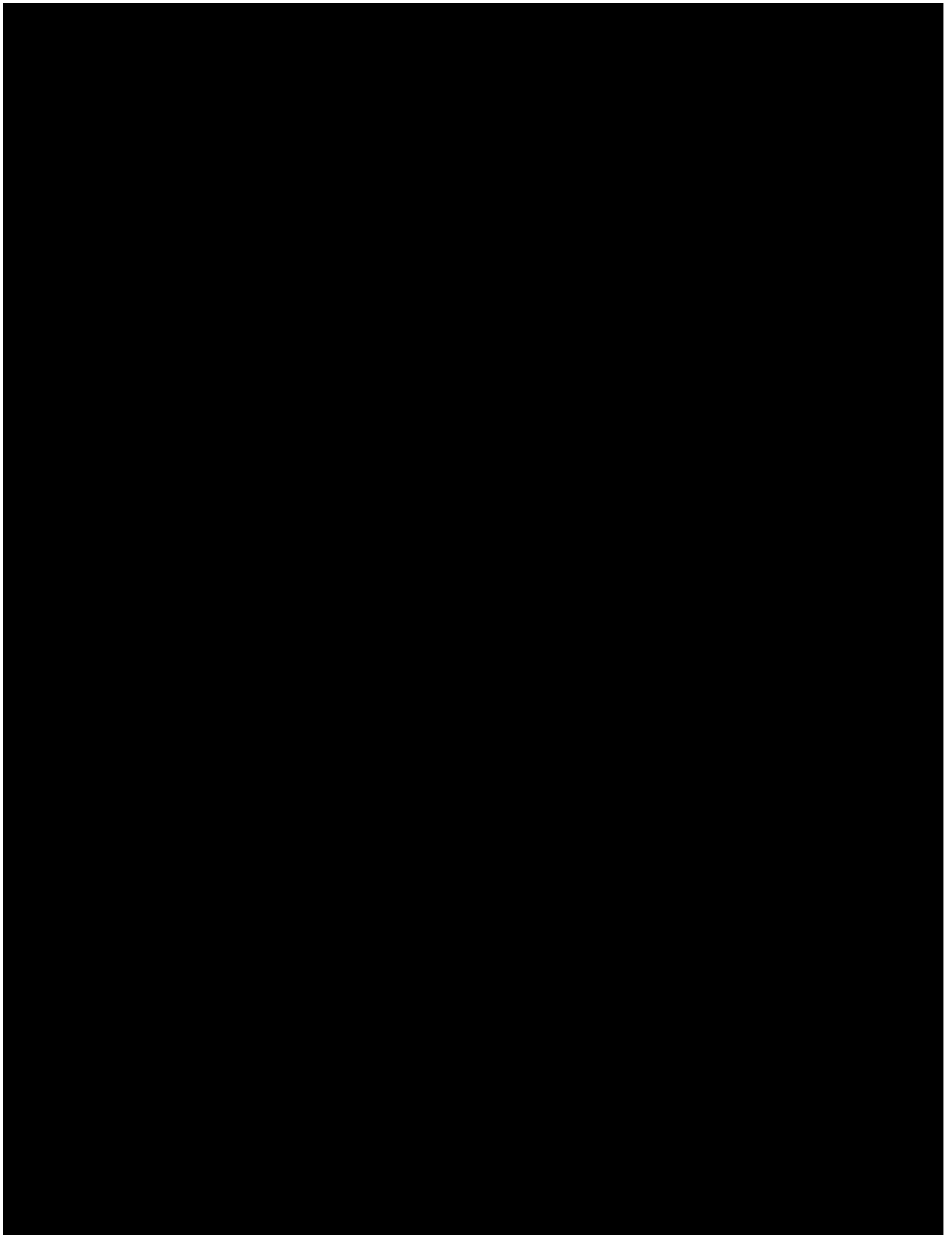




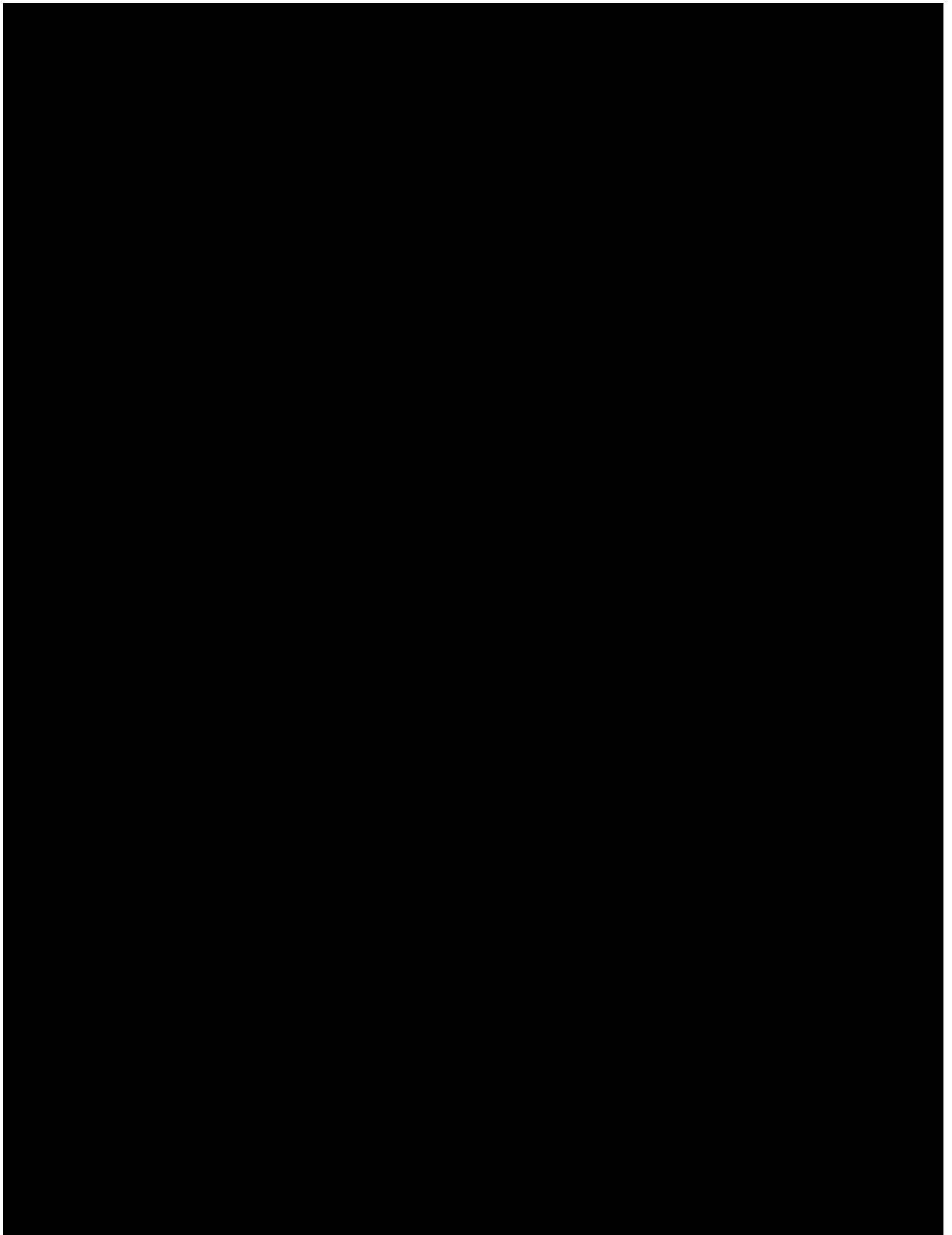


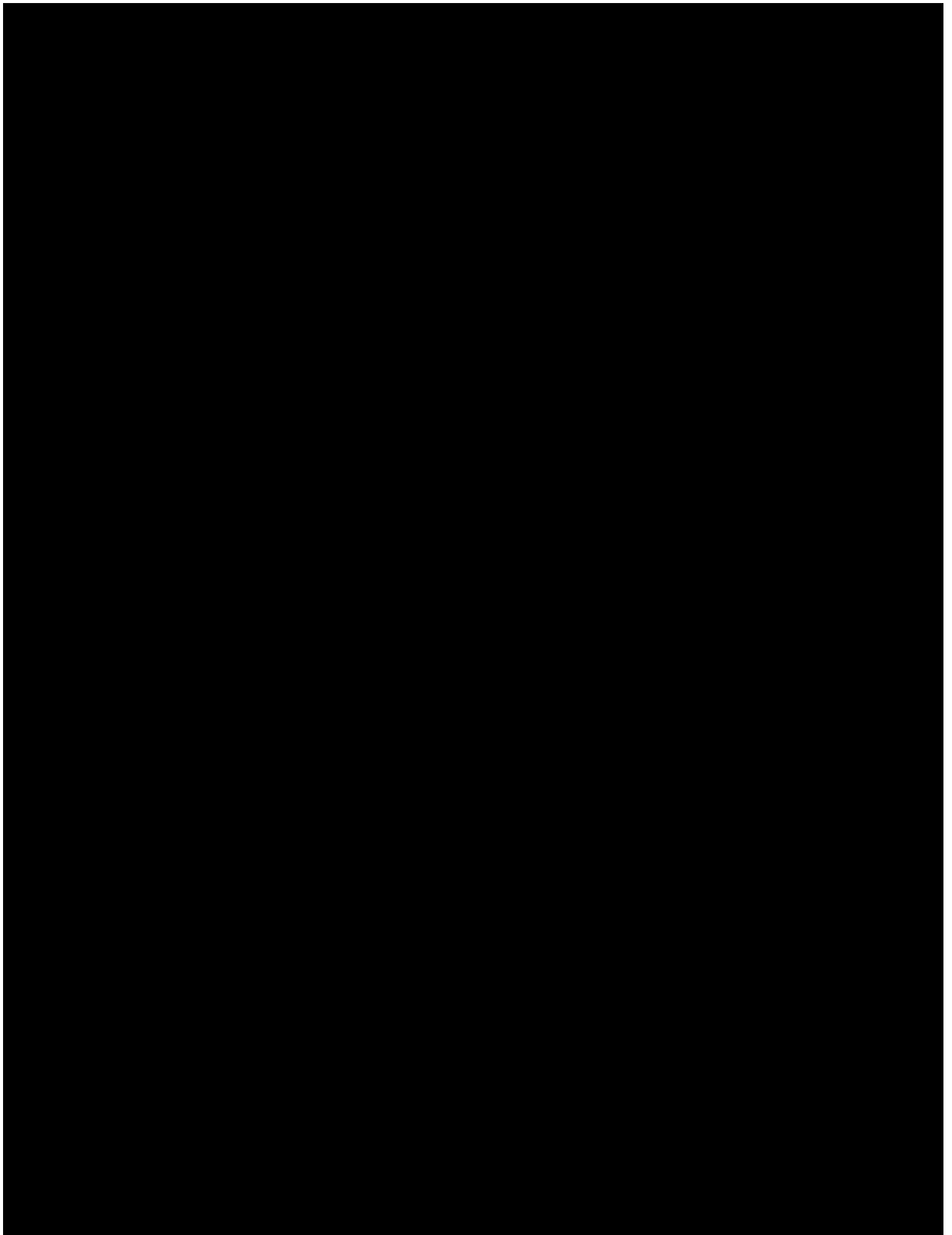


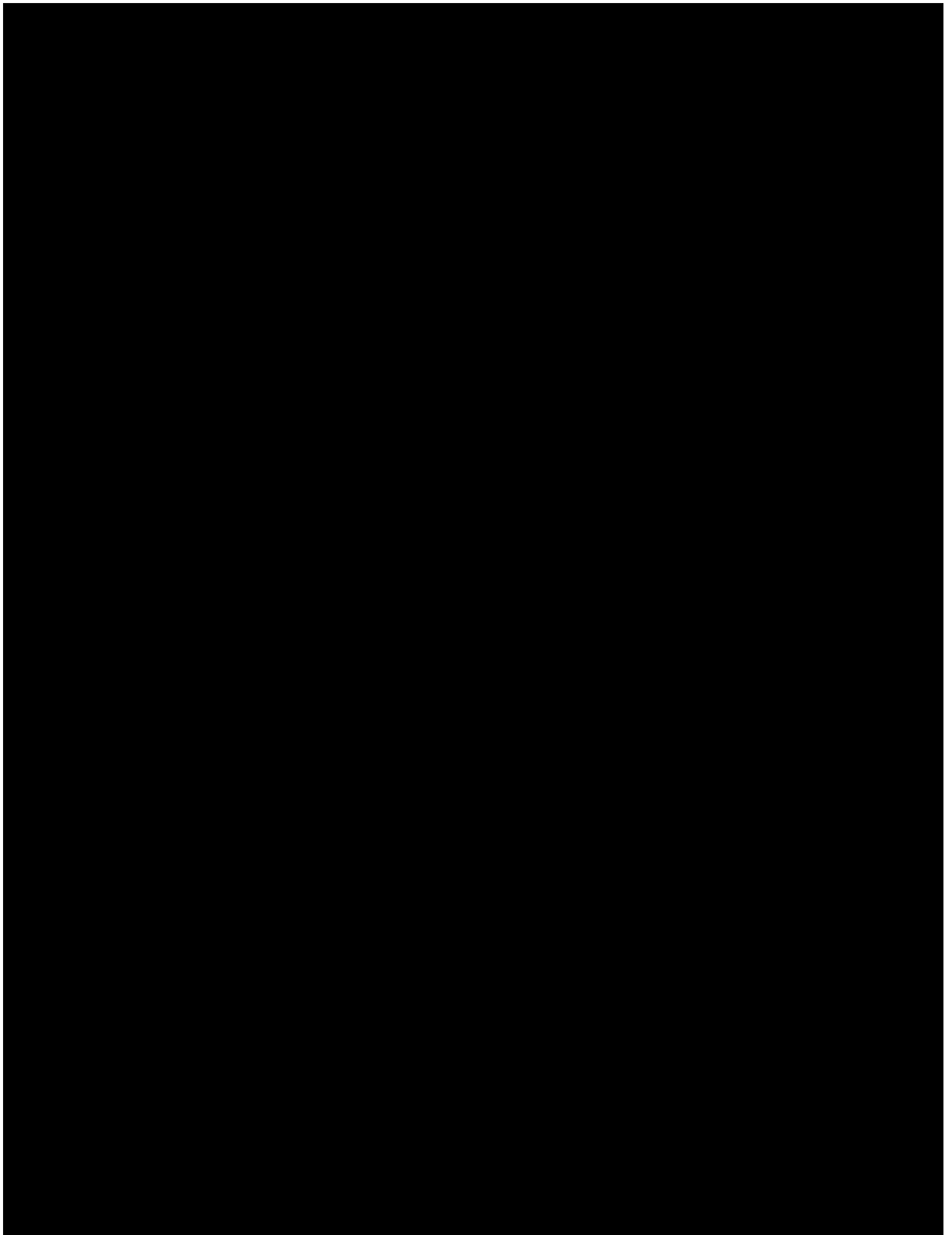


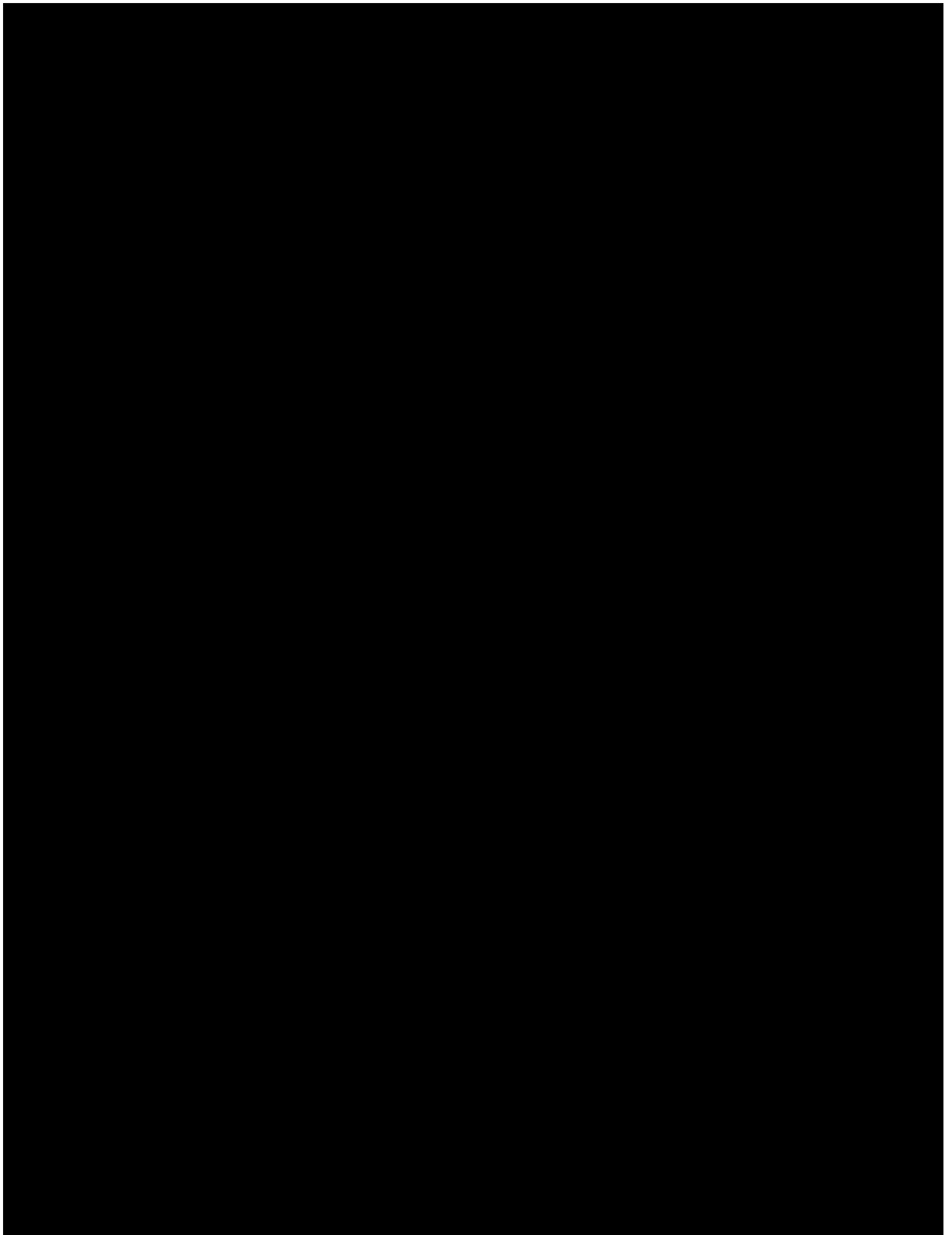


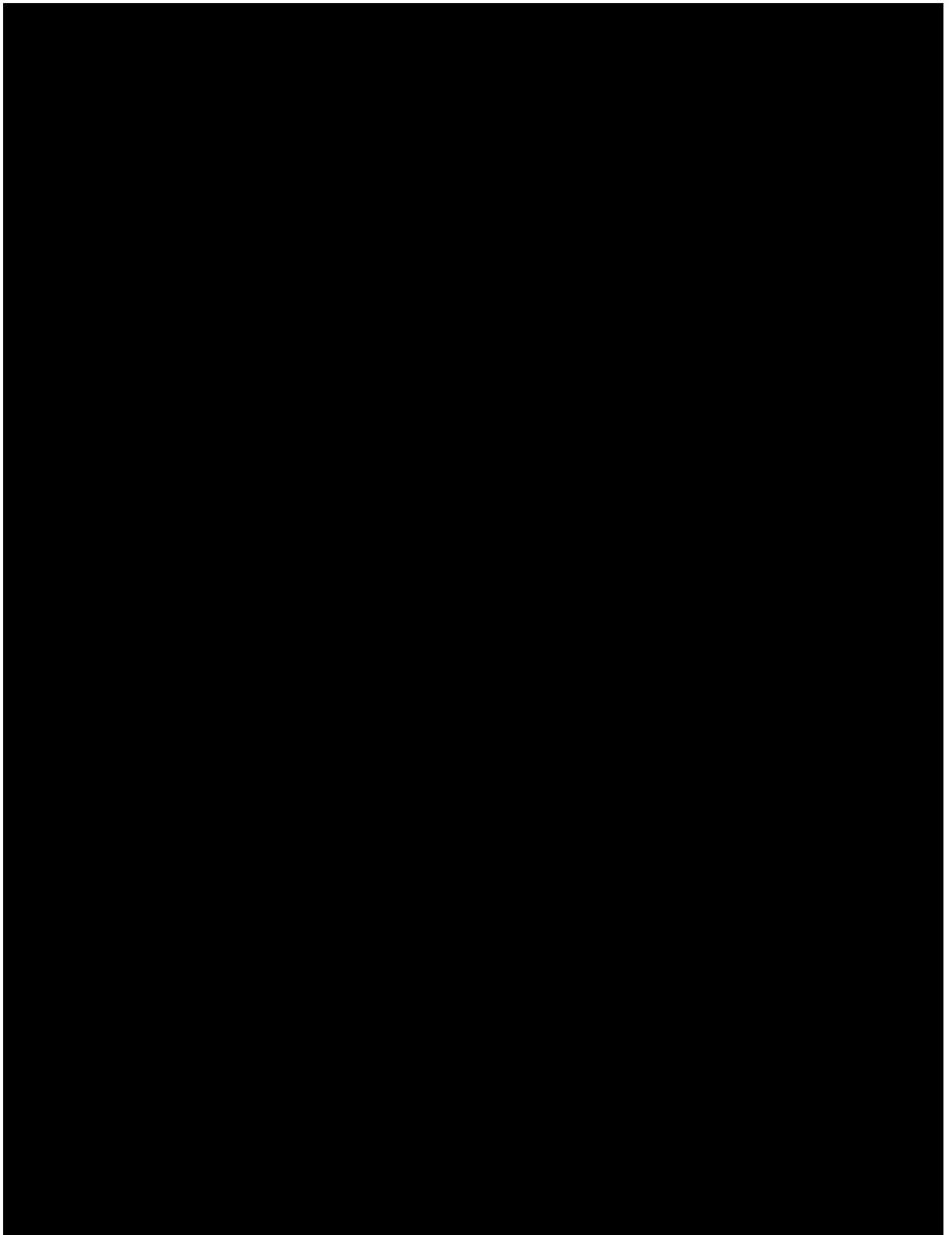


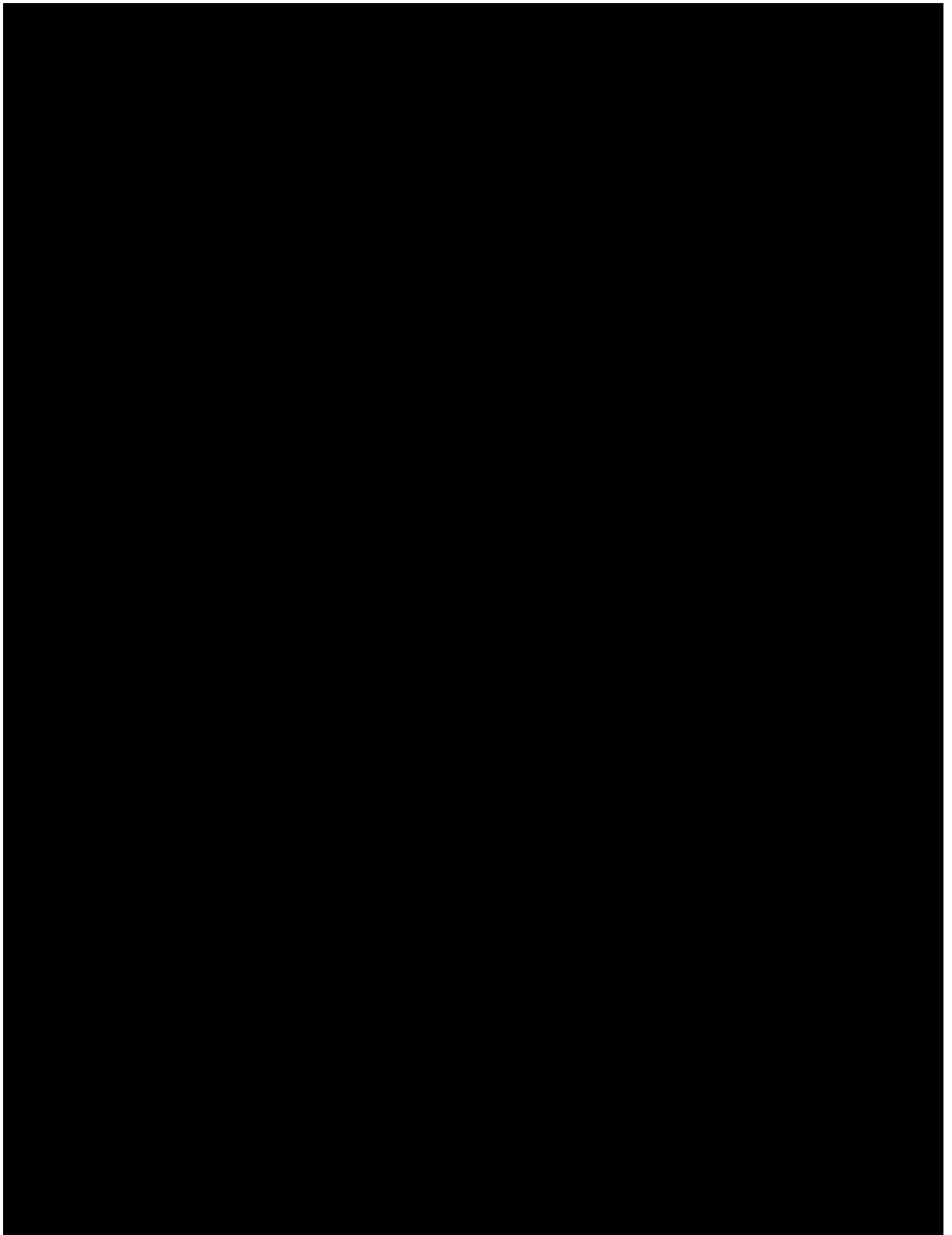


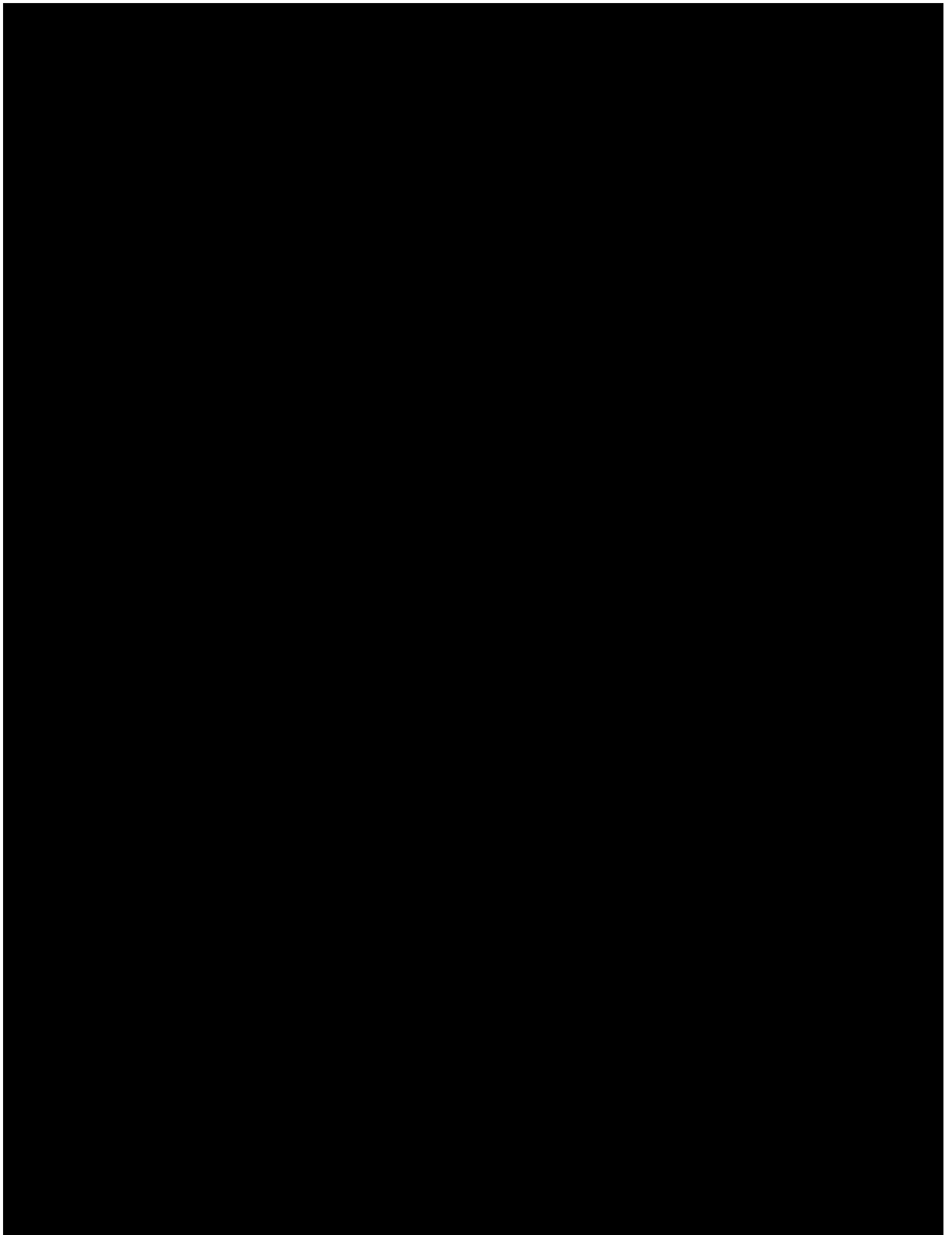


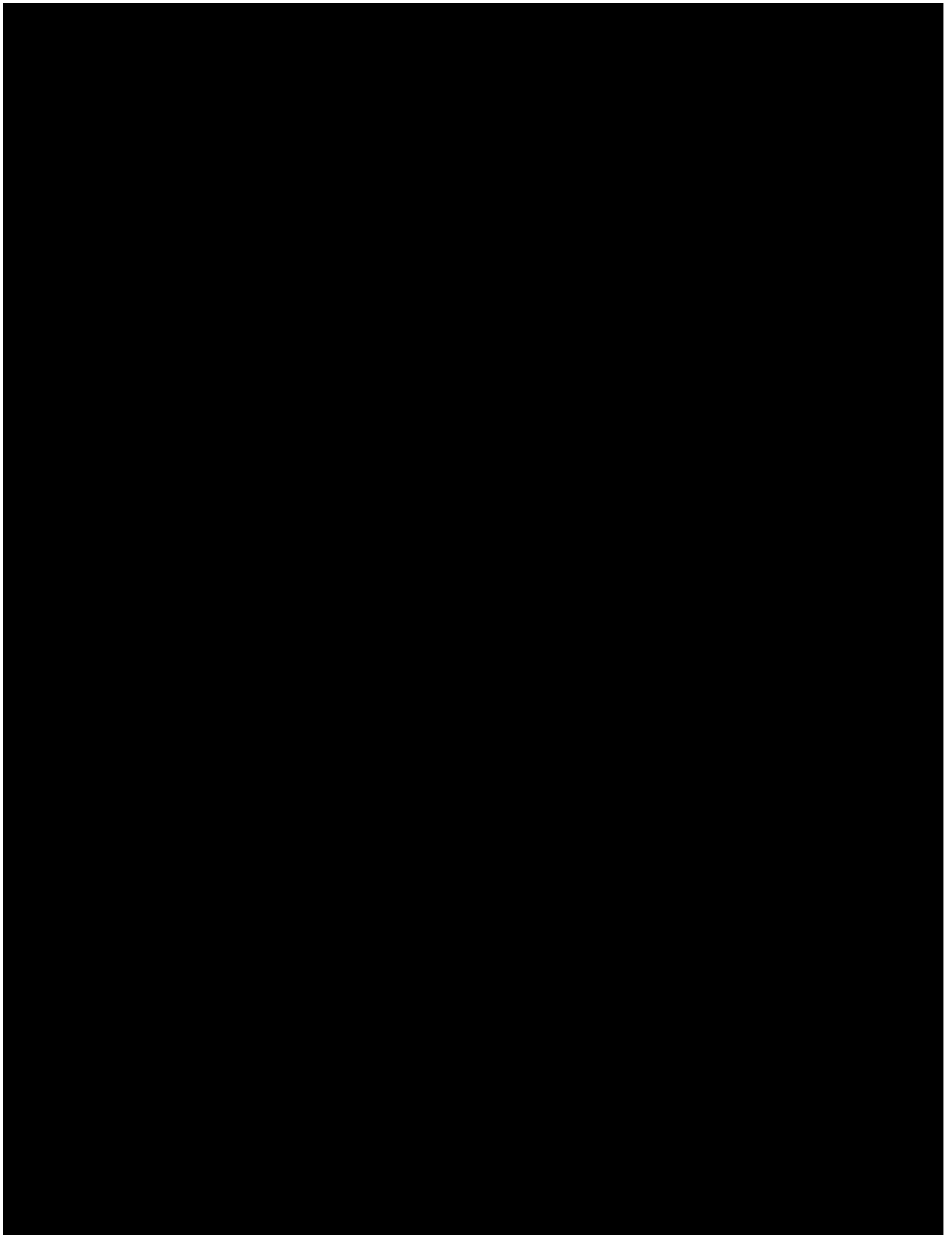




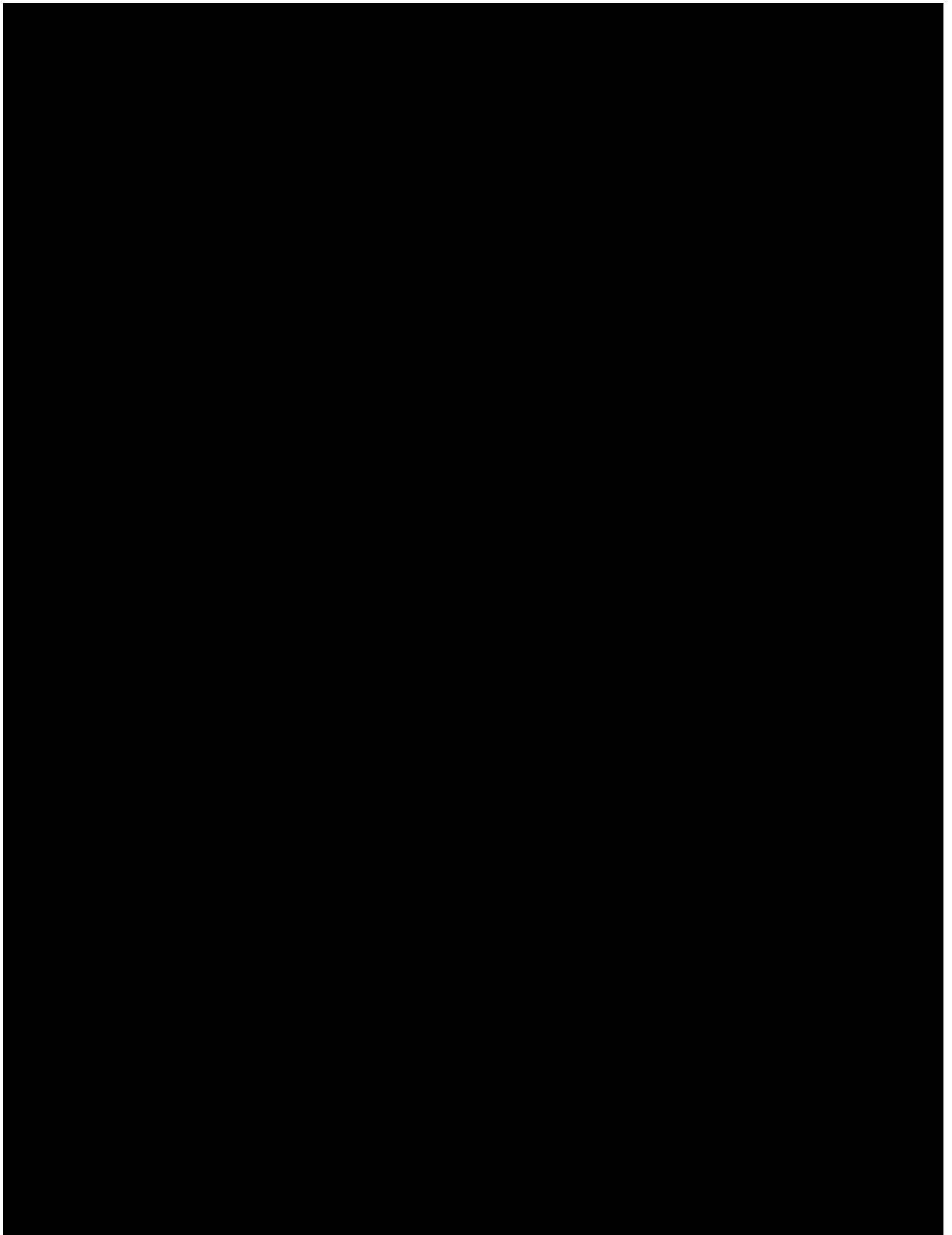


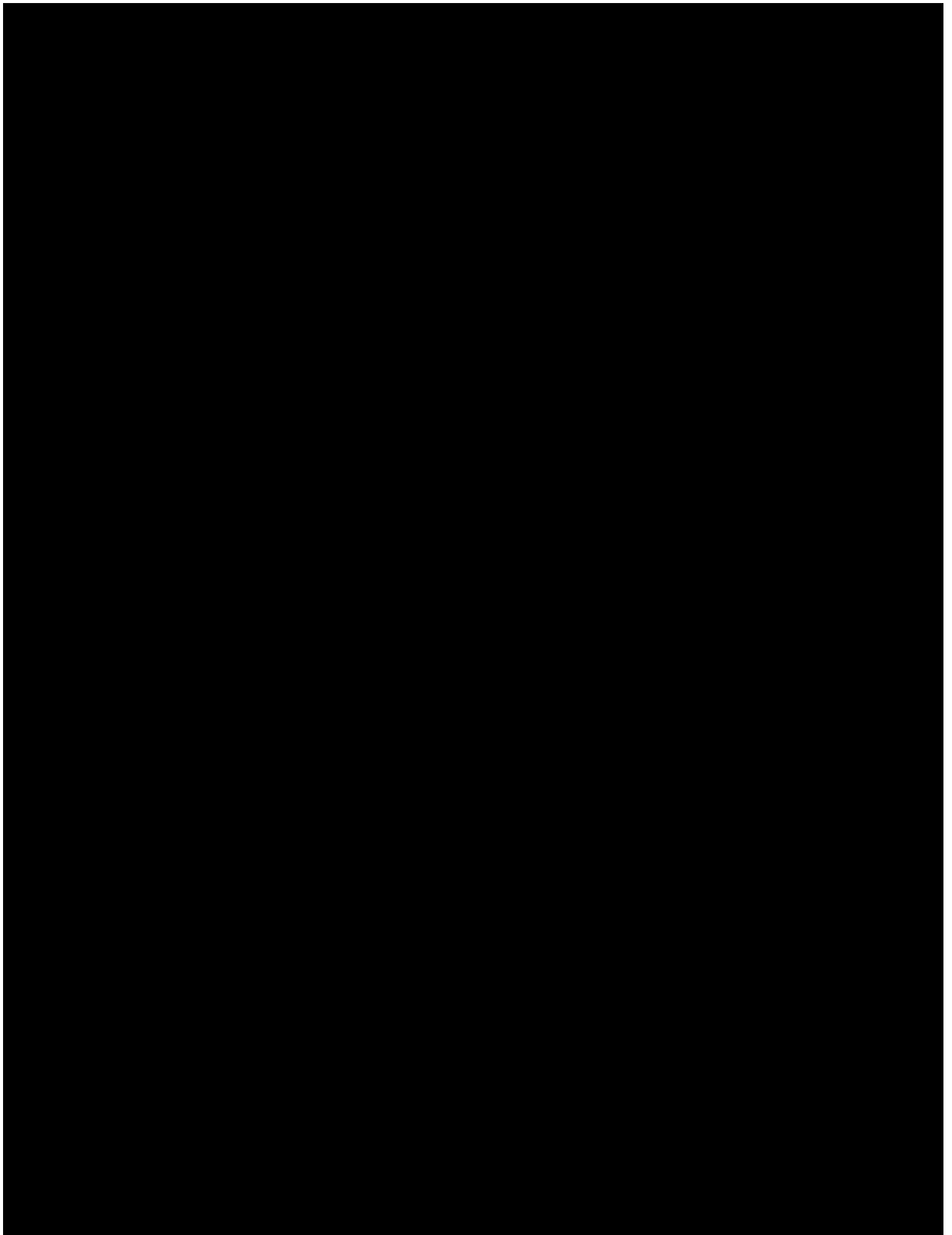


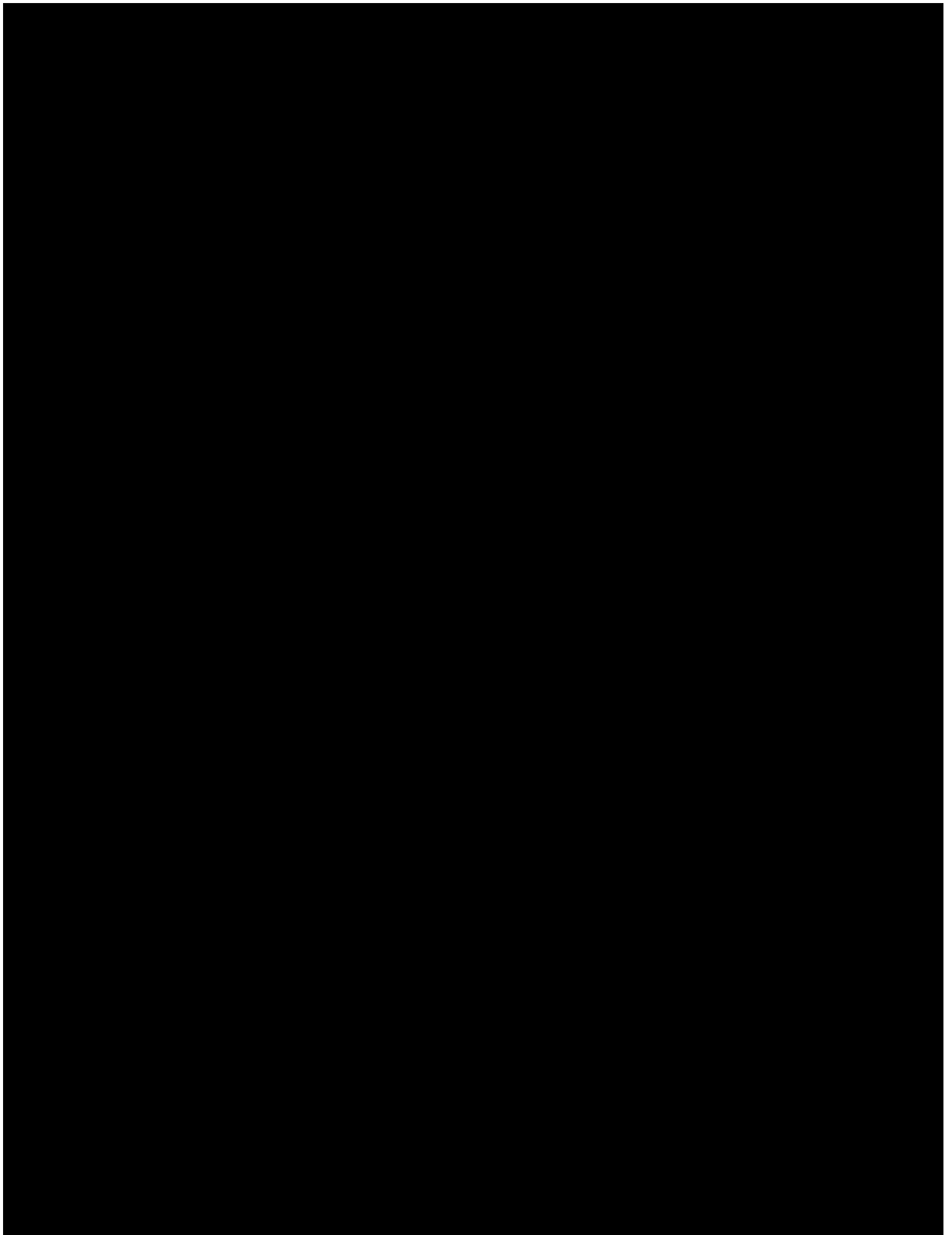


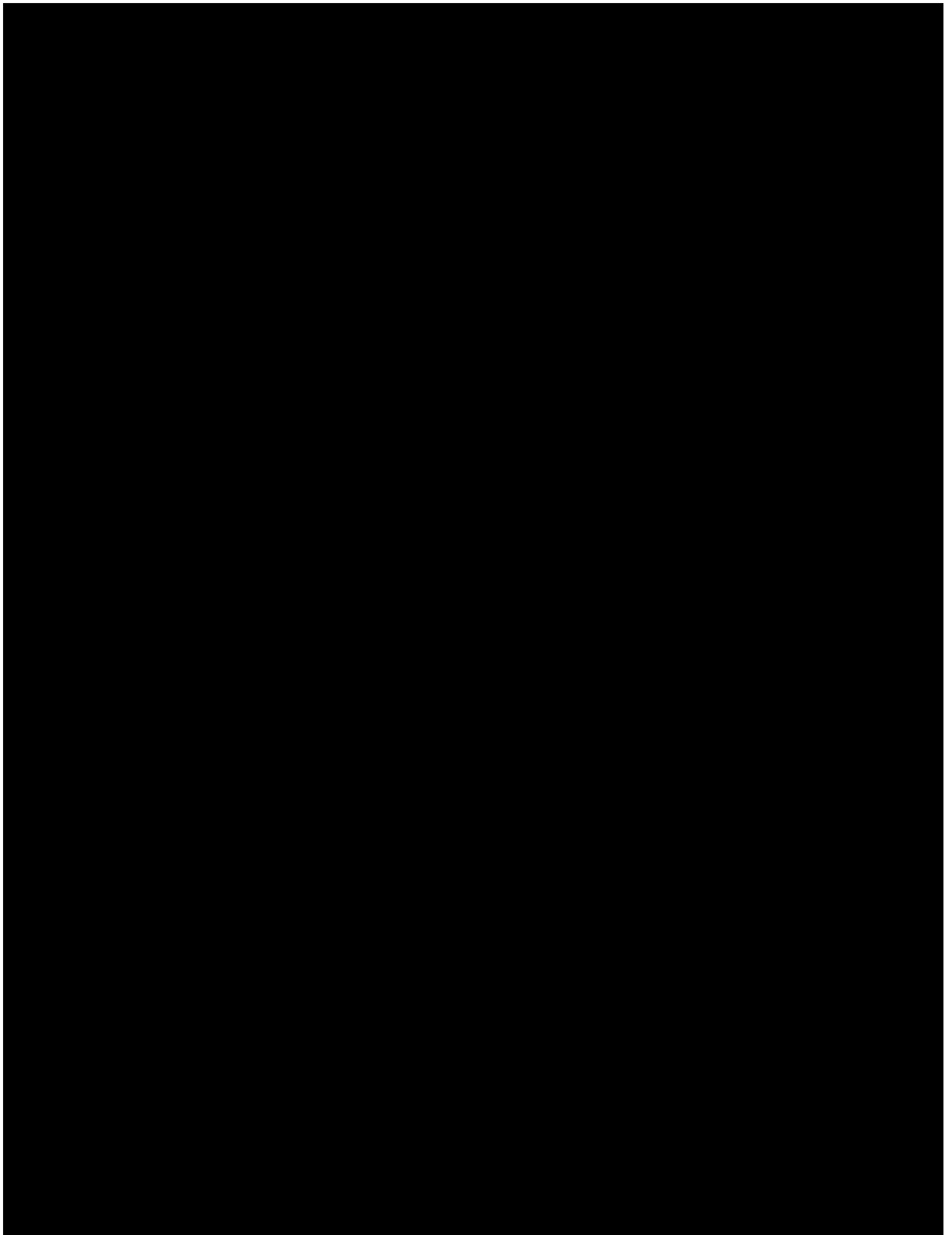


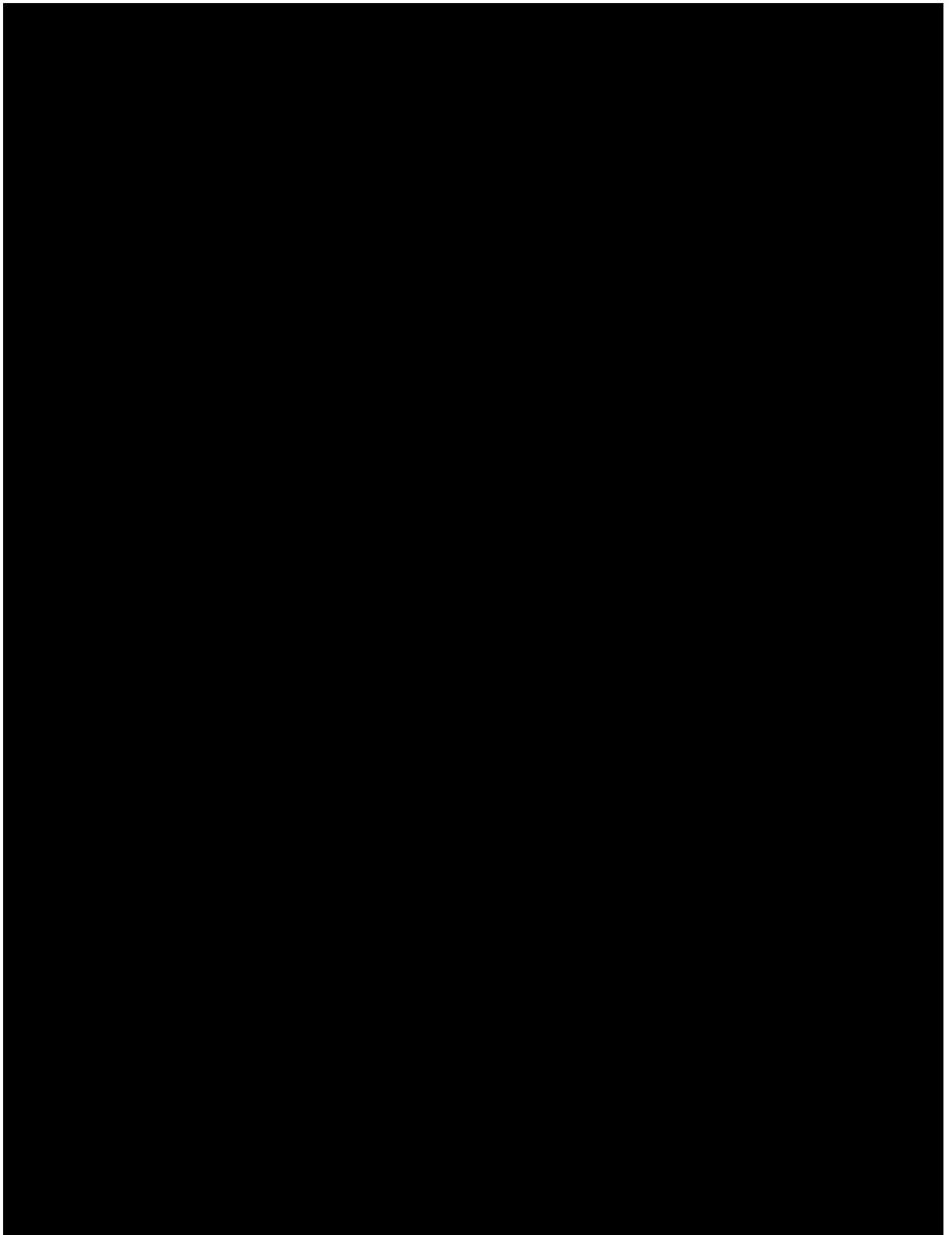


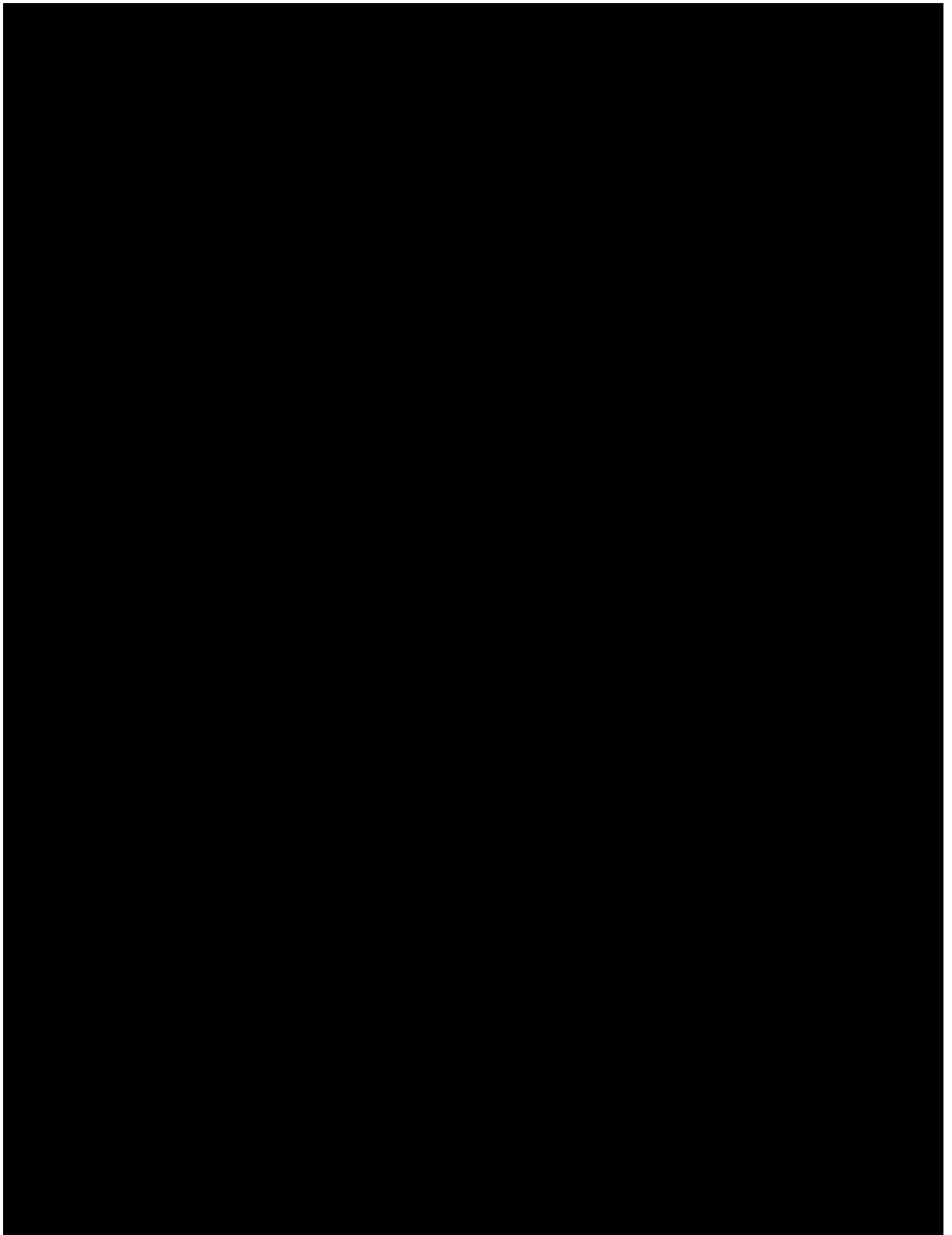


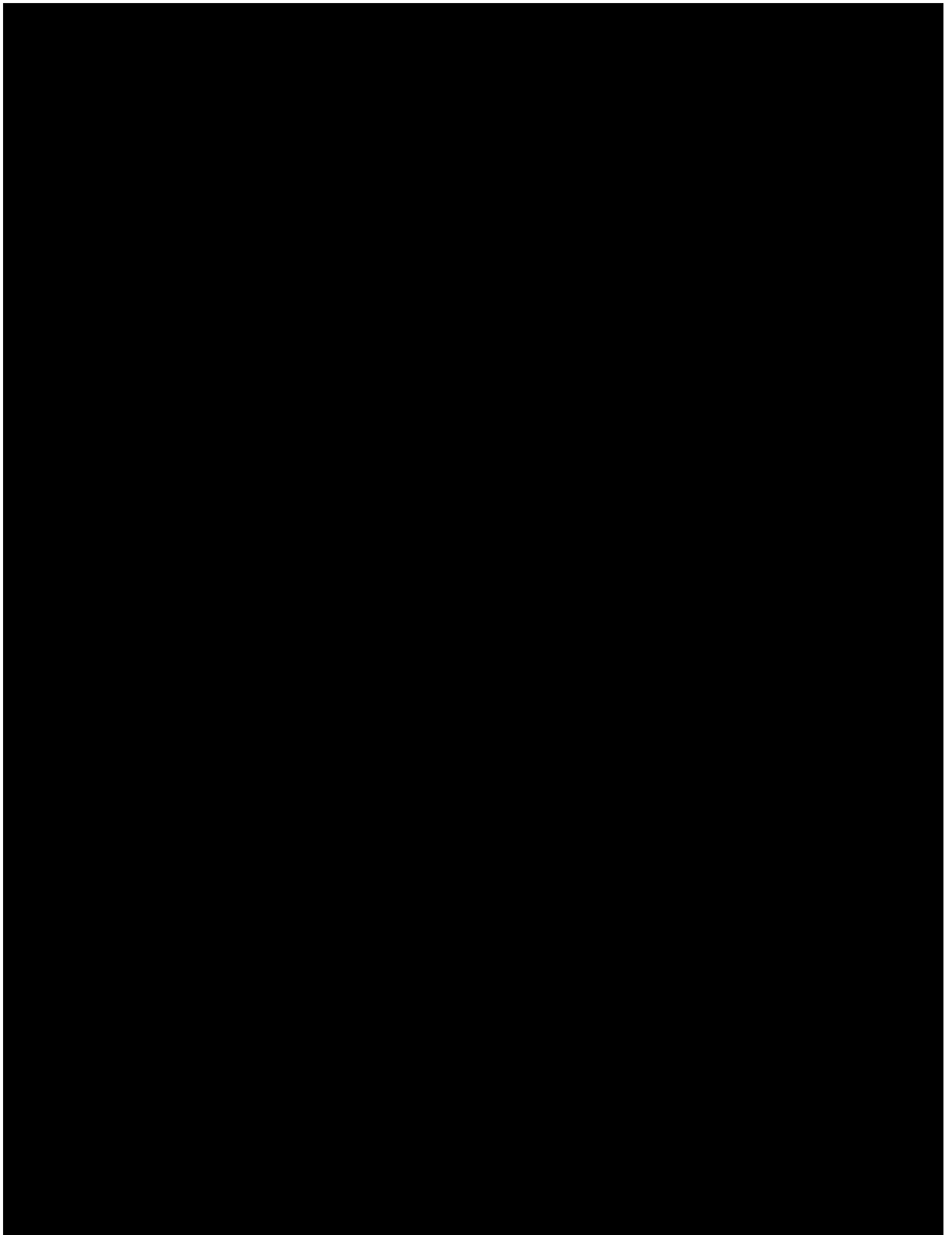


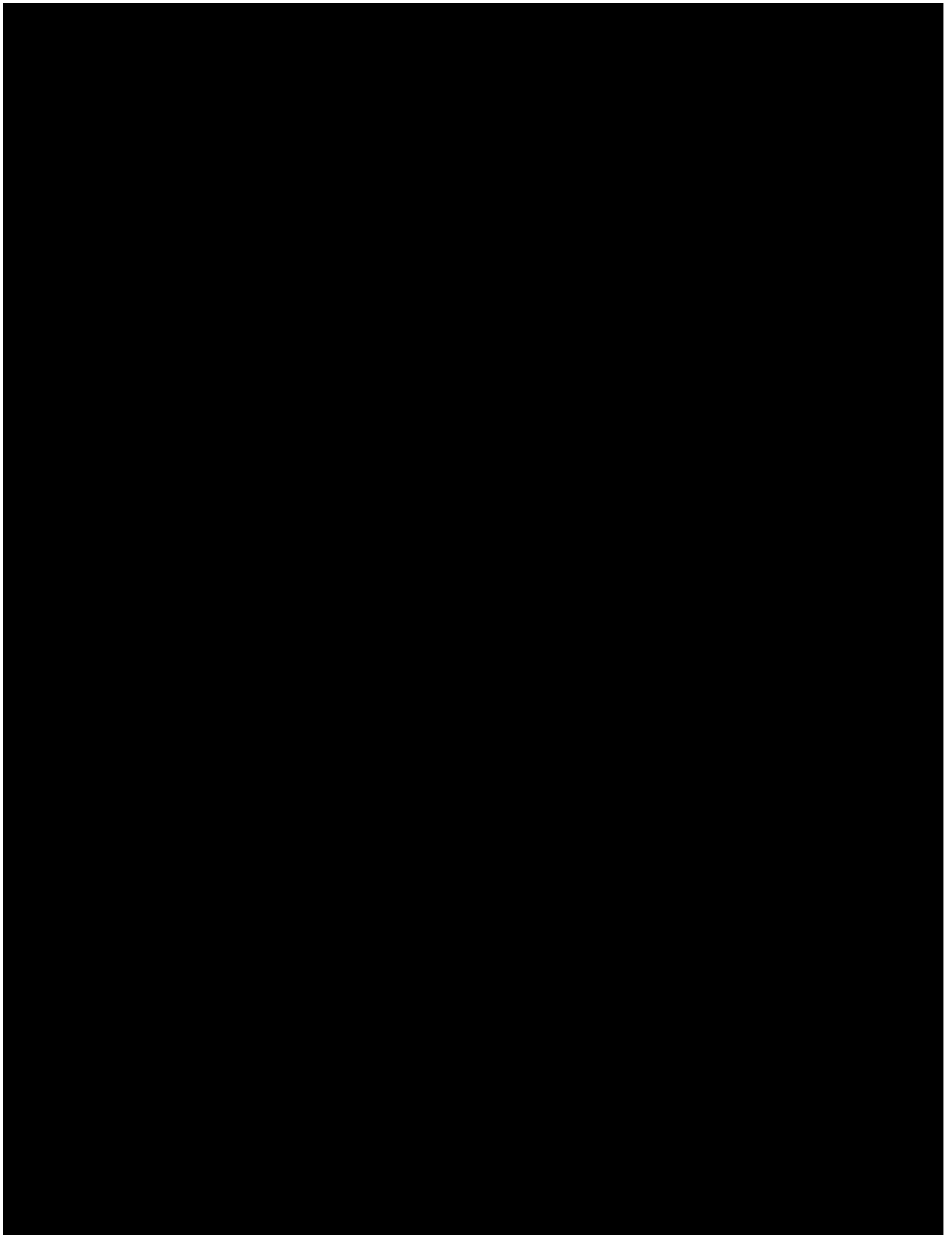




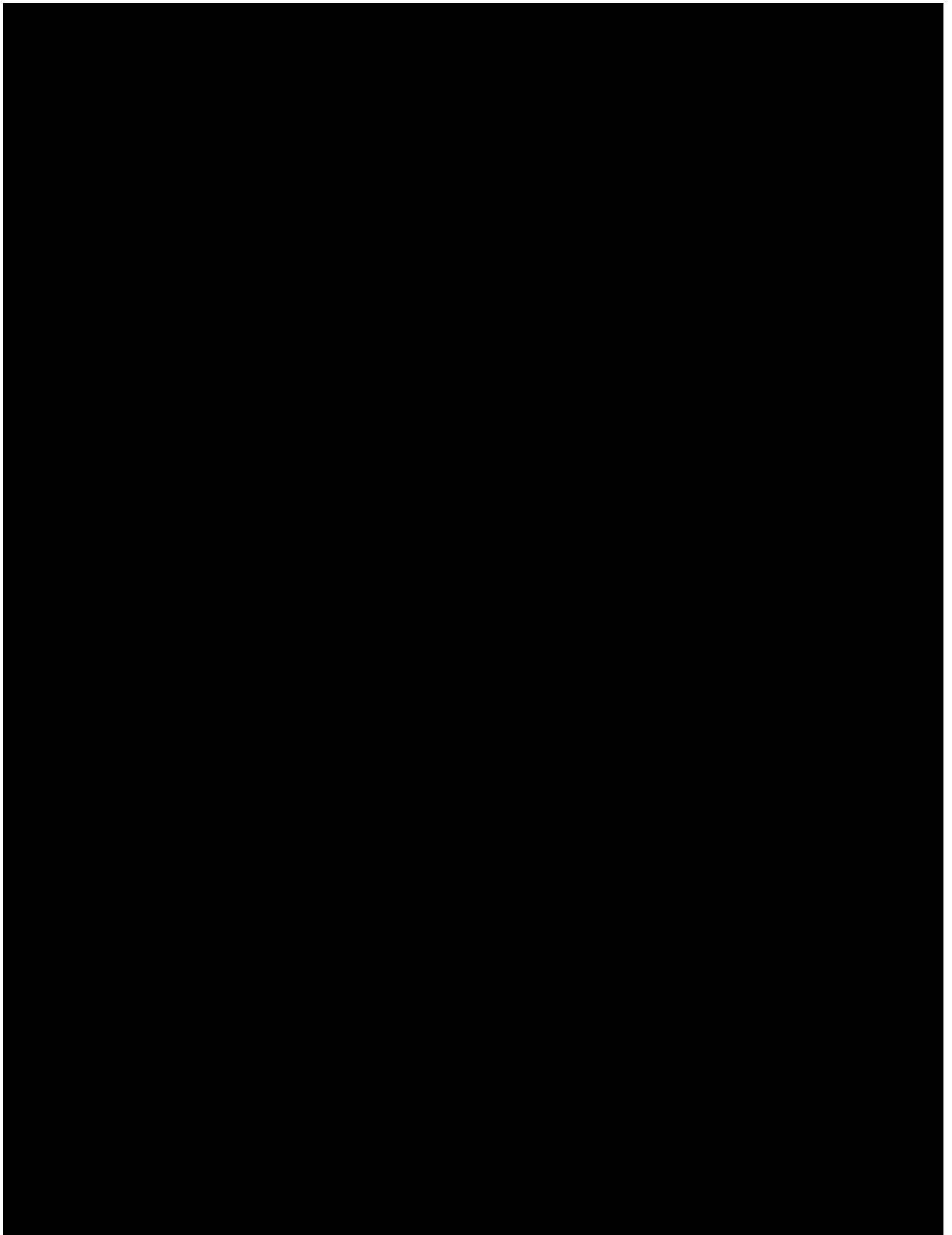


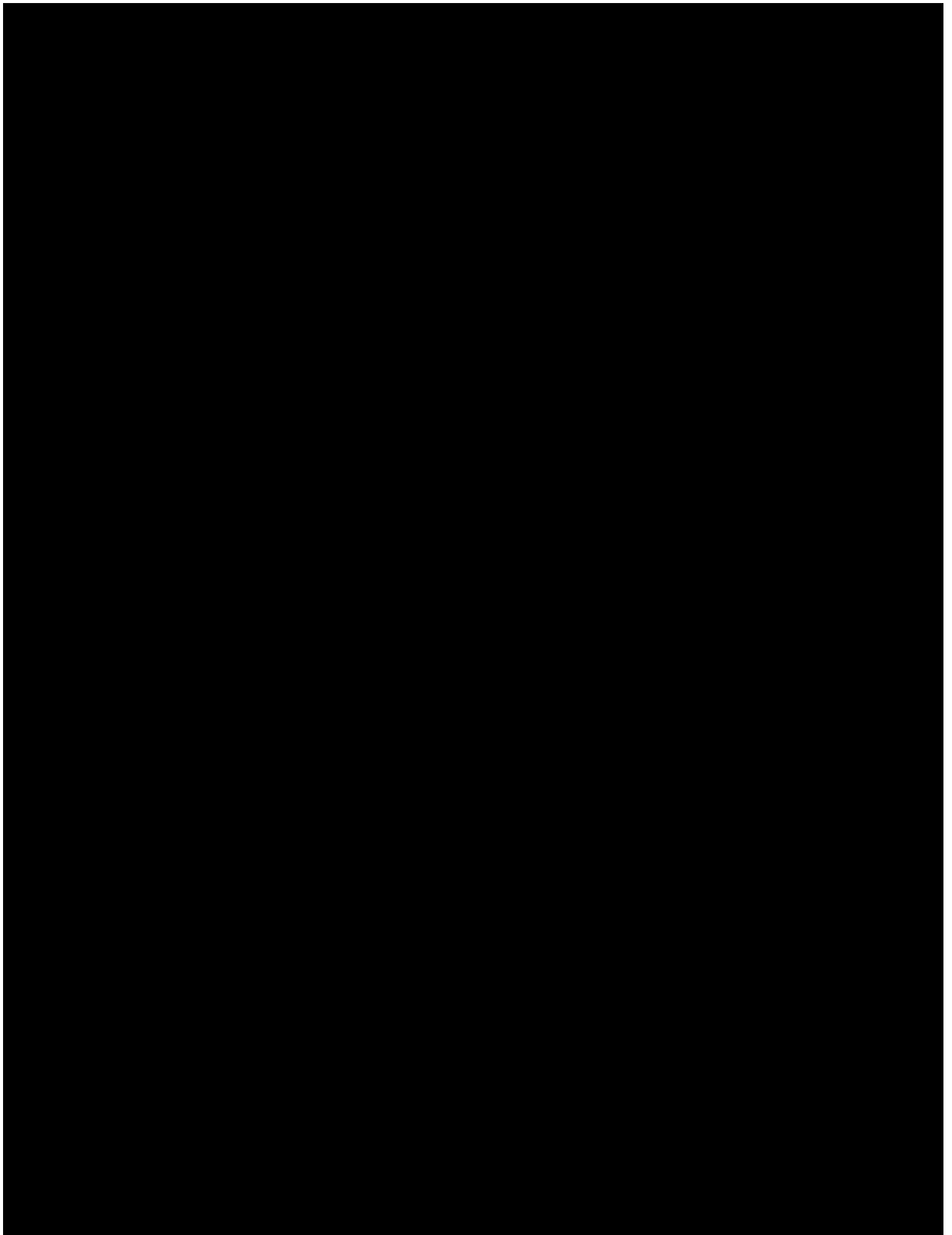


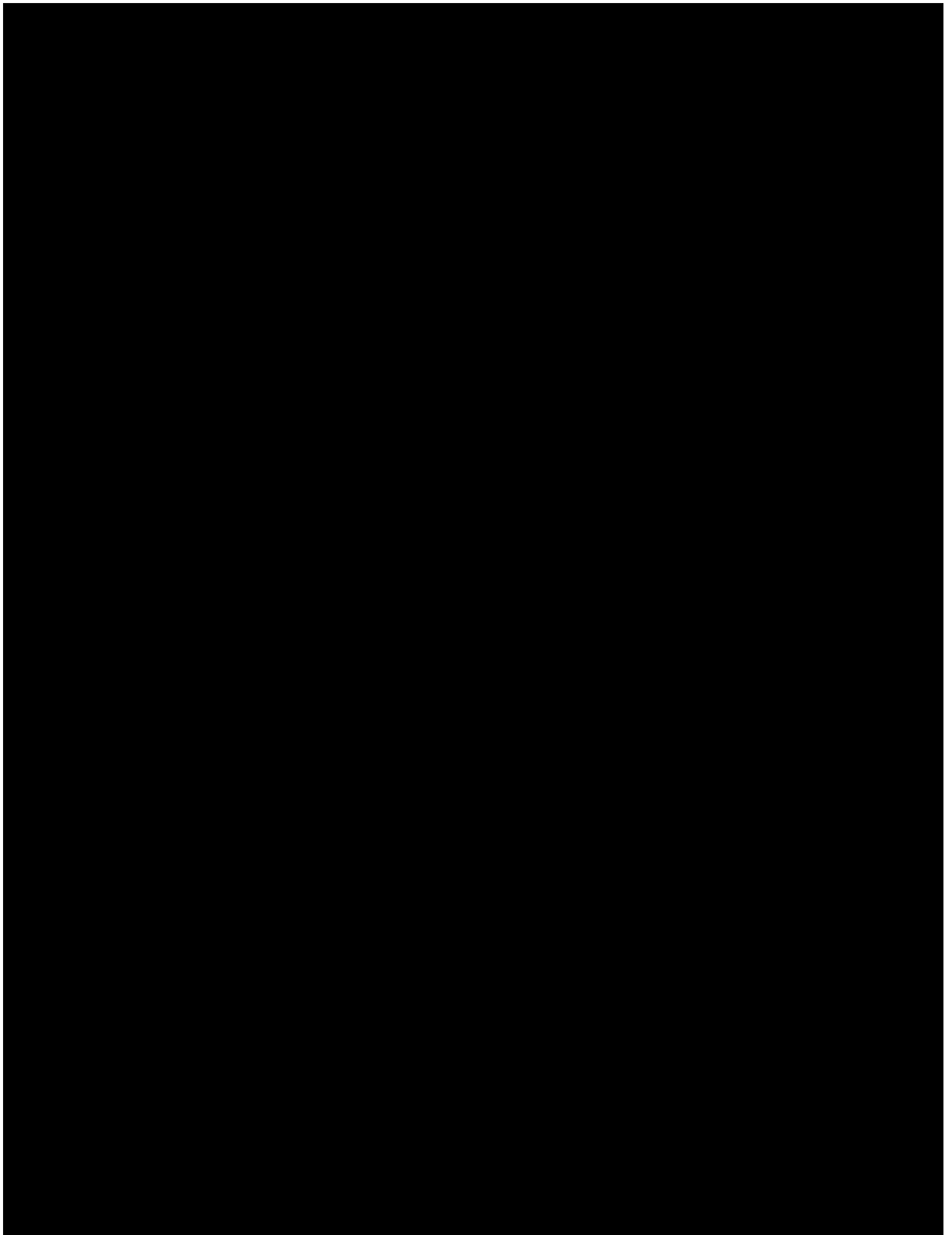


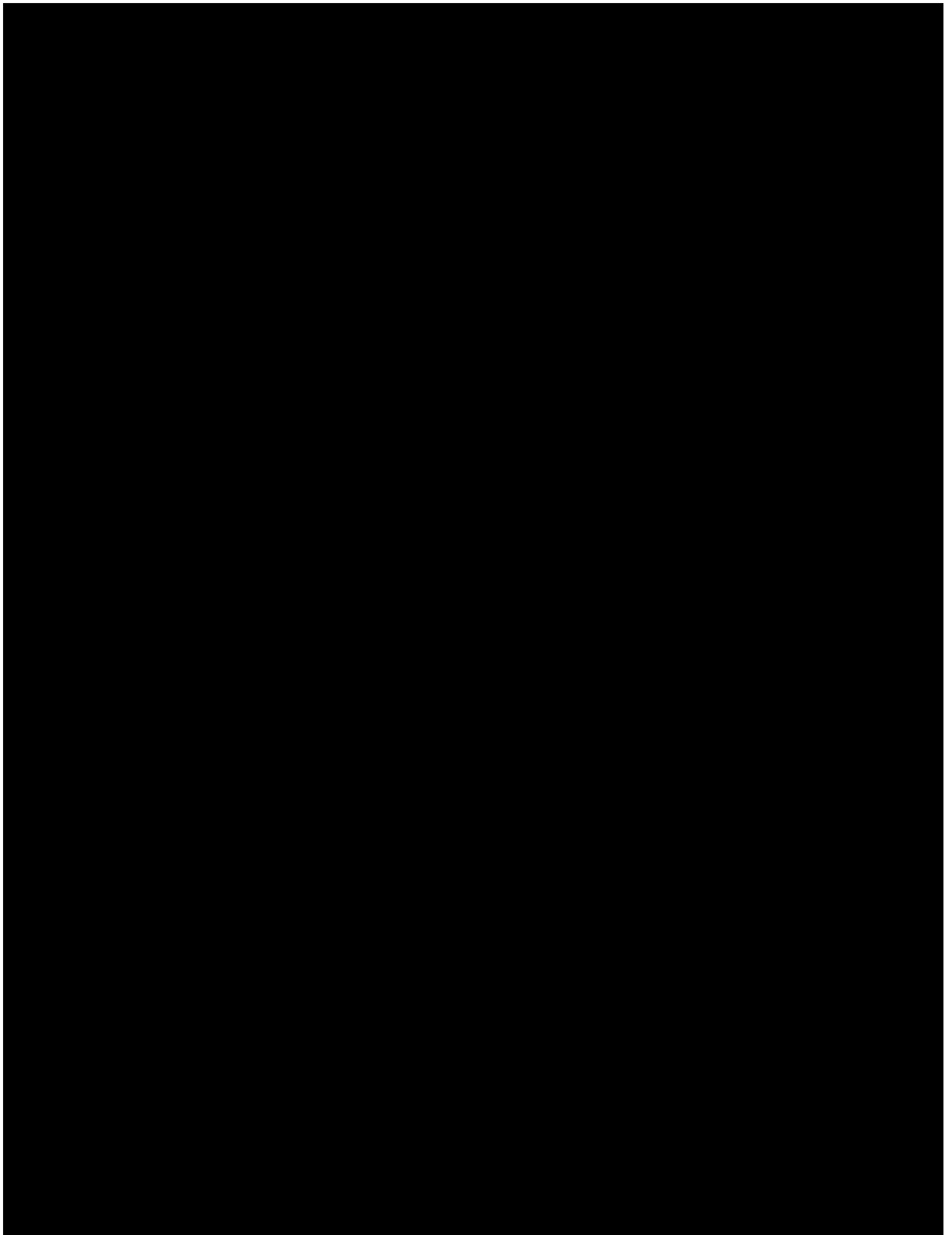


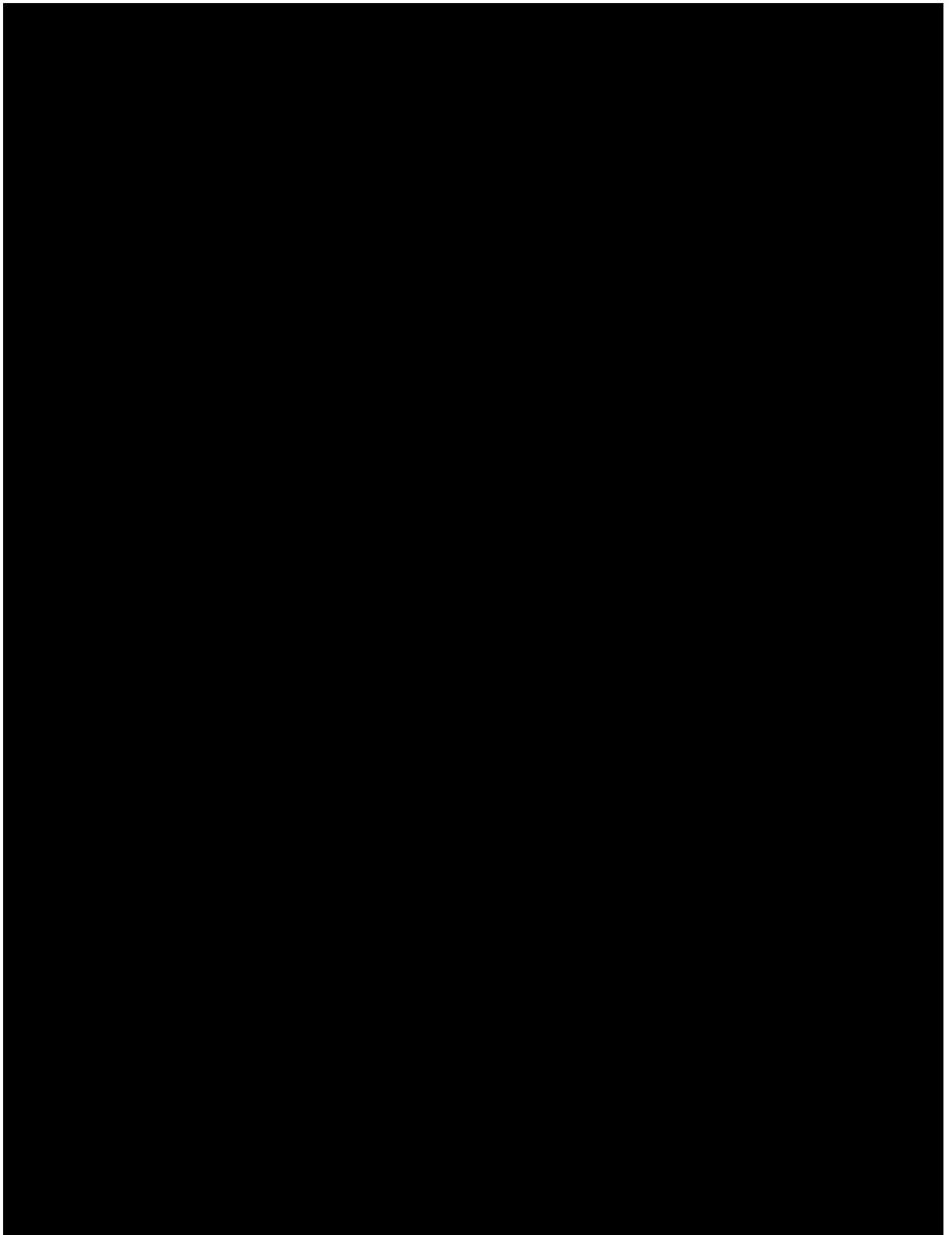


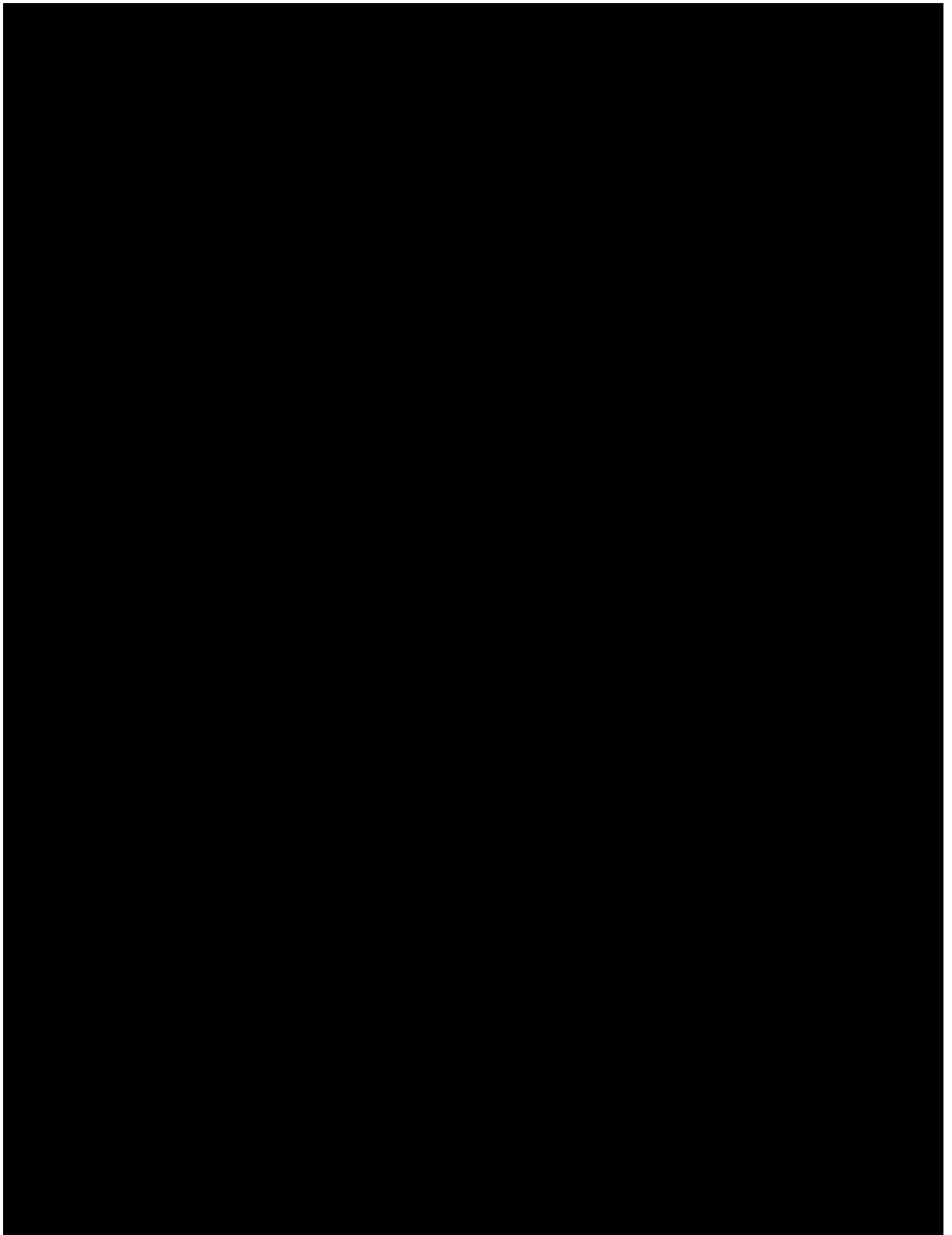


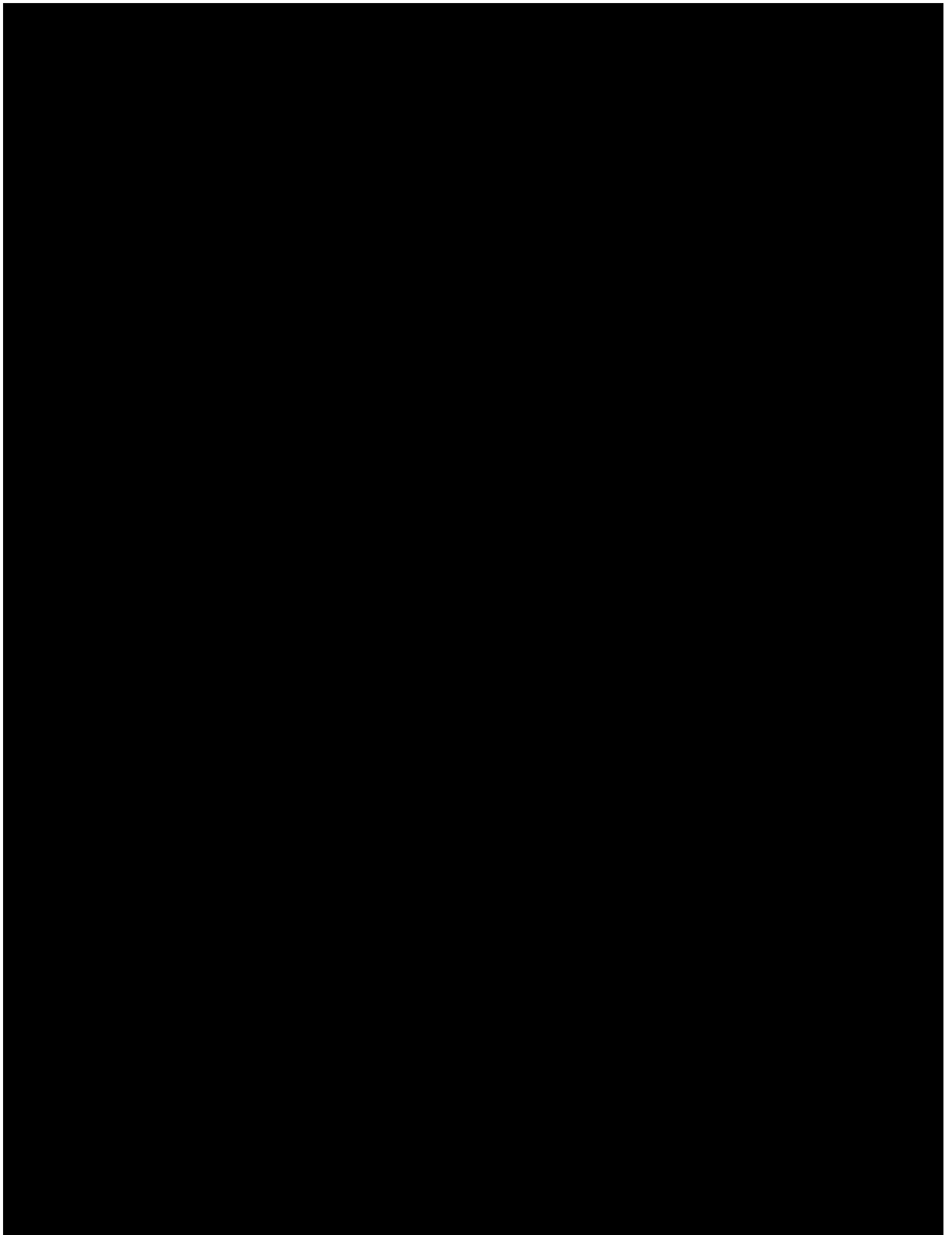












**SCHEDULE 21  
MASTER AGREEMENT**

See attached.



**ATTACHMENT A**  
**AMENDED AND RESTATED MASTER AGREEMENT**  
**FOR**  
**NEXT GENERATION**  
**KENTUCKY INFORMATION HIGHWAY (NG-KIH) INITIATIVE**  
**CONCESSIONAIRE PARTNER**  
**BETWEEN**  
**THE COMMONWEALTH OF KENTUCKY Finance and Administration**  
**Cabinet**  
**AND**

**MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC**  
**Level 16, 125 West 55th Street**  
**New York, New York 10019**

**Contact Person:**  
**Nicholas Hann**  
**Senior Managing Director**  
**Suite 2400**  
**550 Burrard Street Vancouver BC V6C 2B5**  
**Canada**  
**Telephone: 604-605-1779 Fax: 604-605-1634**  
**[Nicholas.hann@macquarie.com](mailto:Nicholas.hann@macquarie.com)**

**MA 758 1500000563**

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WHEREAS, pursuant to KRS 45A.605, the Commonwealth of Kentucky, by and through the Finance and Administration Cabinet (the "Commonwealth"), has the authority to enter into contracts for the development of an information highway on behalf of state agencies and other specified entities;

WHEREAS, the Commonwealth has established networks for the use of state government, institutions of higher learning, K-12 education and local governments;

WHEREAS, the Commonwealth, through its government agencies, educational entities, local government and other stakeholders, supports the finance, design, construction, operation, maintenance and refreshing of the Next Generation Kentucky Information Highway middle mile infrastructure ("NG-KIH" or "Project") to serve the public sector, private interests and Kentucky's citizens;

WHEREAS, the NG-KIH will consist of a statewide dark fiber middle-mile network constructed to provide communication services based on an optical fiber backbone which will improve the quality, reliability, and access to network services across the Commonwealth;

WHEREAS, the Commonwealth issued RFP 758 1500000003-5 ("RFP" or "Solicitation") through a competitive bidding process to select a long-term vendor/partner to assist with this Project;

WHEREAS, Macquarie Infrastructure Developments, LLC ("Contractor"), having acknowledged and accepted, as of the date of submission of Contractor's proposal, the initial terms and scope of the Project as set forth in the RFP, as amended, bid upon the Solicitation and continues to design and develop all aspects of the Project in cooperation with the Commonwealth;

WHEREAS, Contractor has extensive experience in the design, implementation, financing and operation of complex public-private telecommunications projects and was awarded the contract;

WHEREAS, this Agreement is an amendment and restatement of that certain Master Agreement for Next Generation Kentucky Information Highway Initiative Concessionaire Partner between the Commonwealth and the Contractor dated December 19, 2014 to reflect, among other amendments, the inclusion of LTS as a contributor to the Work Product, to establish an Interim Milestone availability proposal and to reflect the terms and conditions applicable to certain early works (Phase 1), which will form part of the scope of the Concession Agreement, but will be performed by LTS and OCI (or through a joint venture entity once formed between LTS and OCI or any of their affiliates) (individually or collectively referred to herein as the "DB

Contractors”) in advance of the effective date of the Concession Agreement in order to maintain the anticipated project schedule;

WHEREAS, the Commonwealth and the Contractor have agreed to further amend this Agreement to reflect the terms and conditions applicable to certain further early works (Phase 2), which will form part of the scope of the Concession Agreement, but will be performed by the DB Contractors in advance of the effective date of the Concession Agreement in order to maintain the anticipated project schedule;

WHEREAS, following execution of the Master Agreement executed December 19, 2014, with feedback from placement agents and underwriters, a viable financing plan utilizing tax-exempt and taxable municipal securities was identified as an alternative to the corporate (taxable) financing that had previously been the basis of the Contractor’s financial plan;

WHEREAS, in connection with the adoption of this financial plan, the Commonwealth and the Contractor agree to enter into this Fourth Amended and Restated Master Agreement;

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Commonwealth and Contractor (collectively referred to as "Parties"), hereby covenant and agree as follows:

This Amended and Restated Master Agreement ("Agreement") is entered into, by and between the Commonwealth and Contractor.

The Commonwealth and Contractor agree to the following:

I. Scope of Contract

The purpose of this Agreement is to engage Contractor to explore the feasibility of the finance, design, construction, operation, maintenance, and refreshing of the NG-KIH initiative (the feasibility phase being the "Initial Project" and the ultimate implementation of the NG-KIH under the Concession Agreement being the "Project") and to exclusively negotiate the Concession Agreement between the Parties governing the Project.

II. Contract Components and Order of Precedence

The Commonwealth's acceptance of Contractor’s proposal in response to Solicitation RFP 758 1500000003, indicated by the issuance of a Contract Award by the Office of Procurement Services, shall create a valid agreement between the Parties consisting of the following:

- A. procurement statutes, regulations and policies (adopted as regulations or otherwise incorporated therein pursuant to KRS Chapter 13A);
- B. any written agreements between the Parties;

- C. any addenda to Solicitation RFP 758 1500000003;
- D. Solicitation RFP 758 1500000003 and all attachments;
- E. any Best and Final Offer;
- F. any clarifications concerning the Contractor's proposal in response to Solicitation RFP 758 1500000003;
- G. Contractor's proposal, as finally amended and agreed to, in response to Solicitation RFP 758 1500000003.

In the event of any conflict between or among the provisions contained in the foregoing, the order of precedence shall be as enumerated above. With respect to items C, D, E, F and G above, the Solicitation and associated RFP process is complete and there will be no further amendments thereto.

### III. Negotiated Items

- 1. Definitions as used herein, capitalized terms shall have the meanings set forth in Attachment C or as further defined in the Agreement.
  - 2. Milestones
- **The Parties agree to work cooperatively and in good faith to achieve three (3) Milestones, as further defined in Attachment D: (1) Guaranteed Maximum Pricing; (2) Interim Milestone; and (3) Financial Close Milestone.**

The indicative timeline for the Milestones is as follows:

- Contractor shall deliver a Guaranteed Maximum Pricing proposal on or before March 28, 2015, or such later date as the Parties agree, acting reasonably. The Commonwealth acknowledges receipt of such proposal on such date;
  - Contractor shall deliver an Interim Milestone availability payment proposal on May 31, 2015, or such later date as the Parties agree, acting reasonably; and
  - The Parties shall seek to achieve the Financial Close Milestone within two (2) months of the Contractor's delivery to the Commonwealth of the Interim Milestone availability payment proposal and the Financial Close Milestone Workplan, or such longer period as the Parties agree, acting reasonably.
- a. The Parties agree to work cooperatively and in good faith to finalize the scope, budget, deliverables and time line, as may be applicable, for each Milestone as described in the "Milestone Workplan." The Milestone Workplans are set forth at Attachment D. However, the

Parties agree to negotiate in good faith as to the final Milestone Workplan for each Milestone.

- b. At or prior to the conclusion of the previous Milestone, Contractor shall submit the Milestone Workplan for the subsequent Milestone, or in the case of the Financial Close Milestone, the Financial Close Milestone deliverables as set forth in Attachment D (the "Deliverables"), to the Commonwealth for approval. Within ten (10) days of the Commonwealth's receipt of the Milestone Workplan or the Deliverables, the Commonwealth must either formally accept or reject the Milestone Workplan or the Deliverables, as applicable. During this ten (10) day review period, the Contractor may, in consultation with the Commonwealth, continue developing plans and taking reasonable and appropriate actions to advance to the next Milestone, however it is under no obligation to do so. If the Commonwealth accepts the Milestone Workplan, then the Commonwealth shall provide Contractor with a notice that it may proceed based on the Milestone Workplan (the "Notice to Proceed"). If the Commonwealth does not formally accept or reject the Milestone Workplan within ten (10) days, then Contractor may, in its sole discretion, either (a) continue to develop the Project and work toward Financial Close or (b) treat inaction as a "Default" subject to cure as set forth in Section III.8. of this Agreement. In the event that Contractor continues to develop the Project in its sole discretion, all provisions of this Agreement continue in full force and effect. In the case of the Deliverables, if the Commonwealth accepts the Deliverables, then the Commonwealth shall provide Contractor with notice that it accepts all Deliverables and request executed versions of all executable Deliverables. If the Commonwealth does not formally accept or reject the Deliverables within ten (10) days, then Contractor may, in its sole discretion, treat inaction as a "Default" subject to cure as set forth in Section III.8. of this Agreement. Should the Commonwealth not formally accept or reject a proposed Milestone Workplan or the Deliverables within ten (10) days of receipt, such Milestone Workplan or Deliverables shall be subject to change, including without limitation the proposed financial close schedule, construction schedule, and any cost proposals. Furthermore, should the Commonwealth accept or not formally reject a proposed Milestone Workplan or the Deliverables within ten (10) days of receipt, the project proposals therein, including the price and schedule proposals, shall supersede prior milestone proposals. The Commonwealth acknowledges that the GMP Milestone was submitted and delivered in compliance with the obligations and requirements set out in this Agreement.
- c. At the conclusion of the GMP Milestone, Contractor shall submit a summary of the conclusions and results of the Milestone ("Working

Assumptions"). The Parties acknowledge that these Working Assumptions are the basis for the subsequent Milestones and commit to apply the Working Assumptions to the subsequent Milestones and the Concession Agreement.

- d. For purposes of workload planning, the Commonwealth shall use good faith efforts to accommodate and adapt to Contractor's proposed Milestone Workplan, within the practical limitations on availability of the Commonwealth's personnel appropriate for performing the types of services in question. Contractor shall accommodate and adapt its proposed Milestone Workplan to the practical limitations on availability of personnel of the Commonwealth.
- e. Upon Completion of each Milestone set forth in the Milestone Workplan in Attachment D, the Commonwealth and Contractor agree to review this Agreement to determine if any amendments or modifications are necessary.
- f. Contractor agrees that the costs of each Milestone shall not exceed the Total Costs as set forth in Attachment D. Provided, however, subsequent Milestone budgets may be amended by mutual agreement of the Parties.

### 3. Open Book Process

The Parties commit to an Open Book Process for developing the costs and financing terms for the Project. Contractor will share the proposals it receives from third parties and will provide the Commonwealth the opportunity to review, comment on and reasonably approve all Costs. Contractor intends to run competitive best value processes for selection of legal, technical and other advisors and for selection of lenders or other debt providers.

### 4. Contractor's Obligations

Contractor shall:

- a. use commercially reasonable efforts to achieve each Milestone in accordance with the Milestone Workplan;
- b. design the Initial Project and each Milestone, as applicable, in accordance herewith and all applicable laws, regulations and ordinances;
- c. advance all incurred External Costs and incurred Internal Costs as set forth in the Milestone Workplan;

- d. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, provide reasonable notice of not less than seven (7) days to the Commonwealth and negotiate in good faith with the Commonwealth as to a revised budget and/or schedule;
- e. Conduct a weekly conference call to provide the Commonwealth with progress reports regarding the current Milestone;
- f. Ensure that there is sufficient auditing capability to track actions taken by Contractor and its staff; and
- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Commonwealth representatives at a mutually agreed upon location.

5. Commonwealth's Obligations

The Commonwealth shall:

- a. Provide Contractor with support as mutually agreed upon and reasonably necessary for Contractor to achieve the Milestones, including without limitation providing reasonable access to Commonwealth staff, key stakeholders, permitting agencies, and other relevant parties;
- b. Provide any relevant information requested by Contractor or its subcontractors;
- c. Provide timely feedback on all plans and proposals submitted to the Commonwealth by Contractor, including without limitation the Milestone Workplan;
- d. In the event of termination as provided herein, reimburse Contractor; pursuant to this Agreement and 200 Ky. Admin. Reg. 5:312.
- e. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, negotiate in good faith with the Contractor as to a revised budget and/or schedule;
- f. Participate in weekly conference calls regarding Milestone progress reports;
- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Contractor representatives at a mutually agreed upon location;

6. Work Product/Ownership

- a. Upon the earlier of Financial Close or a termination prior to Financial Close, the Commonwealth will assume ownership of all Work Product so that future development of the NG-KIH can be leveraged from the analysis already undertaken, but not for any commercial sale to third parties. "Work Product" refers to all materials presented by Contractor and its subcontractors to the Commonwealth, except for the Models, plans, specifications and related design information created by Fujitsu Network Communications, Inc. and its affiliates (collectively, "FNC"), Overland Contracting, Inc. and its affiliates (collectively "OCI") and LTS Managed Technical Services, LLC and its affiliates (collectively "LTS") (the "FNC Design", "OCI Design" and "LTS Design", respectively). Further, Work Product includes, but is not limited to, all network design and engineering information, contract drafts, reports from third party advisors, cost estimates, and financial models, etc. Contractor shall be granted a non-exclusive license to use such Work Product after the transfer of ownership (subject to any lawful public disclosure requirements). Furthermore, following a termination prior to Financial Close, the Commonwealth shall not be permitted to provide such Work Product to another concessionaire for use in a "Similar Project," subject to the Parties' negotiations. The Commonwealth acknowledges and agrees that in the event that the Commonwealth provides the Work Product to a third party, the Contractor, FNC, OCI and LTS, as applicable, shall not be liable for and the Commonwealth expressly waives any claim for any fees, penalties, claims, obligations, damages, costs, expenses, fines, demands and causes of action arising in connection with or related to the Commonwealth's or such third party's use of the Work Product.
- b. Prior to the earlier of Financial Close or termination, all Work Product, and all copies thereof, shall remain exclusively the property of Contractor and its subcontractors, including FNC, OCI and LTS, as applicable, notwithstanding any delivery of copies thereof to the Commonwealth.
- c. Contractor may prepare one or more financial models in connection with this Agreement and/or the Initial Project ("Models"). The Models may include financial models developed for consideration and potential use by the Contractor, Commonwealth and capital providers and advisers to the Project. The Models are anticipated to show forward estimates of future cash flows and are based on Contractor's best understanding of future outcomes at the current time.



While the Models will be prepared in good faith, unless and until expressly included within the Concession Agreement, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, have made, or are making, any representation or warranty as to the completeness, accuracy, reliability or appropriateness of the Models or any of their respective contents or outputs, and no legal or other commitments or obligations shall arise by reason of the provision of the Models or their respective contents, or any outputs derived. The information contained in the Models will not be independently verified by Contractor. Accordingly, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, shall be liable for any direct, indirect or consequential loss suffered by any person as a result of relying on any statement in or omission from the Models or any other information provided in connection therewith.

- d. Notwithstanding any other provision in this Agreement, Contractor, FNC, OCI and LTS, respectively, will retain all of their respective intellectual property rights in relation to the Models and the underlying technology and engineering specifications set forth in the FNC Design, OCI Design and LTS Design, as applicable, including patent, trademark, copyright and rights to confidential information, but excluding any agency or other third party intellectual property rights. However, Contractor and any of its subcontractors, as applicable, will grant the Commonwealth a royalty-free, perpetual, irrevocable license to use the Models, and such technology. As set forth in the Solicitation, Contractor, FNC, OCI, LTS and any other subcontractors agree to maintain an archival copy in data store of any software or other intellectual property, as applicable, that shall be available to the Commonwealth in the event the Contractor, FNC, OCI, LTS or any other subcontractors are unable to continue the business for financial or other business reasons.
- e. The Commonwealth may insert other variables or assumptions to consider alternative scenarios or outcomes. However, Contractor will not be responsible for failure of a Model or for output errors resulting from incorrect or inappropriate inputs by Commonwealth. Notwithstanding the foregoing, the Commonwealth may not use, reproduce or adapt any Model other than in relation to the Initial Project, including all expansions thereto, without Contractor's prior written consent. In addition, data, outcomes and estimates and forecasts contained in or derived from Models shall only be disseminated beyond the Commonwealth's directors, officers, employees and advisors of the Initial Project in accordance with a joint and collaborative plan derived by the mutual cooperation of

the parties. Contractor does not represent that estimates or forecasts derived from any Model will actually be achieved or that the assumptions, variables and other inputs used in any Model are reasonable, reliable or accurate.

- f. The Models may contain forward-looking statements, forecasts, estimates, projections and opinions ("Forward Statements"). No representation is made or will be made that any Forward Statements will be achieved or will prove correct. Actual future results and operations could vary materially from the Forward Statements. Similarly no representation is given that the assumptions disclosed in the Models upon which Forward Statements may be based are reasonable. The Commonwealth acknowledges that circumstances may change and the contents of the Models may become outdated as a result.
- g. In further consideration of Contractor allowing the Commonwealth access to the Models and the information contained therein, the Commonwealth agrees that the Commonwealth will make no claim against Contractor, its partners (including LTS, OCI and FNC), employees or affiliates, that relates in any way to any Model, any information contained therein, or the Commonwealth' access to any Model.
- h. The Commonwealth shall not disclose records identified and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and Contractor shall cooperate with each other and participate if requested by the other in any appeal based upon an exemption contained within KRS 68.878(1)(c).

7. Web-Based Data Site

A secure web-based data site will be used as an electronic repository of the Work Product and Models, and will be available to approved transaction participants, including anyone the Commonwealth reasonably approves to receive any portion of the Work Product and Models for use in connection with the Project. This will be the means by which all Work Product and Models will be transmitted and made available to the Commonwealth. All

Work Product and Models will be made available in real-time subject to reasonable practicalities. The web-based data site shall be constructed, administered and hosted by Contractor.

The Commonwealth shall not disclose records identified by Contractor and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and the Contractor shall cooperate with each other and participate if requested by the other Party in any appeal based upon an exemption contained within KRS 68.878(1)(c).

8. *Right to Cure*

In the event of the occurrence and continuance of a Default by either Party, the Commonwealth or Contractor, as applicable, may in writing request a thirty (30) day period in which to cure the Default. If the Party is unable to cure the Default within that period, the Default may be considered as a basis to terminate this Agreement as set forth in Section III.26.

9. *No Third Party Beneficiaries*

Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

10. *No Joint Venture, Partnership or Alter Ego; Independent Contractor*

Nothing contained in this Agreement, any document executed in connection herewith or any other Agreement with any other party shall be construed as making the Parties joint partners, joint venturers or alter egos of each other or any other entity. Contractor shall at all times remain an independent contractor of Commonwealth.

11. *Notice, Confirmation of Force Majeure Event; Suspension of Performance*

Upon giving written notice to the other Party, a Party affected by a Force Majeure Event shall be released without any liability on its part from the

performance of its obligations under this Agreement, but only to the extent and only for the period that its performance of such obligations is prevented by a Force Majeure Event. Such notice shall include a description of the nature of the Force Majeure Event, and its cause and possible consequences. The Party claiming a Force Majeure Event shall promptly notify the other party of the termination of such event.

The Party invoking the Force Majeure Event shall provide to the other Party confirmation of the existence of the circumstances constituting a Force Majeure Event. Such evidence may consist of a statement or certificate of an appropriate governmental department or agency where available, or a statement describing in detail the facts claimed to constitute a Force Majeure Event.

During the period that the performance by one of the Parties of its obligations under this Agreement has been suspended by reason of a Force Majeure Event, the other Party may likewise suspend the performance of all or part of its obligations hereunder to the extent that such suspension is commercially reasonable.

12. Letter of Credit

Upon Financial Close, with regards to Contractor's performance, Contractor will provide a letter of credit with commercially reasonable terms ("Letter of Credit") or at the option of the Contractor an alternative security package, in form and substance reasonably acceptable to the Commonwealth. The alternative security package shall also provide that the Commonwealth is a co-obligee in addition to the lenders provided therein.

- a. From Financial Close until completion of the Project, the Contractor shall provide the alternative security package referenced in III.12, for at a minimum, an amount equal to \$10,000,000.00.
- b. The Letter of Credit shall be in the form of an irrevocable letter of credit from an approved bank, as may amended in the Concession Agreement, and must be presentable for payment in New York City. The Letter of Credit shall only be transferable in its entirety (but not in part) to the lenders, the collateral agent or agencies of the Commonwealth. The Commonwealth shall only provide a Transfer Letter of Credit to the issuing bank for transfers to agencies of the Commonwealth, the collateral agent or lenders, as may be modified in the Concession Agreement.
- c. The Letter of Credit (or a replacement letter of credit provided prior to the expiration or termination of the Letter of Credit)

shall be in full force and effect from the date provided to Commonwealth until the applicable date referenced in Section III. The Commonwealth, or the subsequent beneficiary, shall provide a Reduction Notice to the issuing bank of the Letter of Credit, with a copy to Contractor, in the commercial customary form within two business days of the Substantial Completion Date and the Final Acceptance Date, respectively, adjusting the amount of the Letter of Credit as provided in Section III.

- d. The Letter of Credit may be drawn upon by Commonwealth, or subsequent beneficiary, in Dollars in the United States of America from time to time (a) to the extent amounts are due and owing under the Concession Agreement from Contractor to the Commonwealth under Section III as may be amended in the Concession Agreement, (b) at any time when there are fewer than thirty (30) days remaining prior to the expiration of such Letter of Credit and the expiring letter of credit has not been replaced by a new letter of credit to be effective no later than such expiration; provided that a letter of credit is still required to be in place under this Section, as may be amended in the Concession Agreement, (c) at any time when the credit rating of the institution providing the Letter of Credit has been downgraded (or withdrawn) such that it no longer qualifies as an approved bank, and Contractor has not replaced such Letter of Credit with a new letter of credit from an approved bank within 15 business days after the date of the relevant downgrade or (d) at any time, if a Contractor Default has occurred and is continuing.
- e. Contractor's sole remedy in connection with an improper draw on the Letter of Credit shall be to obtain from the Commonwealth, or subsequent beneficiary, a refund of the proceeds of such improper draw and the reasonable costs Contractor incurs as a result of such improper draw; provided that at the time of such refund Contractor increases the amount of the Letter of Credit to the amount then required under applicable provisions of the Concession Agreement. Contractor acknowledges that an improper draw on the Letter of Credit could not under any circumstances cause Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Contractor covenants (a) not to request or instruct the issuer of the Letter of Credit to refrain from paying any legitimate sight draft presented with respect to the Letter of Credit and (b) not to commence or pursue any legal proceeding seeking, and Contractor irrevocably waives and relinquishes

any right, to enjoin, restrain, prevent, stop or delay any legitimate draw on the Letter of Credit.

- f. To the extent the Commonwealth, or subsequent beneficiary, draws on the Letter of Credit under the circumstances set forth in Section III. and the basis for such draw is subsequently cured, The Commonwealth, or subsequent beneficiary, shall return to Contractor the funds so drawn (to the extent not applied as part of such cure) and the Letter of Credit will be restored for the full amount of such draw prior to the return of such funds, if such Letter of Credit was not already replaced as part of the cure.

13. Agreement Claims

The Parties acknowledge that KRS 45A.225 to 45A.290 governs contract claims.

14. Limitation of Liability

The liability of the Commonwealth related to contractual damages is set forth in KRS 45A.245.

15. Changes and Modifications to the Agreement

Pursuant to KRS 45A.210 (1) and 200 KAR 5:311, no modification or change of any provision in this Contract shall be made, or construed to have been made, unless such modification is mutually agreed to in writing by the Contractor and the Commonwealth, and incorporated as a written amendment to this Contract and processed through the Office of Procurement Services and approved by the Finance and Administration Cabinet prior to the effective date of such modification or change pursuant to KRS 45A.210(1) and 200 KAR 5:311. Memoranda of understanding, written clarifications, and/or correspondence shall not be construed as amendments to this Agreement. The Parties shall establish a detailed change order process prior to Financial Close to accommodate any required changes to the Project, and such change order process shall also be part of the Concession Agreement.

If the Contractor finds at any time that existing conditions make modification of this Agreement necessary, it shall promptly report such matters to the Commonwealth for consideration and decision.

16. Changes in Scope

The Commonwealth may, at any time by written order, make changes within the general scope of this Agreement. No changes in scope are to be conducted except with the approval of the Commonwealth.

Notwithstanding the foregoing, Contractor shall not be bound by any unilateral material changes in scope, and any change in scope, unilateral or agreed upon, must provide for additional compensation to the Contractor, in form and substance, as mutually agreed to by the Parties in writing.

17. Assignment

This Agreement shall not be assigned in whole or in part without the prior written consent of the non-assigning Party. Notwithstanding the foregoing, the Commonwealth consents to Contractor assigning its rights and obligations hereunder to an appropriate Affiliate or a special purpose entity to carry out the terms of this Agreement, provided that the Contractor requires the Affiliate to be bound by the terms of this Agreement pursuant to a written agreement.. In the event of the Affiliate transferee's insolvency, involuntary or voluntary bankruptcy, dissolution or the termination of this Agreement for Contractor's failure to perform, the Commonwealth may step in and assume responsibility for, and control of, the Project, subject to coordination with secured lenders in connection with the exercise of remedies upon default. The Parties will develop detailed default and termination provisions with respect to the foregoing sentence in the Concession Agreement.

18. Payment

The Commonwealth will make payment within thirty (30) working days of receipt of Contractor's invoice or of acceptance of goods and/or services in accordance with KRS 45.453 and KRS 45.454.

Payments are predicated upon successful completion and acceptance of the described work, services, supplies, or commodities, and delivery of the required documentation. Invoices for payment shall be submitted to the Commonwealth's designated representative.

19. Contractor Cooperation in Related Efforts

The Commonwealth may undertake or award other contracts for additional or related work, services, supplies, or commodities, and the Contractor shall fully cooperate with such other contractors and Commonwealth employees. The Contractor shall not commit or permit any act that will materially interfere with the performance of work by any other contractor or by Commonwealth employees. The Commonwealth shall ensure that such other contractor or its employees will not commit or permit any act that will materially interfere with Contractor's work performance.

20. Contractor Affiliation

"Affiliate" shall mean an entity that controls or is under common control with Contractor together with any fund or investment vehicle managed or advised by any such entity, or a fund or investment vehicle which has delegated to any such entity responsibility for the management of its interest in the Project. If any Affiliate directly involved in the Project shall take any action related to this Agreement that, if done by the Contractor, would constitute a material breach of this Agreement and would also materially impair Contractor's or the Commonwealth's ability to perform the Agreement, the same shall be deemed a breach by Contractor. Actions by Affiliates that do not relate to or adversely impact the Parties' rights and obligations under this Agreement shall not be considered breaches.

21. Commonwealth Property

The Contractor shall be responsible for the proper custody and care of any Commonwealth-owned property furnished for Contractor's use in connections with the performance of this Agreement. The Contractor shall reimburse the Commonwealth for its actual loss or damage, normal wear and tear excepted.

22. Confidentiality of Agreement Terms

The Contractor and the Commonwealth agree that all information communicated between them before the effective date of this Agreement shall be received in strict confidence and shall not be disclosed by the receiving party, its agents, or employees without prior written consent of the other party. Such material will be kept confidential subject to Commonwealth and Federal public information disclosure laws.

Upon signing of this Agreement by all Parties, terms of this Agreement become available to the public, pursuant to the provisions of the Kentucky Revised Statutes, subject to any exemptions to disclosure set forth in KRS 61.878, which the Commonwealth agrees to assert

The Contractor shall have an appropriate agreement with its subcontractors extending these confidentiality requirements to all subcontractors' employees.

23. Confidential Information

a. If either Party provides or has provided Confidential Information prominently designated as such to the other Party, the receiving Party shall hold such information in confidence and shall afford it the same care and protection that it affords to its own confidential and proprietary information (which in any case shall be not less than reasonable care) to avoid disclosure to or unauthorized use by any third party, except as otherwise provided below. All Confidential Information shall be used by the receiving Party only for the intended purposes set forth in this



Agreement. Except as otherwise required by law, after the receiving Party's need for Confidential Information has expired, or upon the reasonable request of the disclosing Party, or promptly following the termination or expiration of this Agreement, the receiving Party shall destroy or return to the disclosing Party all Confidential Information, including all copies of such information, and all notes, summaries, or other writings reflecting Confidential Information. The receiving Party shall not reproduce Confidential Information, except to the extent reasonably necessary to perform under this Agreement, or as otherwise may be permitted in writing by the disclosing Party.

b. Contractor shall comply with the provisions of the Privacy Act of 1974 and instruct its employees to use the same degree of care as it uses with its own data to keep confidential information concerning client data, the business of the Commonwealth, its financial affairs, its relations with its citizens and its employees, as well as any other information which may be specifically classified as confidential by the Commonwealth in writing to the Contractor. All Federal and State Regulations and Statutes related to confidentiality shall be applicable to the Contractor. The Contractor shall have an appropriate agreement with its employees, and any subcontractor employees, to that effect, provided however, that the foregoing will not apply to:

i. Information which the Commonwealth has released in writing from being maintained in confidence;

ii. Information which at the time of disclosure is in the public domain by having been printed and published and available to the public in libraries or other public places where such data is usually collected; or

iii. Information, which, after disclosure, becomes part of the public domain as defined above, through no act of the Contractor.

**24. Permits, Licenses, Taxes and Commonwealth Registration**

The Contractor shall procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of all Federal, State, and local governments in which work under this Agreement is performed.

The Contractor shall maintain certification of authority to conduct business in the Commonwealth of Kentucky during the term of this Agreement. Such registration is obtained from the Secretary of State, who will also provide the certification thereof. Additional local registration or license may be required.

The Contractor shall pay any sales, use, and personal property taxes arising out of this Agreement and the transaction contemplated hereby. Any other taxes levied upon this Agreement, the transaction, or the

equipment or services delivered pursuant hereto shall be borne by the Contractor, or as otherwise mutually agreed to in the Concession Agreement.

25. Provisions for Termination of the Contract

This Agreement shall be subject to the termination provisions set forth in 200 Ky. Admin. Reg. 5:312.

26. Reimbursement of Costs

In the event of a termination that does not arise from a material default solely by Contractor, in accordance with 200 Ky. Admin. Reg. 5:312 the Contractor may request reimbursement of its costs. Provided, however, the costs Contractor may recover shall not exceed the Total Costs set forth in Exhibit A. The Parties agree to establish a cost process to be utilized during each Milestone to permit the Parties to monitor the costs incurred.

27. Bankruptcy

In the event the Contractor becomes the subject debtor in a case pending under the Federal Bankruptcy Code, the Commonwealth's right to terminate this Agreement may be subject to the rights of a trustee in bankruptcy to assume or assign this Agreement. The trustee shall not have the right to assume or assign this Agreement unless the trustee (a) promptly cures all defaults under this Agreement; (b) promptly compensates the Commonwealth for the monetary damages incurred as a result of such default, and (c) provides adequate assurance of future performance, as determined by the Commonwealth.

28. Conformance with Commonwealth & Federal Laws/Regulations

This Contract is subject to the laws of the Commonwealth of Kentucky and where applicable Federal law. Any litigation with respect to this Contract shall be brought in state court in Franklin County, Kentucky in accordance with KRS 45A.245.

29. Access to Records

Contractor constitutes a "contractor," as defined in KRS 45A.030 (9) and agrees that the contracting agency, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this Agreement for the purpose of financial audit or program review. Records and other prequalification information confidentially disclosed as part of the bid process, including without limitation items identified as proprietary or confidential, including

without limitation the Models, Work Product, trade secrets, any information related to the web-based secure data site and all other Confidential Information, shall not be deemed as directly pertinent to this Agreement and shall be exempt from disclosure as provided in KRS 61.878(1)(c), or any other applicable exemption contained with KRS 61.878. The contractor also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Open Records Act, KRS 61.870 to 61.884, including the exemption from disclosure contained in KRS 61.878, which the Commonwealth agrees to assert.

In the event of a dispute between Contractor and the contracting agency, the Attorney General, or the Auditor of Public Accounts over documents that are eligible for production and review, the Finance and Administration Cabinet shall review the dispute and issue a determination, in accordance with Secretary's Order 11-004. (See Attachment B).

30. *Prohibitions of Certain Conflicts of Interest*

In accordance with KRS 45A.340, the Parties mutually represent and warrant, and each of the Parties rely upon such representation and warranty, that to the best of their respective knowledge neither party presently has any actual identifiable interest and shall not acquire any actual identifiable interest, which would directly conflict with the performance of their respective obligations under this Agreement.

The Parties further mutually represent and warrant that in the performance of the Agreement, no person having any such interest shall be employed by either party. In accordance with KRS 45A.340 and KRS 11A.040 (4), the Parties both agree that they shall not knowingly allow any official or employee of the Commonwealth who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement to voluntarily acquire any ownership interest, direct or indirect, in this Agreement prior to the completion of this Agreement.

31. *Intentionally Left Blank*

32. *Agencies to Be Served*

This Agreement shall be for use by all Agencies of the Commonwealth of Kentucky as defined in 45A.605.

33. *Extending the Contract Use to Other Agencies*

The Commonwealth reserves the right, with the consent of the Contractor, to offer this Agreement to other state agencies and stakeholders.

34. Term of Agreement

The term of this Agreement shall begin on December 19, 2014, and at Financial Close shall continue upon completion of the Concession Agreement for a period of thirty (30) years.

Notwithstanding the foregoing, if the Commonwealth fails to approve any Milestone Work Plan as envisioned in Section III.2.c., or fails to consummate Financial Close on agreed upon terms, Contractor may terminate this Agreement, subject to Section III.8., and seek reimbursement for Costs in accordance with Section III.27.

Upon final termination of the Concession Agreement, Contractor shall provide all relevant data in a form that can be practically converted to any subsequent system of the Commonwealth's reasonable choice in accordance with the Concession Agreement. The Commonwealth and Contractor will cooperate to this end with any subsequent vendor of the Commonwealth's choice, in a timely and efficient manner.

35. Notices

All programmatic communications with regard to day-to-day performance under this Agreement are to be made to the agency technical contact(s) identified below.

Mike Hayden, Director  
Finance and Administration Cabinet  
Room 456  
Capitol Annex  
Frankfort, KY 40601  
502-564-782-2535  
[mike.hayden@ky.gov](mailto:mike.hayden@ky.gov)

All communications of a contractual or legal nature are to be made to the Commonwealth buyer. The Commonwealth reserves the right to change the contacts throughout the life cycle of any agreement awarded as a result of this RFP.

Stephanie R. Williams, CPPO, CPPS, MPA  
Assistant Director  
Finance and Administration Cabinet  
Office of Procurement Services (OPS)  
Division of Technology Services Procurement  
(502) 564-8621  
[stephanier.williams@ky.gov](mailto:stephanier.williams@ky.gov)

36. Subcontractors

Contractor is permitted to make subcontract(s) with any other party for furnishing any of the work or services herein. Contractor shall be solely responsible for performance of the entire Agreement whether or not subcontractors are used. The Commonwealth shall not be involved in the relationship between Contractor and any subcontractor. Any issues that arise as a result of this relationship shall be resolved by Contractor. All references to the Contractor shall be construed to encompass both the Contractor and any subcontractors of the Contractor.

37. Reporting Requirements

In conjunction with and in addition to all specific reports and notices required in the Agreement, the Contractor shall be required to provide the following reporting to the Commonwealth:

- a. Weekly progress reports regarding the current Milestone, including but not limited to, a report of any material events, developments or circumstances arising in relation to issues identified by the Commonwealth, including but not limited to, the Project schedule and budget, since the last weekly report;
- b. On a frequency to be reasonably determined by the Commonwealth, provide reports detailing the fulfillment of all contractual obligations to include, but not be limited to, acquisition of required insurances, mandated licenses and permits, executed financial documentation, and audited financial model;
- c. On a frequency to be reasonably determined by the Commonwealth, provide compliance reports itemizing safeguards in place to ensure adherence to the NIST Special Publication 800-53 Security Control Framework;
- d. Such other periodic reports as the Commonwealth may from time to time reasonably require; and
- e. Throughout each Milestone, a response delivered in a timely manner to any inquiry reasonably made by the Commonwealth in relation to any aspect of the relevant business of the Contractor, the Project, the O&M, or this Agreement.

Provided that, to the extent that such reporting includes sensitive data, as defined by the enterprise standards, it must be delivered to the Commonwealth in a confidential manner. All electronic transmissions of sensitive data must, at a minimum, comply with the Commonwealth Office of Technology Enterprise Standard 5100 documented at <https://Qotsource.kv.Qov/docushare/dsweb/Get/Document-301110/>.

The Parties agree that this is not an extensive list of reporting requirements governing the entire Agreement. The Parties agree further that future reporting requirements will be addressed by the Commonwealth and Contractor as the need arises based on the Milestone objectives agreed to by both Parties. Specific metrics and deliverables requisite to achieve the corresponding reporting will be implemented at that time.

#### IV. PHASE 1 EARLY WORKS

##### 1. Phase 1 Early Works

The Commonwealth hereby authorizes the Contractor to engage the DB Contractors to proceed with the Phase 1 Early Works in an amount not to exceed the Phase 1 Early Works Price and in accordance with the other terms and conditions set out in this Section IV. The scope of the Phase 1 Early Works will not be modified without the agreement in writing of the Commonwealth and the Contractor. The Commonwealth acknowledges that the DB Contractors may subcontract certain aspects of the Phase 1 Early Works.

##### 2. Phase 1 Early Works Term

The Phase 1 Early Works will be performed from June 15, 2015, to July 15, 2015 (the "Phase 1 Early Works Term").

##### 3. Applicable Terms

Notwithstanding any provision to the contrary, the Commonwealth and the Contractor acknowledge and agree that only the following Sections in this Agreement will be applicable to the Phase 1 Early Works: Section III.5(d), III.6(h), III.8 (excluding a payment breach), III.9-11, III.13, III.15 (excluding the last sentence of the first paragraph), III.16, III.17, III.18, III.19, III.21, III.22-25, III.26, III.27, III.28, III.29, III.30, III.35, III.36, Section V, Section VI and Schedule C [Definitions] to the extent that capitalized terms used in this Section IV are not otherwise defined in this Section IV.

##### 4. Access

The Commonwealth hereby permits the Contractor to provide the DB Contractors a non-exclusive license to access any of the lands that the Commonwealth owns or controls, including any right-of-ways, in order to complete any of the Phase 1 Early Works.

##### 5. Representation by the Commonwealth

The Commonwealth represents and warrants to the Contractor that as of the date of this Agreement the Commonwealth has the power, capacity and authority to

enter into this Agreement and to observe and perform all the covenants, agreements, terms and conditions to be observed and performed by the Commonwealth in accordance with the terms of this Agreement.

6. Termination

Upon the occurrence of Financial Close:

- a. This Section IV of the Agreement will be deemed to be terminated and of no force and effect; and
- b. all Early Works undertaken under this Agreement in advance of Financial Close will be deemed to have been undertaken by or on behalf of the Concessionaire pursuant to the Concession Agreement.

7. Termination of the Project

If for any reason prior to Financial Close the Commonwealth gives written notice to the Contractor that Financial Close will not be achieved, or Financial Close has not occurred by September 10, 2015, or that either the Commonwealth or the Contractor is terminating its efforts to achieve Financial Close, then upon such notice this Section IV will be deemed to be terminated and of no force and effect (except for payment obligations arising out of such termination) and the Contractor will immediately, in consultation with the Commonwealth, take all reasonable steps to ensure that the DB Contractors wind up all outstanding Phase 1 Early Works at minimum cost.

8. The Commonwealth's Discretion to Terminate all or a portion of the Phase 1 Early Works

At any time prior to Financial Close, and for any reason, the Commonwealth may direct the Contractor, upon five (5) days' written notice, to cease the undertaking of some or all of the Phase 1 Early Works, in which event the Contractor will immediately, in consultation with the Commonwealth, take all reasonable steps to wind up such Early Works at minimum cost.

9. Ownership of Phase 1 Early Works After Termination

If the Phase 1 Early Works are terminated for any reason prior to Financial Close, then the Commonwealth will be entitled to the full benefit of any Phase 1 Early Works for which the Commonwealth has made payment pursuant to this Agreement, including:

- a. any design drawings, calculations, survey mapping, and other design and routing information; and

- b. any contractual rights for the procurement of fiber and/or cable (collectively, the “Early Works Product”)

and in that event the Contractor will use reasonable efforts to obtain from the DB Contractor a formal assignment, transfer or other documentation, if applicable, or take other steps as the Commonwealth may reasonably request in order for the Commonwealth to obtain and receive such benefit. The transfer and delivery of the Early Works Product shall be on an ‘as is where is basis’ and the Contractor will prepare the Early Works Product in good faith based on the information that is available to the Contractor at the time the Early Works Product is prepared.

#### 10. Limitation of Liability

Notwithstanding any provision to the contrary in this Section IV or any other applicable provision in this Agreement, and specifically in relation to the Phase 1 Early Works, the Commonwealth will only be required to pay the Phase 1 Early Works Price and those other applicable payments on termination set out in Section IV paragraph 12 of this Agreement to the Contractor. For clarity, such amounts will not exceed the Phase 1 Early Works Price and the Demobilization Threshold but will be in addition to the Total Costs set forth in Exhibit A. If the Phase 1 Early Works are terminated for any reason prior to Financial Close, the Contractor’s liability will be limited to the Phase 1 Early Works Price.

#### 11. Payment – Termination by Financial Close

If the Phase 1 Early Works are terminated upon reaching Financial Close as provided by paragraph 6 of this Section IV, then no payment will be required under this Agreement, and the payment obligations under the Concession Agreement shall apply.

#### 12. Payment – Termination other than by Financial Close

If the Phase 1 Early Works are terminated other than due to the occurrence of Financial Close, the Commonwealth will pay to the Contractor (and the Contractor will immediately pay to the DB Contractors) an amount calculated based on the portion of the Phase 1 Early Works Price attributable to the portion of the Phase 1 Early Works that has been completed plus a reasonable amount for demobilization costs and termination costs to subcontractors, the amount of such demobilization costs and termination costs not to exceed 7.5% of the Phase 1 Early Works Price (the “Demobilization Threshold”).

The Contractor will pass through the itemized invoice that it receives from the DB Contractor to the Commonwealth for the amount payable under this paragraph 12 (if any), and provide reasonable supporting documentation for the Commonwealth to consider pursuant to 200 KAR 5:312. The Commonwealth will approve and pay the Contractor (and the Contractor will immediately pay the DB Contractor) within 30 days after receipt of the invoice. The Commonwealth



acknowledges that if a portion of the invoice provided by the Contractor is in dispute, the Commonwealth will approve and pay the undisputed portion of the invoice within the 30 days. Notwithstanding any provision to the contrary in this Section IV or any other applicable provision in this Agreement, and specifically in relation to the Phase 1 Early Works, this paragraph 12 will apply in the event of termination for any reason of this Agreement prior to Financial Close.

The Commonwealth acknowledges and agrees that if Phase 1 Early Works is terminated early subject to this paragraph 12 or some or all of the scope of the Phase 1 Early Works cease in accordance with Section IV paragraph 8, then schedule and costs associated with any of the Milestones or proposals as set forth in this Agreement may be subject to change, subject to the Commonwealth's approval of such changes, not to be unreasonably withheld, and subject to such changes being as a direct result of changes to or termination of the Phase 1 Early Works. Should the Commonwealth not approve proposed changes to schedule and costs contemplated in this paragraph 12, and prepared by the Contractor acting reasonably, then paragraph 7 of this Section IV shall apply. In the event that the Commonwealth intends to terminate the Phase 1 Early Works pursuant to this paragraph 12 or cease some or all of the Phase 1 Early Works in accordance with Section IV paragraph 8, it shall provide notice to the Contractor. Within three (3) Business Days of receipt of such notice from the Commonwealth, the Contractor will provide the Commonwealth with an estimate of the impact on the schedule and costs associated with the termination of the Phase 1 Early Works pursuant to this paragraph 12 or cease some or all of the Phase 1 Early Works in accordance with Section IV paragraph 8.

### 13. Monthly Payment Certificates

Each of the DB Contractors will, within 10 days after the end of each month, provide the Commonwealth a statement of the Phase 1 Early Works completed for that month and the relevant amount that would be payable under paragraph 12 of this Section IV in respect of such Phase 1 Early Works, calculated based on the portion of the Phase 1 Early Works Price attributable to the portion of the Phase 1 Early Works that has been completed. For greater certainty, this paragraph 13 does not require payment by the Commonwealth.

## V. Phase 2 Early Works

### 1. Phase 2 Early Works

The Commonwealth hereby authorizes the Contractor to engage the DB Contractors to proceed with the Phase 2 Early Works in an amount not to exceed the Phase 2 Early Works Price and in accordance with the other terms and conditions set out in this Section V. The Phase 2 Early Works will be performed in accordance with the requirements set out in Attachment H [Design and Construction Protocols]. The scope of the Phase 2 Early Works will not be modified without the agreement in writing of the Commonwealth and the

Contractor. The Commonwealth acknowledges that the DB Contractors may subcontract certain aspects of the Phase 2 Early Works. The Commonwealth further acknowledges that a component of the Phase 2 Early Works is the pole make-ready applications which will require the Commonwealth to enter into various pole attachment agreements in order to further the make-ready construction required that is also part of the Phase 2 Early Works. The Commonwealth agrees to execute any pole attachment agreement that the Contractor provides to the Commonwealth within 3 Business Days of receiving such agreements.

2. Phase 2 Early Works Term

The Phase 2 Early Works will be performed from July 16, 2015 to September 3, 2015 (the "Phase 2 Early Works Term").

3. Applicable Terms

Notwithstanding any provision to the contrary, the Commonwealth and the Contractor acknowledge and agree that Section IV.3 (and specifically only those sections referenced therein), IV.4, IV.6, IV.7 (and the reference to Section IV therein will also be a reference to this Section V), IV.8, IV.9, and IV.11 will be applicable to Phase 2 Early Works. References in such sections to Phase 1 Early Works will also be read to include Phase 2 Early Works.

4. Access

The Commonwealth hereby permits the Contractor to provide the DB Contractors a non-exclusive license to access any of the lands that the Commonwealth owns or controls, including any right-of-ways, in order to complete any of the Phase 2 Early Works.

5. Limitation of Liability

Notwithstanding any provision to the contrary in this Section V or any other applicable provision in this Agreement, and specifically in relation to the Phase 2 Early Works, the Commonwealth will only be required to pay the Phase 2 Early Works Price and those other applicable payments on termination set out in Section V, paragraph 6 of this Agreement to the Contractor. For clarity, such amounts will not exceed the Phase 2 Early Works Price and the Demobilization Phase 2 Threshold but will be in addition to the Total Costs set forth in Exhibit A.

If the Phase 2 Early Works are terminated for any reason prior to Financial Close, the Contractor's liability will be limited to Phase 2 Early Works Price.

Neither party will be liable to the other party, whether in contract or in tort or on any other basis whatsoever, for any Indirect Losses suffered or incurred by that other party in relation to the Phase 2 Early Works.

6. Payment – Termination other than Financial Close

If the Phase 2 Early Works are terminated other than due to the occurrence of Financial Close, the Commonwealth will pay to the Contractor, into a client account specified by the Contractor, (and the Contractor will immediately pay to the DB Contractors) an amount calculated based on the portion of the Phase 2 Early Works Price attributable to the portion of the Phase 2 Early Works that has been completed plus a reasonable amount for demobilization costs and termination costs to subcontractors, the amount of such demobilization costs and termination costs not to exceed 7.5% of the Phase 2 Early Works Price (the “Demobilization Phase 2 Threshold”).

The Contractor will pass through the itemized invoice that it receives from the DB Contractor to the Commonwealth for the amount payable under this paragraph 5 (if any), and provide reasonable supporting documentation for the Commonwealth to consider pursuant to 200 KAR 5:312. The Commonwealth will approve and pay the Contractor (and the Contractor will immediately pay the DB Contractor) within 30 days after receipt of the invoice. The Commonwealth acknowledges that if a portion of the invoice provided by the Contractor is in dispute, the Commonwealth will approve and pay the undisputed portion of the invoice within the 30 days. Notwithstanding any provision to the contrary in this Section V or any other applicable provision in this Agreement, and specifically in relation to the Phase 2 Early Works, this paragraph 6 will apply in the event of termination for any reason of this Agreement prior to Financial Close.

The Commonwealth acknowledges and agrees that if Phase 2 Early Works is terminated early subject to this paragraph 6 or some or all of the scope of the Phase 2 Early Works cease in accordance with Section IV paragraph 8, then schedule and costs associated with any of the Milestones or proposals as set forth in this Agreement may be subject to change, subject to the Commonwealth’s approval of such changes, not to be unreasonably withheld, and subject to such changes being as a direct result of changes to or termination of the Phase 2 Early Works. Should the Commonwealth not approve proposed changes to schedule and costs contemplated in this paragraph 6, and prepared by the Contractor acting reasonably, then paragraph 7 of Section IV shall apply. In the event that the Commonwealth intends to terminate the Phase 2 Early Works pursuant to this paragraph 6 or cease some or all of the Phase 2 Early Works in accordance with Section IV paragraph 8, it shall provide notice to the Contractor. Within three (3) Business Days of receipt of such notice from the Commonwealth, the Contractor will provide the Commonwealth with an estimate of the impact on the schedule and costs associated with the termination of the Phase 2 Early Works pursuant to this paragraph 6 or cease some or all of the Phase 2 Early Works in accordance with Section IV paragraph 8.

7. Monthly Payment Certificates

Each of the DB Contractors will, within 10 days after the end of each month, provide the Commonwealth a statement of the Phase 2 Early Works completed for that month and the relevant amount that would be payable under paragraph 7 of this Section V in respect of such Phase 2 Early Works, calculated based on the portion of the Phase 2 Early Works Price attributable to the portion of the Phase 2 Early Works that has been completed. For greater certainty, this paragraph 7 does not require payment by the Commonwealth.

8. Insurance

The Contractor will require the DB Contractors to place the insurance coverage described in Attachment G [Insurance] in the amounts and on the terms stated in Attachment G and for the Phase 2 Early Works Term.

VI. Relationship of the Parties

The Contractor agrees to cooperate and support the Commonwealth's efforts to procure financing for the Project. The Commonwealth acknowledges and agrees that (i) any discussions, communications, conferences, negotiations and undertakings by the Contractor in connection with the financing of the Project will be effected and negotiated in an arm's length commercial transaction between the Commonwealth, Project Co and the Contractor, (ii) in connection with any offer or sale of municipal securities to finance the Project and with the process leading to such transaction, the Contractor is acting solely as a principal and is not the agent or fiduciary of the Commonwealth or Project Co., and (iii) the Commonwealth has its own and legal and financial advisors. The Contractor intends to be a purchaser of a portion of the bonds and has financial and other interests that differ from those of the Commonwealth and Project Co. It is expressly understood and agreed between the Commonwealth and the Contractor that the Contractor is not acting as an underwriter or selling agent for the Commonwealth or Project Co in connection with any issuance or sale of municipal securities.

VII. Entire Agreement

This Agreement and the attached Exhibits to this Agreement constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

**VII. Approvals**

This Agreement is subject to the terms and conditions as stated. By executing this Agreement, the parties verify that they are authorized to bind this Agreement and that they accept the terms of this Agreement.

This Agreement may be executed electronically in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same Agreement.

This Agreement is invalid until properly approved and executed by the Finance and Administration Cabinet.

**1st Party: MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC, as Contracting Agent ("Contractor ")**

Nick Butcher  
Printed name



\_\_\_\_\_  
Signature

Manager  
Title

September 1, 2015

\_\_\_\_\_  
Date

Andrew Ancone  
Printed name



\_\_\_\_\_  
Signature

Manager  
Title

September 1, 2015

\_\_\_\_\_  
Date

**2nd Party: COMMONWEALTH OF KENTUCKY, FINANCE AND ADMINISTRATION CABINET ("Commonwealth")**

Lori Hudson Flanery  
Printed name



\_\_\_\_\_  
Signature

Secretary, Finance Cabinet  
Title

September 2, 2015

\_\_\_\_\_  
Date

**Approved by the Finance and Administration Cabinet, Office of Procurement Services**

Donald R. Speer

Printed name

Donald R. Speer

Signature

Executive Director

Title

9/2/15

Date

Approved as to form and legality

Geni Gingsby