

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BRENNAN CENTER FOR JUSTICE,)	
)	
Plaintiff,)	
)	
v.)	
)	09 CIV. 8796 (VM)
UNITED STATES DEPARTMENT OF JUSTICE,)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES, AND)	
U. S. AGENCY FOR INTERNATIONAL)	
DEVELOPMENT,)	
)	
Defendants.)	

DECLARATION OF PAUL P. COLBORN

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Cross-Motion for Summary Judgment and in opposition to Plaintiff’s Motion for Summary Judgment. These statements are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

OLC'S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in his role as legal advisor to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport, and in fact lacks authority, to make policy decisions. OLC's legal advice and analysis informs the decision-making of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. Some of OLC's final formal opinions are made public. OLC reviews its formal legal opinions after they are issued to determine whether they may be appropriate for publication. It only publishes opinions after consultation with affected agencies or offices. Likewise, when OLC receives FOIA requests, OLC considers whether to make discretionary releases of final legal analysis, also only after such consultation. That said, for OLC to maintain the trust of those within the Executive Branch who rely on its legal advice, and because of other Executive Branch confidentiality interests, much of its advice, whether provided as a formal opinion or as informal advice, must be kept confidential. In this case, Plaintiff, a FOIA requestor, challenges OLC's withholding of documents it generated in the course of providing confidential legal advice to the United States Department of Health and Human Services ("HHS") and to the United States Agency for International Development ("USAID").

DOCUMENTS AT ISSUE

4. I am familiar with the three documents at issue in this case. We have released to Plaintiff redacted versions of these documents, together with redacted cover emails forwarding

the documents to the client agencies. *See* Exhibits A, B and C, attached hereto. However, as set forth in more detail below, the withheld portions of these three documents fall squarely within Exemption Five of the FOIA, 5 U.S.C. § 552(b)(5).

5. The three partially withheld documents were prepared by OLC in its capacity as a legal advisor to HHS and USAID. The first document is an informal legal advice memorandum provided to HHS and USAID on or about February 17, 2004 (the “Informal Advice”). *See* Exhibit A and Vaughn Index No. 3. The other two documents are drafts, dated July 2 and July 29, 2004, of a formal opinion that was never finalized (respectively, the “July 2nd Draft” and the “July 29th Draft”). *See* Exhibit B and C, and Vaughn Index Nos. 13 and 15.¹

6. The Informal Advice was prepared by OLC at the request of HHS and USAID. It provided those agencies with preliminary and tentative legal advice concerning the constitutionality of funding restrictions on grants under the Traffic Victims Protection Reauthorization Act (“TVPRA”) and the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Leadership Act”). *See* Exhibit A. On February 17, 2004, OLC Deputy Assistant Attorney General Renee Lerner emailed the Informal Advice to Deputy General Counsel Paula Stannard at HHS and General Counsel John Gardner at USAID.

¹ In light of certain public disclosures, and in an effort to narrow the issues in dispute, the February 17 Informal Advice (Exhibit A) now discloses two of the legal conclusions reached by OLC (but not the underlying legal analysis). *See* paragraph 9, *infra*. Redactions also have been removed from the cover email to USAID transmitting the July 29th Draft to make the redactions consistent with those made on the cover email to HHS transmitting the July 2nd Draft. The released portions of the emails now disclose that each draft was provided to the two agencies for their review and comments. A small portion of the July 2nd cover email continues to be redacted based on Exemption Six, in order to shield a personal private communication from Ms. Lerner to Ms. Stannard regarding a mutual friend.

Id. The released portions of the Informal Advice disclose that the advice represented OLC's "tentative views, which might need to be altered after further analysis." *See* Exhibit A.

7. The other two documents at issue are drafts of an OLC opinion for HHS General Counsel Alex Azar, regarding the constitutionality under the First Amendment of certain statutory restrictions found in the the TVPRA and the Leadership Act. *See* Exhibits B and C. The July 2nd Draft was transmitted to Ms. Stannard of HHS by Ms. Lerner of OLC by an email in which Ms. Lerner explained that she was providing the draft opinion to HHS to obtain that Agency's comments. *See* Exhibit B. The July 29th Draft was provided to Mr. Gardner by OLC Attorney-Advisor Brian Prestes for the purpose of obtaining USAID's comments. *See* Exhibit C. In his cover email, Mr. Prestes explained to Mr. Gardner that he was "circulating this memorandum in draft form on the understanding that it will be maintained as a close hold and not shared outside your office or with others inside your office who do not have a specific need to review it." *Id.* The same expectation of confidentiality applied with respect to the sharing of the July 2nd Draft with HHS. OLC does not share drafts of its opinions without an expectation that those reviewing them will maintain their confidentiality. Both the July 2nd Draft and the July 29th Draft are marked clearly in bold type, "**DRAFT.**" The opinion was never finalized or issued.

EXEMPTION FIVE

8. I am concerned that the compelled disclosure of the withheld portions of the Informal Advice and the July 2nd and July 29th Drafts would harm the deliberative processes of the Executive Branch and would disrupt the attorney-client relationship between Federal agencies like HHS and USAID and their attorneys at the Department of Justice. As set forth

below, these three documents are exempted from mandatory disclosure under FOIA's Exemption Five, which exempts from compelled disclosure under the FOIA "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

9. To the best of my knowledge, neither the Informal Advice nor the July 2nd or the 29th Drafts has ever been made public. These documents have only been circulated within the Executive Branch and have been accessed only by government officials and staff working on the issues directly addressed by these memos. That said, we recognize that two of the conclusions conveyed in the Informal Advice have been made public. Accordingly, OLC has un-redacted those conclusions in the Informal Advice. *See* Exhibit A. The remainder of the Informal Advice, including other legal conclusions and the underlying legal analysis supporting all of the conclusions, has not been disclosed to the public and, accordingly, continues to be withheld. I am concerned that its disclosure would materially harm the deliberative process necessary for effective agency decision making and interfere with the Department's relationship of confidence with its client agencies.

The Deliberative Process Privilege Applies to the Informal Advice

10. The withheld portions of the Informal Advice and the cover email of February 17, 2004 are protected by the deliberative process privilege because they are both pre-decisional and deliberative. They are pre-decisional because they were prepared in connection with an effort at HHS and USAID to formulate guidelines governing the provision of grants to non-governmental organizations combating HIV/AIDS, tuberculosis, and malaria pursuant to the TVPRA and the Leadership Act. They are deliberative because they constitute advice used by decision-makers at

HHS and USAID in the context of their efforts to formulate guidelines to govern such grants pursuant to these two statutes. Compelled disclosure of the withheld portions of the Informal Advice would undermine the deliberative processes of the Executive Branch. Attorneys at OLC are often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive operations of the Executive Branch—on matters that can be quite controversial. It is essential to the mission of the Executive Branch that OLC legal advice, and the development of that advice, not be inhibited by concerns about public disclosure. Protecting the confidentiality of OLC legal advice memoranda provided in the context of agency deliberations is essential in order both to ensure that creative and even controversial legal arguments and theories may be examined candidly, effectively, and in writing, and to ensure that Executive Branch officials will continue to request and rely on legal advice from OLC on such sensitive matters.

The Attorney-Client Privilege Applies to the Informal Advice

11. The foregoing considerations regarding the need for confidential Executive Branch deliberations are particularly compelling in the context of the provision of legal advice. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. When the advice is provided in confidence, it is protected from compelled disclosure. It is critical to protect this relationship of trust in the governmental context, where the attorney-client privilege ensures the full and frank communication between attorneys and their clients that in turn promotes broader public interests in the observance of law and the administration of justice. The free and candid flow of information between agency decision makers and their outside legal advisors depends on the

decision makers' confidence in their ability to keep that advice confidential. The Informal Advice was communicated by OLC attorneys to their agency clients in a context that was intended to be and was in fact kept confidential. The Informal Advice was prepared by OLC attorneys for their client agencies after these agencies had specifically requested the legal advice. In so doing, OLC attorneys were serving an advisory role as legal counsel. In the context of HHS and USAID preparation of guidelines governing the grant-making process under the TVPRA and the Leadership Act, the general counsels at these two agencies sought OLC advice regarding the constitutional limitations on the authority of their agencies. Having been requested to provide counsel on the law, OLC attorneys stood in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust.

The Deliberative Process Privilege Applies to the Drafts of an OLC Opinion

12. The deliberative process privilege applies to the July 2nd and July 29th Drafts. Drafts of an OLC opinion do not reflect the views of OLC or the Department—particularly here, where the legal advice set forth in these drafts was never finalized and the opinion never issued. Compelled disclosure of such drafts of a never-completed opinion would only mislead the public as to the actual legal position of the Department and the agencies on the legal questions addressed therein. More importantly for purposes of Exemption Five, disclosure of draft OLC opinions would compromise important Executive Branch confidentiality interests. By their very nature, drafts are pre-decisional and deliberative—part of the exchange of ideas and suggestions that accompanies careful legal decision making. Drafts are particularly sensitive in the

deliberative process within OLC, where OLC attorneys make extensive use of drafts to focus, articulate, and refine their legal advice and analysis. OLC attorneys circulate draft opinions for review, seeking out comments, edits, suggestions—even stout criticism. Inevitably, initial drafts of documents differ substantially from the final version, as attorneys adjust their analysis in response to input from their colleagues. It is not uncommon at OLC for legal conclusions themselves to change over the course of the deliberations. In the ordinary case, comparing the final copy of a document against the prior drafts would inevitably reveal changes and revisions made by OLC and the Department during the deliberative process. Compelled disclosure of such preliminary analysis would seriously inhibit the candor and effectiveness of the attorneys engaged in this highly deliberative process, and the quality and integrity of the final result would inevitably suffer.

OLC Practice Regarding Circulation of Draft Opinions

13. At page 7 of Plaintiff’s Memorandum in Support of its Motion for Summary Judgment, Plaintiff makes the following assertion:

A memorandum describing the “Best Practices for OLC Legal Advice and Written Opinions” suggests that the July 2004 Opinion represented the views of the OLC because the DOJ makes clear that, as a “best practice,” the “*OLC does not ordinarily circulate draft opinions outside the Office.*”

Plaintiff’s Brief at 7 (emphasis added). Plaintiff argues that since “OLC does not ordinarily circulate draft opinions outside the Office,” and the First and Second Draft Memos were “circulated . . . outside the Office,” the memos should be treated as if they were *final* opinions and not mere drafts.

14. Plaintiff relies on an OLC “best practices” memo issued in 2010. See Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, re: *Best Practices for OLC Legal Advice and Written Opinions*, 4 (July 16, 2010), accessible on-line at: <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>. This 2010 “best practices” memo does not reflect the actual practices in place at OLC six years earlier when the July 2nd and 29th Drafts were prepared. At this earlier time, it was common practice for OLC to circulate drafts of opinions to affected agencies for their review and comment. This practice is described in the following passage from the first OLC “best practices” memo, which was issued in 2005:

[A] draft of the opinion may be shared outside the Office. In some cases, because of time constraints, OLC may circulate a draft opinion before [OLC’s] internal review is complete. Our general practice is to circulate draft opinions to the Office of the Attorney General and the Office of the Deputy Attorney General for review and comment. When and as warranted, we also circulate an informational copy of the draft opinion to the Office of the Counsel to the President. In addition, *in most cases, we will circulate a draft to the requesting agency (or, in cases where we are resolving a dispute between agencies, to those agencies that are parties to the dispute) for review, primarily to ensure that the opinion does not misstate the facts or the legal points of interest to the agencies.* On certain occasions, where we determine it appropriate, we may circulate a draft opinion to one or more other agencies that have special expertise or interest in the subject matter of the opinion, particularly if they have offered views on the question.

Memorandum for Attorneys in the Office, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, re: *Best Practices for OLC Opinions*, 3 (May 16, 2005), accessible on-line at: <http://www.justice.gov/olc/best-practices-memo.pdf> (emphasis added). This 2005 memorandum demonstrates that when the July 2nd and 29th Drafts were prepared in 2004, it was standard

practice for OLC to have circulated a draft opinion to the requesting agencies for their review and comment before the opinion was issued.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 11, 2011

A handwritten signature in black ink, appearing to read "Paul P. Colborn", written over a horizontal line.

PAUL P. COLBORN

Exhibit A

[REDACTED]

From: Lerner, Renee
Date: Tuesday, February 17, 2004 5:06 PM
To: 'paula.stannard@hhs.gov'; 'jgardner@usaid.gov'
Subject: OLC's advice on grant announcements
Attachments: OLC on HHS, USAID funding.doc

Dear Paula and John,

Attached is OLC's advice on HIV/AIDS and trafficking grant announcements. [REDACTED]

[REDACTED] Thanks very much. Of course please call if you have any questions.



OLC on HHS, USAID
funding.doc ...

Renee

Renee Lettow Lerner
Office of Legal Counsel
U.S. Department of Justice
(202) 514-2242
renee.lerner@usdoj.gov

**Constitutionally Permissible Funding Restrictions
for Sex Trafficking and HIV/AIDS Prevention**

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

(1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(1) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);

(2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, *see* USLAHATMA § 301(f); and

(3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have reached the following tentative views, which might need to be altered after further analysis:

- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—
 - cannot be constitutionally applied to U.S. organizations. _____
 - can be constitutionally applied to foreign organizations _____ when they are engaged in activities overseas. _____

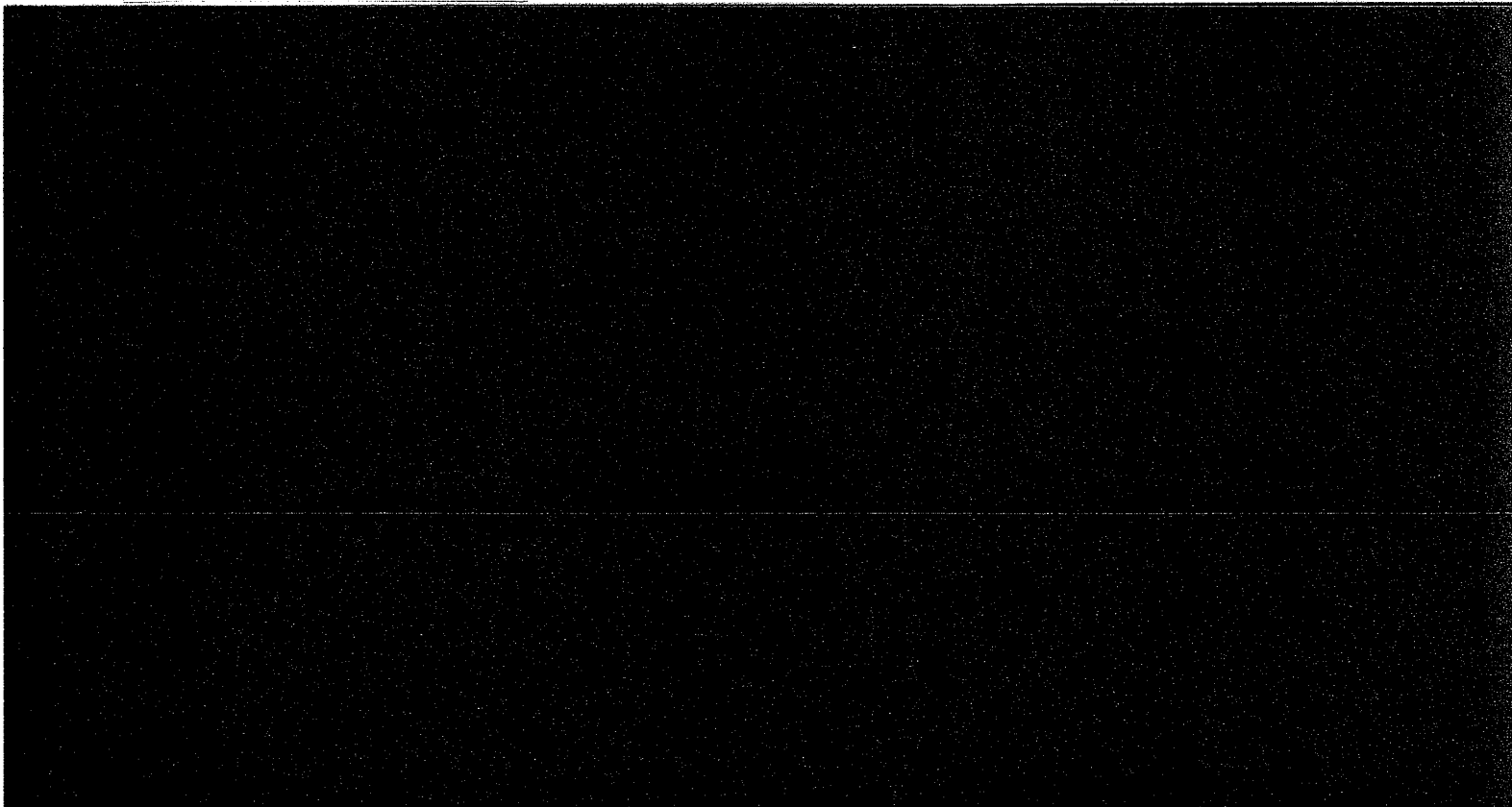


Exhibit B

[Redacted]

From: Renee.Lerner@usdoj.gov
Sent: Friday, July 02, 2004 2:36 PM
To: Stannard, Paula (HHS/OS)
Cc: Steve.Bradbury@usdoj.gov; Noel.Francisco@usdoj.gov; Brian.Prestes@usdoj.gov
Subject: OLC draft opinion on Sex Trafficking, AIDS Act grant restrictions



HHS Opinion
7-2-04 Draft).wpd..

Paula,

As promised, here is a draft of our opinion. Any comments you have would be much appreciated. [Redacted]

Thanks,
Renee

Renee Lettow Lerner
Office of Legal Counsel
U.S. Department of Justice
(202) 514-2242
renee.lerner@usdoj.gov

b5

Image Not Available

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

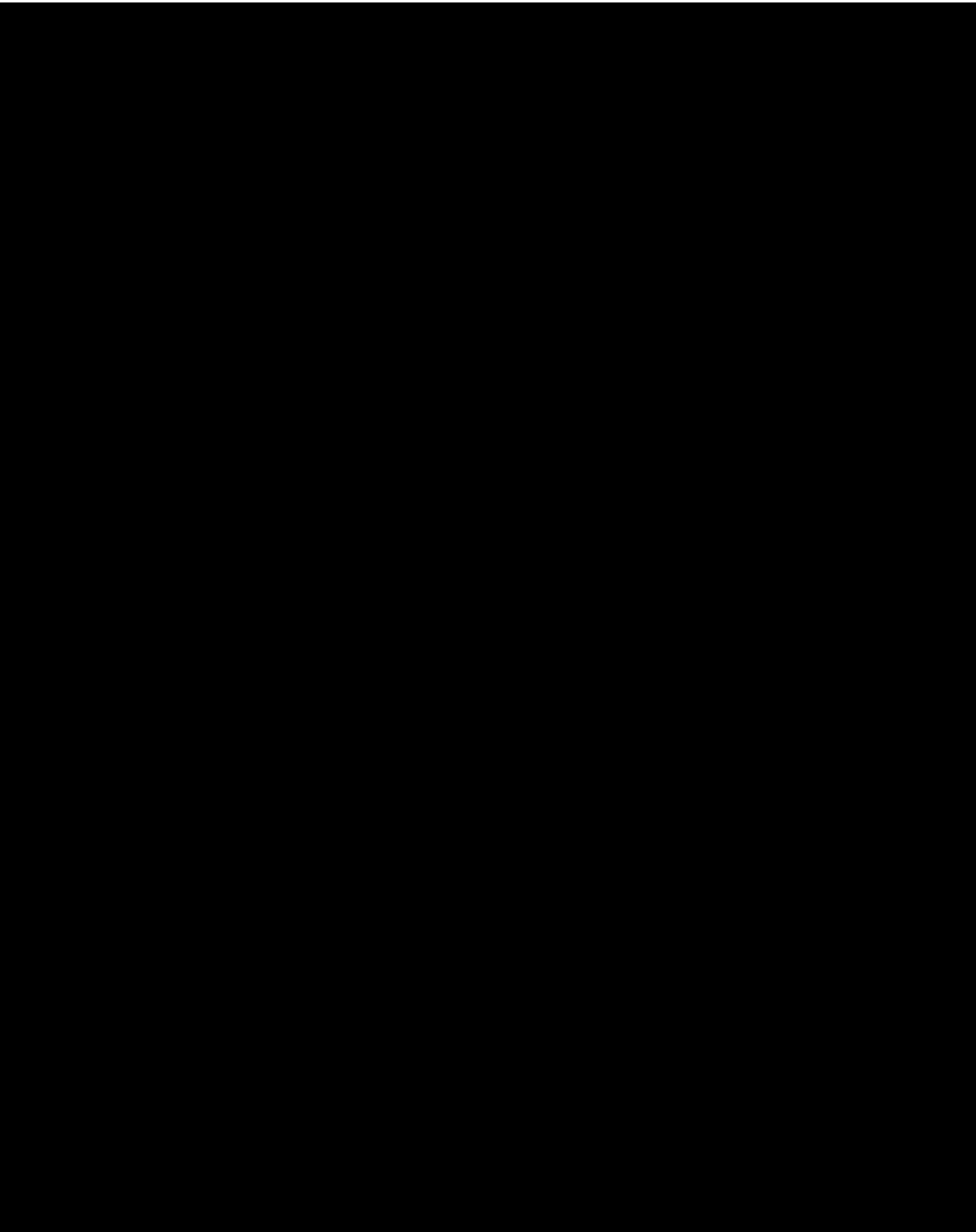
DRAFT July 2, 2004

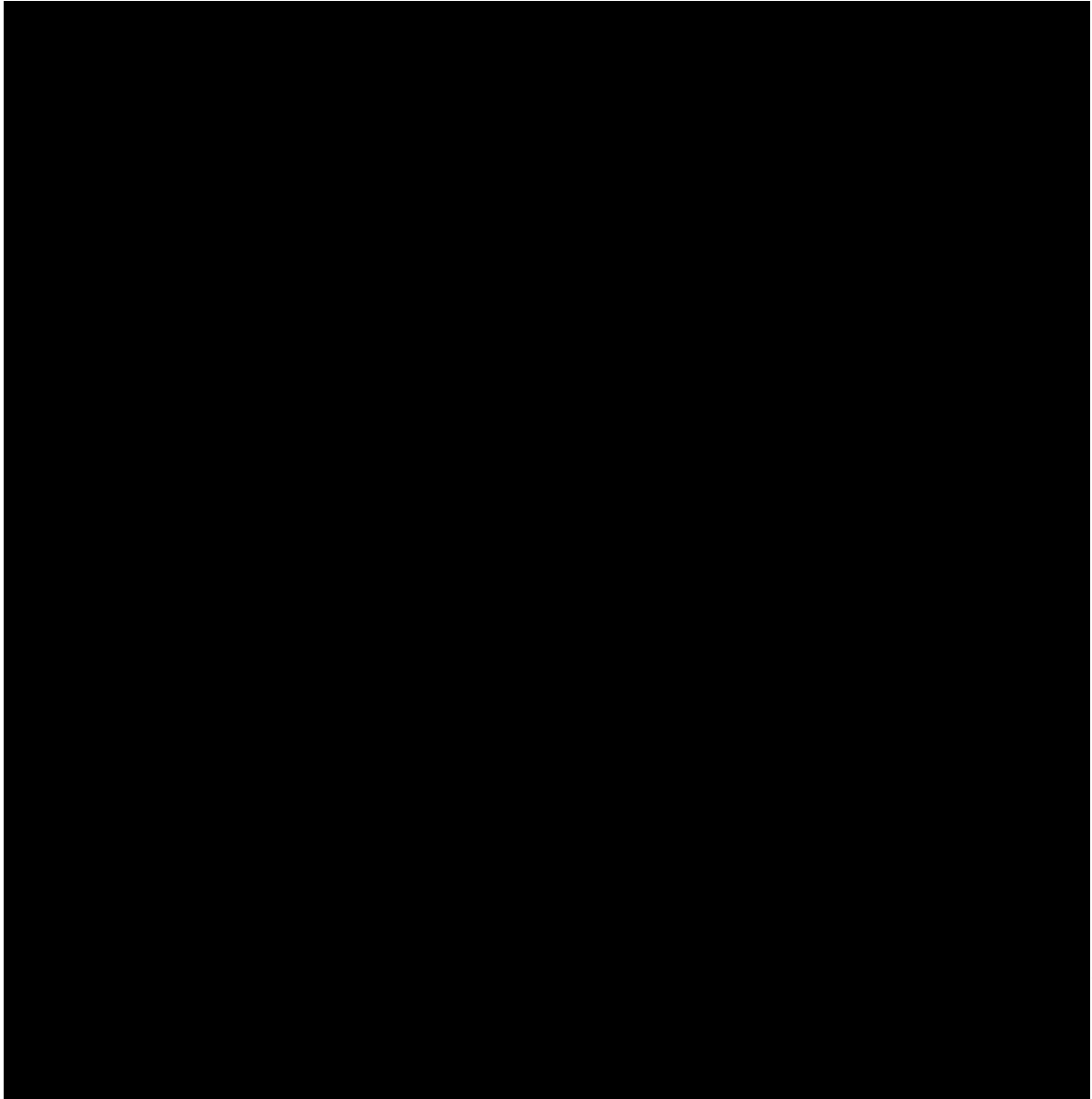
**MEMORANDUM FOR ALEX M. AZAR II
GENERAL COUNSEL, DEPARTMENT OF HEALTH AND HUMAN SERVICES**

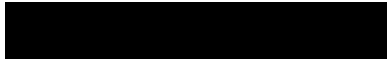
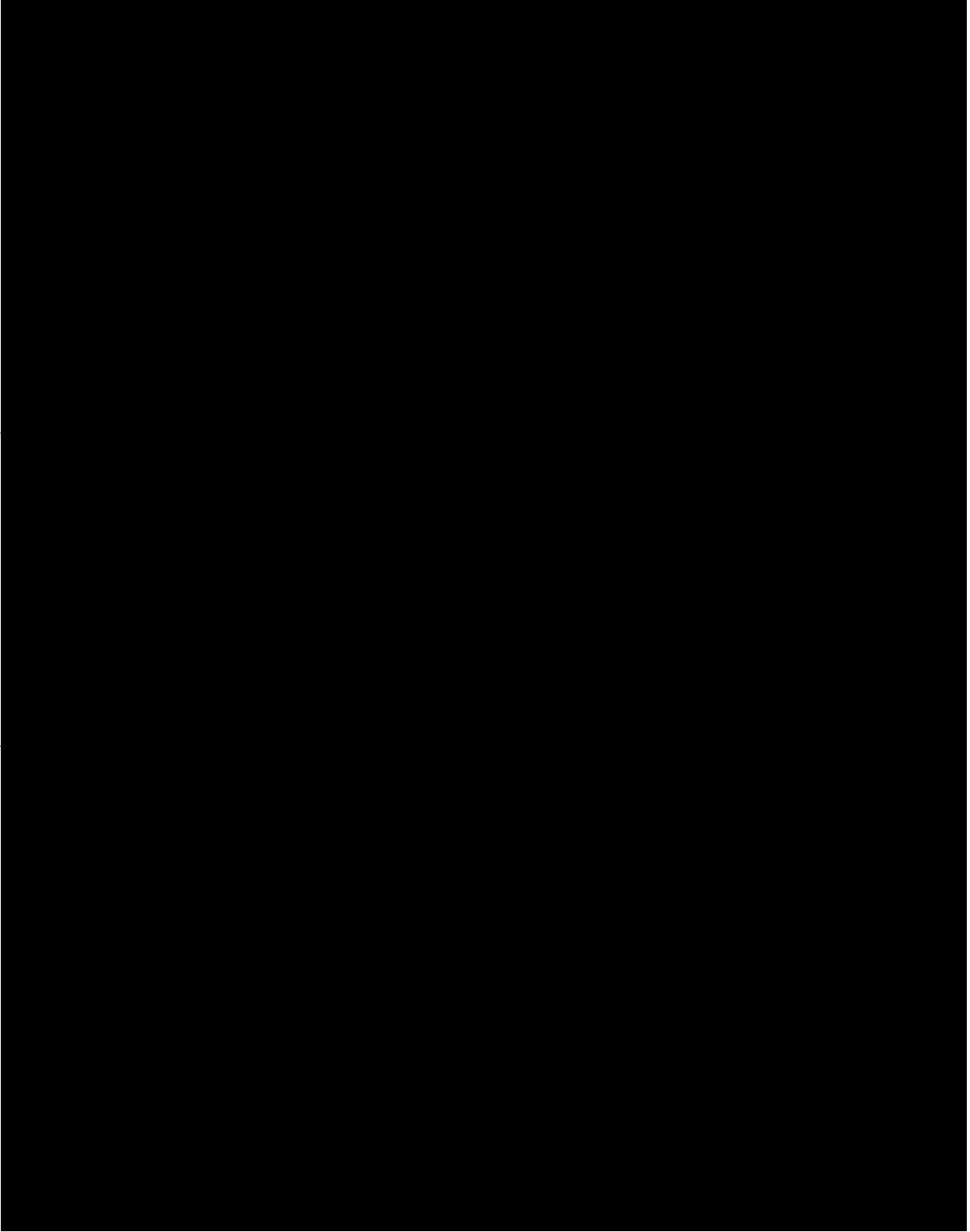
Re: Federal Funds Restrictions in the Trafficking Victims Protection Reauthorization Act and the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act¹

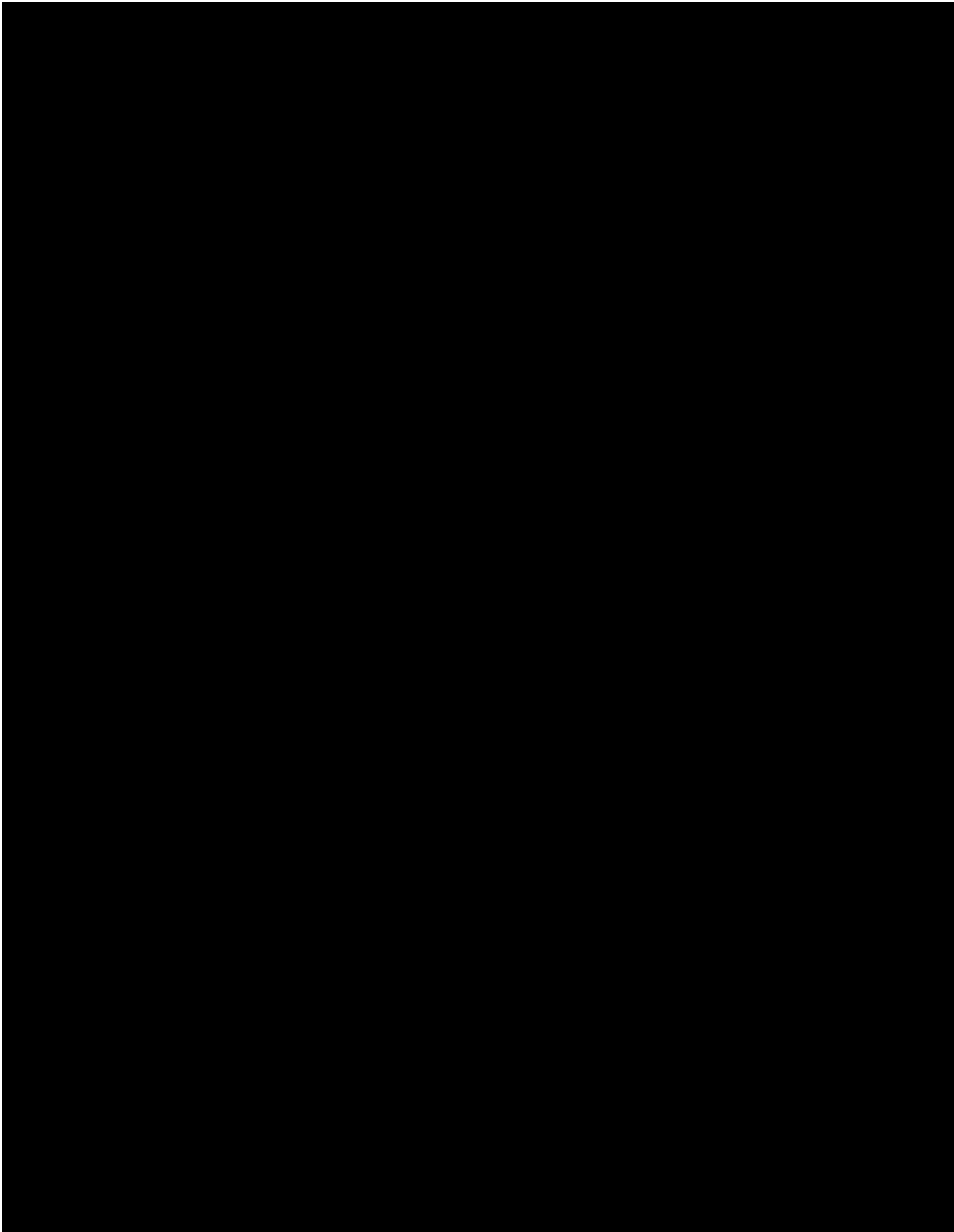
You have asked us whether certain statutory restrictions found in the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA") and in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("AIDS Act") are constitutional under the First Amendment.² [REDACTED]

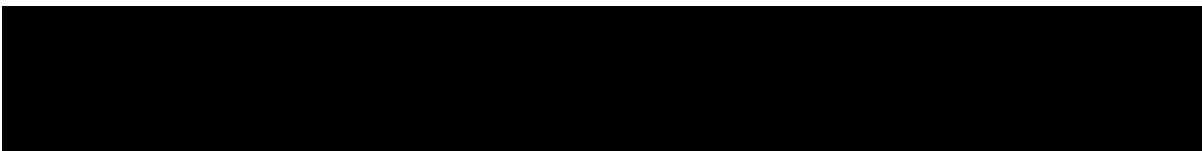
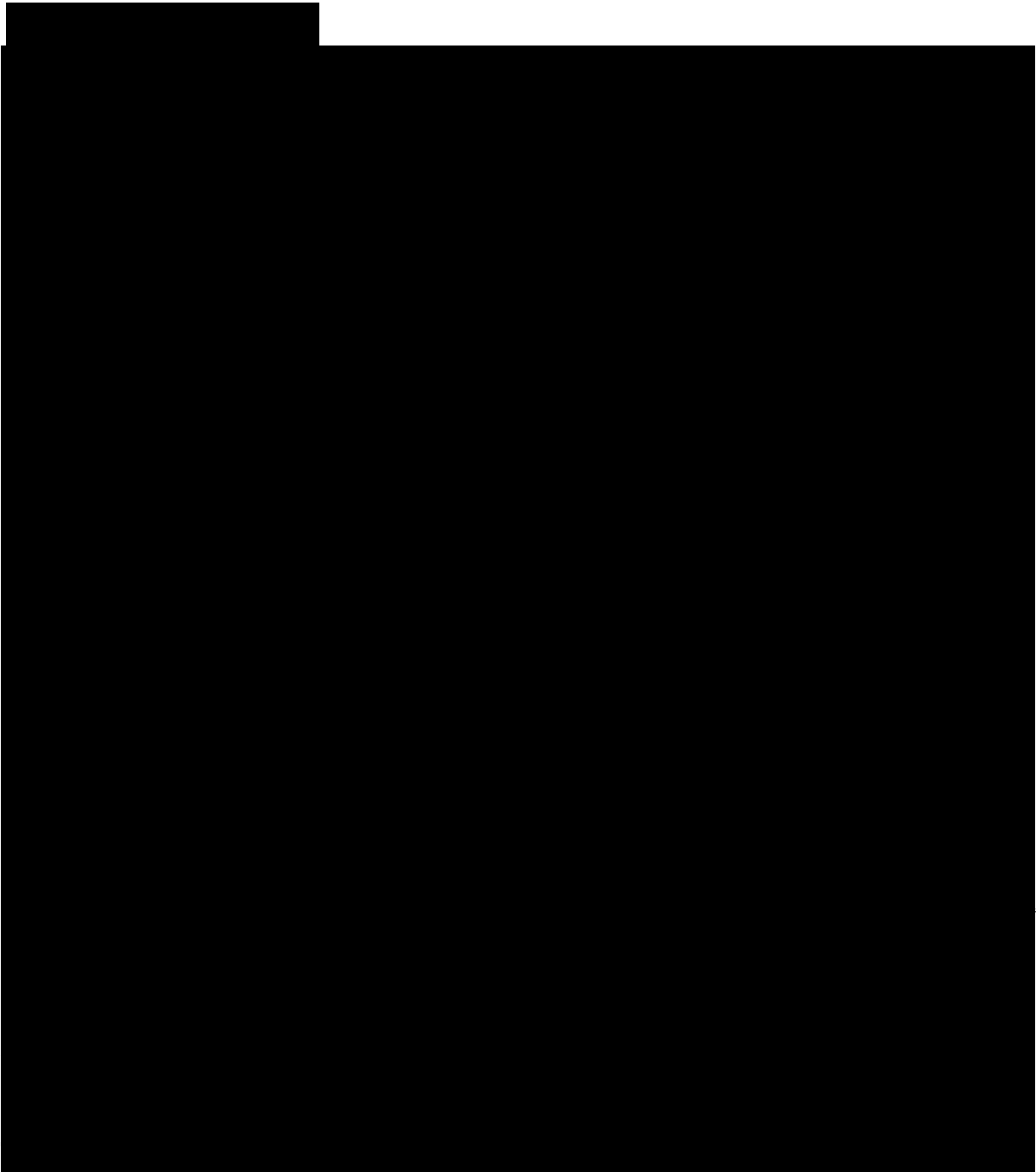
² Letter from Alex M. Azar II, General Counsel, Department of Health and Human Services ("HHS"), to Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel (Feb. 12, 2004). [REDACTED]

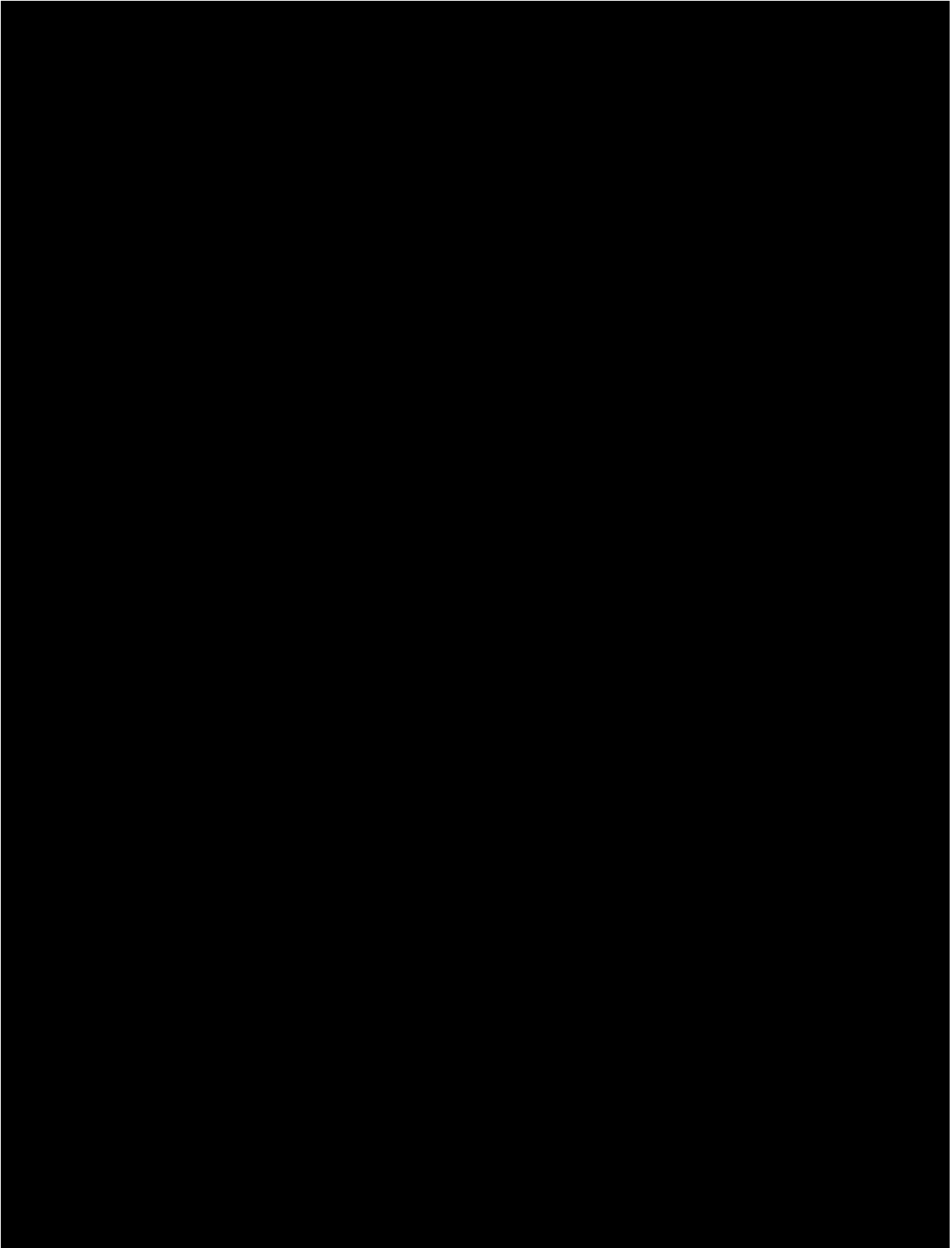


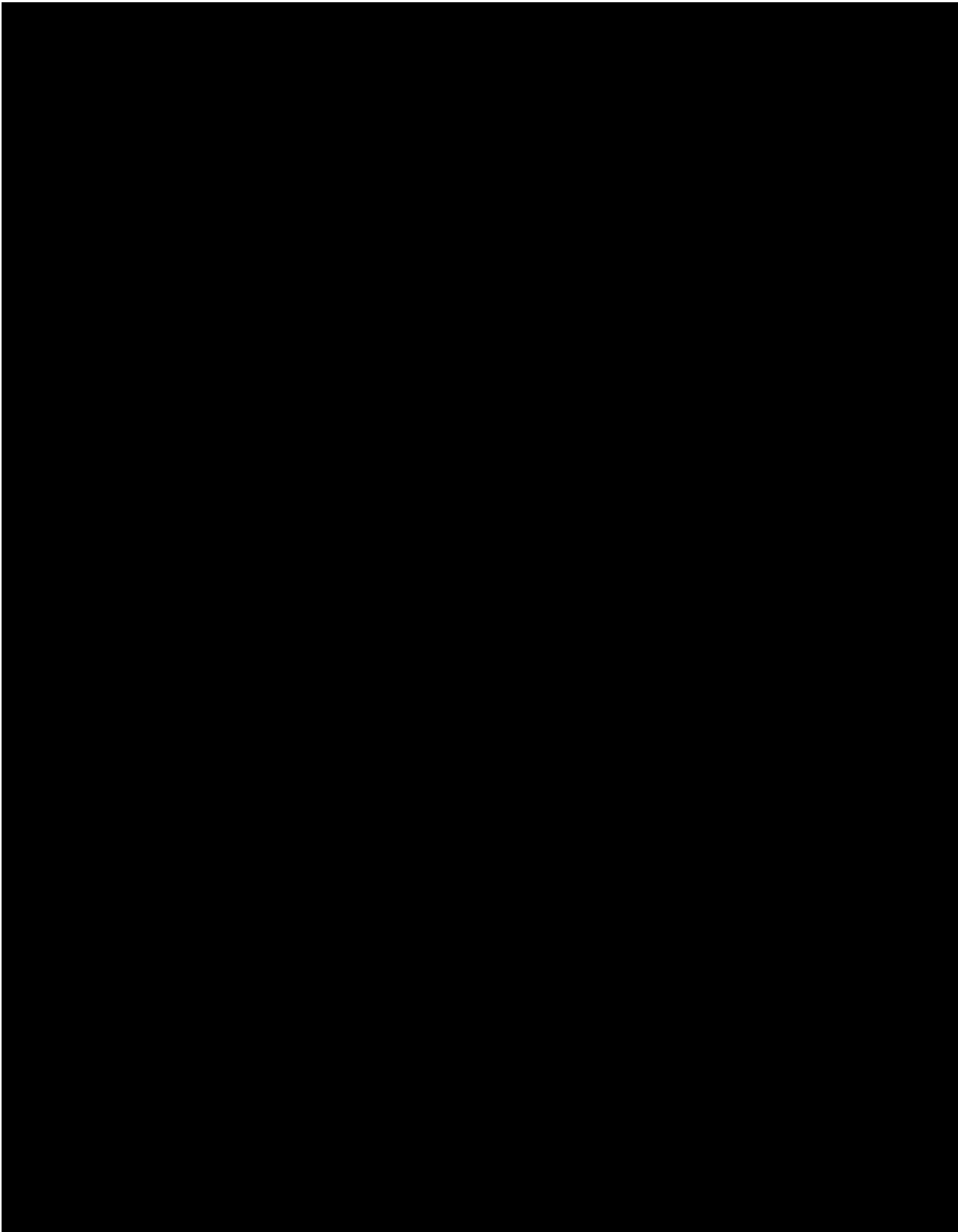


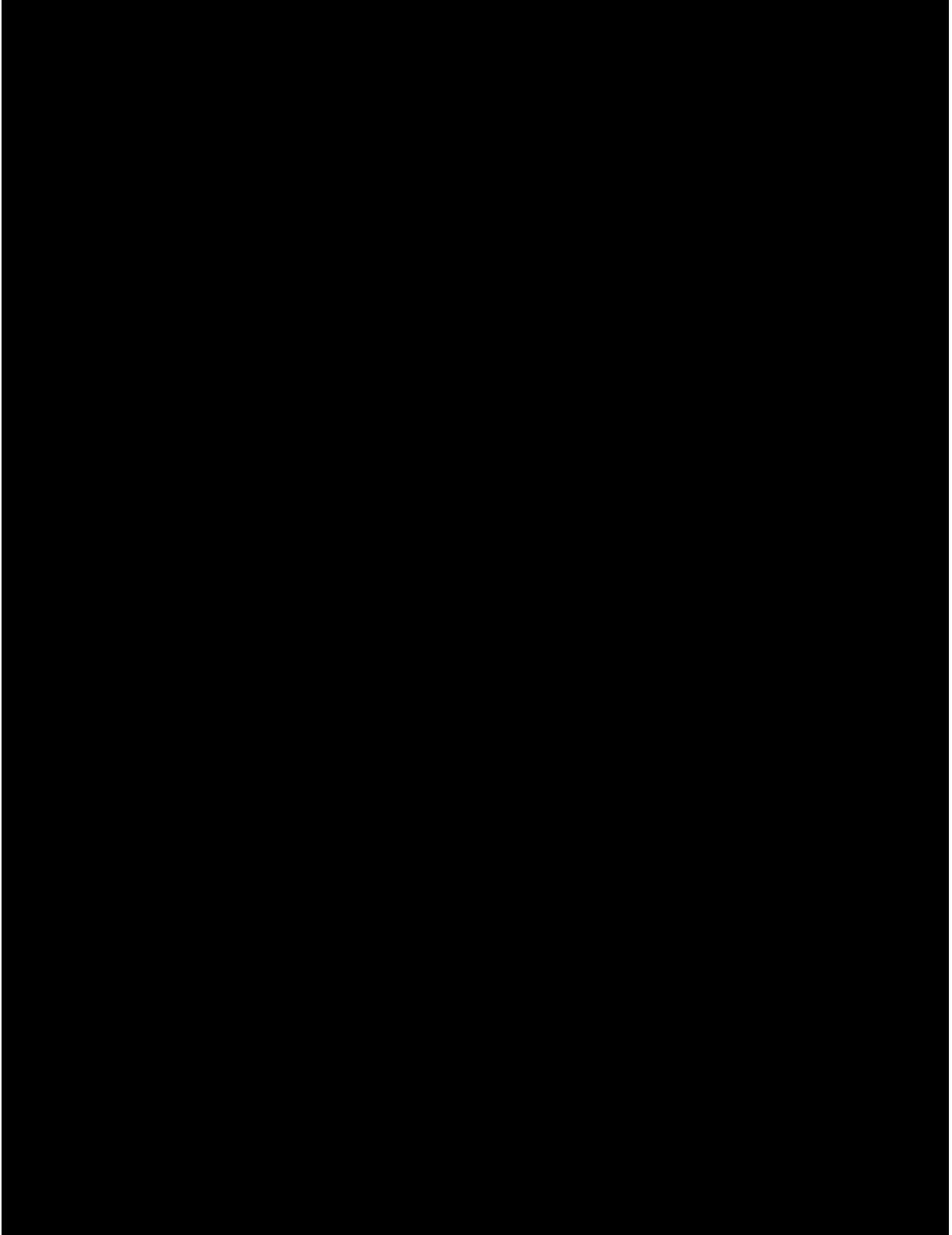


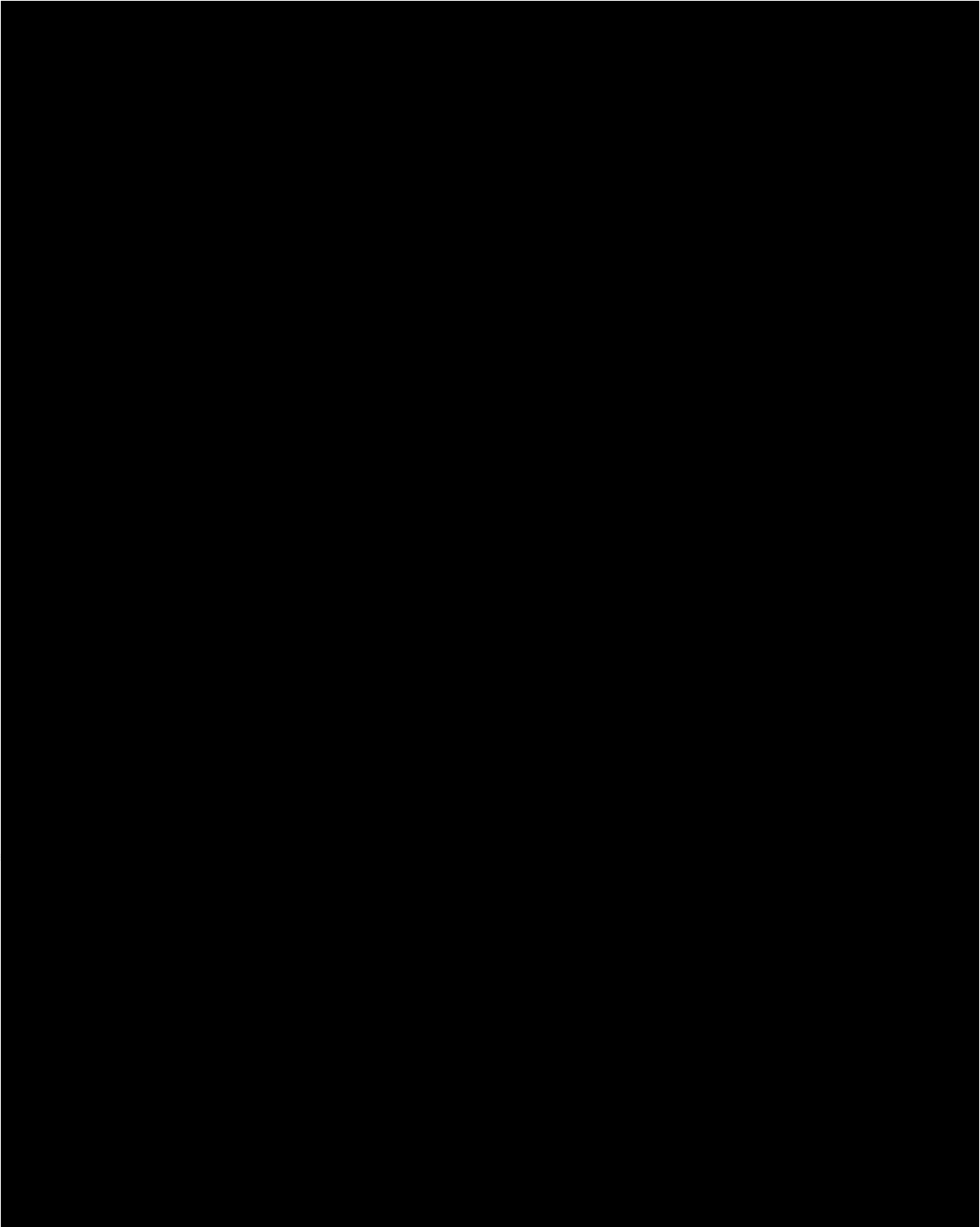


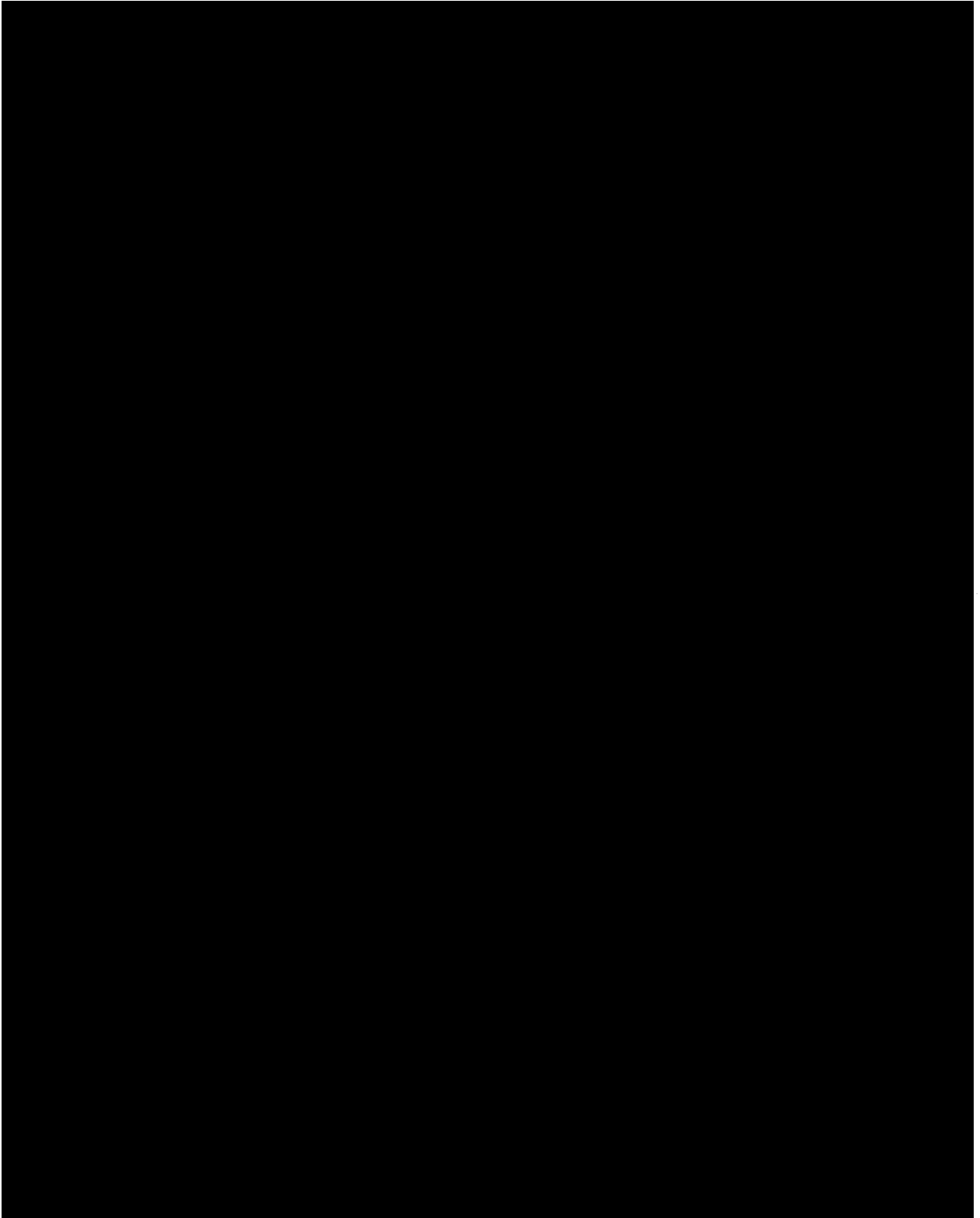


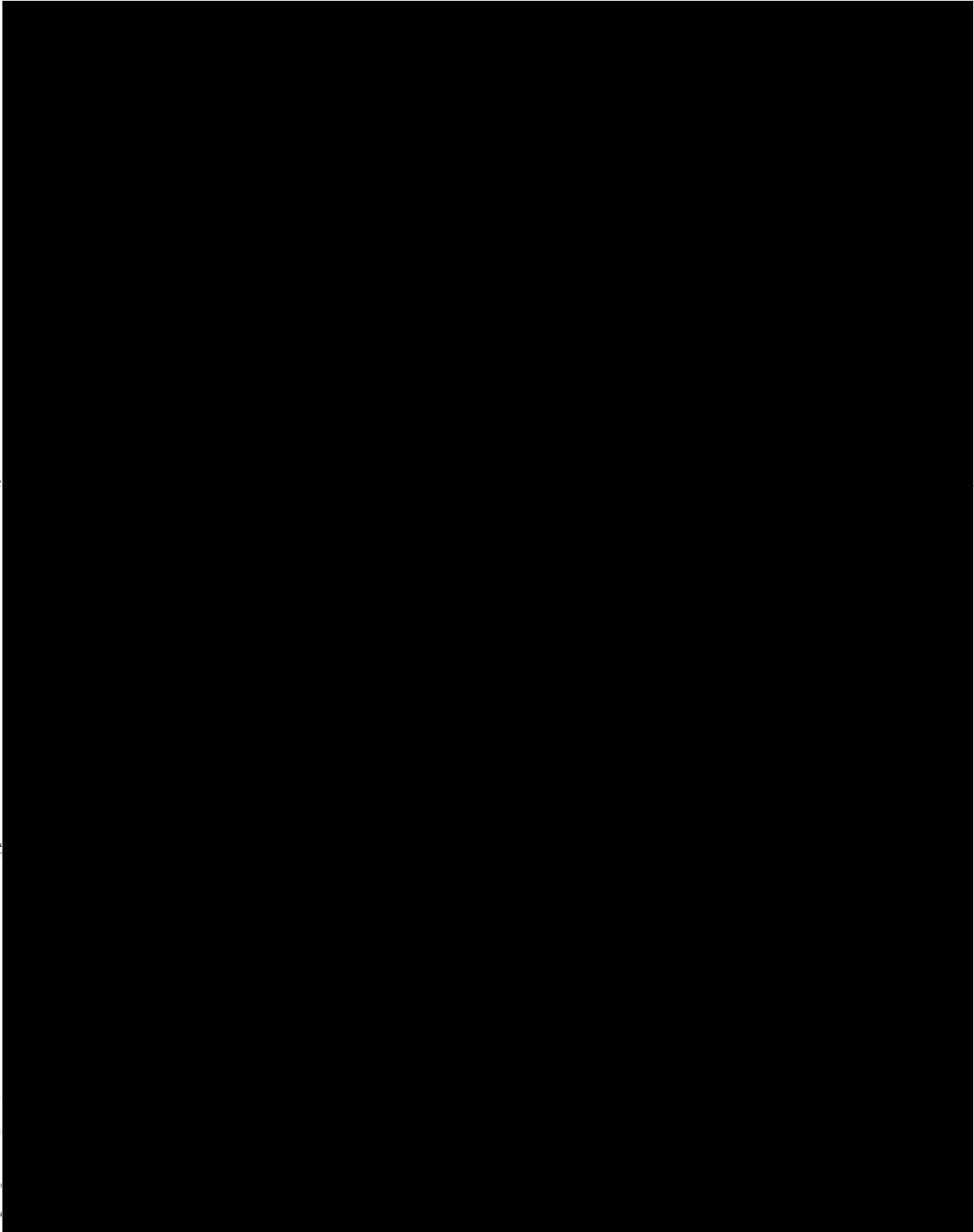


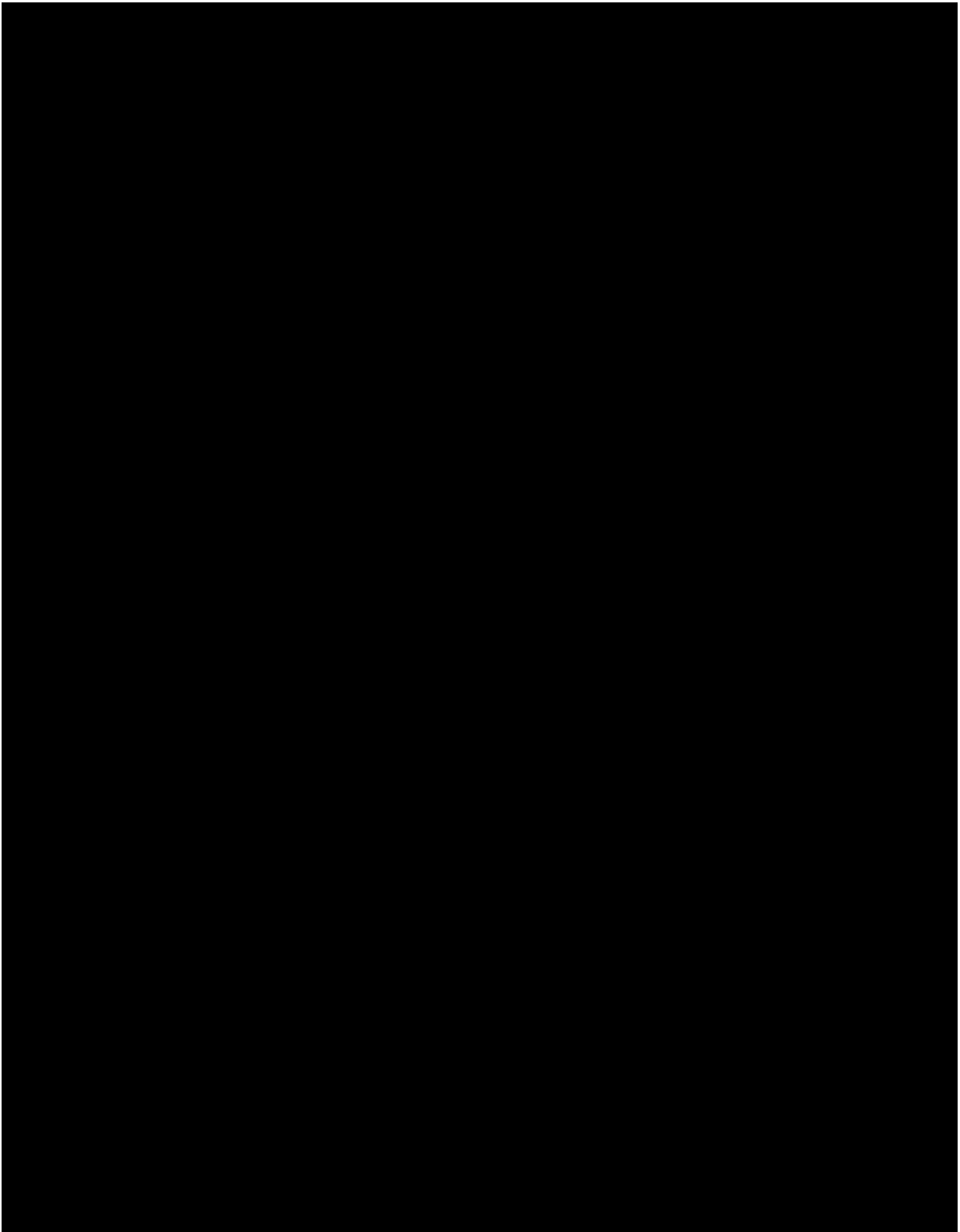


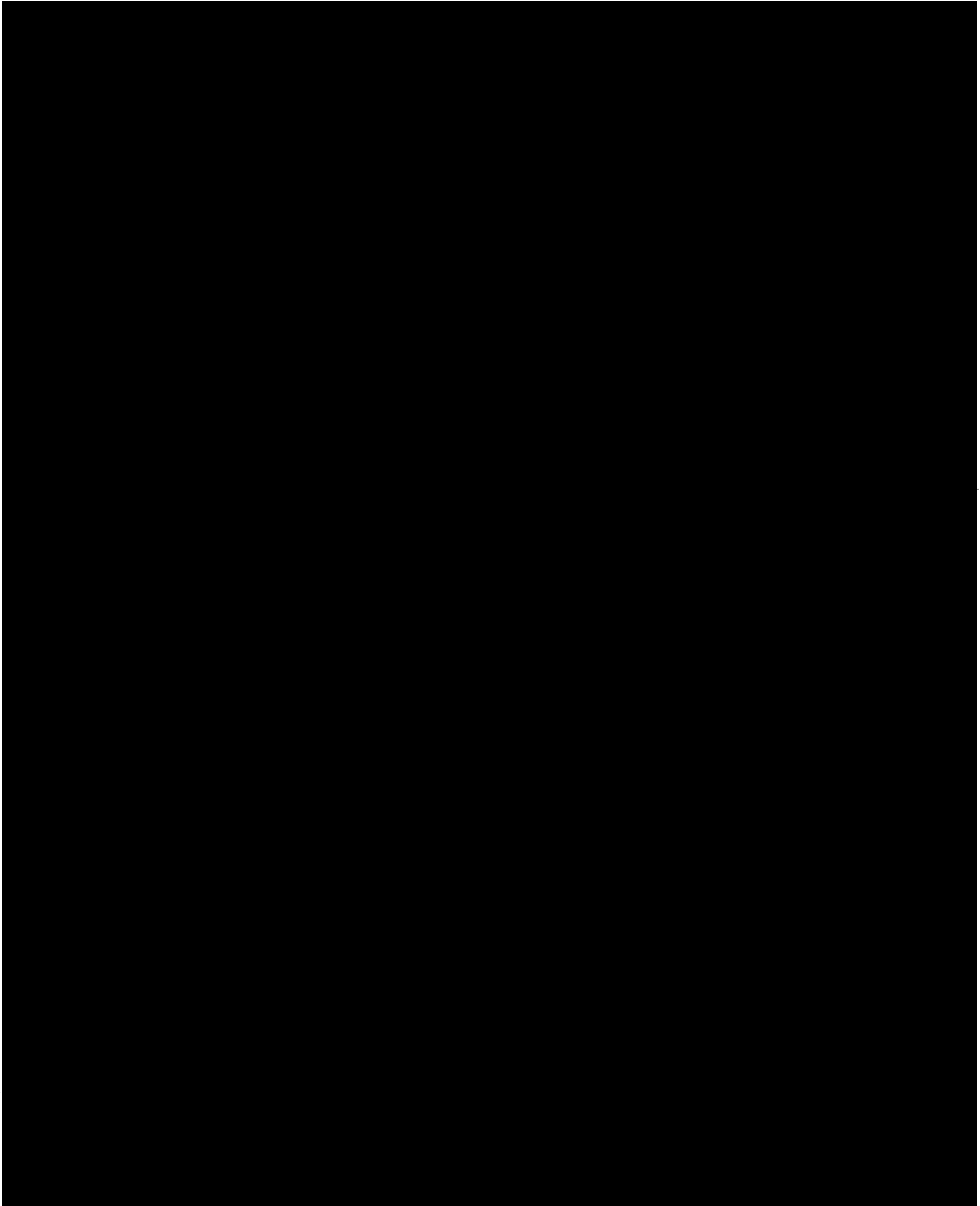


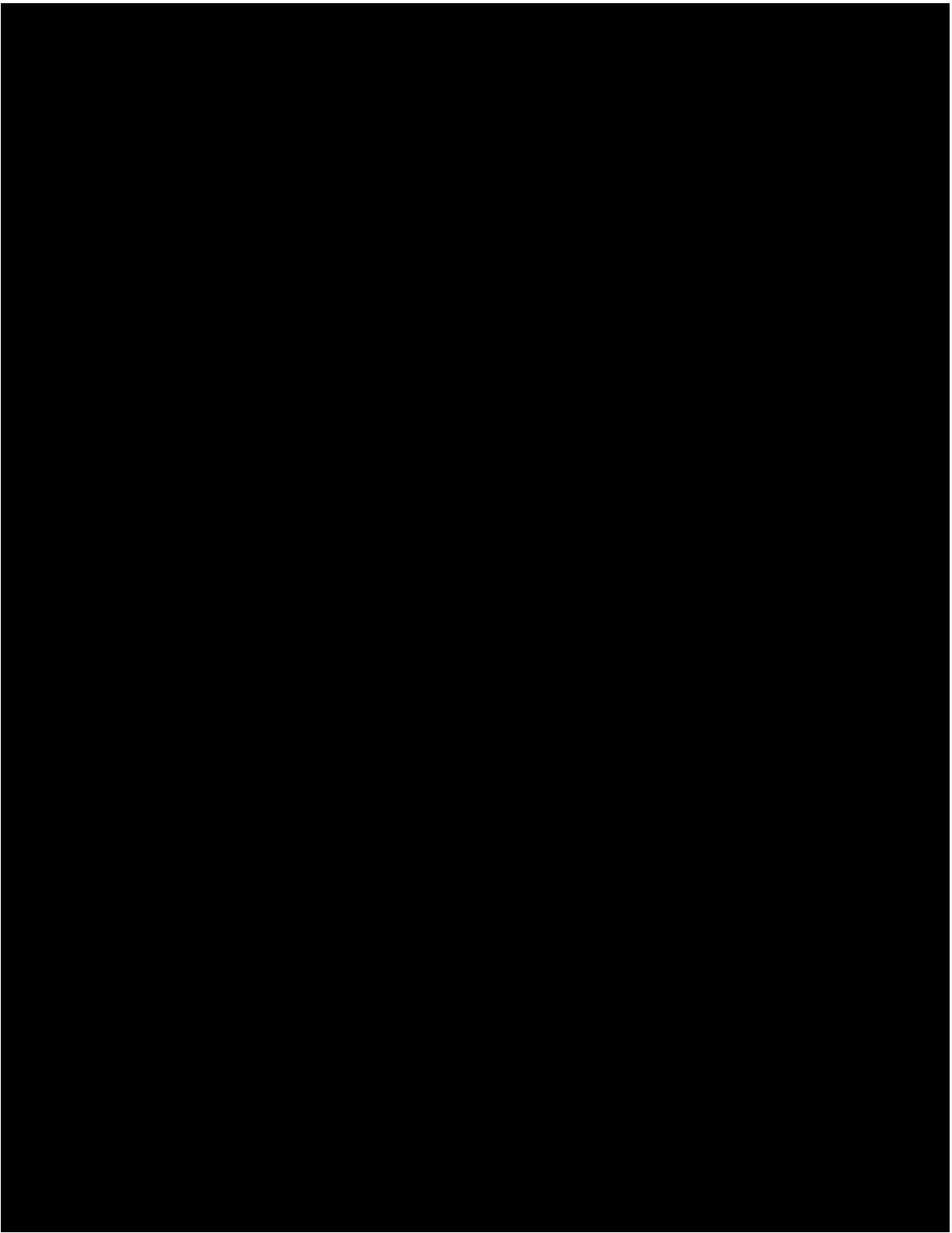


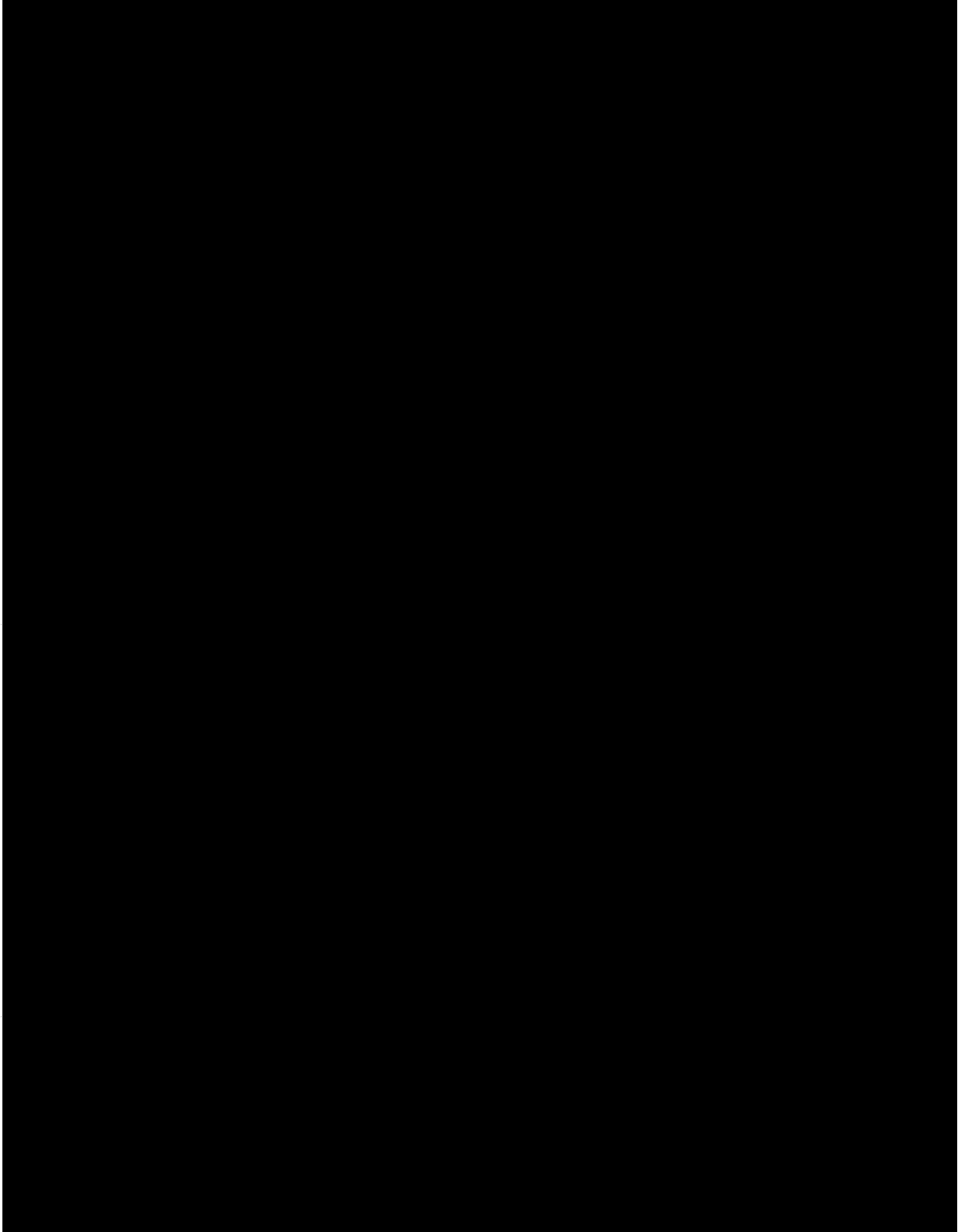


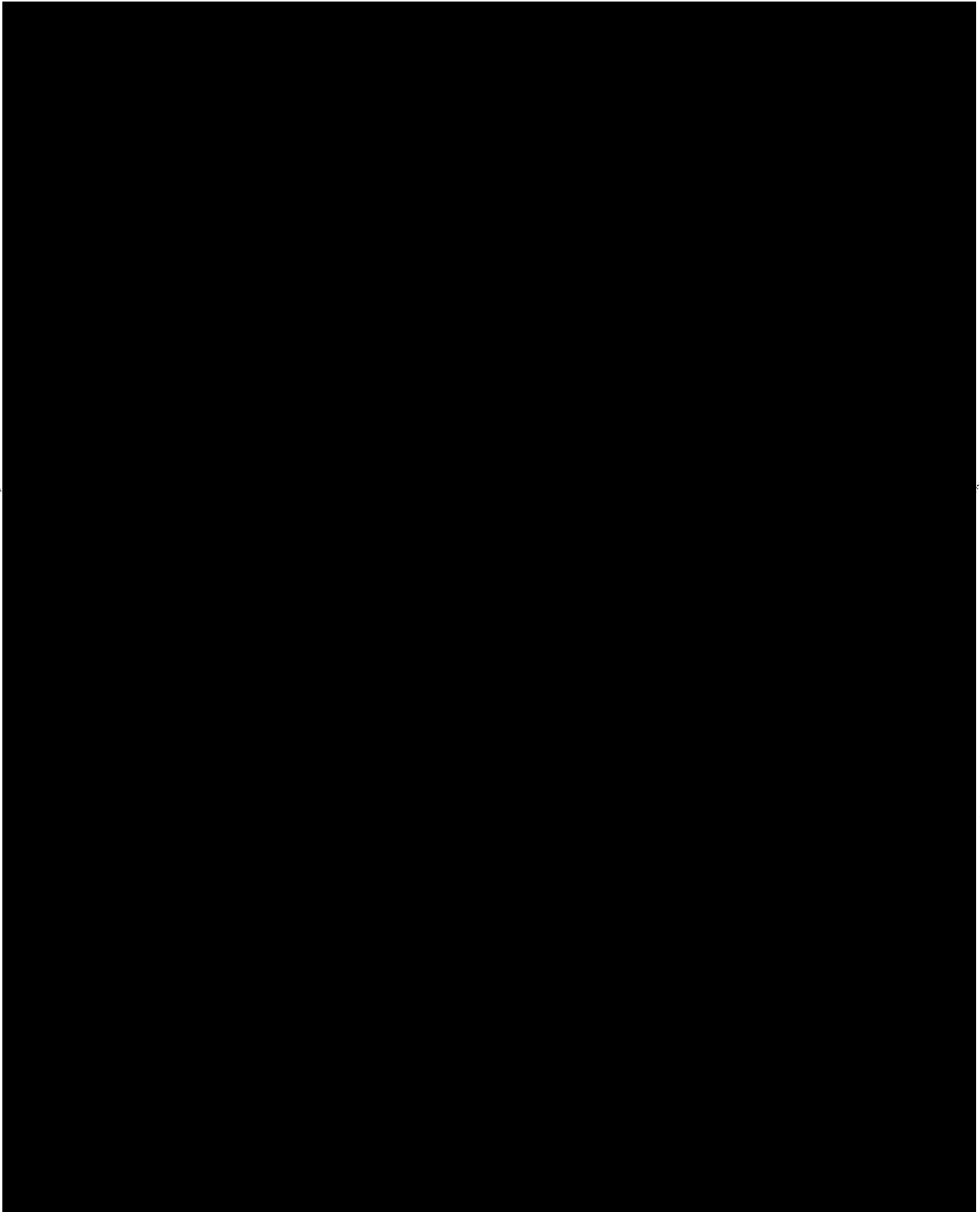


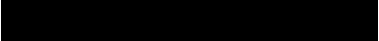
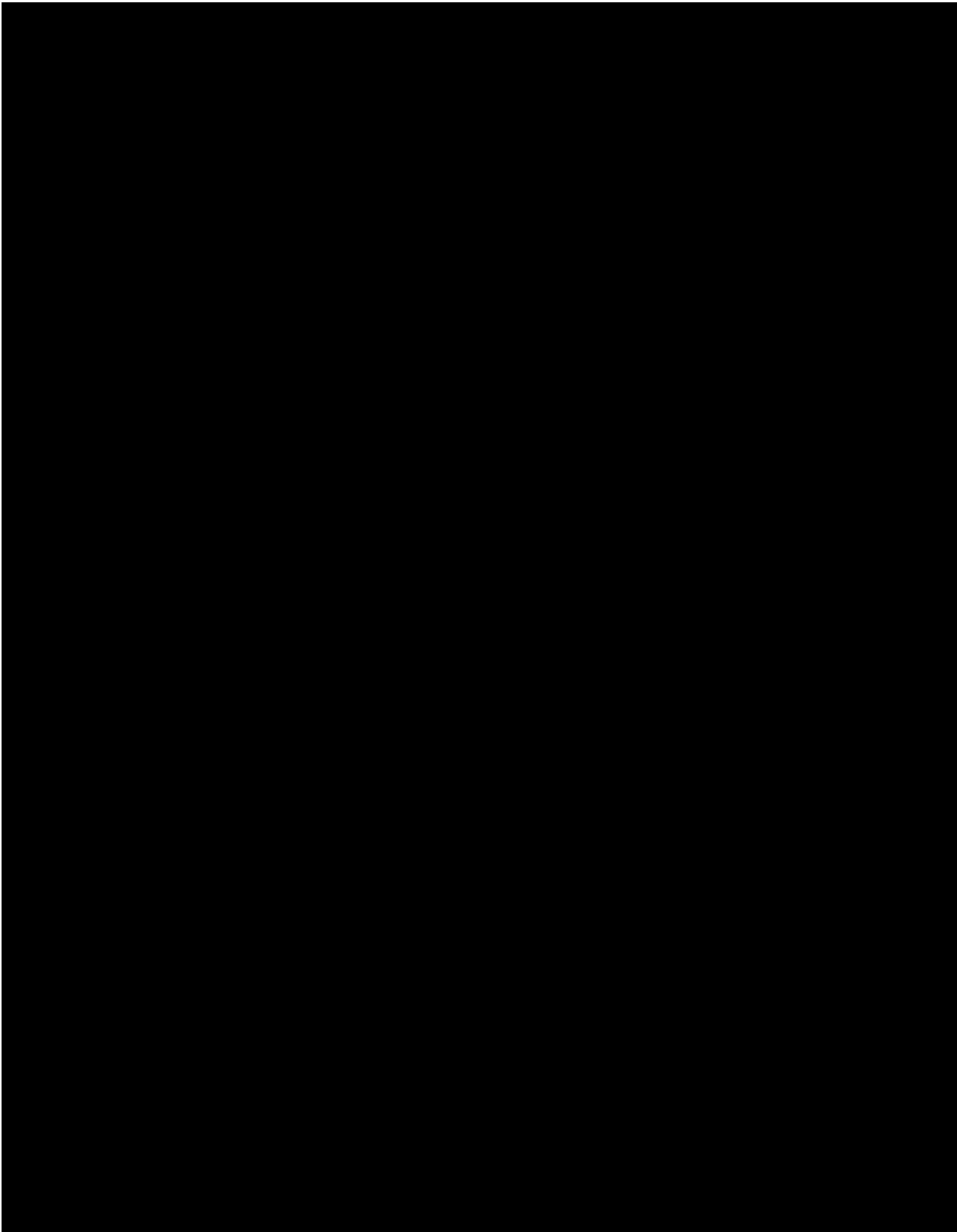


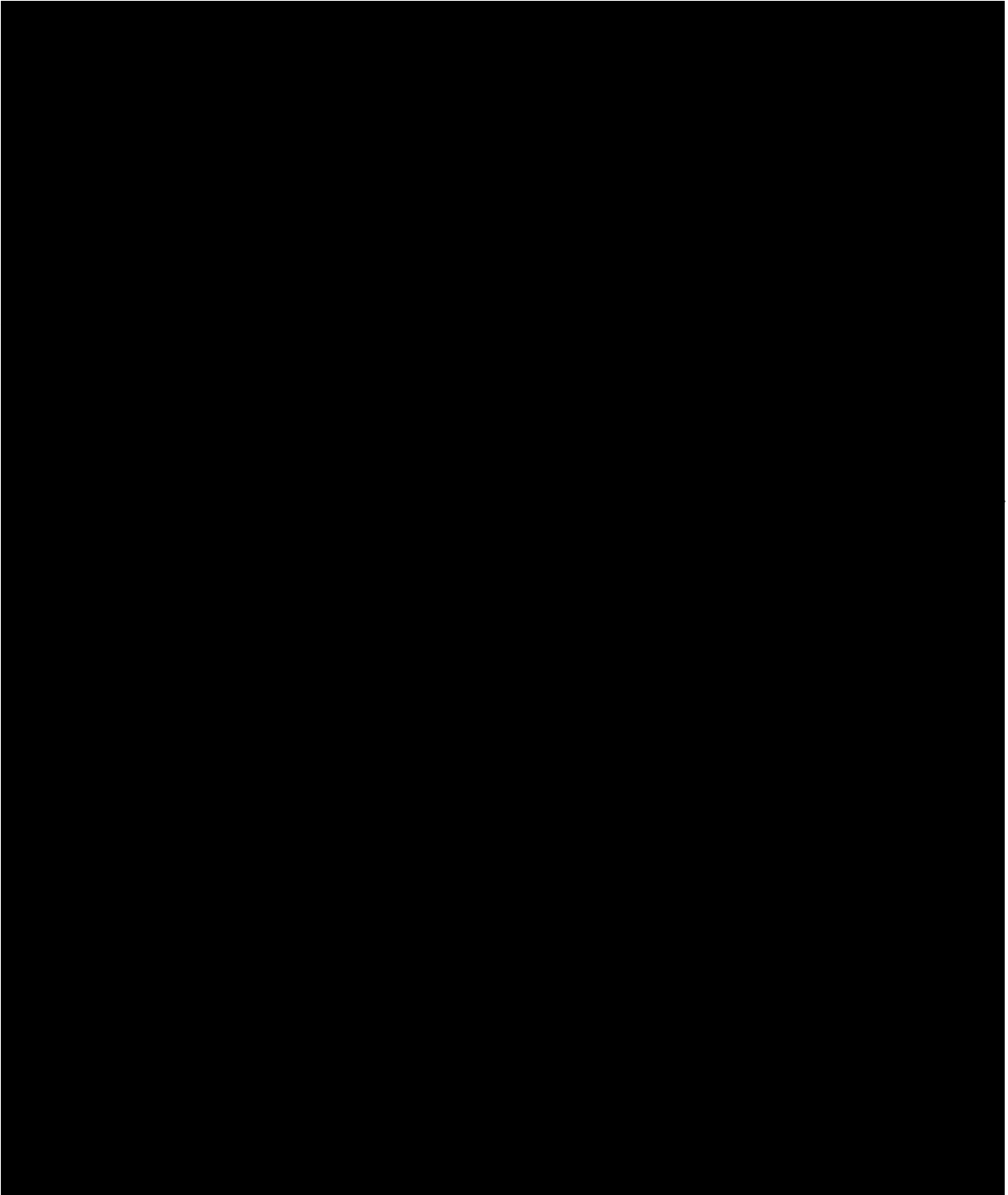


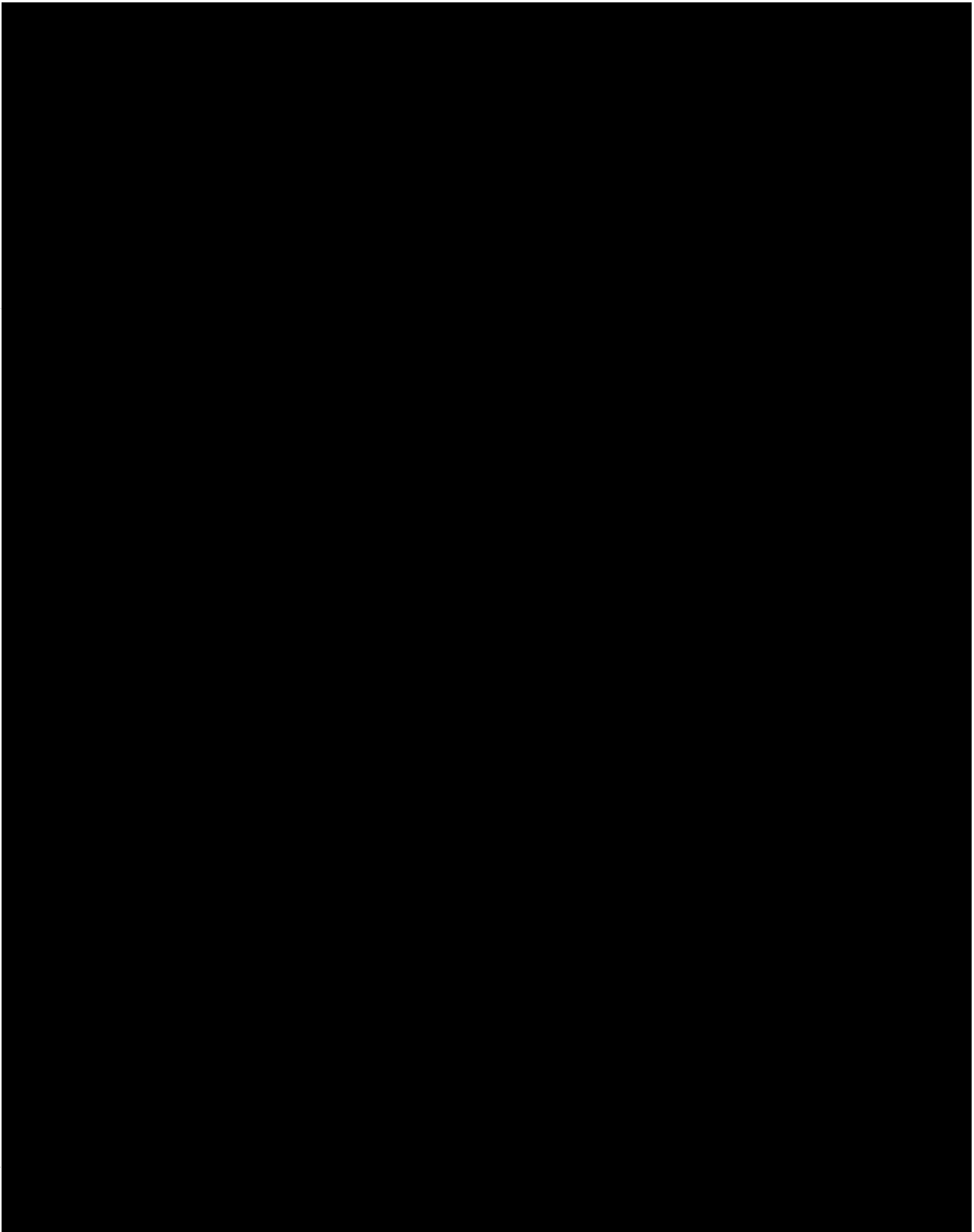


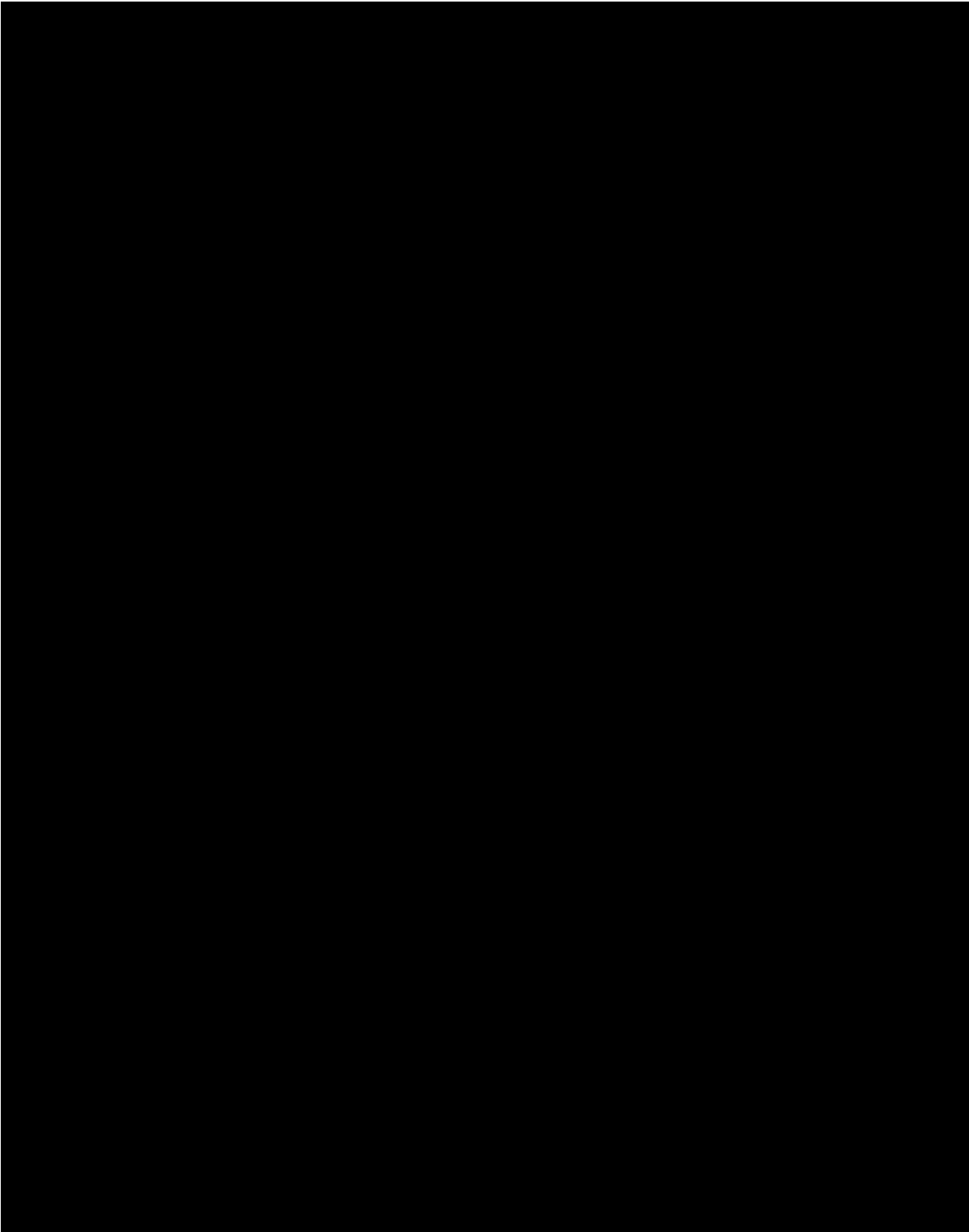


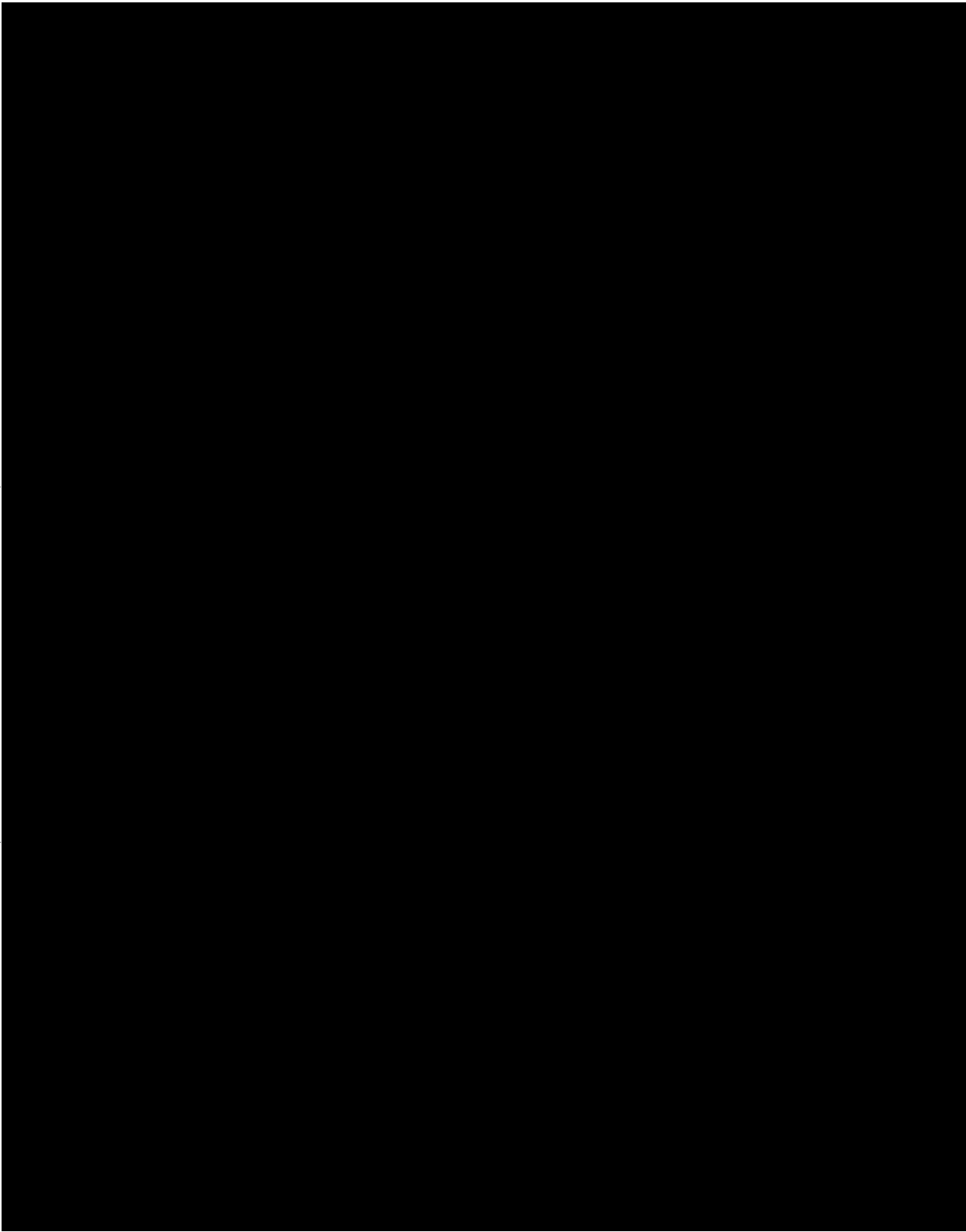


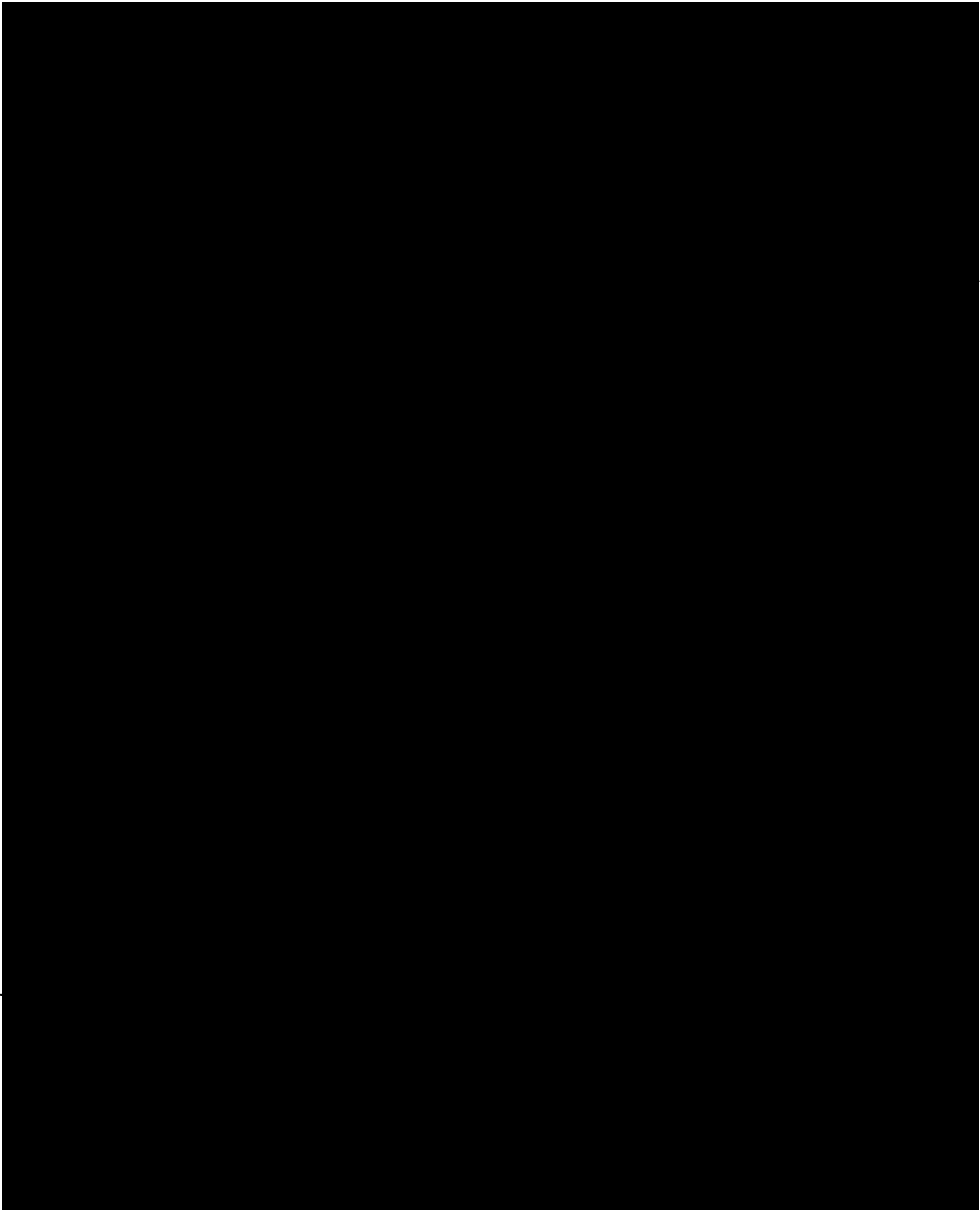


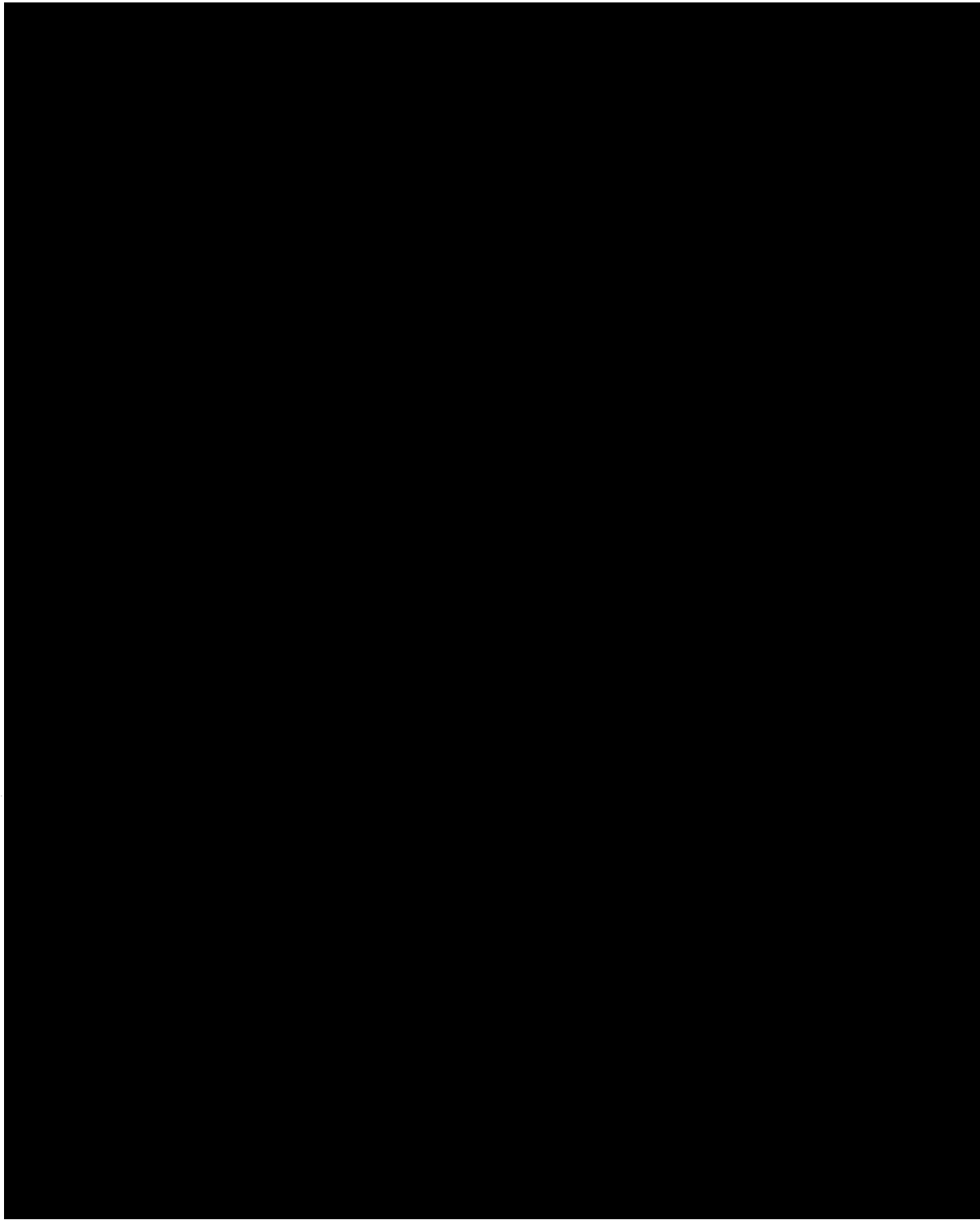


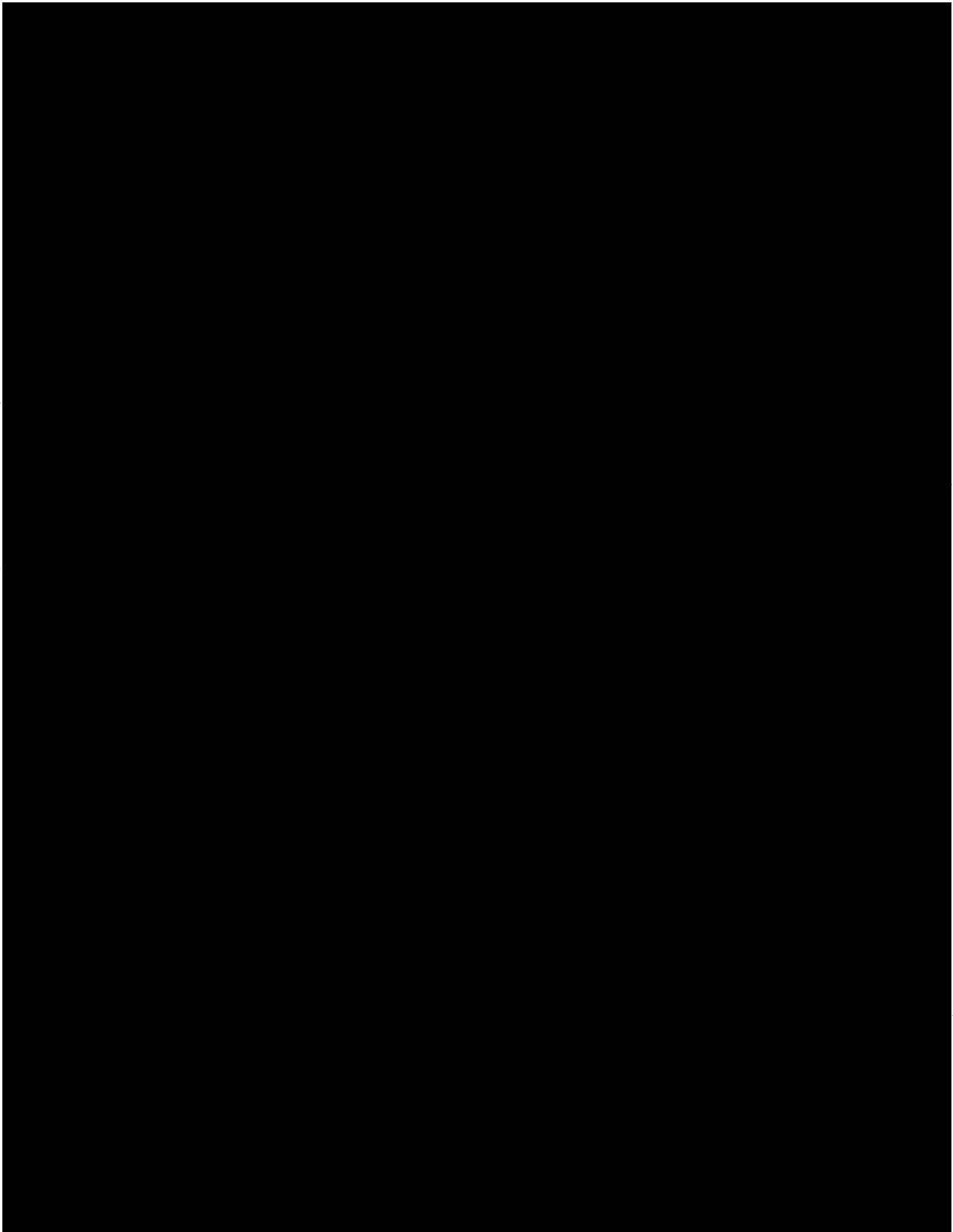


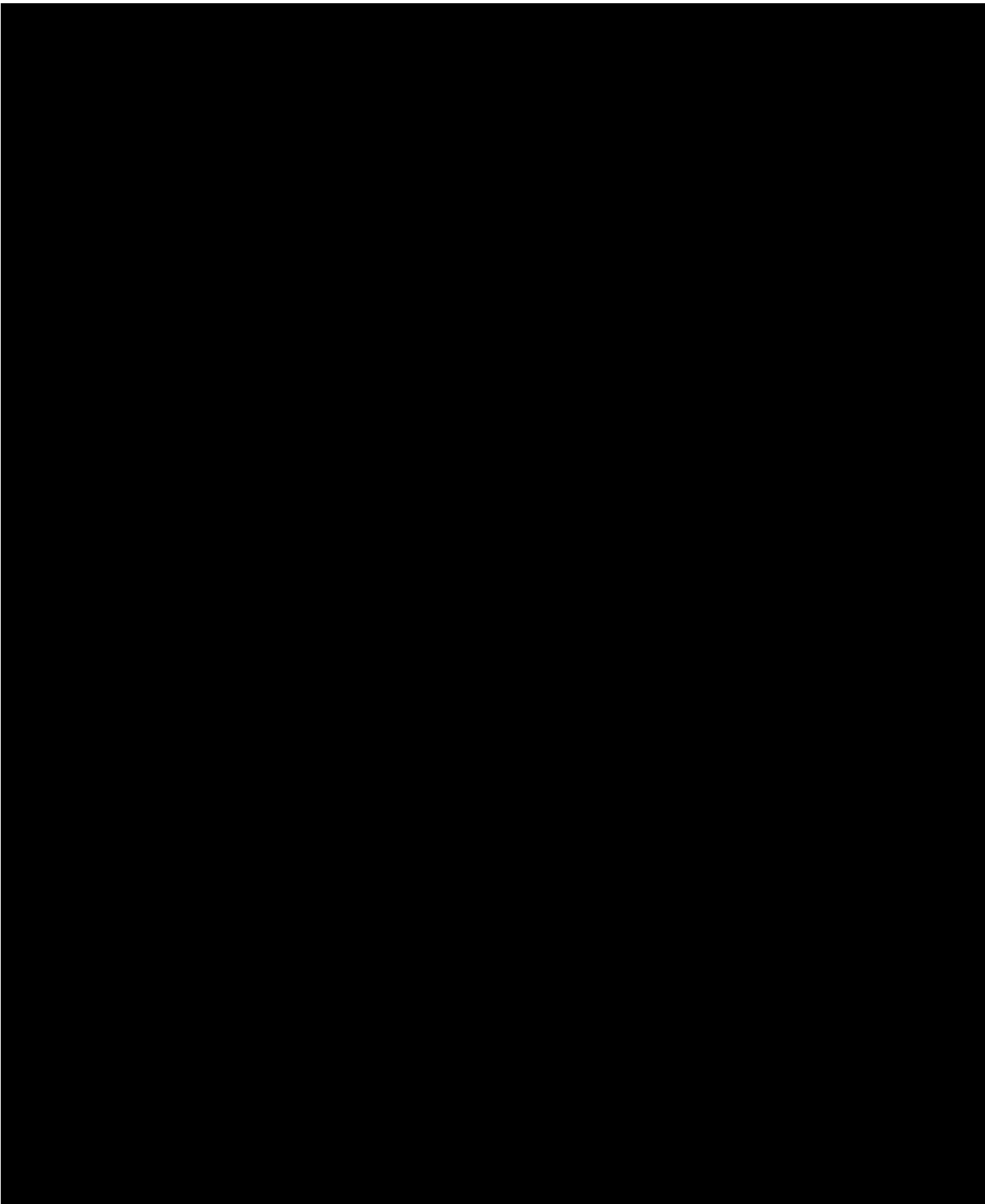


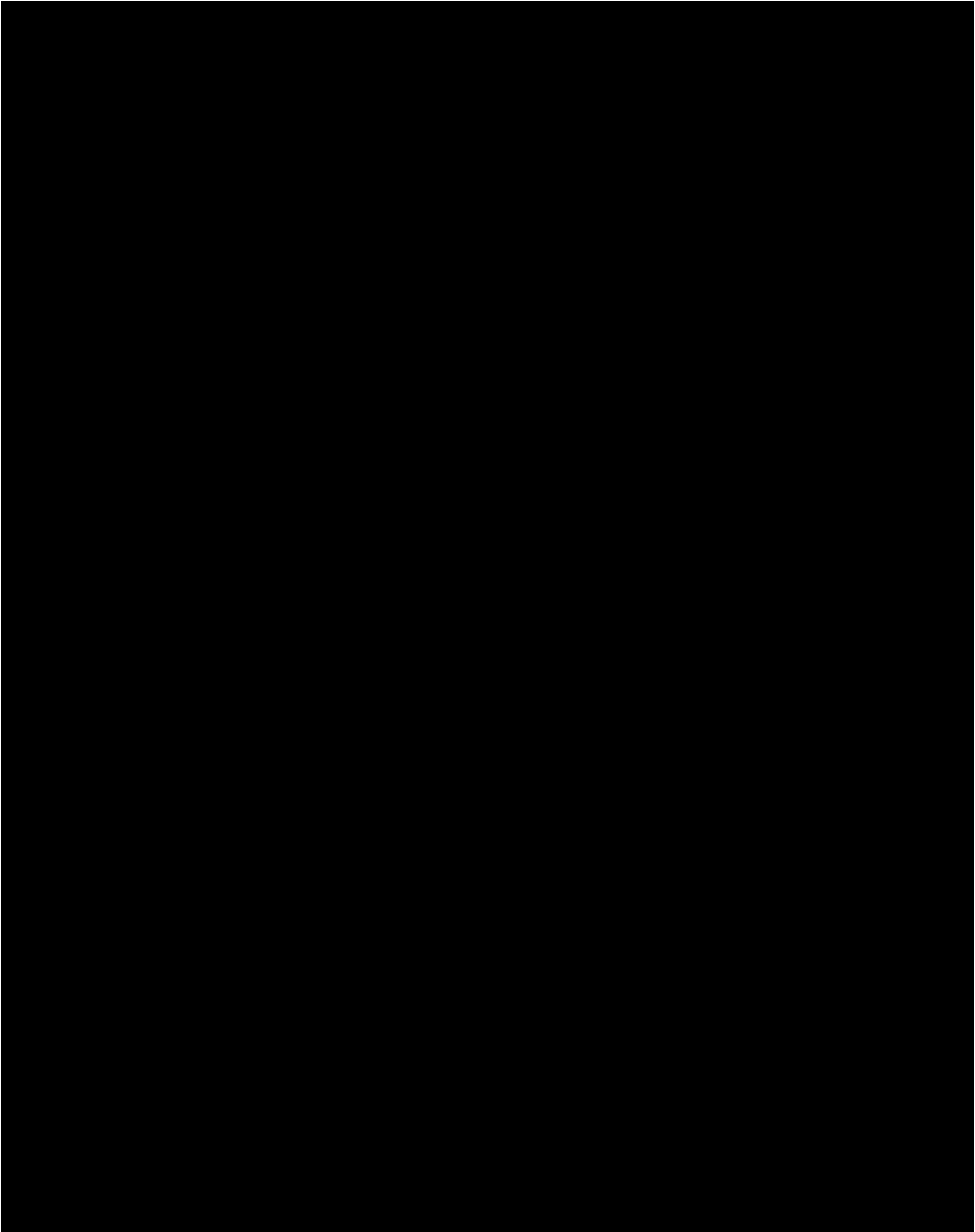


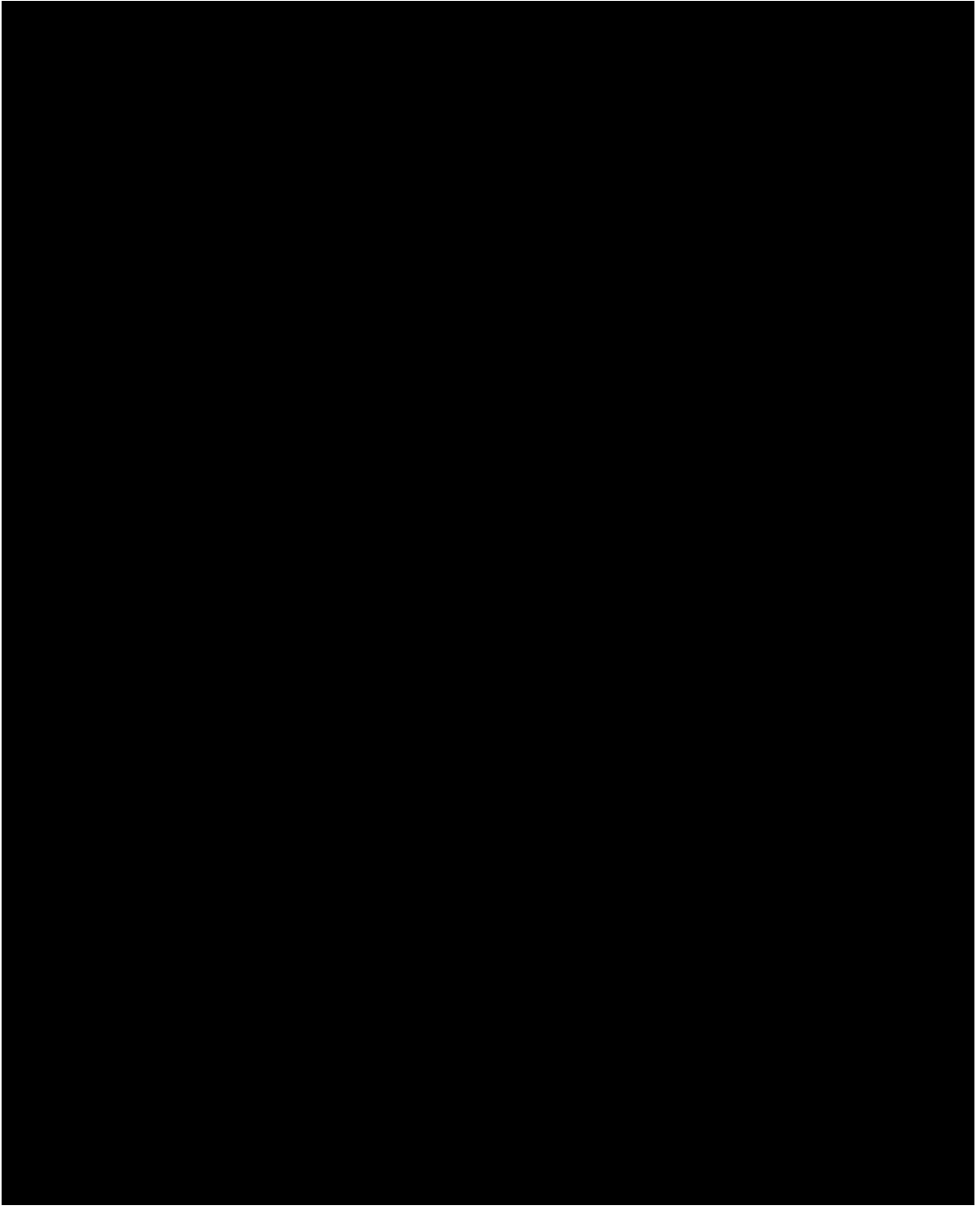












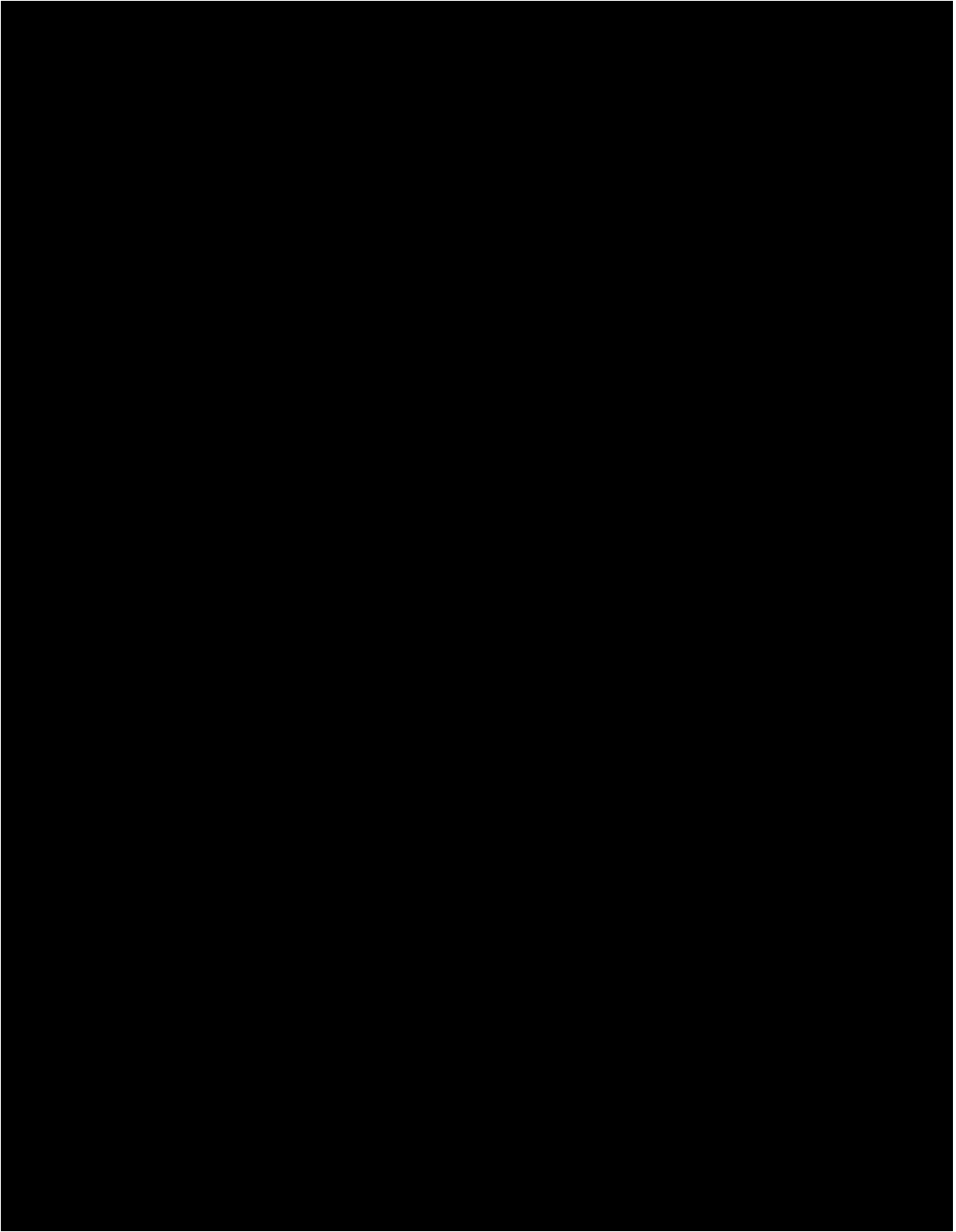




Exhibit C

From: Prestes, Brian
Sent: Friday, July 30, 2004 8:20 AM
To: 'jgardner@usaid.gov'; Susan Pascoello (E-mail)
Cc: Bradbury, Steve; Lerner, Renee
Subject: Draft HHS Opinion

Attachments: HHS Opinion (7-29-04 DRAFT).wpd

Attached for review and comment is a draft of our office's memorandum, for Alex Azar at HHS, regarding federal funds restrictions in the Trafficking Victims Protection Reauthorization Act and in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act.

We are circulating this memorandum in draft form on the understanding that it will be maintained as a close hold and not shared outside your office or with others inside your office who do not have a specific need to review it.

We ask that you provide any comments to us by Friday, August 13.

In the meantime, please do not hesitate to contact me with any questions.

Thanks,

Brian S. Prestes
Office of Legal Counsel
United States Department of Justice
(202) 514-2054



HHS Opinion
7-29-04 DRAFT).wp.



U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

DRAFT July 29, 2004

**MEMORANDUM FOR ALEX M. AZAR II
GENERAL COUNSEL, DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Re: Federal Funds Restrictions in the Trafficking Victims Protection Reauthorization Act and the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act¹

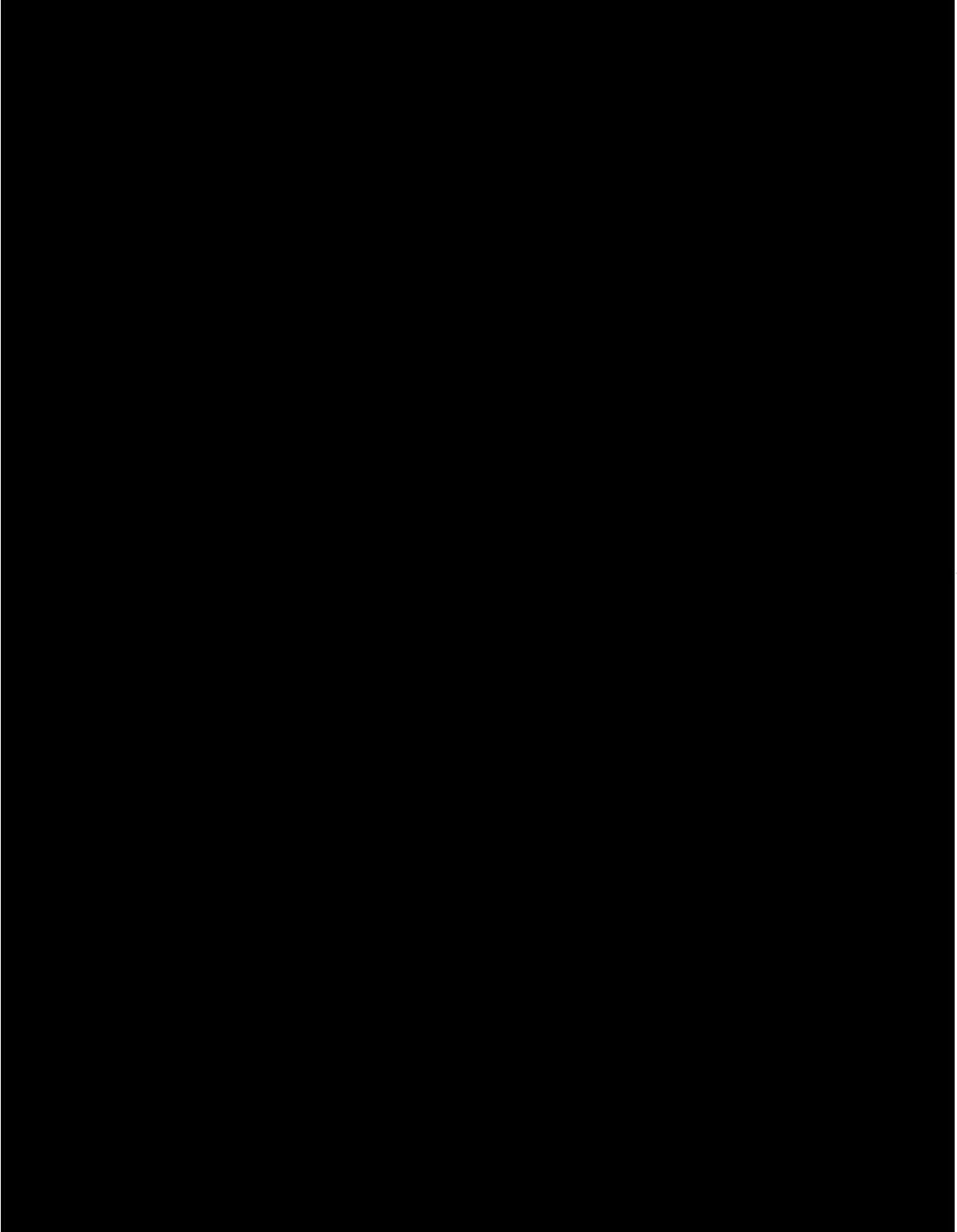
You have asked us whether certain statutory restrictions found in the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA") and in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("AIDS Act") are constitutional under the First Amendment.²

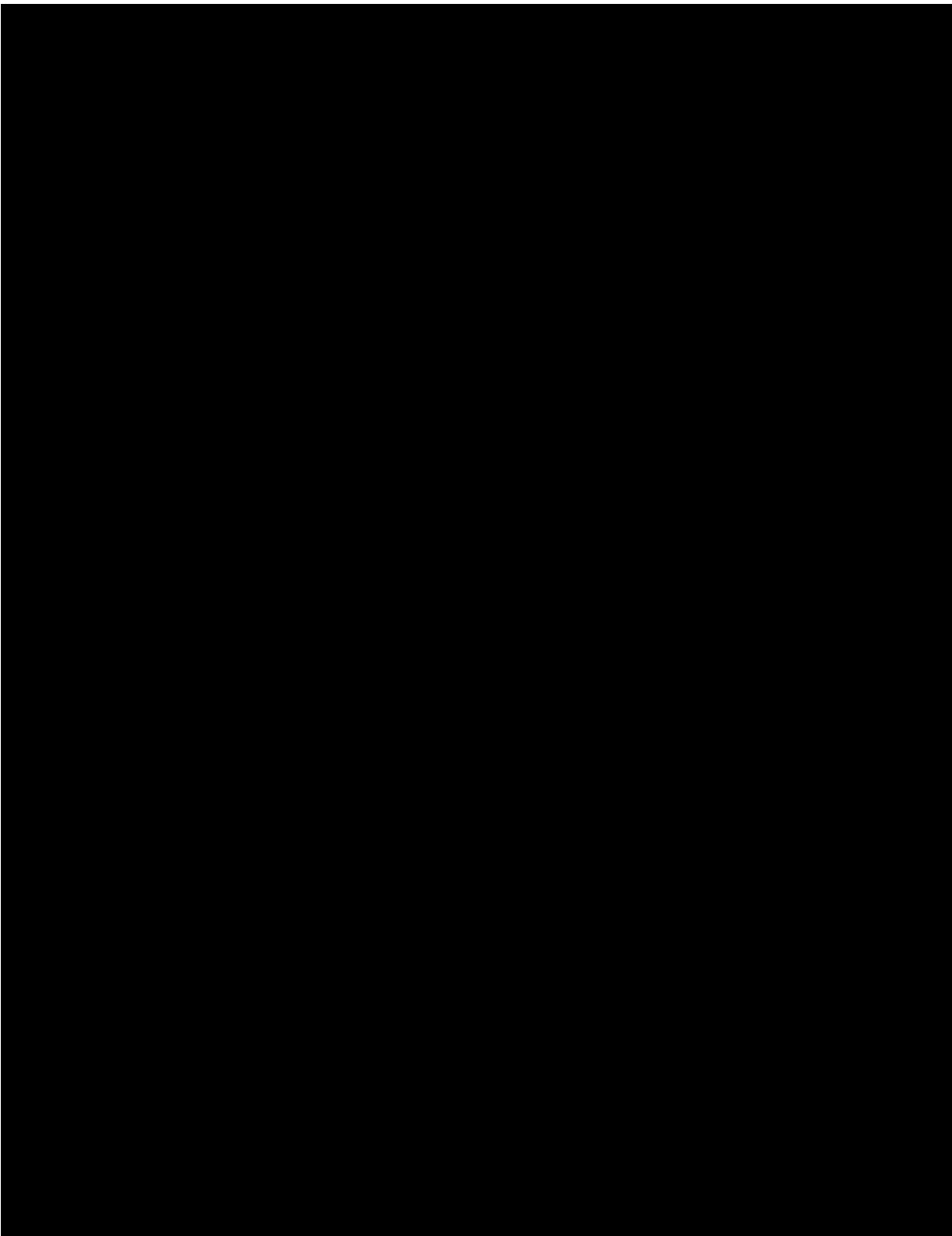
[REDACTED]

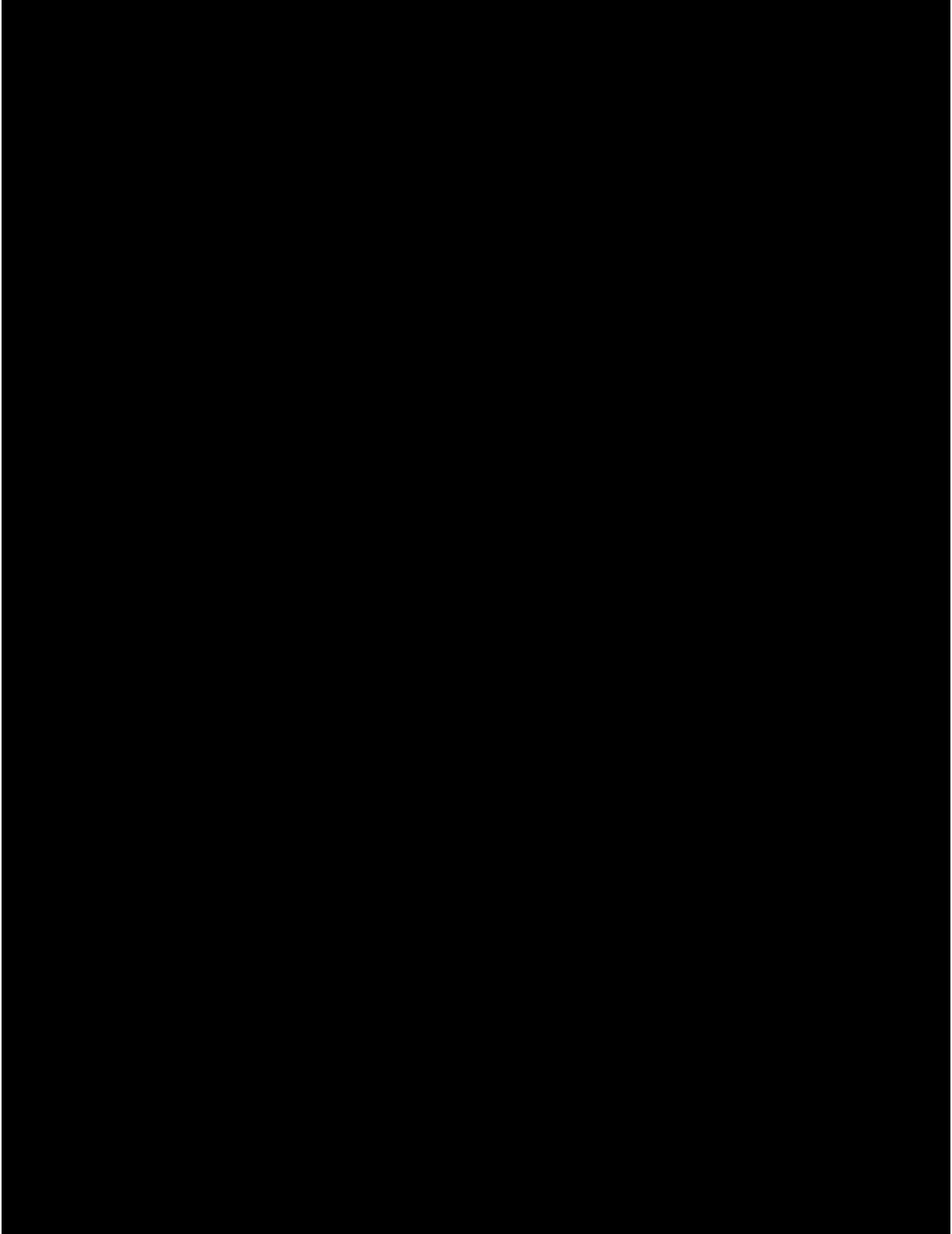
² Letter for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from Alex M. Azar II, General Counsel, Department of Health and Human Services ("HHS") (Feb. 12, 2004).

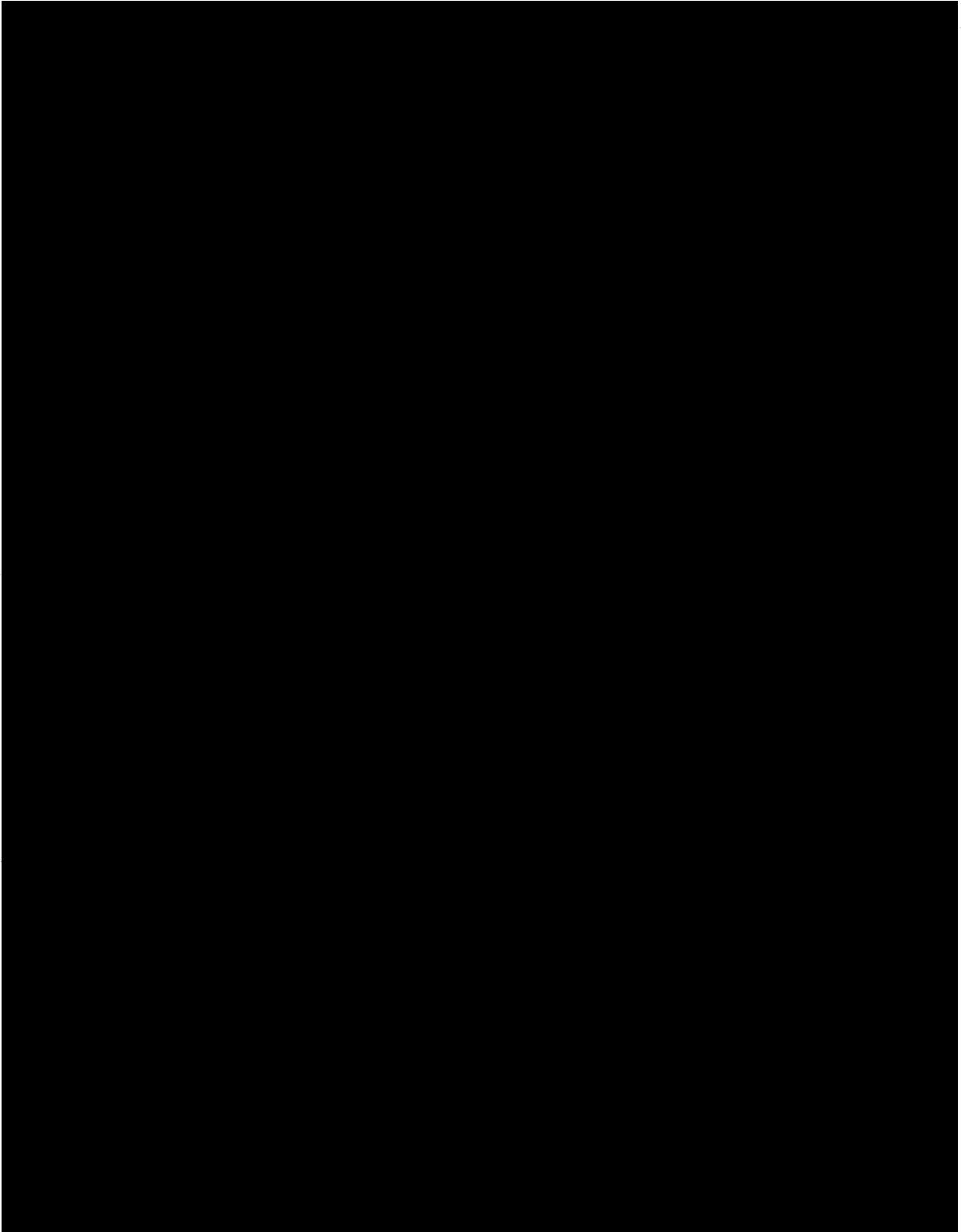
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[REDACTED]









[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

