

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

February 28, 2020

Austin Evers
American Oversight
1030 15th Street, NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: Freedom of Information Act Request No. # 873478 and 878035

Dear Mr. Evers,

This letter responds to your Freedom of Information Act (FOIA) requests of February 1, 2019, in which you requested 1) all records reflecting communications with the White House (including but not limited to anyone whose email ends in @who.eop.gov) about Steve Wynn, Wynn Las Vegas, or Wynn resorts, and 2) all records reflecting communications with Steve Wynn, Wynn Las Vegas, or Wynn resorts, or any individuals acting on Wynn's behalf, including any individuals with email addresses ending in @wynnlasvegas.com, @wynnresorts.com, @wynnmacau.com, @wynnpalace.com, or with the email addresses cspies@clarkhill.com and wmoschella@bhfs.com between January 20, 2017, and May 17, 2019. Your requests were received in our office on February 6, 2019, and assigned FOIA tracking number 873478 and on May 16, 2019, and assigned FOIA tracking number 878035. Both requests are currently in litigation.

A search for responsive records of the Office of the Secretary (OSEC) was conducted based on your request. A total of 671 document pages were located;

- 70 pages are being released without redactions, and
- 601 pages which have been redacted in part under to 5 U.S.C. § 522(b)(6) which permits the withholding of personnel, medical and similar files when disclosure of such information would constitute a clearly unwarranted invasion of personal privacy and in combination with (b)(5) which permits the withholding of information during client - attorney communications and the deliberation process.

If you have questions about this response, you may contact the Office of the Secretary (OSEC) FOIA point of contact at OSEC-FOIA@dol.gov or the DOL FOIA Public Liaison, Thomas Hicks, at 202-693-5427 or by email at hicks.thomas@dol.gov. Alternatively, you may contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration, to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National

Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at 202-741-5770, by fax at 202-741-5769, or by calling toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DeBusk', with a stylized flourish at the end.

Thomas DeBusk
Administrative Officer

From: Geale, Nicholas C. - SOL
To: Amin, Stacy C. EOP/WHO
Sent: 8/15/2017 9:00:36 PM
Subject: Re: FYI

(b) (5)



On: 15 August 2017 11:51, "Amin, Stacy C. EOP/WHO"

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From: Geale, Nicholas C. - SOL [mailto:Geale.Nicholas.C@DOL.gov]
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Subject: FYI

From: Geale, Nicholas C. - SOL
To: Amin, Stacy C. EOP/WHO
Sent: 8/15/2017 10:10:52 AM
Subject: FYI
Attachments: Tip Credit NPRM Relevant Litigation Memo NCG final.docx

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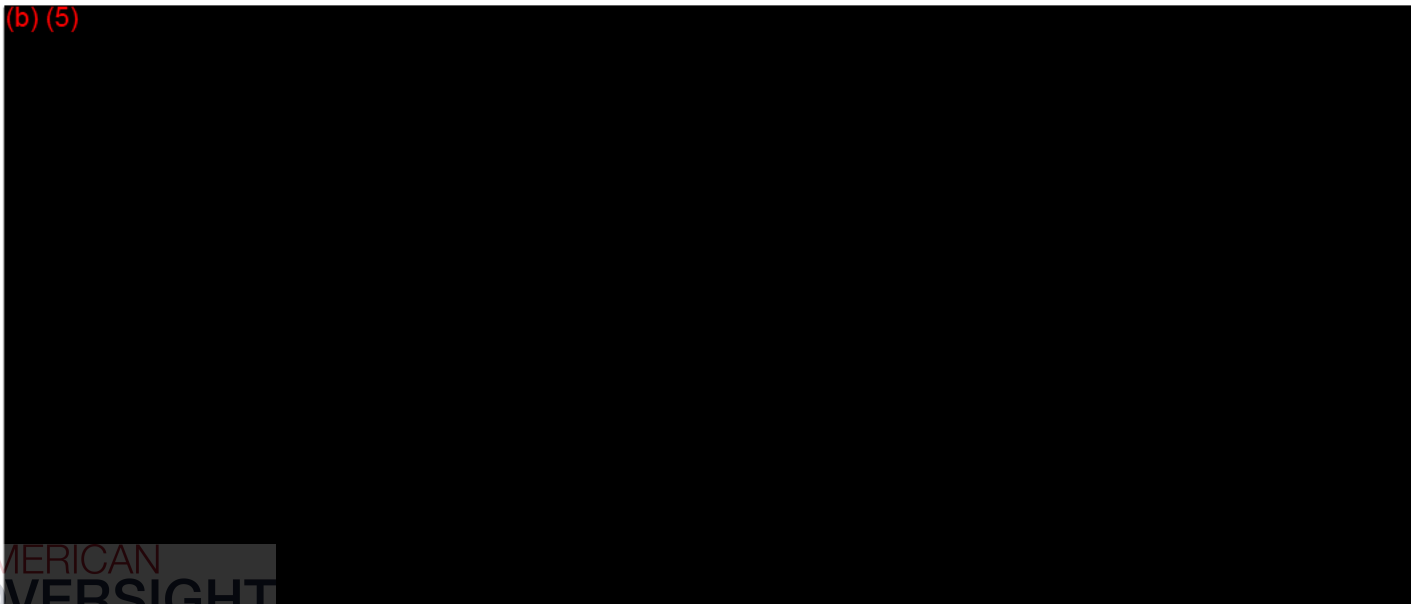
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To: Sieger, Edward - SOL[Sieger.Edward@dol.gov]
From: (b) (6)
Sent: Wed 2/1/2017 10:04:47 AM
Importance: Normal
Subject: Wynn Las Vegas v. Cesarz Br Opp 16-163
Received: Wed 2/1/2017 10:05:11 AM
Wynn Las Vegas v Cesarz.rtf

Edward Sieger sent you content from Westlaw.
Please see the attached file.

Item: Wynn Las Vegas v. Cesarz
Citation: 2016 WL 6873249
Sent On: Wednesday, February 1, 2017
Sent By: Edward Sieger
Client ID: EDS

Note:

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2016 WL 6873249 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

WYNN LAS VEGAS and Steve Wynn, Petitioners,
v.
Joseph CESARZ and Quy Ngoc Tang, et al., Respondents.

No.
16
-
163

November 16, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

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***i QUESTIONS PRESENTED**

(1) Section 531.52 of the Department of Labor regulations under the Fair Labor Standards Act (“FLSA”) provides that an employer “is prohibited from using an employee’s tips, whether or not it has taken a tip credit,” except for the purposes affirmatively authorized by section 3(m) of the FLSA. The question presented is:

Is the provision of section 531.52 limiting employer use of employee tips valid as applied to an employee who claims that the prohibited use of his or her tips resulted in a wage lower than the minimum wage required by the FLSA, where the employer does not take a tip credit?

(2) Section 216(b) of the FLSA provides a private cause of action for any violation of the minimum wage requirements of the Act. The question presented is:

Does the private cause of action in section 216(b) apply to an employee who claims that an employer’s use of his or her tips resulted in a wage lower than the minimum wage required by the FLSA?

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*1 REGULATIONS INVOLVED

Section 531.35 of 29 C.F.R. provides:

Whether in cash or in facilities, “wages” cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or “free and clear.” The wage requirements of the Act will not be met where the employee “kicks-back” directly or indirectly to the employer or to another person for the employer’s benefit the whole or part of the wage delivered to the employee. This is true whether the “kick-back” is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

Section 531.52 of 29 C.F.R. provides in pertinent part:

The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

*2 STATEMENT

Introduction

This case does not present any circuit conflict. Petitioners challenge the validity of the provision of section 531.52 of the Department of Labor FLSA regulations which limits an employer’s use of employee tips to the circumstances affirmatively authorized by section 3(m) of the Fair Labor Standards Act (“FLSA”). 29 U.S.C. § 203(m). But the Ninth Circuit decision in the instant case is the only appellate opinion regarding the validity of this regulation. The Fourth Circuit decision in *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442 (4th Cir. 2015), expressly did not decide that question. 795 F.3d at 445 n. 5.

There is also no circuit conflict regarding whether the plaintiffs have a private cause of action under the circumstances of this case. The Fourth Circuit in *Trejo* held only that a plaintiff who advanced no minimum wage claim would not have a private cause of action. The plaintiffs in *Trejo* expressly disavowed any claim that they had not been paid the minimum wage mandated by the FLSA. 795 F.3d at 446, 448. In the instant case, on the other hand, the plaintiffs expressly did allege in their complaint, and argued below, that the effect of the defendants’ disputed practices was wages lower than the minimum wage. Although petitioners deny that their practices violate the minimum wage laws, the plaintiffs’ *claim* to the contrary is one for which an express private cause of action is provided by section 216(b) of the FLSA. 29 U.S.C. § 216(b). And at this stage in the litigation, moreover, no question is yet presented regarding the existence of a private cause of action, because neither *3 the Ninth Circuit nor the district court has yet addressed petitioners’ contention that plaintiffs lack a private cause of action.

Petitioners also contend that, even if no conflict is presented by the Ninth Circuit's holding that the complaint states a cause of action, the court of appeals' rationale for that holding conflicts with methodology used in other circuits for determining the validity of a regulation. But section 531.52 is a substantive rule adopted after notice and comment, which by its very nature can impose obligations not contained in the underlying statute. The circuit court cases on which petitioners rely concern the standards for evaluating the validity of interpretive regulations.

The substantive standard embodied in section 531.52 is more than forty years old. That section codifies the manner in which the Department of Labor has consistently enforced the FLSA since 1974, under presidents of both political parties. The very practice at issue in this case, the confiscation of casino dealers' tips to give more money to supervisors, was specifically addressed by a published 1989 Opinion Letter, which advised a different Las Vegas casino that this practice would violate the FLSA's minimum wage requirement.

Legal Background

Section 206(a) of the FLSA provides that "[e]very employer shall pay to each of his employees ... wages at [certain specified hourly rates]." 29 U.S.C. § 206(b). The statute itself provides no standard for determining how much an employer has actually "pa[id]" to an employee.

*4 The lower courts and the Department have long agreed that the determination of how much an employee was paid necessarily requires consideration of not only how much the employer gave to the worker, but also of whether the employer required the worker to kickback money, or other things of value, to the employer. The amount "pa[id]" is net after any such kickbacks. That principle is set out in section 531.35 of the regulations. 29 C.F.R. § 531.35. "Whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" *Id.* Section 531.35 applies to funds paid "directly or indirectly to the employer or to another person for the employer's benefit," whether "in cash or in other than cash." *Id.* Thus if Wynn paid a dealer \$7.50 an hour, but required the dealer (as a condition of continued employment) to agree to sign over to the casino his or her federal tax refund, the amount "pa[id]" for the week in question would be the sum of the cash wages minus the amount of the tax refund.

Wynn has not questioned the general rule in section 531.35, but disputes only whether it should be applied in this case. As the petition correctly notes, the key question here is whether by using employee tips as it did, Wynn "evad[ed] the minimum-wage requirements by effectively forcing employees to make 'kick-back[s]' that 'cu[t] into the minimum ... wages,' in violation of another Department regulation." Pet.12 (quoting *Cumby v. Woody Woo, Inc.*, 596 F.3d 577, 581-82 (9th Cir. 2010). (The "[j]other Department regulation" to which the petition refers is section 531.35.) The answer depends on whether the "tips belong to employees in the first place." Pet. 12 (quoting *Cumby*, 596 F.3d at 583). Wynn claims that tips given to the employees are really the company's money, like cash *5 given to a bartender to pay for a drink; if that is correct, section 531.35 would not apply. The plaintiff employees, on the other hand, contend that the tips are their money, like a tax refund. Section 3(m) and the validity of the Department's disputed 2011 regulation affect *whose* money the tips are, and thus whether a dealer's after-kickback wage was less than the federal minimum wage.

In 1966 and in 1974 Congress adopted amendments to the FLSA regarding employee tips. The 1966 law affirmatively authorized an employer to take a tip credit based on tips received by an employee; the law limited the proportion of the minimum wage that could be deemed paid through the tip credit, and thus required the employer to pay the remaining portion out of its own funds. Pub.L. No. 89-601, § 101(a), 80 Stat. 830 (1966). That authorization of a tip credit, now somewhat reworded, is set out in the first sentence of the tip provision in section 3(m).

In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between

the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

*6 29 U.S.C. § 203cm).¹

The wording of the 1966 law gave rise to a dispute about whether the authorized tip credit was the exclusive method by which an employer could use an employee's tips.² Congress responded in 1974 with additional language, now codified (also somewhat reworded) in the third and fourth sentences of the section 3(m) tip provision.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Id. The restriction in the last sentence forbids an employer to actually take (as opposed to merely take a credit for) an employee's tips, except in the case of tips placed into a tip pool limited to co-workers "who customarily and regularly receive tips." In 1974 Congress for the first time gave the Secretary authority to promulgate substantive rules "with regard to" tips. "[T]he Secretary is authorized to *7 prescribe necessary rules, regulations, and orders *with regard to* the amendments made by this Act." Pub. L. No. 93-259, § 29, 88 Stat. 55, 76 (1974)(emphasis added).³

The Department's Longstanding Interpretation of Section 3(m)

It was unclear whether the tip provision in the original 1966 FLSA amendments constituted the exclusive manner in which an employer could use an employee's tips, or whether an employer who opted not to use a tip credit was free to seize those tips and use them in whatever way it chose. The Department of Labor interpreted the 1966 provision to impose no limitations on an employer which did not take a tip credit.⁴

In the wake of the 1974 amendments, however, the Department immediately construed the new language to limit employers who did not take a tip credit. In an Opinion Letter issued less than two months after the effective date of the 1974 provision, the Department concluded that the limits in section 3(m) indeed apply to an employer which has not taken a tip credit. FLSA-626, June 21, 1974, 1974 WL 422051. That letter addressed the application of the 1974 provision to an employer who confiscated all tips paid by credit card, and then used those funds to pay the minimum wage; all employees were required to sign an agreement consenting to this arrangement. *8 The Department concluded that this arrangement was unlawful, even though the employer had not taken a tip credit.

The amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are ... turned over to the employer for use by the employer in satisfying the monetary requirements of the Act.... Under the amended Act, a tip becomes the property of the 'tipped employee' Thus, where the employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, [under the proposed agreement] the employee has in effect waived his right to the minimum wage.... It cannot be said that an employee has been paid by his employer when the money used is the employee's own money.

1974 WL 422051 at *2.

An Opinion Letter issued the next year again held that under the 1974 Act an employer which had not taken a tip credit could not confiscate and use its employees' tips, despite written agreements "that amounts presented by customers as tips belong to the employer and will be turned over to the employer daily." WH-310, Feb. 18, 1975, 1975 WL 40934 at *1.

[T]he use of [that] system ... would have the effect of nullifying Section 3(m) as amended. [I]nstead of using the employee's tips for paying a maximum of 50% of the minimum *9 statutory rate [as then provided if a tip credit were claimed], the employer would use his employee's tips to satisfy as much as

100% of the monetary requirements of the Act.... [T]he parties may not agree to an arrangement where the employee's tips are used to satisfy the employer's minimum wage obligation.

Id. The Department announced that its earlier interpretations of the 1966 provision “have no effect to the extent they are in conflict with the amended Act,” and that new regulations were “being prepared which will incorporate the changes resulting from the 1974 amendments.” *Id.*

Another 1975 Opinion Letter explained that the 1974 Senate Report made clear that the Congressional purpose in amending Section 3(m) was ... to insure “that all tips received by such employee must be retained by the employee” ..., except to the extent that there is an arrangement for the “pooling of tips among employees who customarily and regularly receive tips.” (29 U.S.C. 203(m)).... If an employer should elect not to avail himself of [the tip credit], he would have to pay his tipped employees in accordance with the Act's minimum wages standard, and, in addition, allow them to keep their tips

WH-321, April 30, 1975, 1975 WL 40945 at *1. That was followed by a series of opinion letters reiterating the Department's view that under the 1974 provision an *10 employer could not retain or confiscate its workers' tips, regardless of whether the employer took the tip credit. WH-380, March 26, 1976, 1976 WL 41732 at *1 (“Congress ... require[ed] as a general principle that tipped employees retain all of their tips”); WH-386, July 12, 1976, 1976 WL 41739 at *2 (“regardless of whether or not the employer takes a tip credit, the employee must retain all tips”), *4 (“the law forbids any arrangement whereby any part of the tips of a tipped employee belong to the employer or are retained by the employer”); WH-489, Nov. 22, 1978, 1978 WL 51435 at *2 (“The tip retention requirement of section 3(m) applies regardless of whether the employer elects to take credit for tips received”).

A 1989 Opinion Letter declared unlawful the very practice at issue in this case. WH-536, October 26, 1989, 1989 WL 610348. The letter was issued in response to an inquiry from an unnamed Las Vegas casino, which sought to require its dealers to give a portion of their tips, through a tip pool, to casino supervisors, who did not themselves customarily receive tips from customers, and who thus could not be included in a section 3(m) tip pool. The Department responded that the proposed arrangement could violate the minimum wage laws under the anti-kickback regulation. An employee's tips, it explained, “are the property of the employee to whom they are given,” except in the case of a tip pool that meets the requirements of section 3(m). *Id.* at *2.

In this circumstance, therefore, if there is not a valid tip pool, the employee would, in effect, contribute part of his or her property to the employer or to other persons for the benefit of the employer, with the result that an employee *11 would not have received the full minimum wage “free and clear,” as required by section 531.35

*Id.*⁵ Thus confiscating part of a dealer's tips to pay supervisors would violate the minimum wage laws if “the employer does not pay a sufficiently high cash wage to reimburse such employee for such loss plus at least the minimum wage” *Id.* An employer could confiscate and redistribute a dealer's tips only to the extent that the dealer's hourly wage exceeded the minimum wage. The Department noted that under certain circumstances the proposed arrangement would also violate the FLSA's overtime provisions. *Id.* at *3-*4.

The Department successfully brought several actions enforcing its interpretation of the FLSA. In *Usery v. Emersons, Ltd.*, 1976 WL1668 (E.D.Va. Nov. 23, 1976), the employer paid waiters and waitresses the minimum wage, and did not take a tip credit. But it required the workers to agree to a “tip back” arrangement under which they turned over to the employer tips equal to the minimum wage which it was paying them. The court held that arrangement violated the minimum wage requirement of section 206. 1976 WL 1668 at *6. In *Donovan v. Tavern Talent and Placements, Inc.*, 1986 WL 32746 (D.Colo. Jan 8, 1986), the employer also paid the minimum wage and did not take a tip credit, but required the employees to agree *12 to a “tip-back” scheme under which they had to turn over to the employer tips equal to that minimum wage plus an additional \$1 per hour. 1986 WL 32746 at *2. In holding this practice unlawful, the court rejected the employer's contention “that section 3(m) is not the exclusive method of computing tipped employees' wages” *Id.* at *4.

The Adoption of The 2011 regulations

In 2008⁶ the Department published a notice of proposed formal rulemaking (“NPRM”) regarding its FLSA regulations. 73 Fed.Reg. 43654 (July 28, 2008). The draft regulations included language to replace the long-disavowed interpretation of the 1966 Act, and to codify the agency’s longstanding interpretation of the 1974 provision regarding tipped employees. The proposed regulation codified the Department’s longstanding position that section 3(m) sets out the exclusive methods by which an employer can use its employee’s tips. Generally an “employee is prohibited from using an employer’s tips for any reason other than to make up the difference between the required case wage paid and the minimum wage or in furtherance of a valid tip pool.” 73 Fed. Reg. 43667. The Department’s commentary on the proposed regulation referred repeatedly to its 1989 letter disapproving diversion of casino dealer tips. Mat 43659. The proposed regulation and accompanying commentary, however, appeared to permit an employer who paid a worker *more* *13 than the minimum wage to require the worker to give up tips in an amount no greater than the difference between the minimum wage and the higher cash wage. 73 Fed. Reg. 43654.

Although a significant number of employer organizations commented on the NPRM, none objected to the codification of the Department’s well-established position that employers are forbidden to use employee tips even when no tip credit was being claimed, except authorized by section 3(m). To the contrary, the United States Chamber of Commerce expressly endorsed the replacement of the pre-1974 regulation with the new proposed regulation. Pet.App. 111a.⁷ Unions and employee representatives, however, objected to the aspect of the proposed regulation which suggested that an employer could confiscate employee tips in the limited circumstance described above. Pet. App. 108a-113a. The Department responded by rewording the regulation and commentary to indicate that an employer which paid workers more than the minimum wage could only make deductions (to no less than the minimum wage) from the wages paid by the employer itself, not from the workers’ tips. Pet.App. 118a.

The regulation ultimately adopted in 2011 contained in section 531.52 language prohibiting an employer “from *14 using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.” 29 C.F.R. § 531.52. The Department set out three independent justifications for provision. First, the agency explained that the provision embodied its longstanding view that section 3(m) sets out the exclusive circumstances in which an employer is authorized to use an employee’s tips.⁸ Second, the agency reasoned that a regulation forbidding use of tips except in the manner set out in section 3(m) was necessary to prevent employers from resorting to other schemes to evade the limitations in section 3(m).⁹ Third, the Department explained that *15 requiring a worker to kickback all or part of his or her tips would often result in an after-kick back wage below the minimum wage.¹⁰

Factual Background

Wynn Las Vegas (“Wynn”) is a large casino employing approximately 500 table dealers. Wynn generally pays the dealers only the minimum wage; the bulk of the dealers’ income is in the form of tips from gamblers. Tips are paid by the customers in casino chips, and are referred to in the industry as tokens.¹¹

When the casino first opened in 2005, the tips were shared among the table dealers by means of a pool. All tips were centrally collected, and then divided among the individual dealers under a formula not here in dispute. In 2006, however, Wynn decided that it wanted to increase the earnings of certain supervisors. Rather than spend its *16 own money to give raises to the non-tipped supervisors, the company decided instead to confiscate a significant portion of the dealers’ pooled tips, and to use that money to increase the pay of certain supervisors. The amount of additional payment given to each supervisor was determined as a fixed share of the total tips that had been received by the dealers.¹² The supervisors could not have participated in a tip pool under section 3(m) because they were not individuals “who customarily and regularly receive tips.” 29 U.S.C. § 203(m). The plaintiffs contend that about \$17,000 a year was in this manner taken from each dealer¹³, a sum significantly larger than minimum wage a dealer was paid by the casino itself.¹⁴ By using the dealers’ tips, rather than its own funds, to increase the income of the supervisors, Wynn saved several \$8 million dollars a year.

Proceedings below

Plaintiffs brought this action against Wynn, alleging that the seizure and redistribution of their tips violated the FLSA and section 531.52. Specifically, the complaint asserted that the funds taken from the dealers' tips constituted (under the anti-kickback rule described above) a deduction from their casino-paid wages, and that as a result the net wage received from the casino was less than the minimum wage.¹⁵ The complaint claimed that *17 amount of tips seized from each dealer was the appropriate measure of the minimum wage violation¹⁶, the difference between the required minimum wage and the net post-kickback wage received. In both courts below plaintiffs reiterated their contention that Wynn's action denied them the minimum wage required by the FLSA.¹⁷

*18 Wynn moved to dismiss the complaint. It noted that under the 2010 Ninth Circuit decision in *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010), the casino's seizure of the dealer's tips did not violate the FLSA itself, and argued that because of *Cumbie* the relevant provision of section 531.52 was invalid. The validity of that same regulation was at that time the subject of a pending challenge in *Oregon Restaurant & Lodging v. Solis* ("ORLA") in the District of Oregon. On June 7, 2013, the Oregon District Court in *ORLA* held section 531.52 invalid. 948 F.Supp. 2d 1217 (D.Or. 2013). The district court in the instant case, relying on the district court decision in *ORLA*, subsequently dismissed plaintiffs' complaint. Pet. App. 37a-38a. The appeal in the instant case was consolidated with the government's appeal in *ORLA*.

On appeal, both plaintiffs and the Secretary of Labor (the defendant in *ORLA*) argued that the Ninth Circuit's interpretation of the FLSA in *Cumbie* did not preclude the Secretary from issuing section 531.52. The Secretary stressed that under the 1974 Act he was not limited to issuing regulations that interpret section 3(m), but was *19 also authorized "to prescribe necessary rules, regulations, and orders with regard to [section 3(m)]." Brief for Defendants-Appellants, No. 13-35765, pp. 4, 13, 18, 21 n. 2. "[W]hen an agency has been authorized to promulgate 'necessary' regulations for the implementation of the statute, it may adopt reasonable prophylactic measures to ensure the accomplishment of the Act's purposes." *Id.* p. 32 (citing *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) and *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969)). The Secretary explained that in the absence of the disputed regulation, an employer could easily circumvent the restrictions in section 3(m), such as through schemes under which a worker's entire wage was in effect paid out of his or her tips. *Id.* pp. 15, 20, 32, 34. The Secretary also argued, as did plaintiffs, that the improper seizure of a worker's tips would at least usually violate the FLSA because it would constitute a kickback that reduced the worker's wages below the required minimum wage. Brief for Defendants-Appellants, p. 21 n.3.¹⁸

*20 The Ninth Circuit upheld the regulation. Pet.App. 1a-22a. The court of appeals correctly concluded that the question of whether the FLSA itself prohibits the practice in this case (the issue decided in *Cumbie*) is different than the question of whether the Secretary has the authority to issue a regulation forbidding that practice. "The precise question before this court is whether the DOL may *regulate* the tip pooling practices of employers who did not take a tip credit. The restaurants and casinos argue that we answered this question in *Cumbie*. We did not. Our task in *Cumbie* was to decide whether a restaurant tip pooling practice violated the FLSA." Pet.App. 13a (emphasis added). The FLSA itself does not specifically address any employer uses of employee tips other than through a tip credit; the court of appeals held that this silence did not indicate that Congress wanted to protect from regulation all the other possible employer uses of employee tips. "Whereas the restaurants [and] casinos ... equate this silence concerning employers who do not take a tip credit to 'repudiation' of future regulation of such employers, we decline to make that great leap without more persuasive evidence." Pet. App. 18a. The court of Appeals rejected the employers' argument that by failing to address in section 3(m) any of those other possible schemes, "Congress clearly intended to deprive the DOL [of] the ability to [apply any restrictions on] employers who do not take a tip credit." Pet. 20a. "[S]ilence is meant to convey nothing more than a refusal to tie the agency's hands" Pet.App. 18a (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009)). Judge Smith, a member of the panel that had earlier decided *Cumbie*, dissented. Pet.App. 23a-32a.

*21 The employer-defendant in the instant case, and the employer-association plaintiff in *ORLA*, both filed petitions for rehearing en banc. The petition in the instant case was denied on April 1, 2016 (Pet. App. 40a), and this petition followed. The rehearing petition in *ORLA* was denied on September 6, 2016. 2016 WL 4608148 (9th Cir. Sept. 6, 2016). Judge O'Scannlain, the author of *Cumbie*, dissented from the denial of rehearing in *ORLA*. 2016 WL 4608148 at *1-*9.

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE VALIDITY OF 29 C.F.R. § 531.52

There is no circuit conflict regarding the validity of section 531.52. The only appellate decision to address that question is the Ninth Circuit opinion in the instant case. The petition repeatedly points to the Fourth Circuit decision in *Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442 (4th Cir. 2015). But the Fourth Circuit in *Trejo* made emphatically clear that it was not deciding the validity of section 531.52. 795 F.3d at 445 n. 5 “The Plaintiffs have repeatedly argued that they are pursuing a claim only under the FLSA and that the [2011] regulations are ‘not an issue’ in this case.... Accordingly, we have no occasion to opine on the validity of the regulations in this appeal.” 795 F.3d at 445 n. 5; *see* 795 F.3d at 451 (Harris, J., concurring)(“the majority carefully clarifies that we have no occasion to opine on the regulation today.”)¹⁹

*22 On pages 6, 19, and 24, the petition asserts that the court of appeals below held that the FLSA itself restricts use of employee tips by employers that are not taking a tip credit. E.g. Pet. 19 (“The Ninth Circuit[] hold[s] that the FLSA imposes freestanding ... restrictions on tip pooling and creates a circuit conflict.”)(emphasis and capitalization omitted). Such an interpretation of the FLSA, petitioners argue, would conflict with *Trejo*. But on pages 15 and 22, the petition acknowledges, to the contrary, that the opinion below actually accepted the earlier Ninth Circuit decision in *Cumbe* that the FLSA itself does not contain such restrictions, and much of the petition is devoted to arguing that the panel’s acceptance of *Cumbe* should have led it to invalidate section 531.52. Obviously these inconsistent descriptions of the decision below cannot both be correct. The latter version is the sound one; the panel decision proceeded from the premise that under *Cumbe* the FLSA itself does not restrict use of employee tips by an employer which does not take a tip credit. Pet.App. 13a-14a, 21a.²⁰ That is entirely consistent with the Fourth Circuit decision in *Trejo*.

***23 II. THERE IS NO CIRCUIT CONFLICT REGARDING WHETHER THE FLSA PROVIDES A PRIVATE CAUSE OF ACTION TO AN EMPLOYEE WHO ASSERTS A MINIMUM WAGE CLAIM ARISING OUT OF THE CONFISCATION OF HIS OR HER TIPS BY THE EMPLOYER**

The Fourth Circuit in *Trejo* held that the FLSA does not provide a private cause of action for plaintiffs “who are seeking only the recovery of tips *unrelated* to a minimum wage or overtime claim.” 795 F.3d at 448 emphasis added. In *Trejo* “the Plaintiffs essentially concede[d] that they do not have a private right of action under § 216(b) because they [were] not seeking damages for unpaid minimum wages.” 795 F.3d at 446; *see id.* at 450 (Harris, J., concurring)(“Plaintiffs ... expressly disclaim any connection between the tip-related practices of which they complain and the FLSA’s minimum wage requirements.”). The *Trejo* plaintiffs argued only that the tip-credit provision in section 203(m) “creates a free-standing right to bring a claim for lost ‘tip’ wages.” *Id.* at 447. The Fourth Circuit held that section 203(m) did not create such a private cause of action.

Petitioners claim that this aspect of *Trejo* conflicts with the Ninth Circuit decision in the instant case. That is clearly incorrect.

First, the Ninth Circuit never decided whether there is a private cause of action in this case. The district court rejected plaintiffs’ claim only on the ground that section 531.52 is invalid, and never reached Wynn’s separate argument that the plaintiffs have no private cause of action. Pet.App. 33a-38a. The Ninth Circuit also addressed only *24 the validity of section 531.52, and then remanded the case “for proceedings consistent with this opinion.” Pet.App. 22a. Petitioners object that the Ninth Circuit “permitted a suit by private employees to enforce [section 531.52]” (Pet. i), “allowed this suit by private plaintiffs to proceed” (Pet. 18), and “remanded the case to allow the litigation to proceed.” Pet. 25. But none of these objections assert that the Ninth Circuit ever determined or even discussed whether the plaintiffs have a private cause of action. With regard to the existence of a private cause of action, there is simply nothing in the Ninth Circuit opinion with which *Trejo* could conflict. Petitioners’ real grievance is that the Ninth Circuit declined to address an objection that the district court had not yet considered.

Second, - unlike the plaintiffs in *Trejo* - the plaintiffs in this case *do* assert that they were denied the minimum wage and overtime. In the instant case, unlike *Trejo*, the plaintiffs “[c]laim a[] connection between the tip-related practices of which they complain and the FLSA’s minimum wage requirements... [and] tie [the] purported tip violation to the Defendants ... minimum wage obligations” *Trejo*, 795 F.3d at 450 (Harris, J., concurring). Petitioners argue that “[t]he FLSA provides a private right of action *only* for workers seeking ‘unpaid minimum wages’ or ‘unpaid overtime compensation’ (or alleging retaliation).” Pet. 24 (quoting 29 U.S.C. § 216(b)) (emphasis in original). But that is precisely what the plaintiffs seek in this case. Petitioners rely repeatedly on the government’s brief in *Trejo*, which stated that “plaintiffs [who] are not pursuing minimum wage claims or overtime claims, but instead seek only to collect improperly withheld tips, ... do not have a cause

of action under the FLSA.” Dep’t *Trejo* Br. 11, (quoting Pet.App. 161a); see Pet.10, 24, 27. But in the instant case the plaintiffs are pursuing minimum *25 wage and overtime claims.²¹ The government brief in *Trejo* expressly argued that an employer’s improper use of employee tips would constitute a deduction from the employees’ wages, and would therefore violate the minimum wage law if the deduction brought those wages below the minimum wage.²² That is precisely what the plaintiffs contend occurred in the instant case.

III. THERE IS NO CIRCUIT CONFLICT REGARDING THE STANDARD FOR DETERMINING THE VALIDITY OF A SUBSTANTIVE REGULATION

Much of the petition is devoted to objections to the “reasoning” or “rationale” of the court of appeals opinion. Pet. 4, 6, 18. Petitioners assert that the Ninth Circuit held that any federal agency can adopt regulations about any topic whatsoever unless Congress has expressly forbidden the agency to act on that particular issue. Pet. 18. This aspect of the petition rests on a mischaracterization of the court of appeals decision.

*26 The substantive rule at issue here was adopted pursuant to the broad express rulemaking authority in section 29(b) of the Fair Labor Standards Amendments of 1974. Pub L. No. 93-259, § 29, 88 Stat. 55, 76 (1974). That provision authorizes the Secretary “to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.” The statutory requirements that a regulation be “with regard to” a provision of the 1974 Act, and be “necessary,” are precisely the limiting principles that petitioners object are missing from the court of appeals opinion.

Section 531.52 clearly is “related to” an “amendment[] made by th[e] Act”; it concerns the language in section 13(e), now codified in the second, third and fourth sentences in the section 203(m) tip provision. Neither petitioners nor the dissent in this case or *ORLA* dispute the Secretary’s finding that this regulation is needed to prevent circumvention of the restrictions in section 3(m) on employer use of employee tips. As the Secretary of Labor has repeatedly pointed out, in the absence of a limitation such as section 531.52, an employer could seize all of its employees’ tips, and use them to pay its entire minimum wage obligation, thus frustrating the provision in section 3(m) mandating that employers pay at least \$2.13 per hour from their own pockets.

Although the question presented refers circumspectly to tip pools, petitioners at times state quite clearly their view that the Secretary has no authority whatever to limit use of employee tips by an employer which does not take a tip credit. Pet. 19-20. On this view, Wynn could seize all tips and turn them over to its payroll department to be used to pay the federally required minimum wage and *27 overtime, or could create an \$8 million “tip pool” allocated entirely to the company CEO. In the district court cases cited approvingly in the petition, the employers in question had expropriated for their own use all of their employees’ tips, or all tips paid by credit card, or had used the seized tips to pay various business expenses (including wages), or to reward management employees.²³ If the Secretary could not adopt a regulation forbidding such practices, the limits in the section 3(m) tip provision would be virtually meaningless, because any employer could devise a scheme to circumvent the section 3(m) limitations. Since money is fungible, there is no practical difference between using expropriated tips to pay the minimum wage, and using those tips to give raises to managers or to buy slot machines, and then diverting for the payment of minimum wages the funds that would otherwise have been spent for those other purposes.

Nothing in the text of section 29(b) precludes the Secretary from addressing the manifest necessity of preventing such schemes. Wynn argues that the broad grant of authority in section 29(b) is restricted by the tip provision in section 13(e) of the 1974 Act, not because section 13(e) contains on its face any express limitation on the Secretary’s section 29(b) rulemaking authority, but solely because section 13(e) fails to mention any tip-related practices other than tip credits. Wynn contends that this mere silence - the absence from section 13(e), for example, of a prohibition against expropriation of a worker’s tips *28 to pay the worker’s entire minimum wage - implicitly excludes from the scope of the regulatory authority established by section 29(b) all tip-related practices that do not involve a tip credit subject to section 13(e). The court of appeals correctly rejected that argument, holding that in the face of the express and broadly written grant of rulemaking authority in section 29(b), Wynn was required to show that some other provision of the FLSA affirmatively barred the regulation at issue. It was silence in the face of the express grant of authority in section 29(b), not mere silence, that confirmed the Secretary’s power to adopt the regulation in question.

The Fourth Circuit decision in *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152 (4th Cir. 2013), on which

petitioners rely, refused to read such merely implicit limitations into an express grant of rulemaking authority. “[I]f Congress had intended to curtail in a particular area the broad rulemaking authority granted [by one section of a statute], we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section.” 721 F.3d at 159 (quoting *American Hospital Association v. NLRB*, 499 U.S. 606, 613 (1991)). Petitioners describe *Chamber of Commerce* as having “emphatically refused to equate the absence of statutory language directly addressing an issue with a license for an agency to regulate.” Pet. 33. But the aspect of this decision to which petitioners refer merely holds that because with regard to the particular regulation at issue in that case “there [was] no general grant of [rulemaking] power to the NLRB” at all, “there [was] simply no authority to be limited.” 721 F.3d at 159-60.

***29** This Court’s decision in *Mourning v. Family Publications Service, Inc.*, rejected precisely the argument advanced by petitioners. In that case, the substantive provisions of the Truth in Lending Act required disclosures of certain specified information *only* if a seller imposed a finance charge. Acting under a statutory provision authorizing the issuance of “necessary” regulations, the agency administering the Act required that those disclosures be made in any case in which a buyer was to pay for goods or services in more than four instalments, regardless of whether the seller imposed a finance charge. 15 U.S.C. § 1640. The defendant in *Mourning* challenged the validity of that regulation, arguing that “in requiring disclosure as to some transactions [those involving a finance charge], Congress intended to preclude the [agency] from imposing similar requirements as to any other transactions [those with no finance charge].” 411 U.S. at 372.²⁴ This Court ***30** upheld that regulation as reasonably adopted to prevent “evasion by subterfuges,” noting that a seller could simply build its finance charges into the price of the goods or services involved. 411 U.S. at 371. “To accept respondent’s argument would undermine the flexibility sought in vesting broad rulemaking authority in an administrative agency.” *Id.* at 372. “Neither the sections of the Truth in Lending Act which refer specifically to transactions involving finance charges nor any other section of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board’s regulations might apply.” *Id.* at 373. “Where the empowering provision of a statute states simply that the agency may ‘make ... such rules and regulations as may be necessary to carry out the provisions of this Act,’ we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’ ” *Id.* at 369 (quoting 42 U.S.C. § 1408 and *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280 (1969))(footnote omitted).

In *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), this Court upheld an FLSA regulation prohibiting homework in the embroidery industry. The FLSA itself did not impose any limitations on homework, but the Administrator was authorized to impose “such terms and conditions as the Administrator find necessary” to carry out the minimum wage rules. 324 U.S. at 248. The absence of any statutory limitation on homework did not mean that “homework was ... put beyond [the Administrator’s] power to prescribe the means necessary to achieve the purposes of the ... Act.” 324 U.S. at 262. “When command [to enforce the minimum wage standards] is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short ***31** of express limitation or abuse of discretion in finding necessity exists should undermine the action taken to execute it.” *Id.* at 255. The Ninth Circuit did not err in holding that, in the absence of any such express limitation in section 13(e), section 29(b) authorized the Secretary to issue section 531.52.

Petitioner argues that because the Ninth Circuit had earlier held in *Cumby* that the FLSA itself clearly did not restrict the use of employee tips by an employer which did not claim a tip credit, the court below was required to hold section 531.52 invalid. But that argument overlooks the critical distinction between an interpretive regulation and a substantive regulation promulgated after notice and comment. See *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1203-04 (2015). The cases on which petitioners rely concern agency rules or regulations which merely interpret statutory provisions. In such cases, a finding that the statute is unambiguous indeed ends the inquiry. “A court’s prior judicial construction of a statute trumps agency *construction* otherwise entitled to ... deference ... if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) (emphasis added). But in the instant case, section 531.52 is a substantive rule, adopted after formal notice and comment, and intended (like the regulations in *Mourning* and *Gemsco*) to prevent evasion of - not merely to reiterate - the commands of the statute. Such regulations can create obligations and rights over and above those contained in the underlying statute; the very purpose of the authority provided in provisions such as section 29(b) is to authorize such regulatory action.

***32 CONCLUSION**

For the above reasons, certiorari should be denied.

Footnotes

- ¹ The effect of subsection (1) is to require employers to pay at least \$2.13 an hour, no matter how much their employees earn in tips.
- ² See Brief of the Secretary of Labor as *Amicus Curiae* In Support of Plaintiff-Appellant, *Cumbe v. Woody Woo, Inc.*, No. 08-35718 (9th Cir.), pp. 10-12.
- ³ This is the same provision that authorized the regulations upheld in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007). The statutory exemption for domestic service employees was part of the 1974 FLSA amendments.
- ⁴ 29 C.F.R. § 531.55 (1970).
- ⁵ “[W]here tips are redistributed to employees who do not customarily and regularly receive tips ..., an employee who has originally received tips will be considered to have contributed all such improperly redistributed tips to the employer for purposes of determining where he or she has received the minimum wage, free and clear.” *Id.*
- ⁶ Petitioner asserts that the regulations were adopted “in response to *Cumbe*” (Pet. 12) and “for the express purpose of repudiating the [Ninth Circuit’s] prior decision [in *Cumbe*].” Pet. 17-18. The Department’s proposal pre-dated *Cumbe* by two years, and always contained the general rule that an employer may not use an employee’s tips for purposes outside the scope of section 3(m).
- ⁷ Letter of Randel Johnson to Wage and Hour Division, Sept. 26, 2008 (“the Proposed Rules will eliminate references in [the pre1974 regulations] to agreements between employer and employees that would make tips the property of employer or require employees to turn tips over to employers. Congress amended the FLSA in 1974 to clarify that employers are not permitted to retain employees. ... [T]he Proposed Rules will eliminate the misleading and confusing references. The Chamber supports these revisions”).
- ⁸ Pet. App. 104a (“Under the 1974 amendments to section 3(m), an employer’s ability to utilize an employee’s tips is limited to taking a credit against the employee’s tips as permitted by section 3(m). Section 3(m) provides the only method by which an employee may use the tips received by an employee.”), 111a (“Congress... amended the FLSA’s tip credit provisions in 1974 to clarify that section 3(m) provides the only permitted uses of an employee’s tips - through a tip credit or a valid tip pool among those employees who customarily and regularly receive tips. This has been the Department’s longstanding position since the 1974 amendments.”), 112a (“section 3(m) provides the only permissible uses of an employee’s tips regardless of whether a tip credit is taken.”), 117a (“section 3(m) sets forth the only permitted uses of an employee’s tips - whether or not the employer has elected the tip credit.”). The commentary noted the contrary interpretation of section 3(m) in *Cumbe*, which had been decided after the initial NPRM, and set forth the agency’s reasons for disagreeing with that opinion. Pet.App. 113a-116a.
- ⁹ Pet. App. 116a (in the absence of the regulation, “an employer could simply eschew the tip credit and use a greater part of its employees’ tips toward its minimum wage obligation than permitted under section 3(m)”); “instead of using only a portion of its employees’ tips to fulfill its minimum wage obligation, [an employer] could use all of its employees’ tips to fulfill its entire minimum wage obligation to the tipped employees or other employees.”; “[in the absence of such a regulation] an employer can mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose.”); 117a (“an employer that does not utilize a tip credit [could] use its employee’s tips to a greater extent than an employer that does utilize such credit. This ... makes the 1974 amendment superfluous.”).
- ¹⁰ Pet. App. 105a (“[where the employer had only paid the worker the minimum wage] any deductions by the employer from the employee’s tips would result in a violation of the employer’s minimum wage obligation”).
- ¹¹ Complaint, Doc. 6, pp. 3-5; see *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 98-99 (Nev. 2008).
- ¹² *Id.*
- ¹³ Affidavit of Daniel Baldonado, Doc 19-1, p. 6.
- ¹⁴ A dealer who worked 40 hours a week for 50 weeks a year and paid the minimum wage of \$7.25 would earn \$14,500.

- 15 Complaint, paragraph 13:
Defendants, by implementing the policies alleged [above], have effectively failed to pay any wages whatsoever to the plaintiffs, in that defendants recoup from the plaintiffs, through the taking of a portion of the plaintiffs' tips, an amount far in excess of the amount it nominally pays to the plaintiffs from the defendants' own funds, such actions by the defendants violating the purpose and intent of the FLSA which is to make all employers pay FLSA required minimum wages and overtime wages and all other wages solely from the resources of the employer and not by appropriating employee tips to make such wage payments, the FLSA also preventing an employer from engaging in such an appropriation by using a tip pool, such as the one used by defendants, to compensate employees who do not regularly and customarily receive tips with a portion of the tips received by other employees who do regularly and customarily receive tips.
Doc. 6, pp. 4-5.
- 16 The complaint also alleged that the seizure of the dealer tips resulted in a violation of the overtime provisions of the FLSA.
- 17 Response in Opposition to Defendants' Motion to Dismiss, p. 2 ("[The] defendants ... seek to ... evad[e] the Fair Labor Standards Act's ... minimum wage requirements.... Defendants would do so by taking the tips received by the plaintiffs and actually paying the plaintiffs nothing whatsoever, as those seized tips will far exceed the \$7.25 an hour minimum wage the defendants give back to the plaintiffs.");
Appellants' Opening Brief, pp. 11-12 ("This ... arrangement allows Wynn to take the tips received by the Dealers and actually pay the Dealers nothing whatsoever, as the seized tips will far exceed the \$7.25 an hour minimum wage the Wynn gives ... to the Dealers in the form of 'minimum wage.' "); Appellants' Reply Brief, pp 1-2 ("The Wynn assets that: [']plaintiffs do not ... contend that the Wynn failed to make a cash wage payment in an amount equal to or greater than the minimum wage....['] Wynn Brief p. 9. The Dealers contend ... that the Wynn has done precisely what the Wynn insists the plaintiffs "do not ... contend." It is undisputed that the Wynn takes tips give to its dealers It is also undisputed that the amount so taken by Wynn is far in excess of the minimum hourly wage.")
- 18 "When the employer uses tips for its own purposes, whether to supplement wage payments to non-tipped employees or to otherwise offset its own business expenses, such as by taking the tips directly from employees and putting them in the cash register, it is in effect making a deduction from employees' wages. The use of tips by the employer for its own purposes permits the employer to shift its costs to the employee To this end, the department is not regulating the employer's use of the tips; it is regulating the employer's statutory wage payment obligation. Depending on the amount of the direct wage payment made by the employer, the deduction may bring the employee below the minimum wage. This would constitute a violation of the FLSA because an employer cannot be permitted to undermine the minimum wage and overtime guarantees of the FLSA by paying an employee wages and then requiring the employee to bear a portion of the employer's expenses."
- 19 The Fourth Circuit in *Trejo* concluded only that the FLSA itself does not restrict the manner in which an employer who does not utilize a tip credit may seize and use its workers tips. 795 F.3d at 448. In his dissenting opinion in *ORLA*, Judge O'Scannlain insisted "that holding necessarily forecloses the Department's effort to ban tip pooling by employers who do not take a tip credit." *Oregon Restaurant and Lodging Ass'n v. Perez*, 2016 WL 4608148 at *9 (9th Cir. Sept. 6, 2016)(O'Scannlain, J., dissenting from denial of rehearing en banc). But the central conclusion of the Ninth Circuit in the instant case is the absence of such a requirement in the FLSA itself does *not* necessarily mean that the Secretary could not impose such a requirement by regulation.
- 20 Judge O'Scannlain correctly characterized the opinion below in this way. 2016 WL 4608148 at *4.
- 21 Petitioners argue that "[a]s the Department has acknowledged, '[t]here is no cause of action' under Section [2]16(b) for claims for tips 'divorced from a minimum wage claim or an overtime claim.' " Pet. 10 (quoting Dep't *Trejo* Br. 12). In the instant case, however, plaintiffs' objections to Wynn's tip practices are married to a wage and overtime claim.
- 22 Pet.App. 162a-63a ("When an employer uses tips for its own purposes, whether to supplement wage payments to non-tipped employees through an invalid tip pool or to otherwise offset its own business expenses, such as by taking the tips directly from employees and putting them in the cash register, it is in effect making a deduction from employees' wages... Depending on the amount of direct wage payment made by the employer, the deduction may bring an employee below the minimum wage. This would constitute a violation of the FLSA").
- 23 *Brueningsen v. Resort Express Inc.*, 2015 WL 339671 at *1 (D.Utah. Jan. 26, 2015); *Azeez v. Ramaiah*, 2015 WL 1637871 at *7 (S.D.N.Y. April 9, 2015); *Malivuk v. Ameripark, LLC*, 2016 WL 3999878 at *1 (N.D.Ga. July 26, 2016) *Platek v. Duquesne Club*, 961 F.Supp. 835, 836 (W.D.Pa. 1995).
- 24 See Brief for Respondent, *Mourning v. Family Publications Service, Inc.*, 15-16:
It is petitioner's fundamental contention that: "The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave

regulation of the transaction to the Board.” Pet. Br. 9. This position is clearly unsound.... Congress ... specifically limited the scope of the Act to creditors who impose a finance charge ... [T]he explicit limitation of the requirements of the Act to finance charge transactions cannot rationally be said to manifest “an intent to leave regulation of [all other transactions] to the Board.” Plaintiffs thesis would lead to the conclusion that the Board is authorized to regulate everything not dealt with by Congress.

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Sent: Fri 10/13/2017 4:21:30 PM
Importance: Normal
Subject: RE: EXPEDITED Clearance Request: WHD NPRM - due Friday COB
Received: Fri 10/13/2017 4:22:01 PM
Tip NPRM redlined version for Dept. Clearance 10-12-17 final v2 sca.docx

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Sent: Thursday, October 12, 2017 7:10 PM
To: (b) (6)
Subject: Fwd: EXPEDITED Clearance Request: WHD NPRM - due Friday COB

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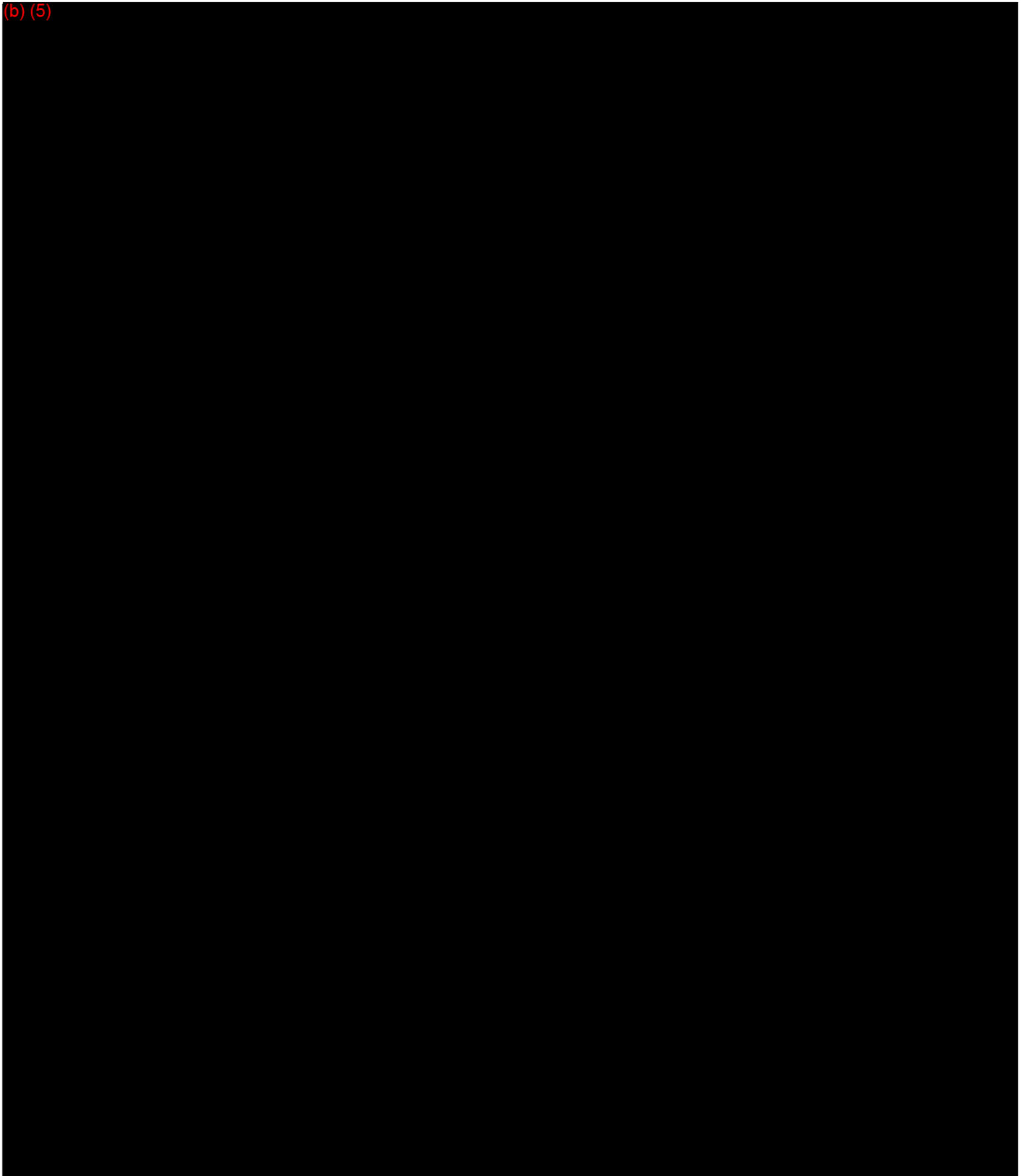
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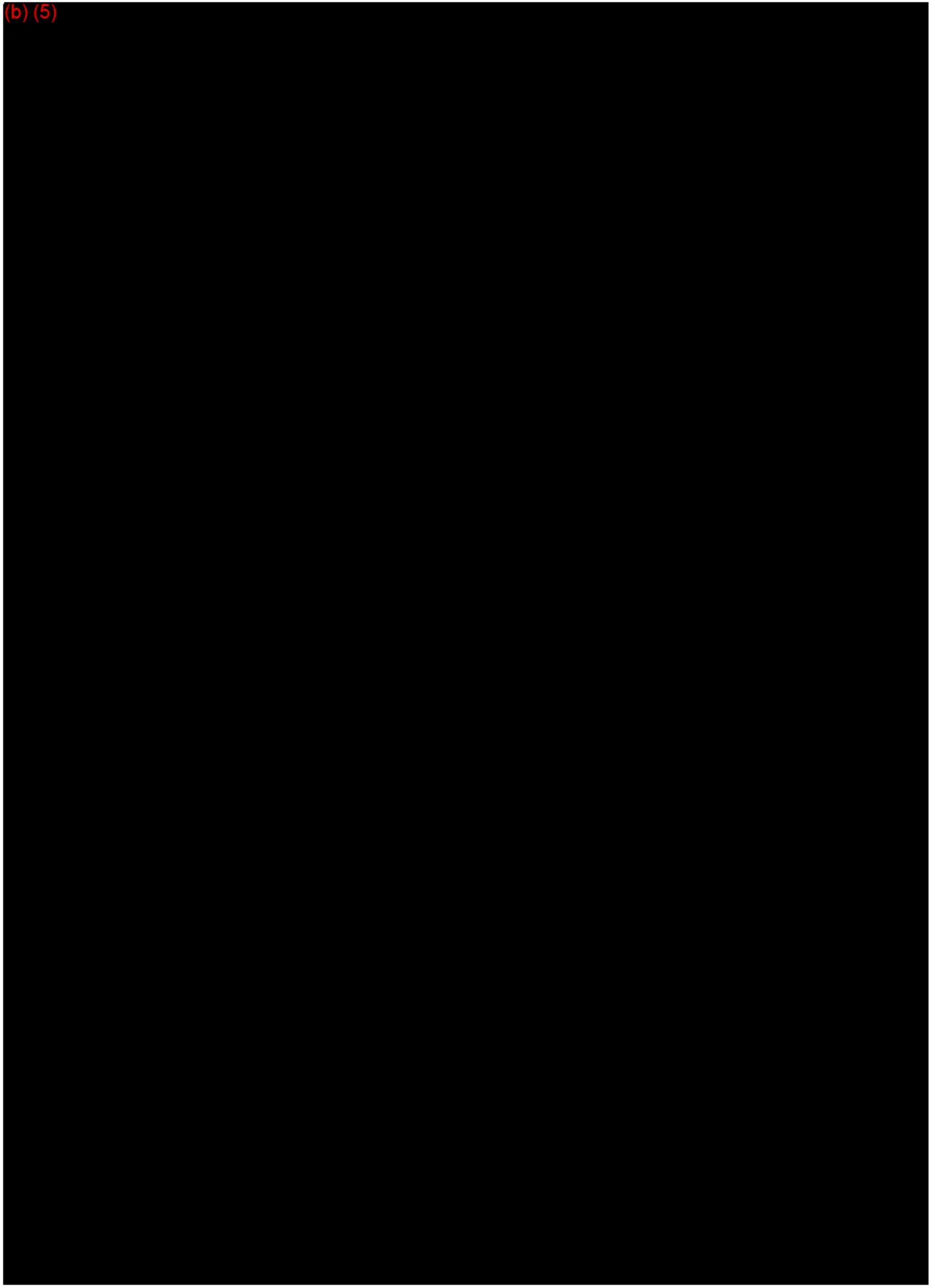
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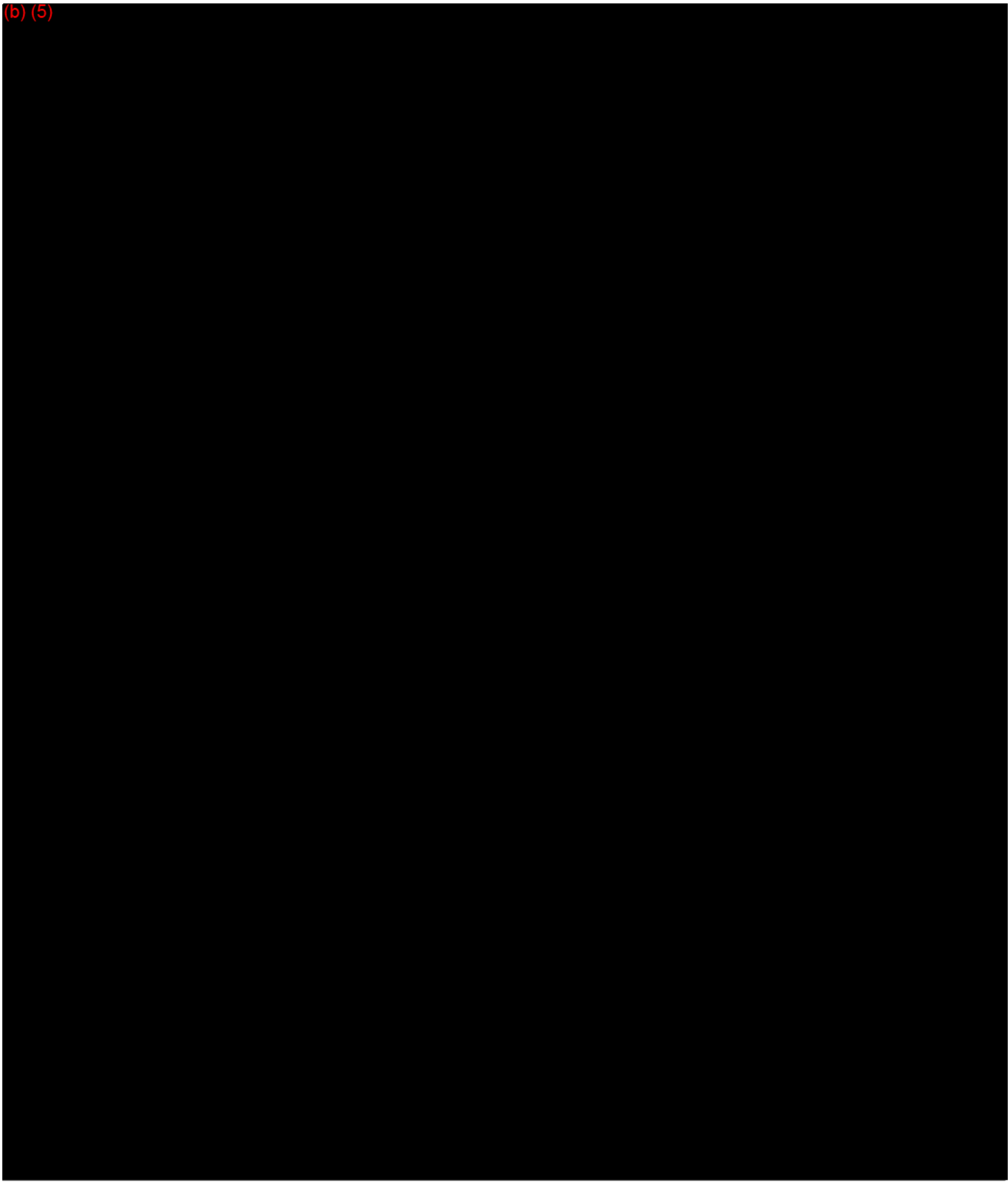
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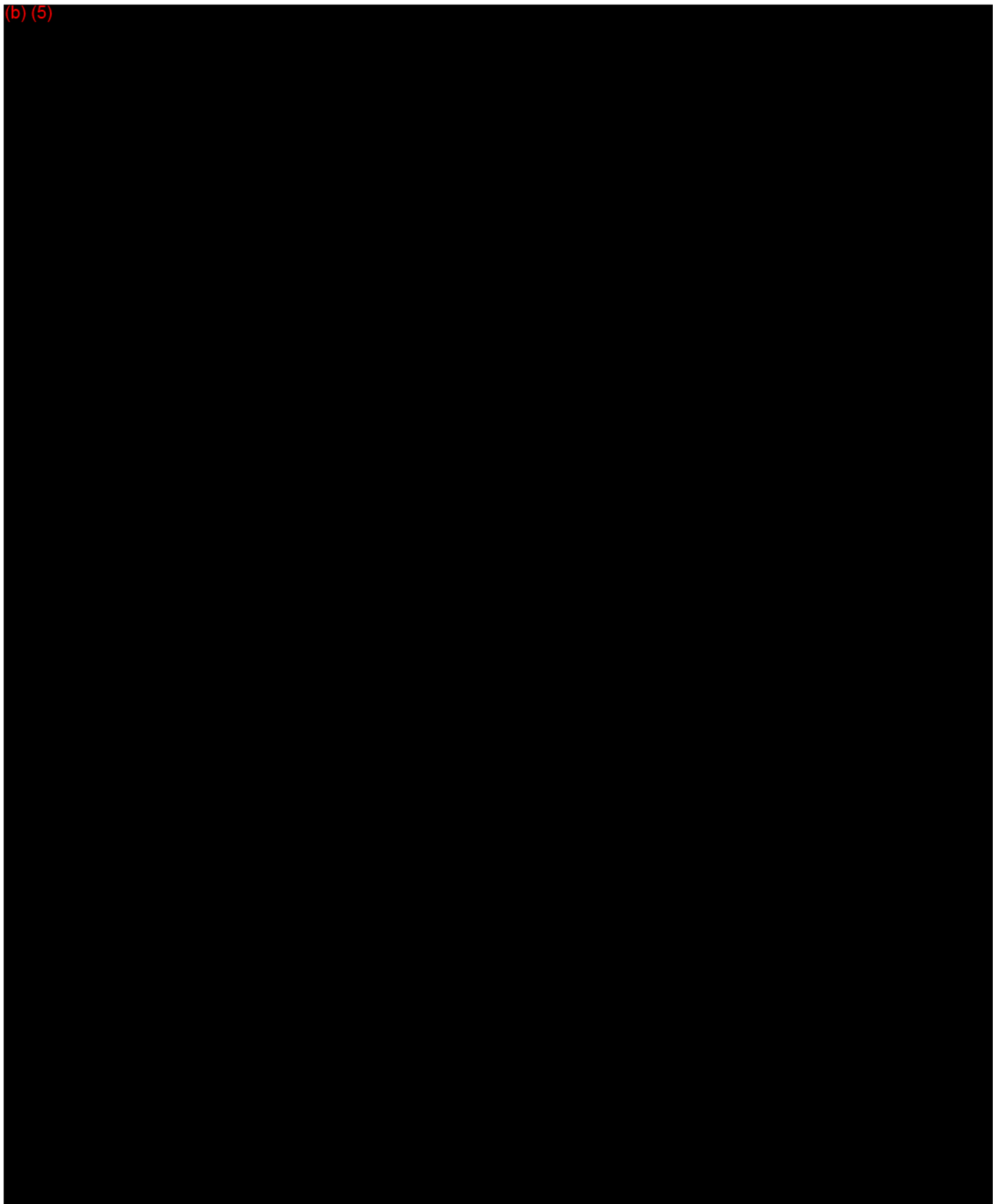


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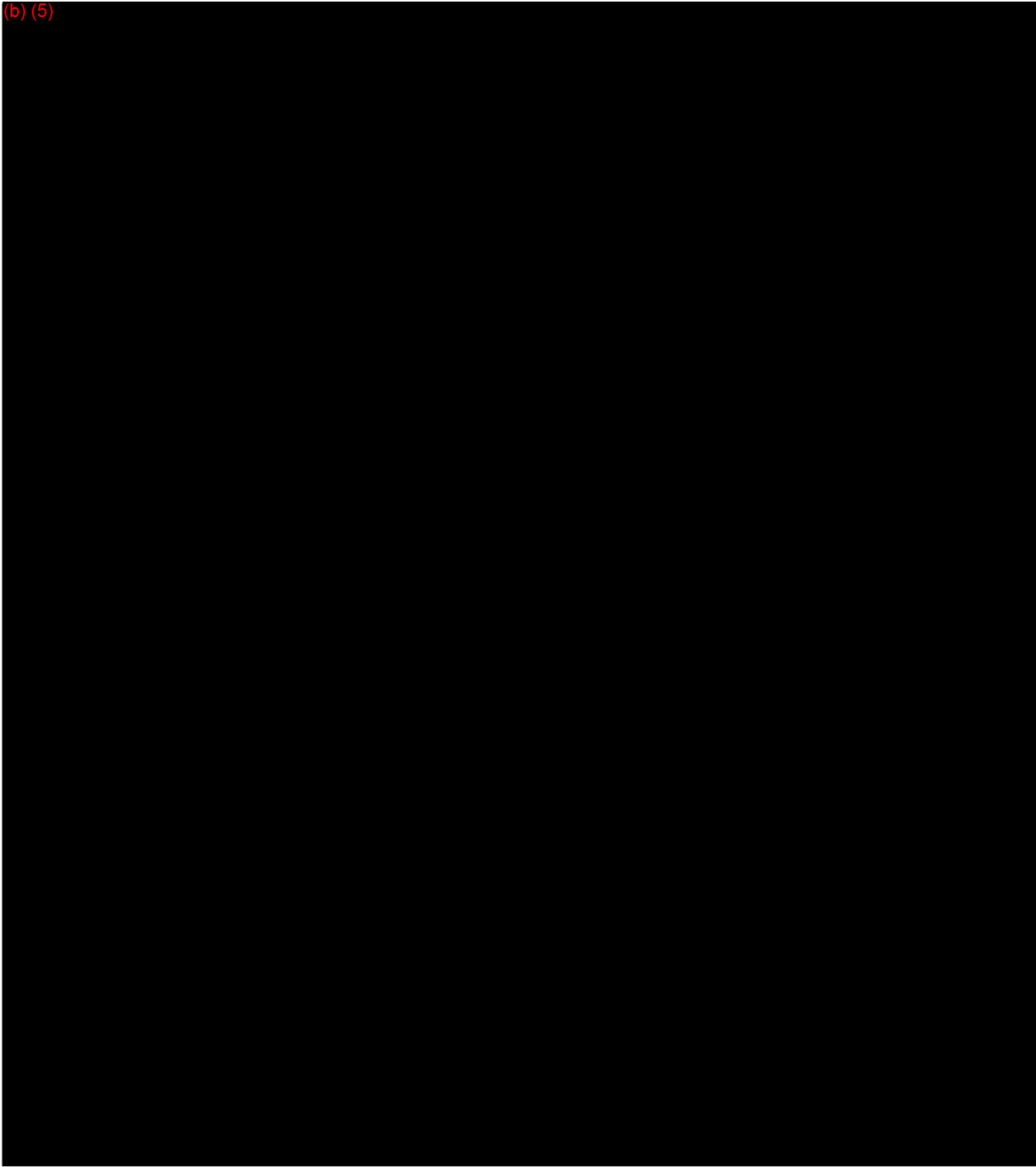
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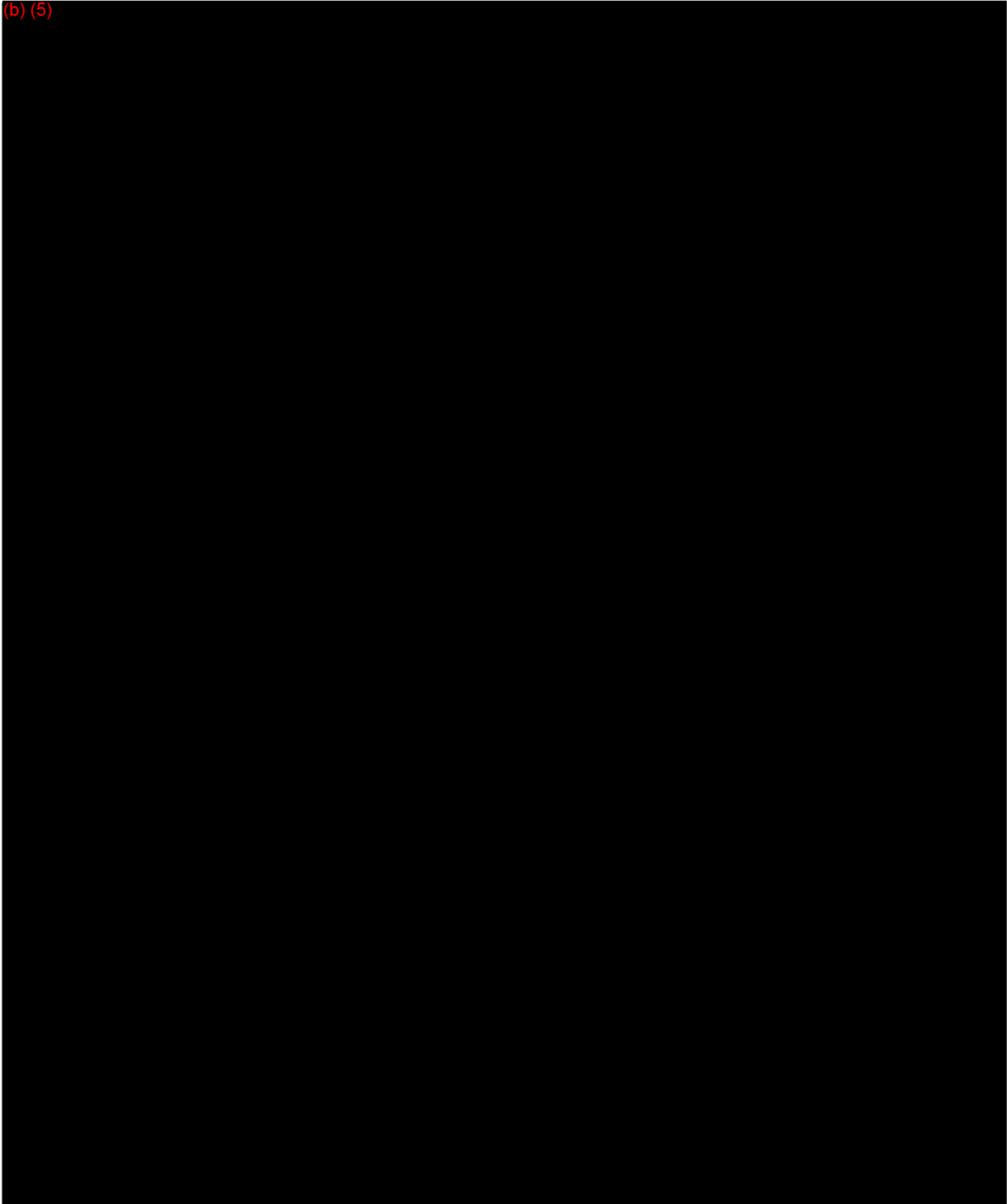


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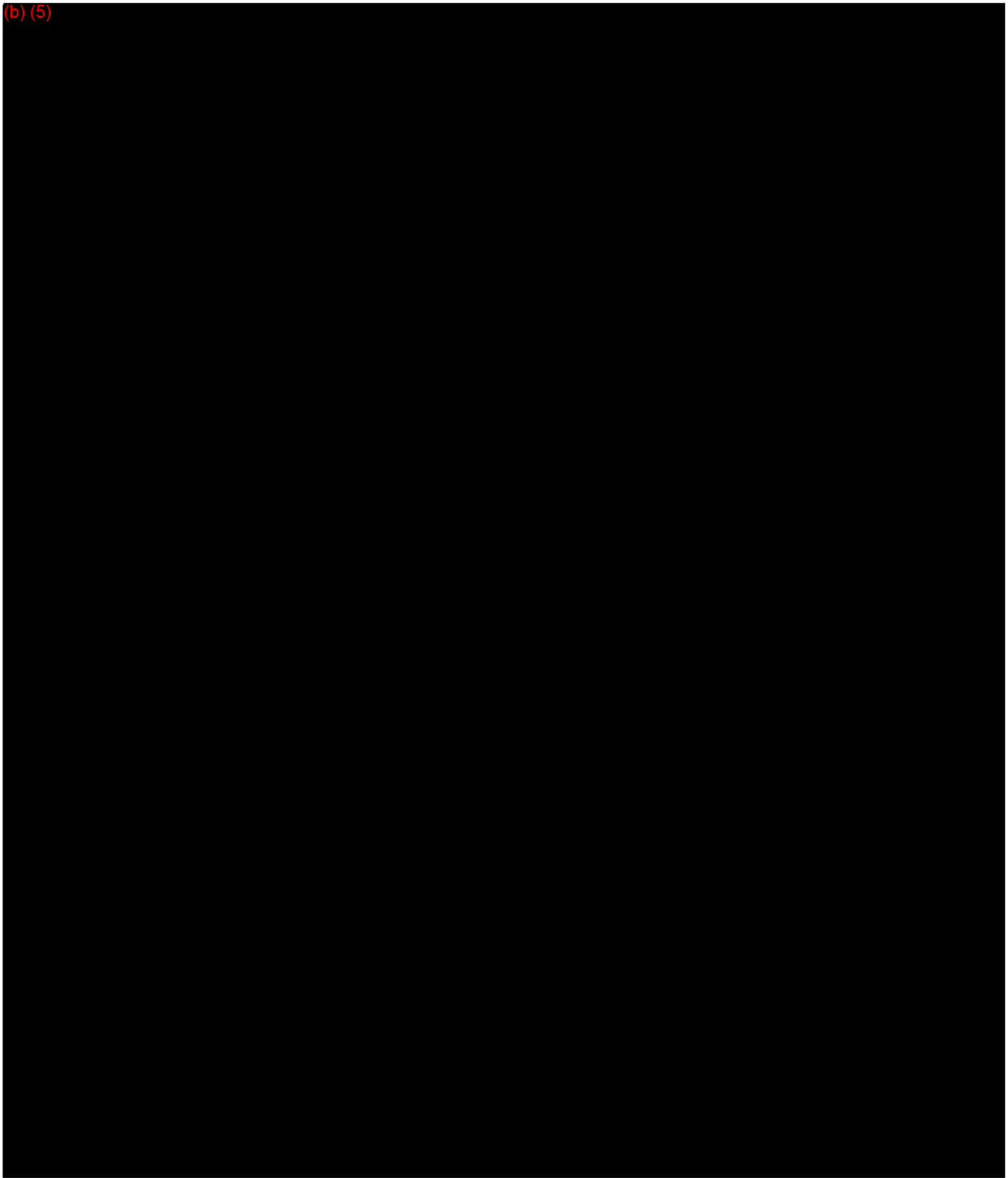
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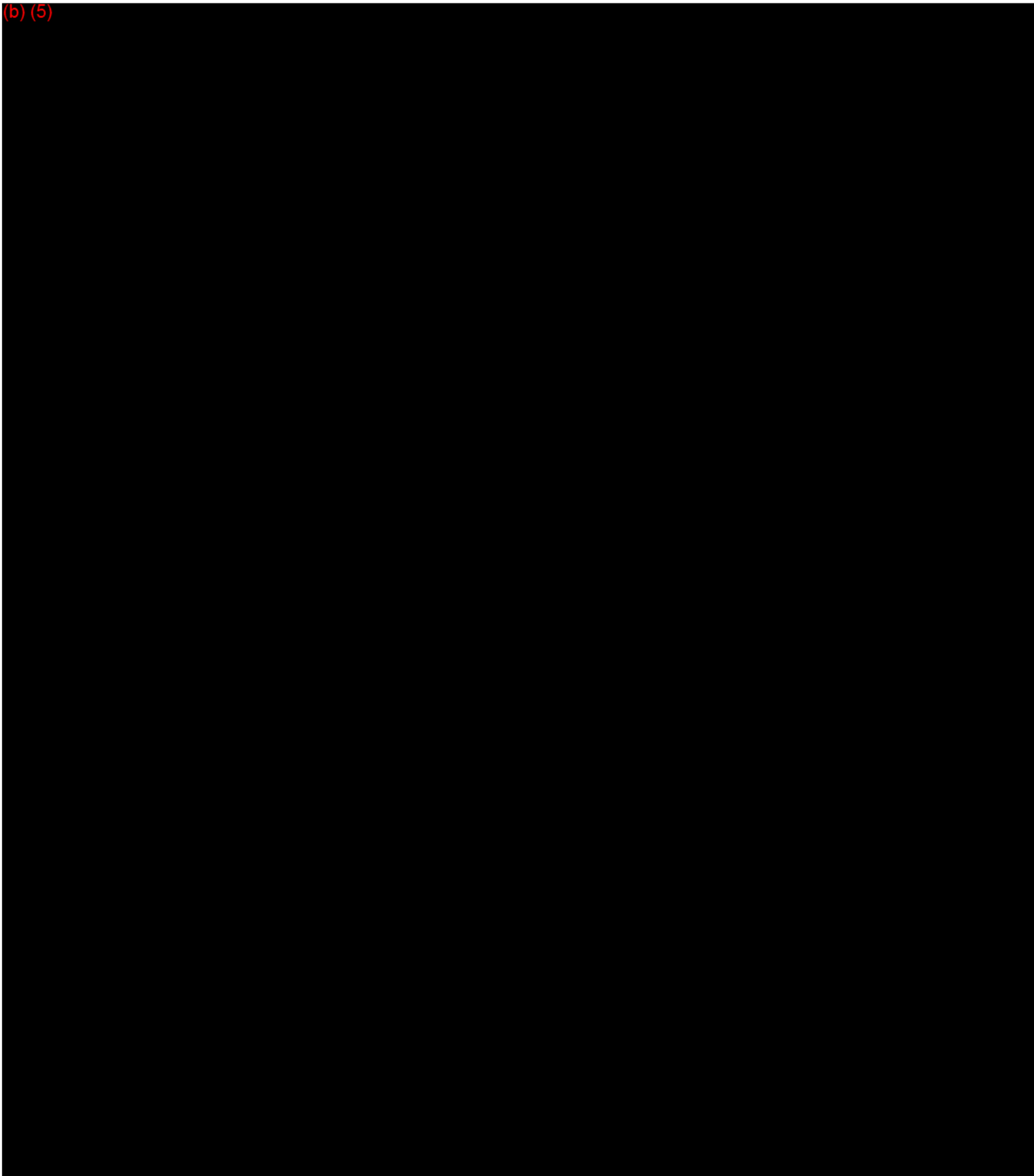
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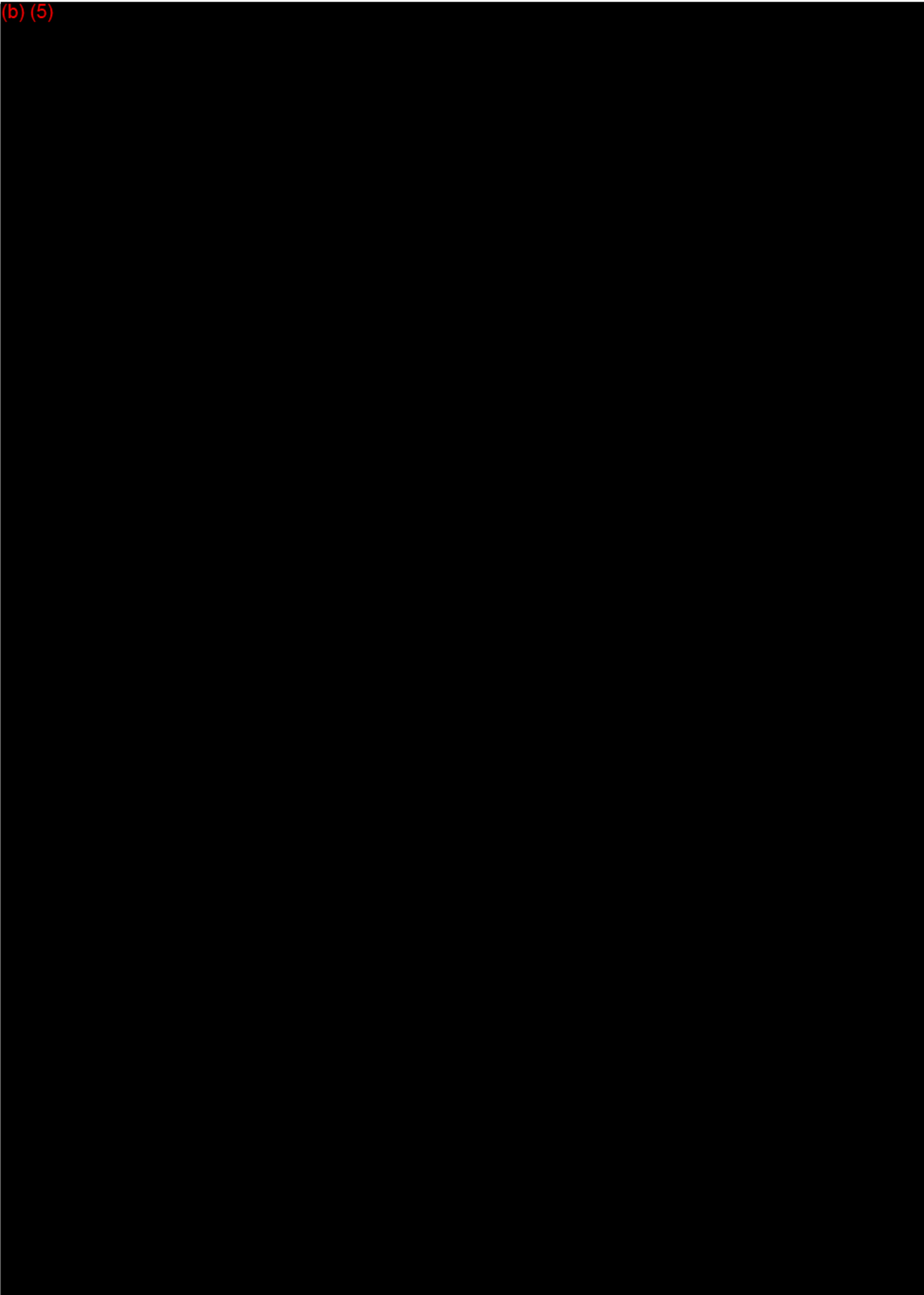
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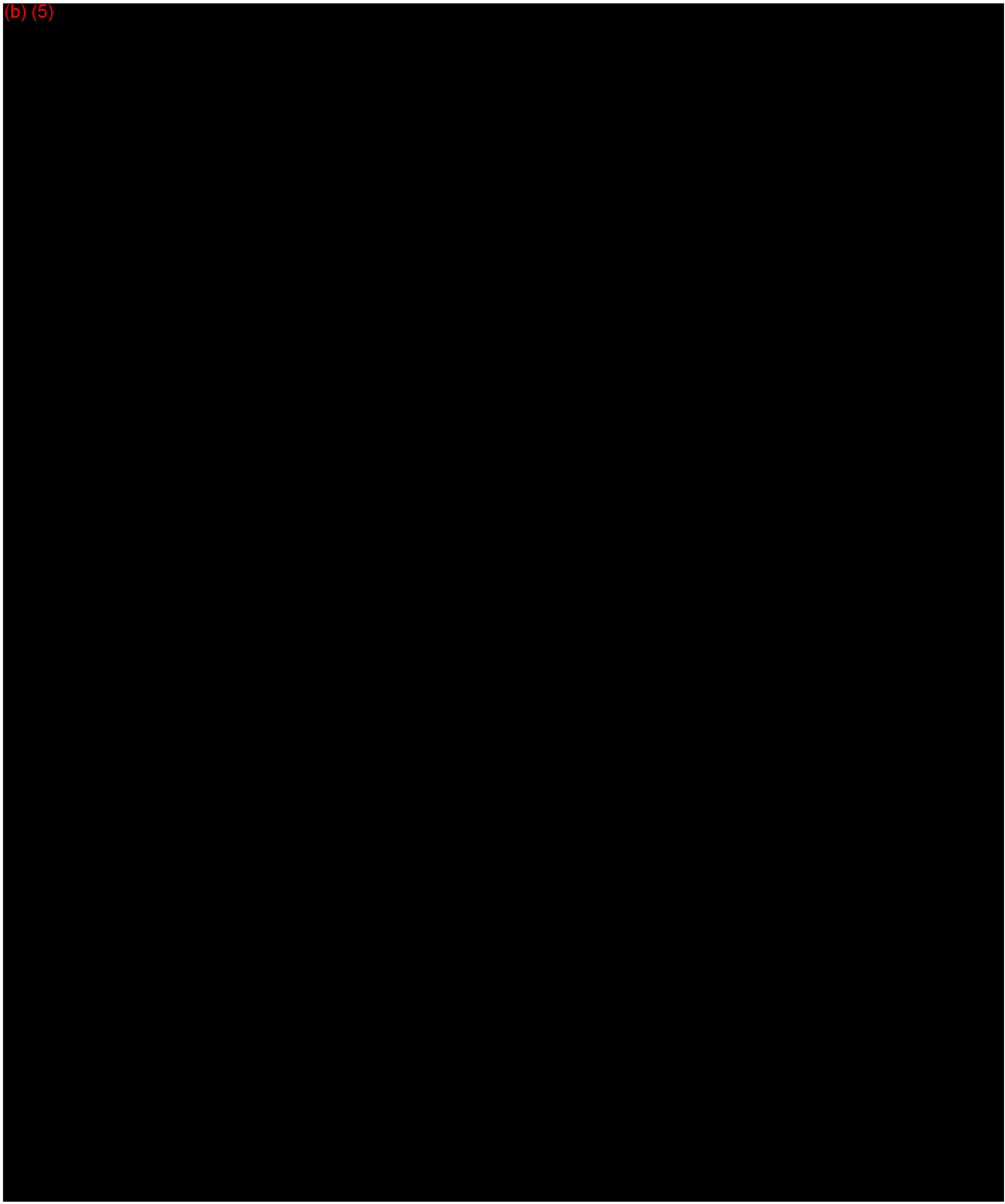
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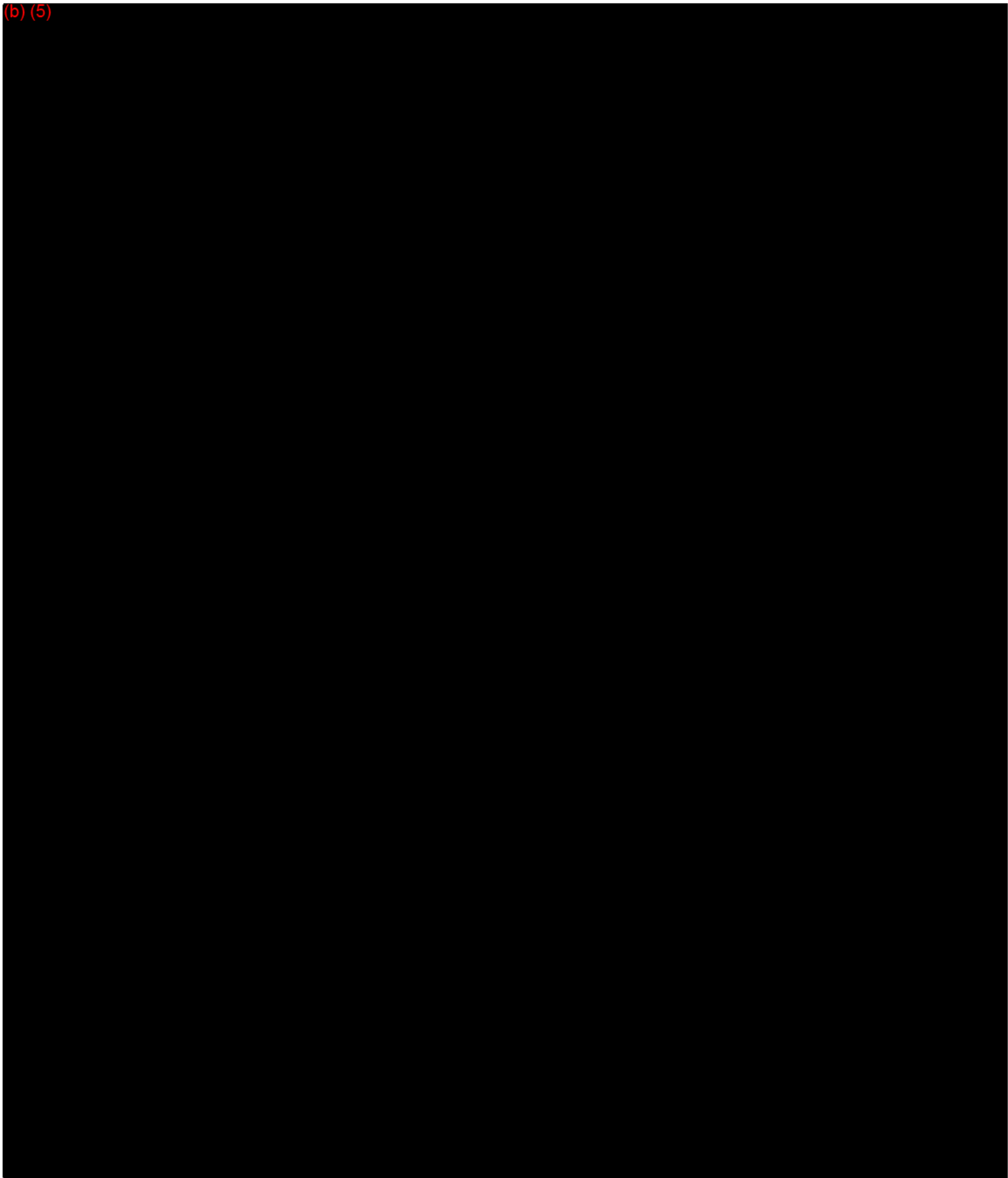
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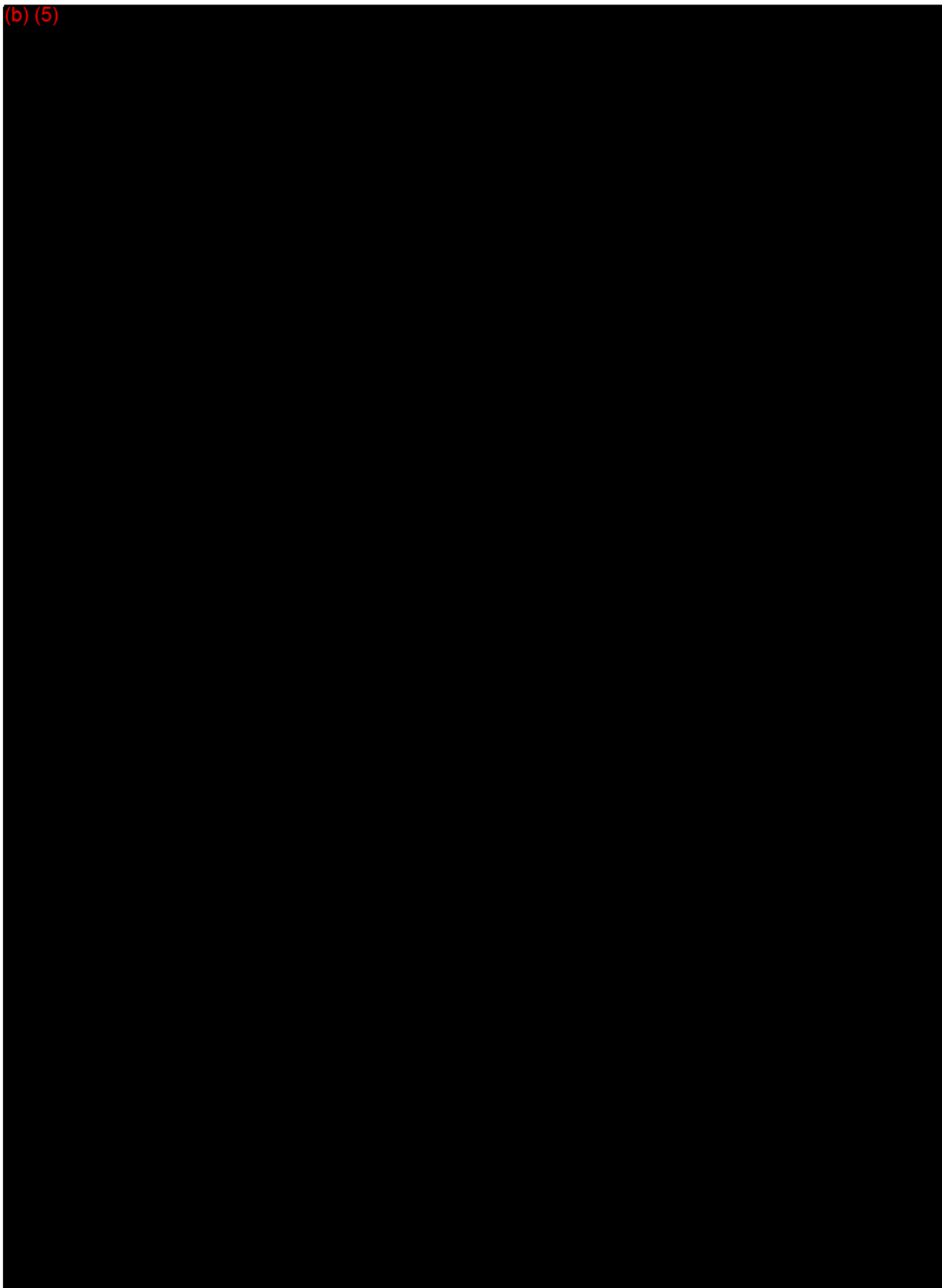
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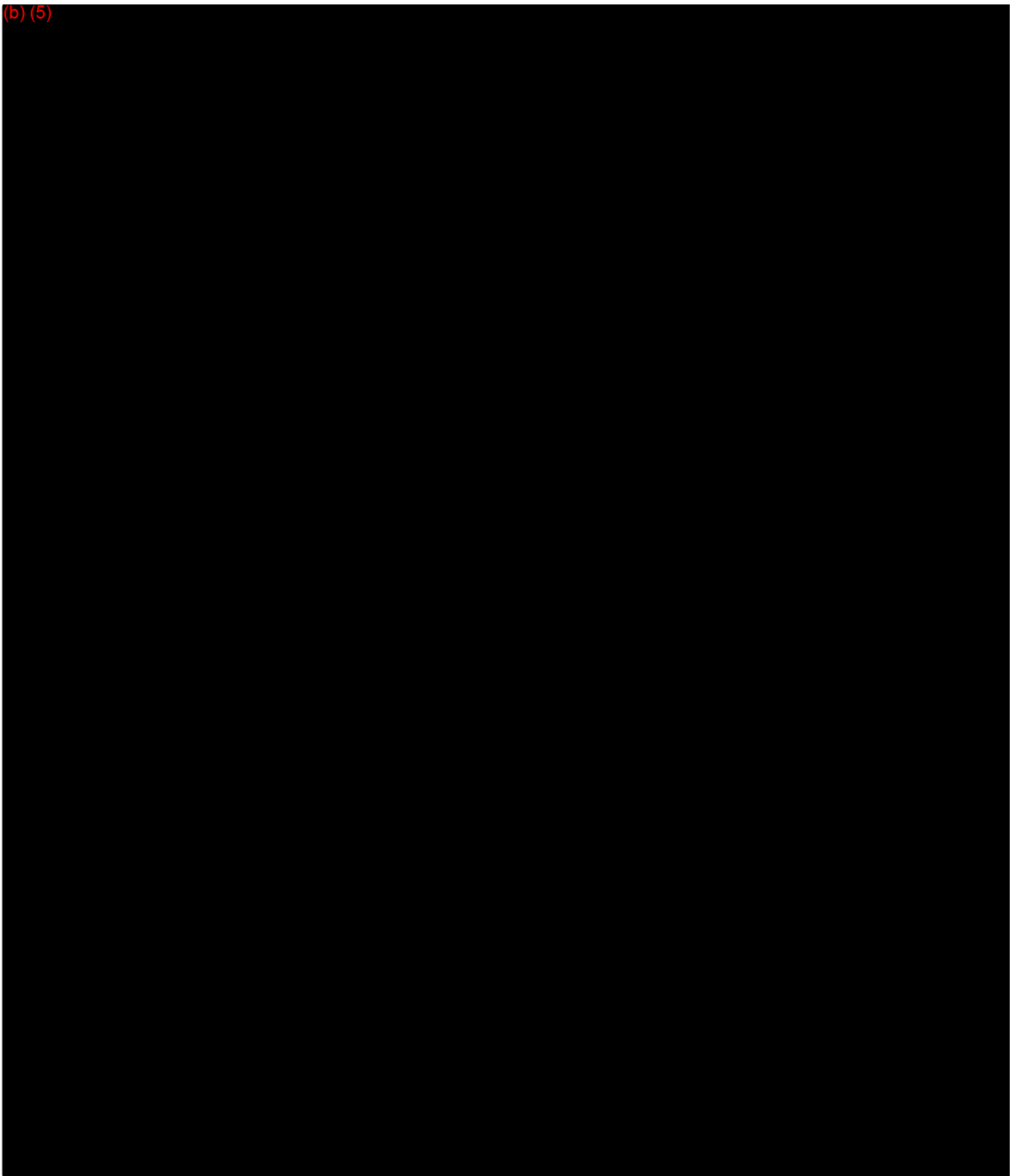


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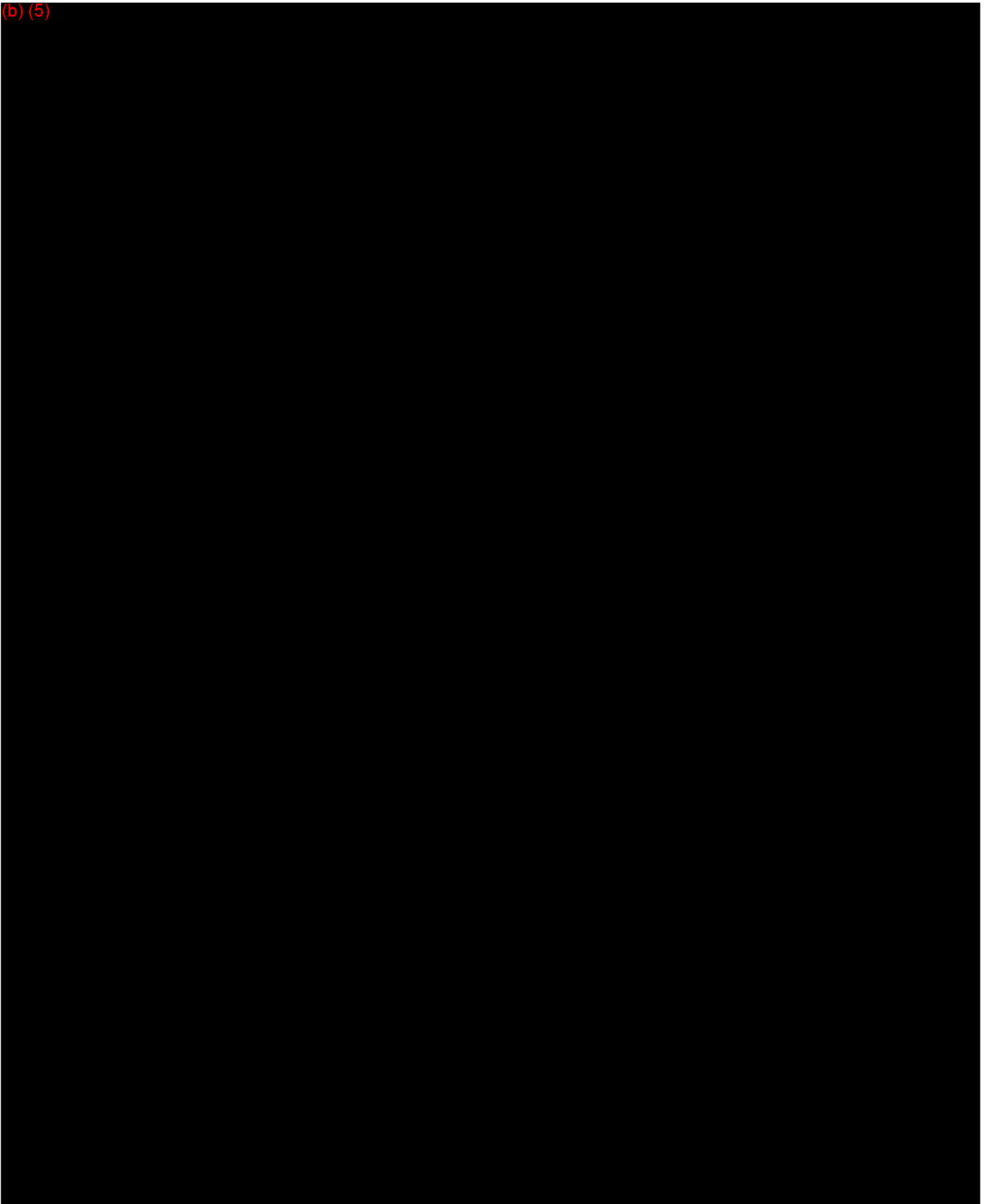
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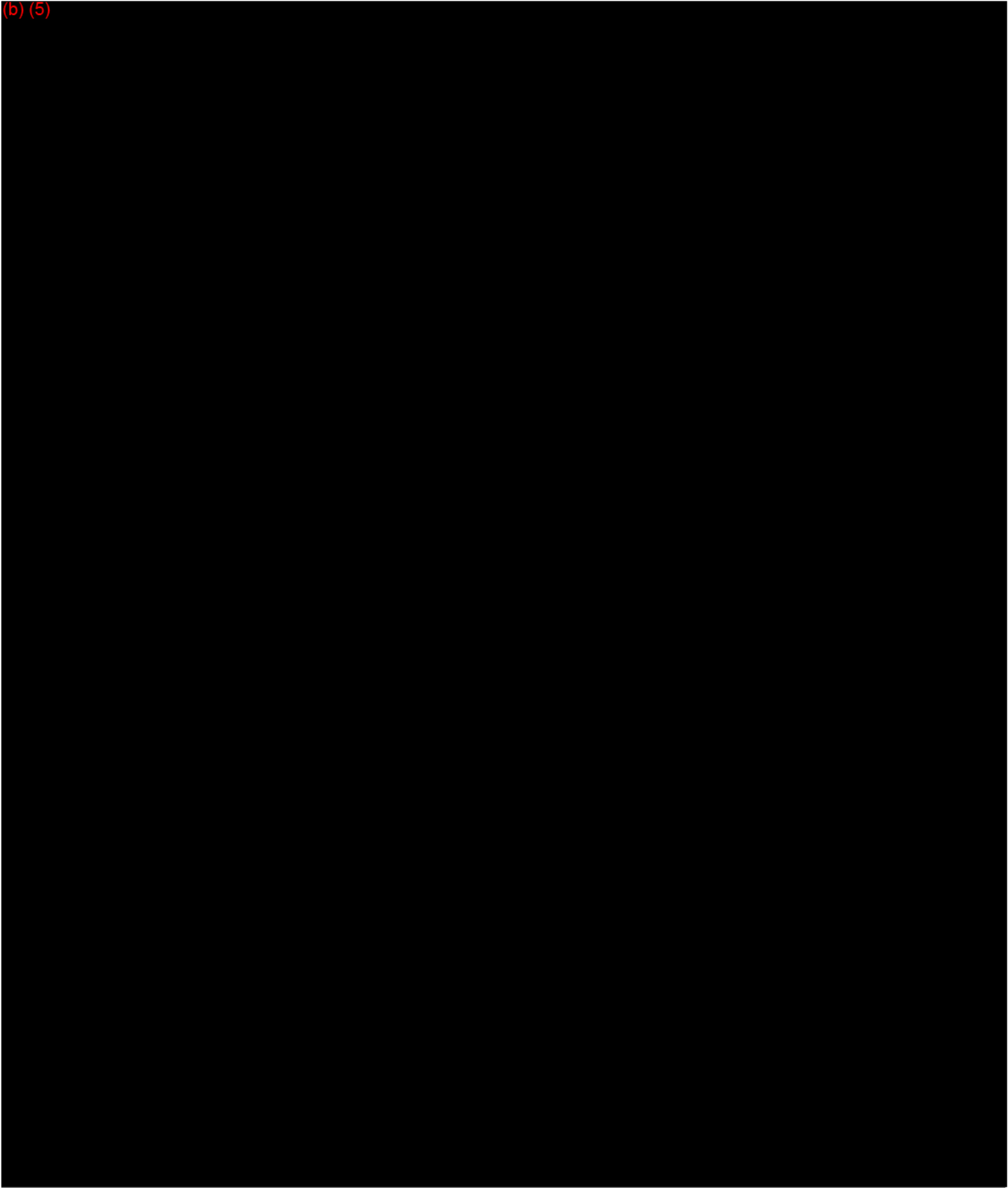
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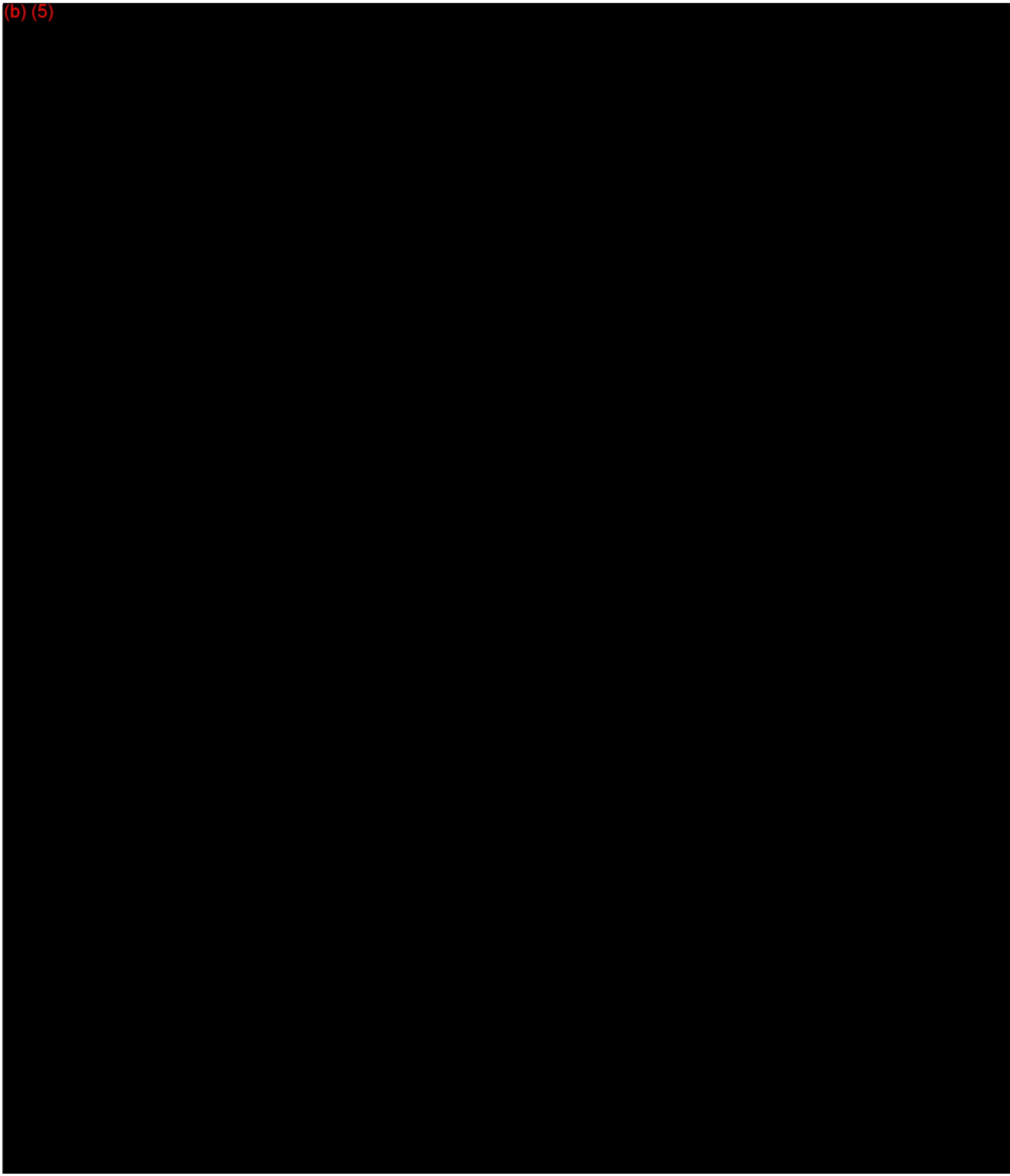
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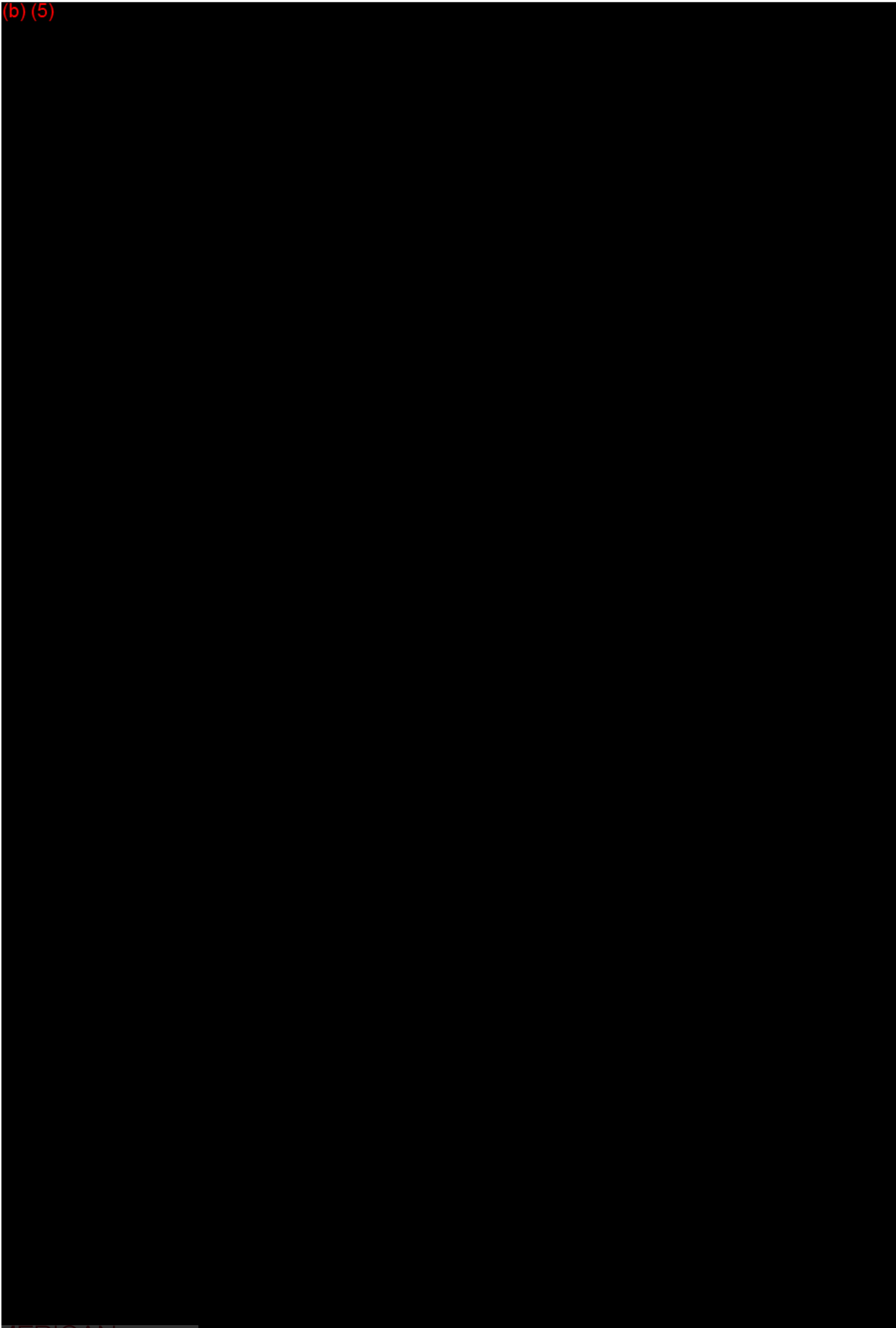


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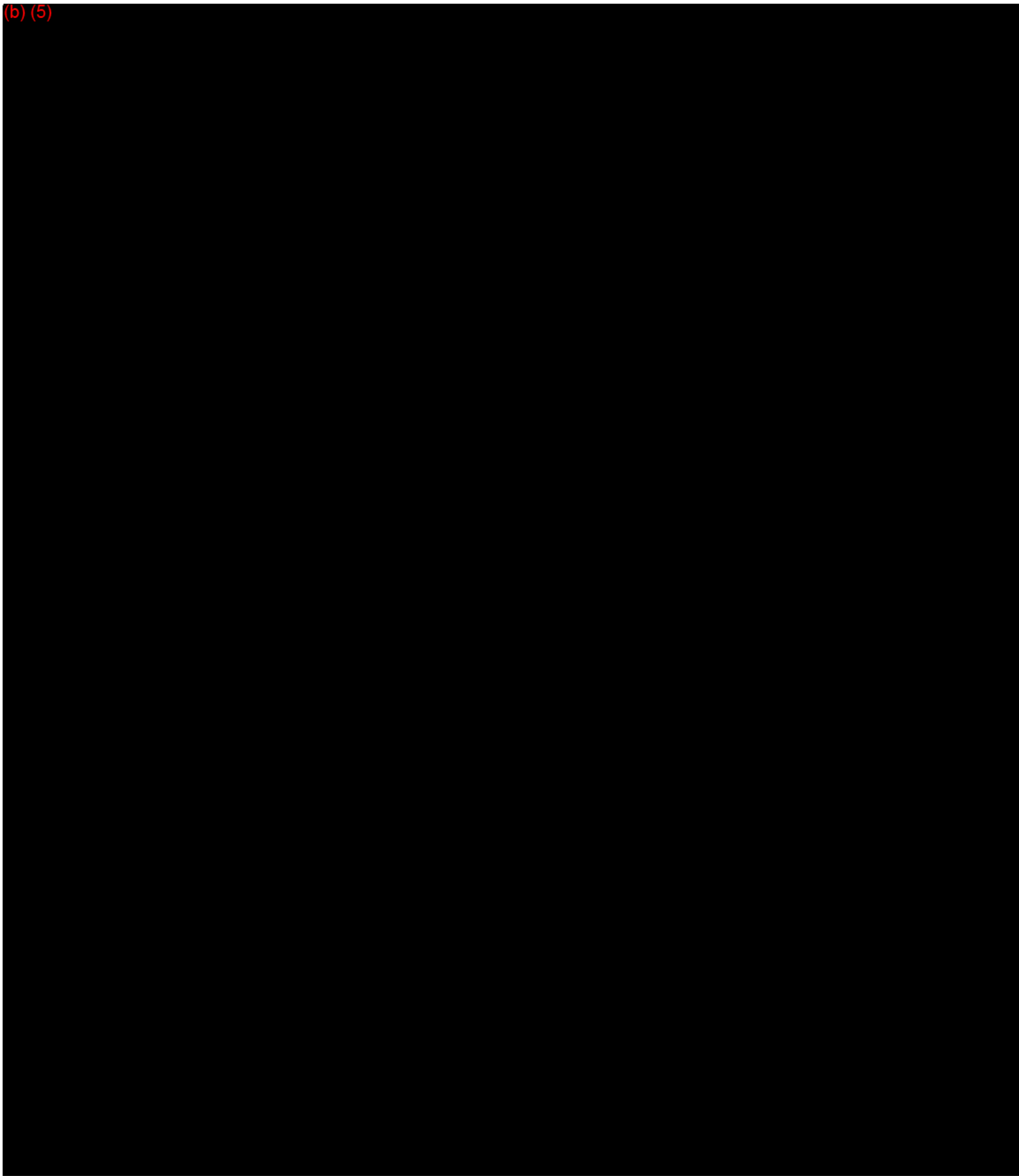


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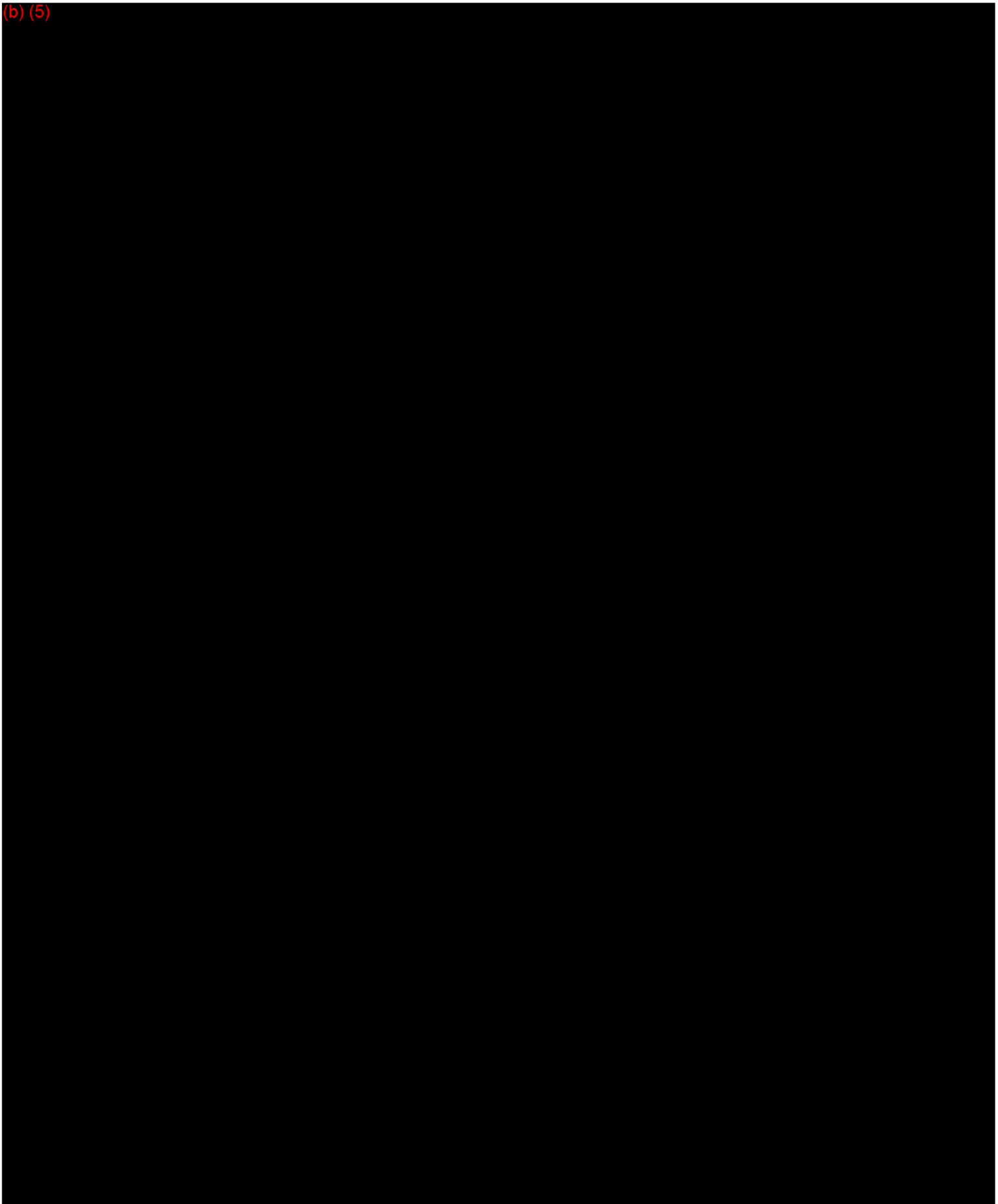
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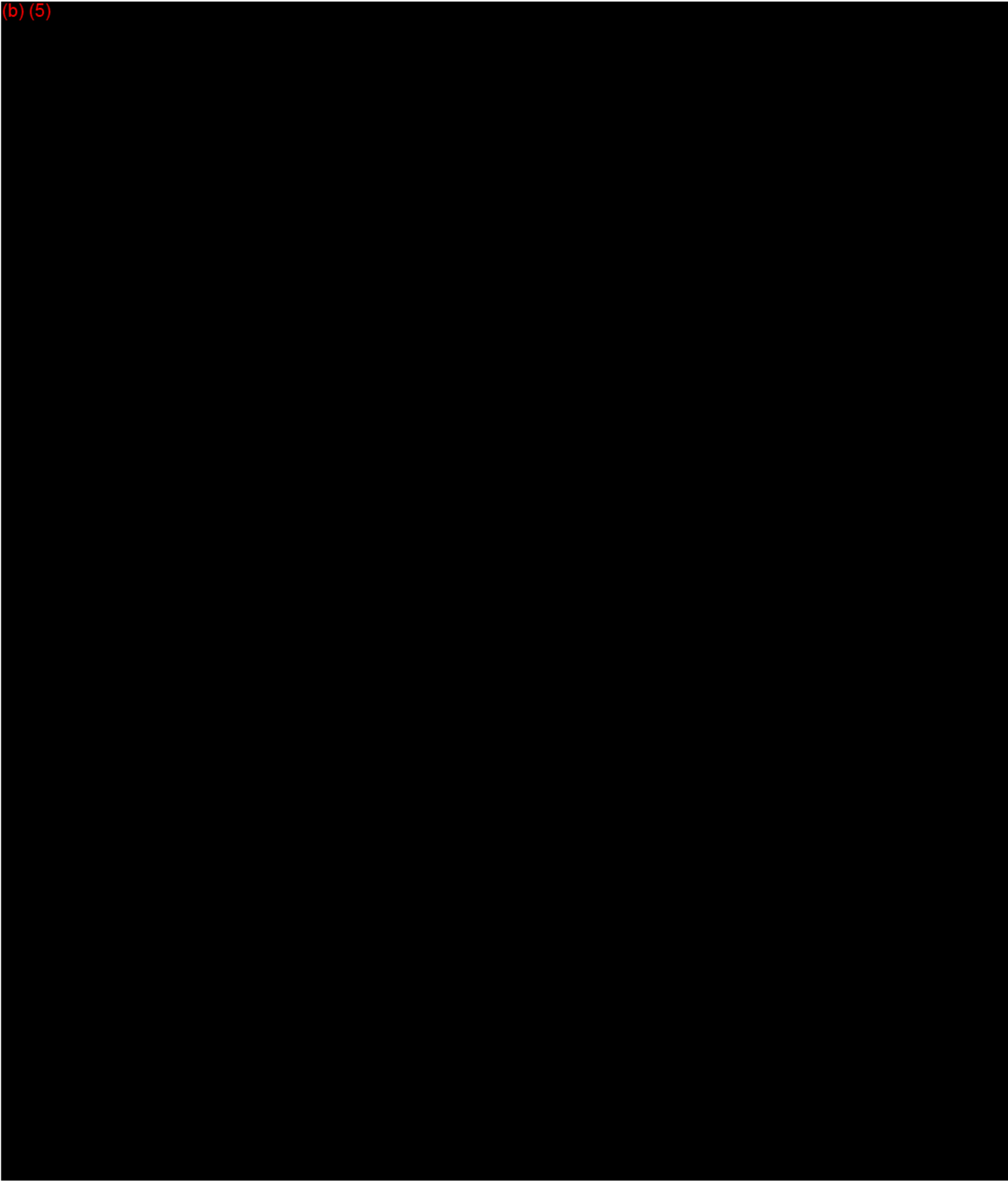
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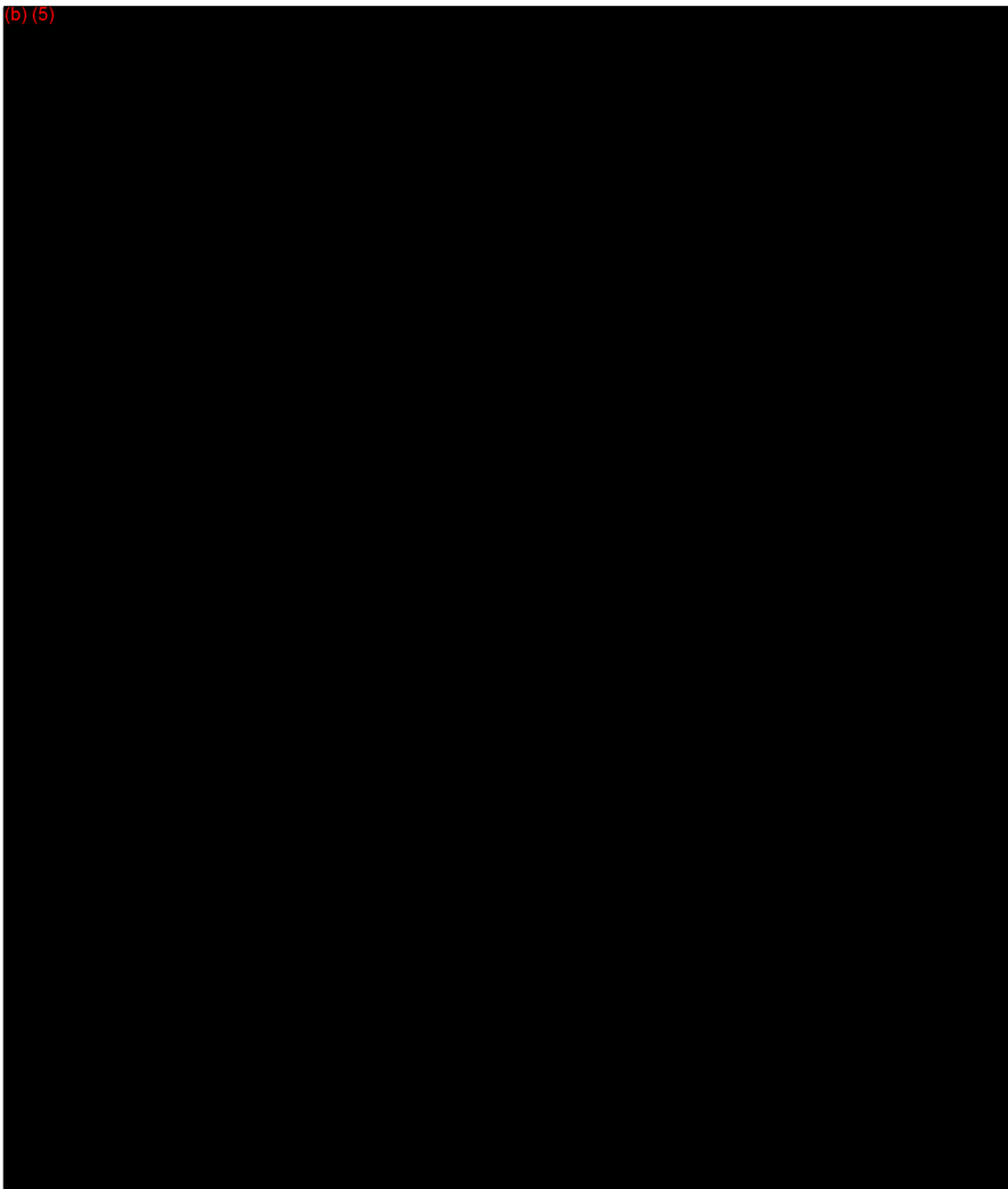
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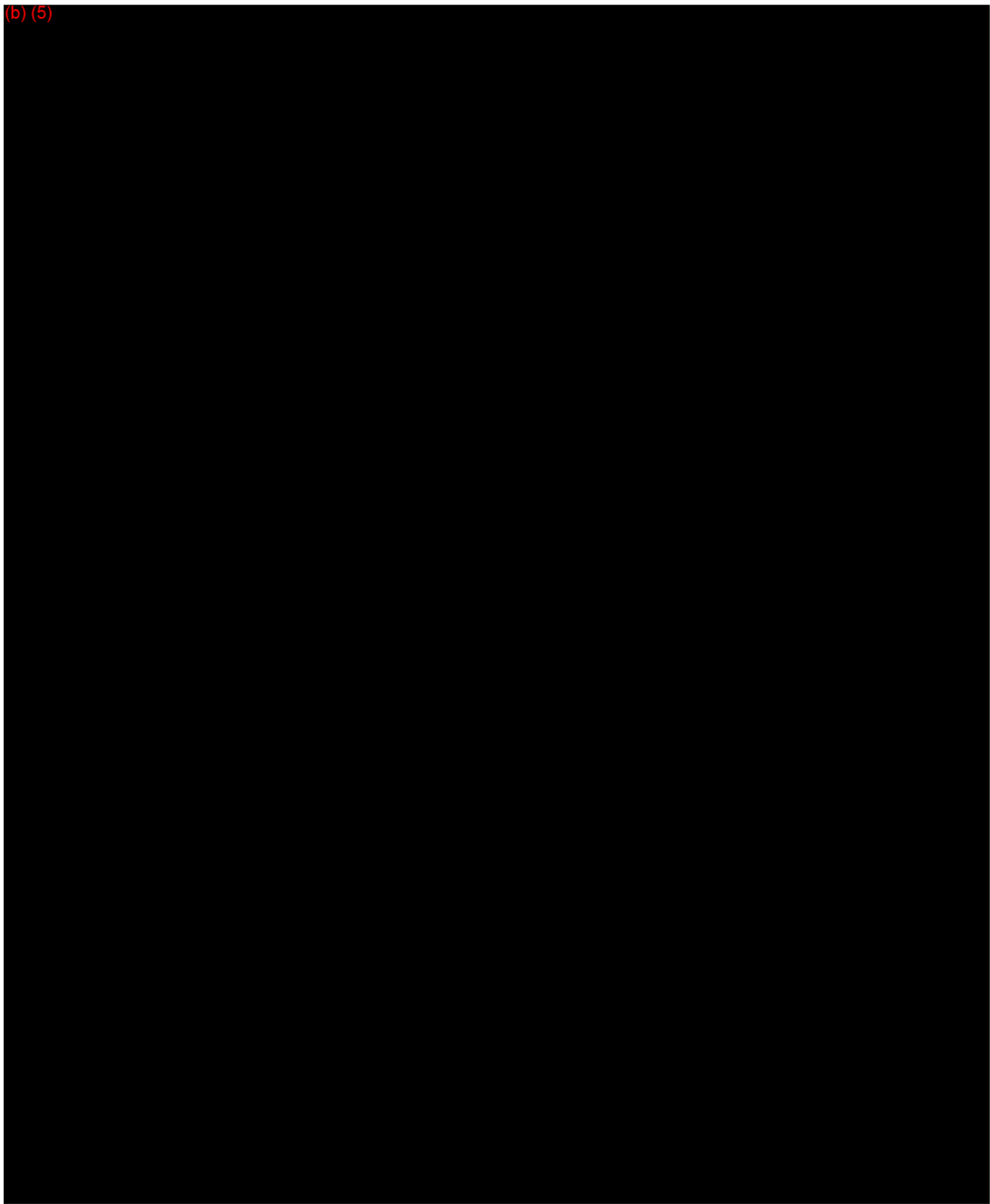
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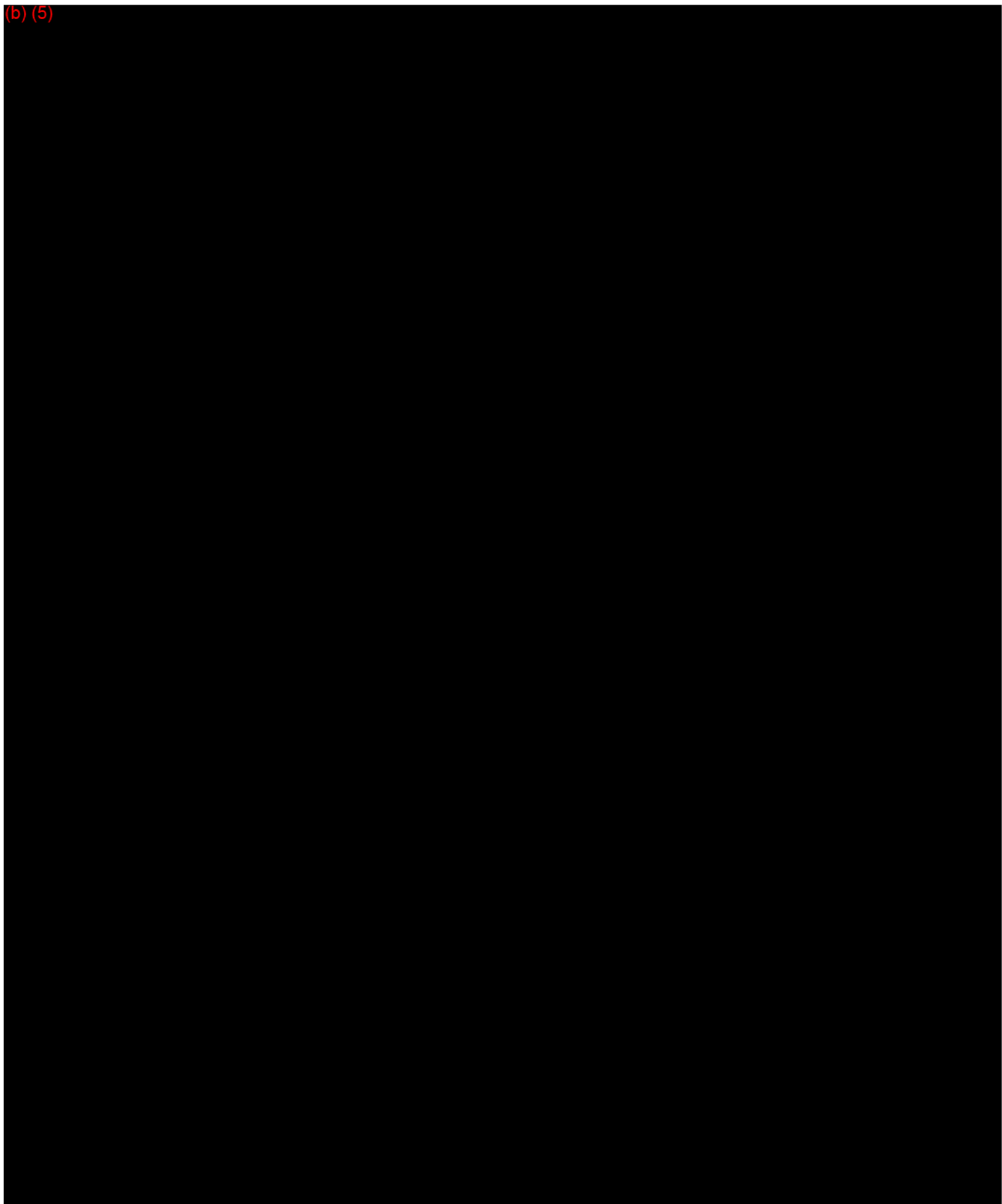
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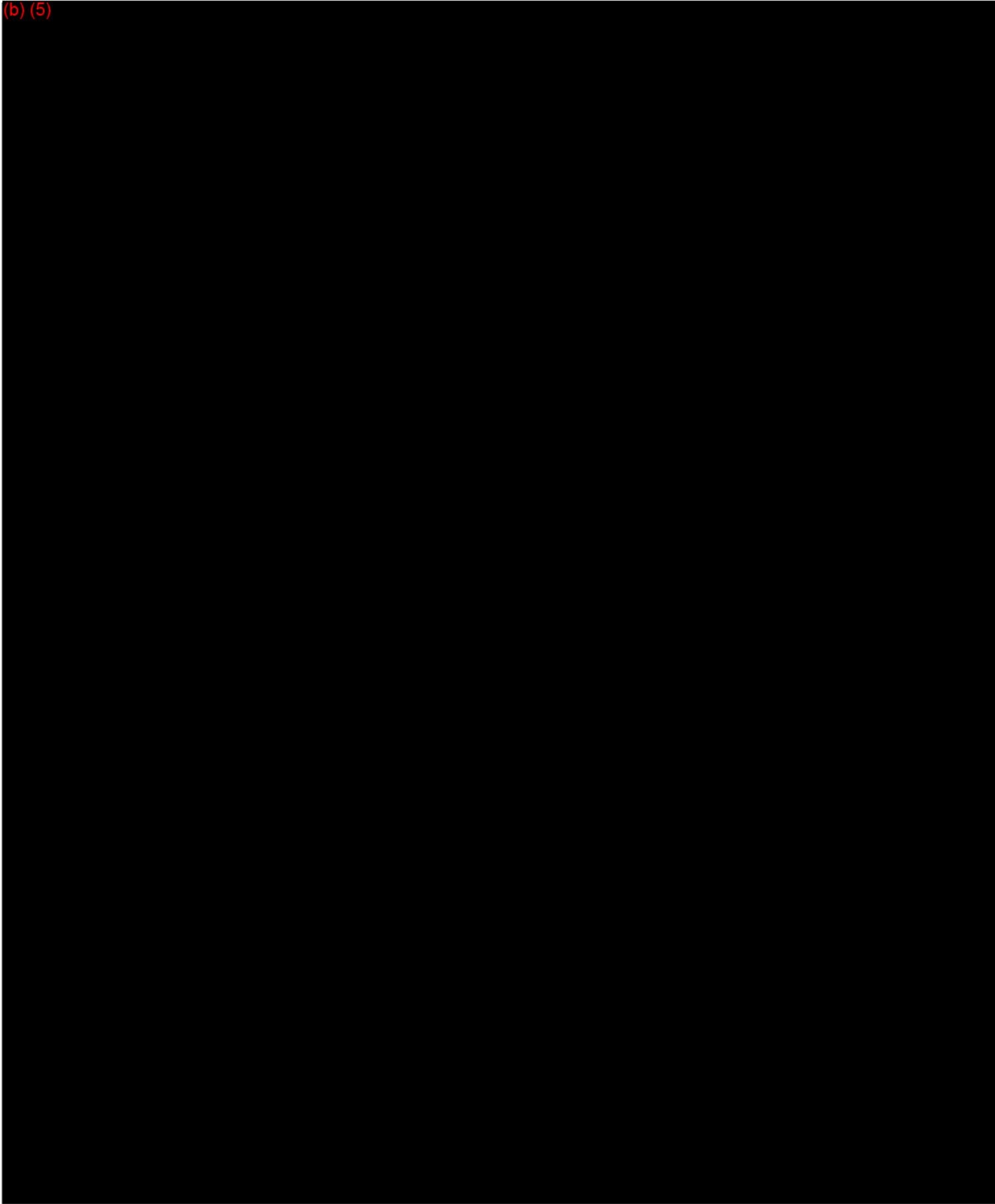
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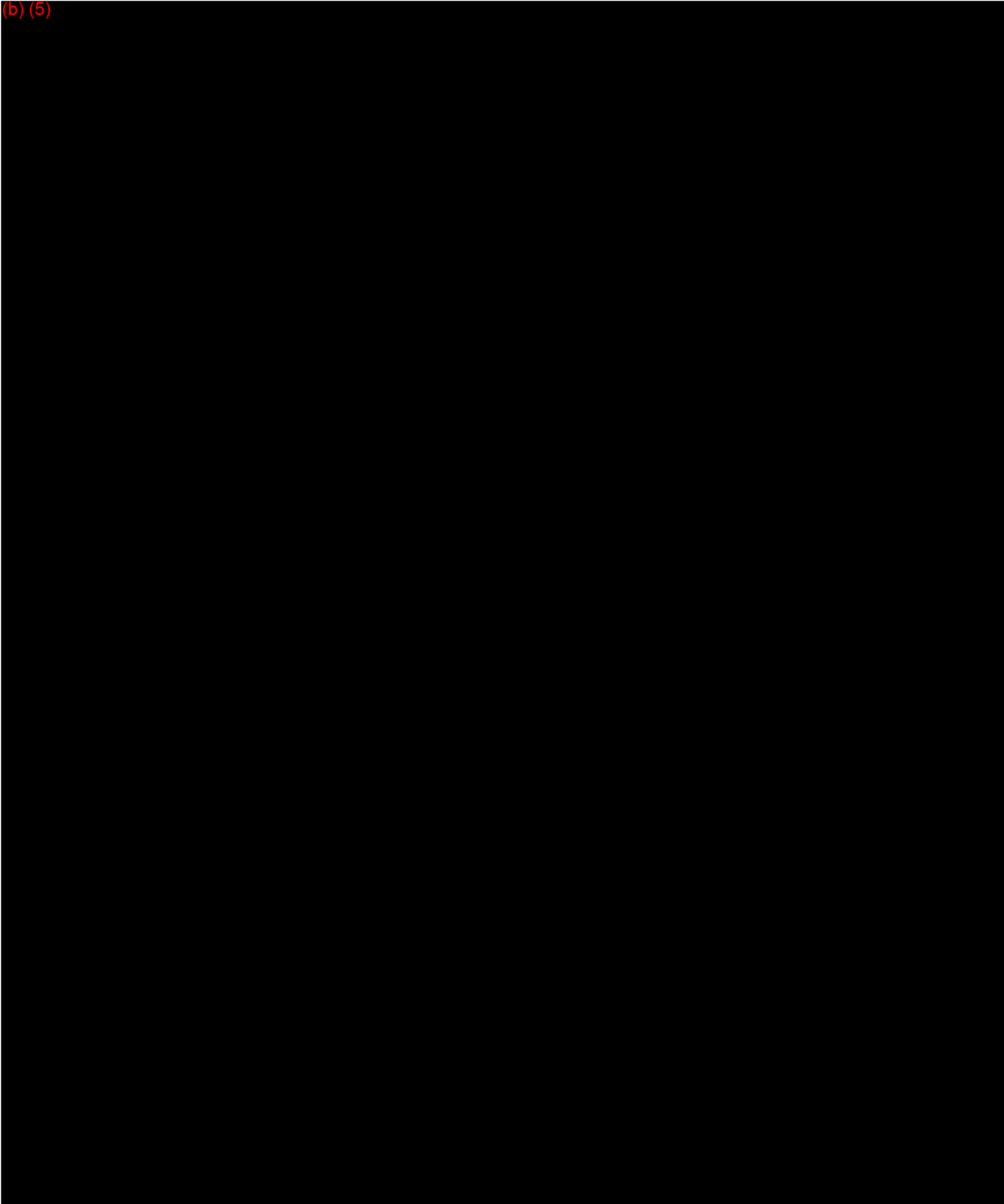
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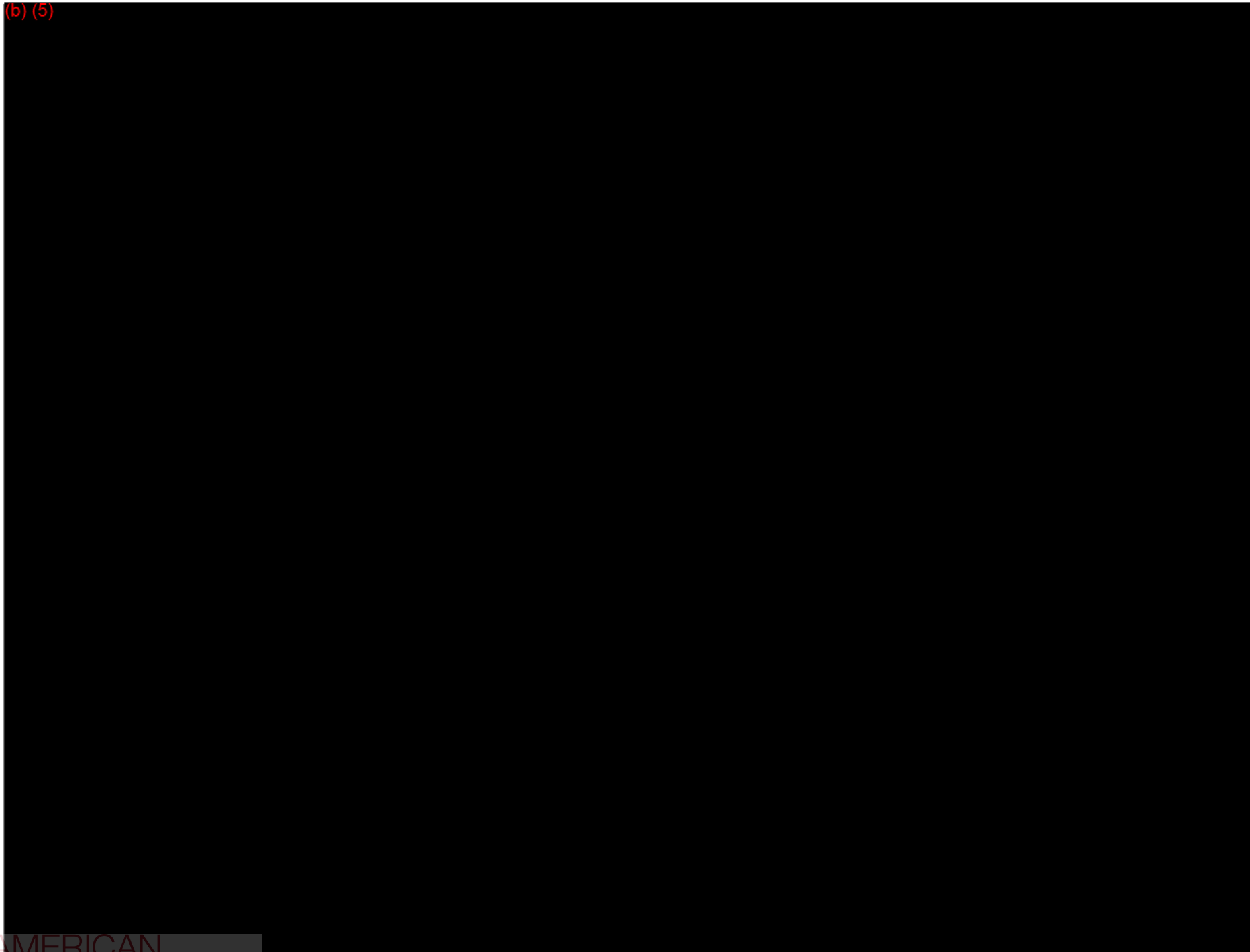
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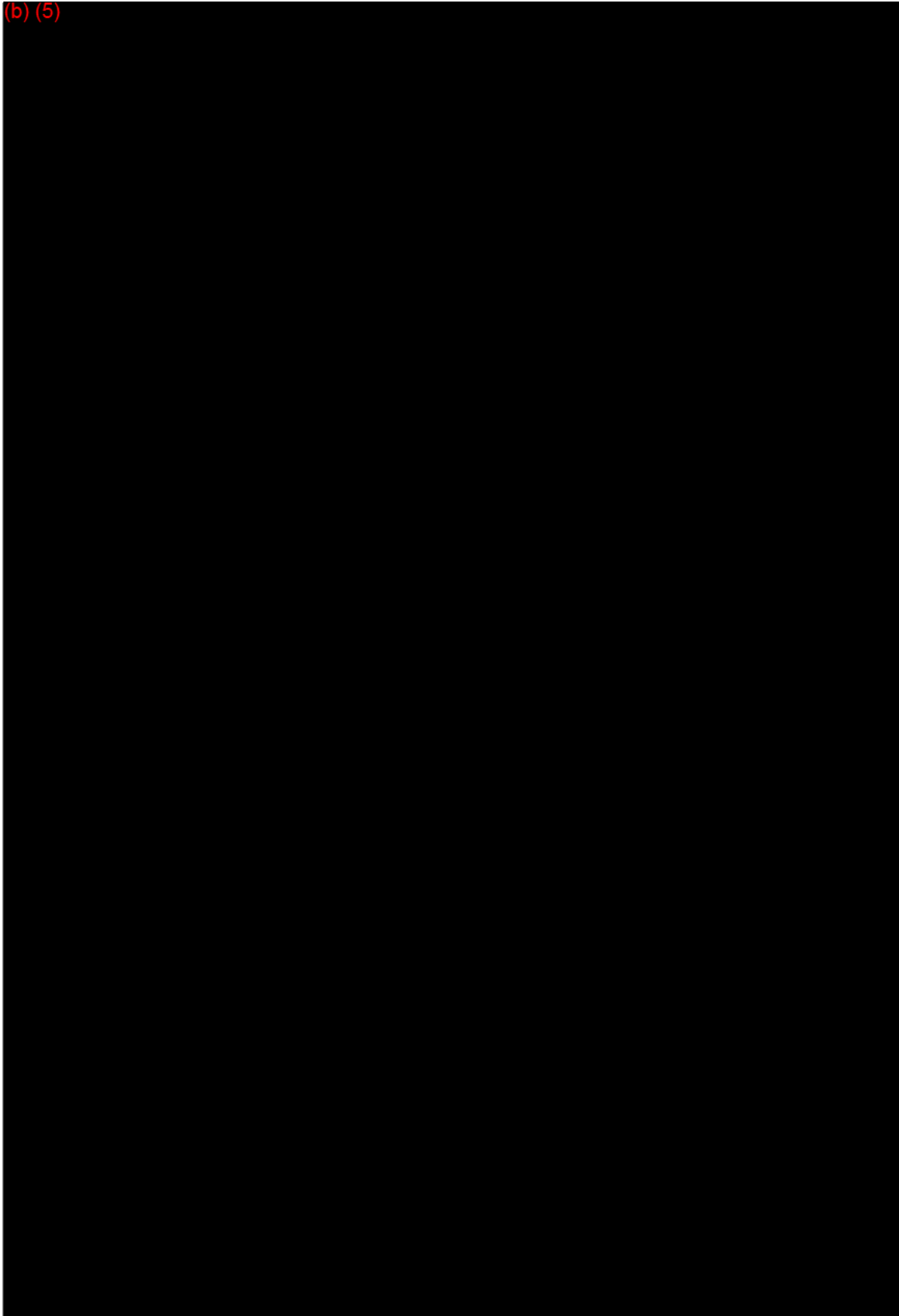


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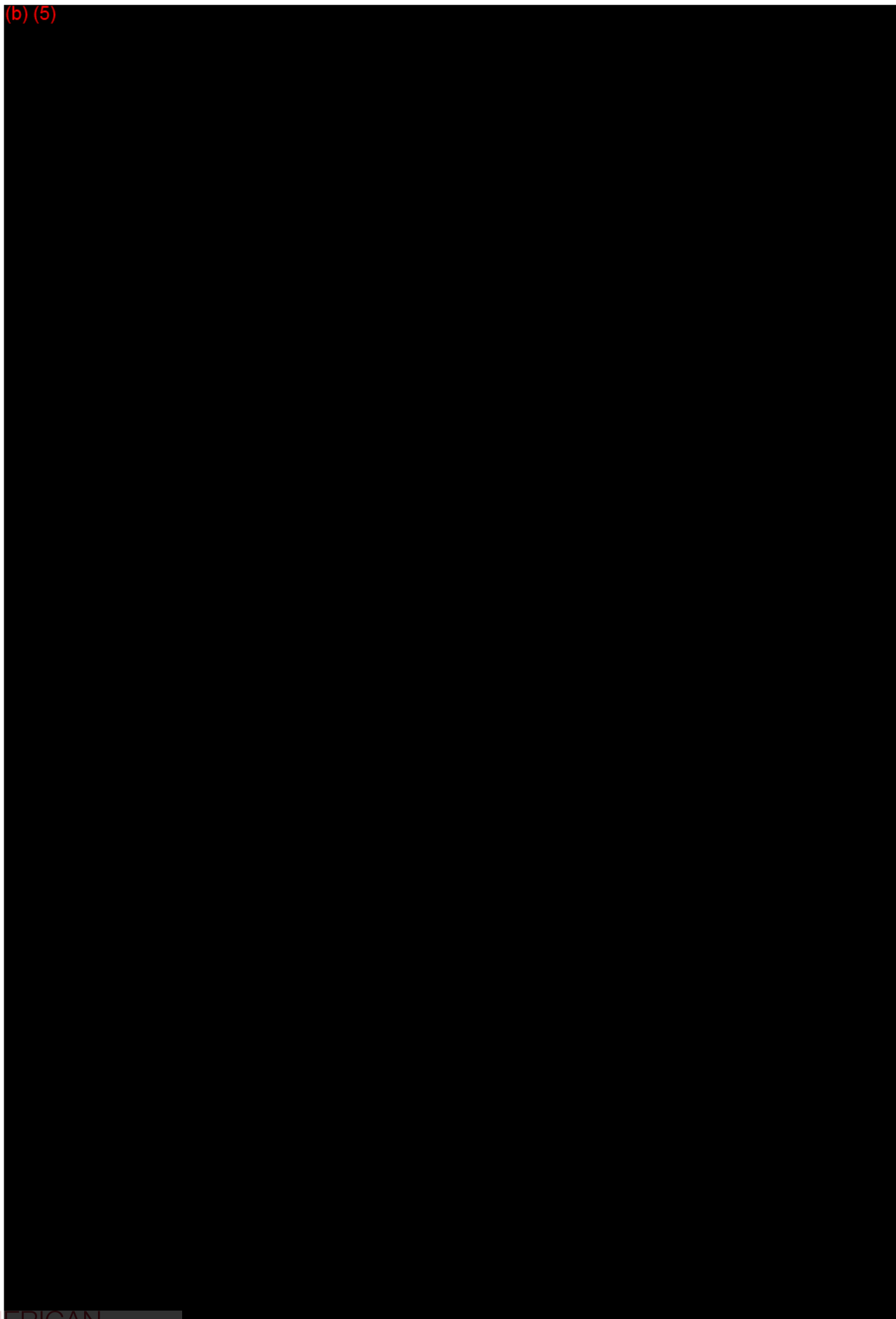
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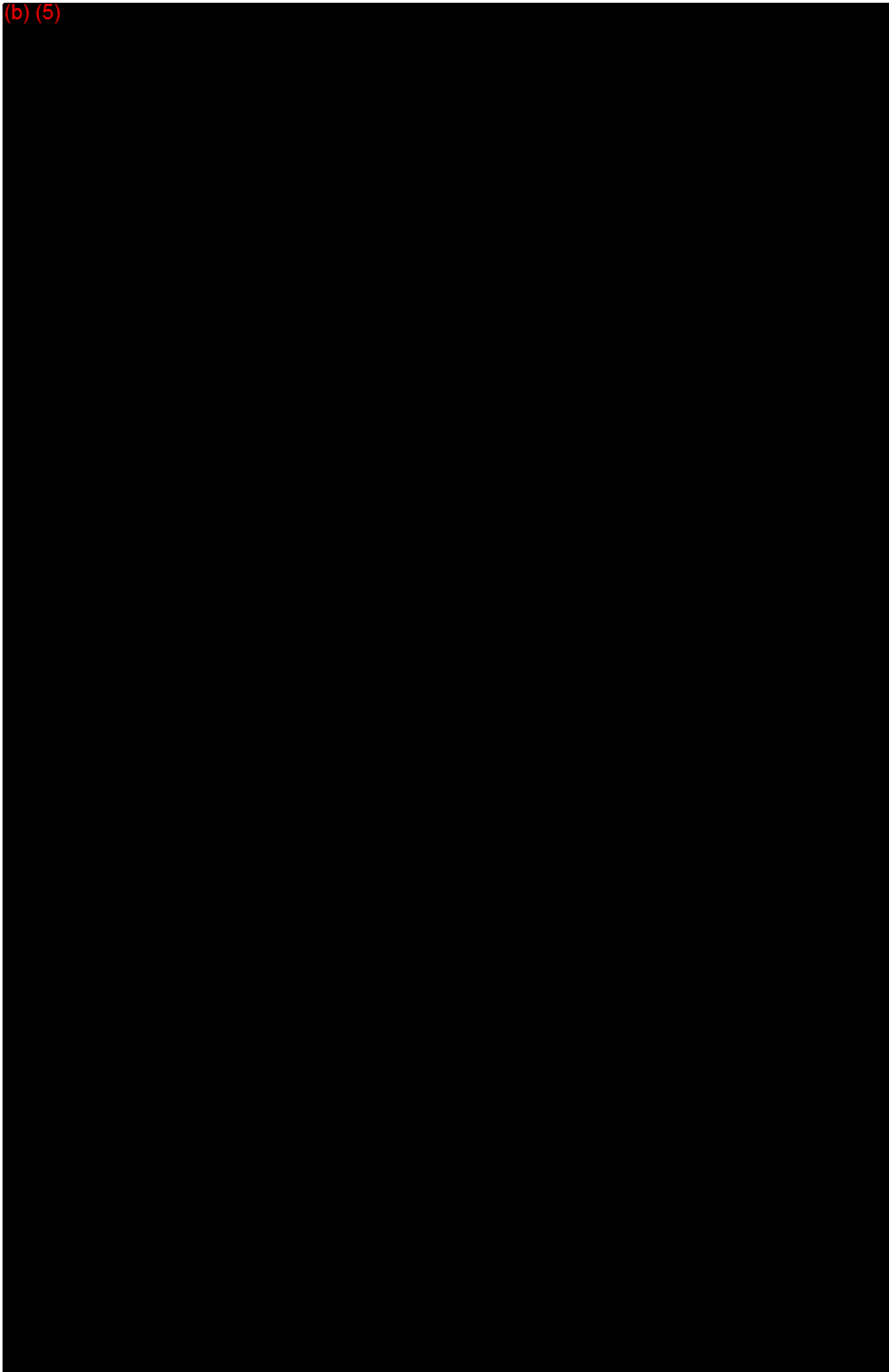
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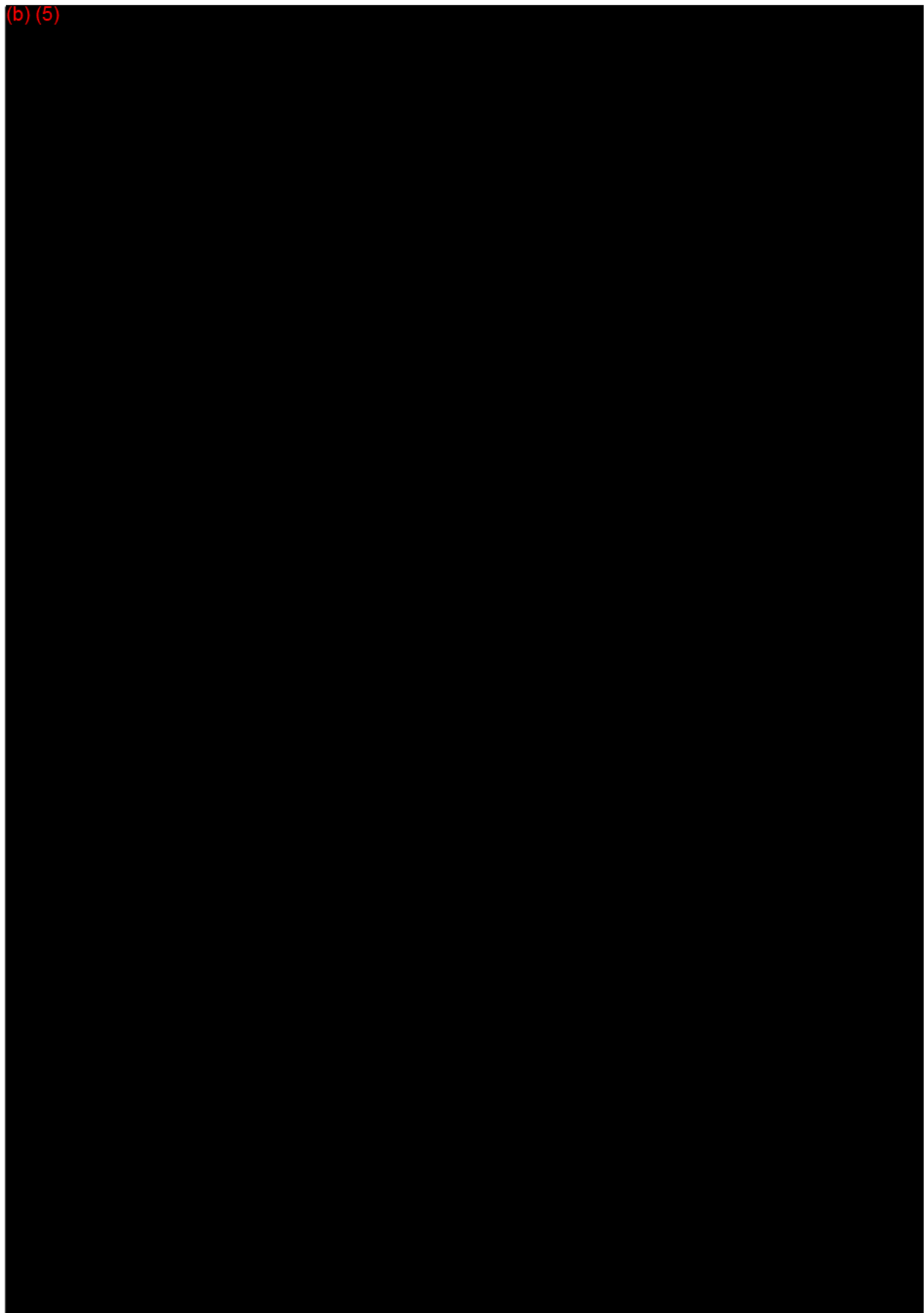
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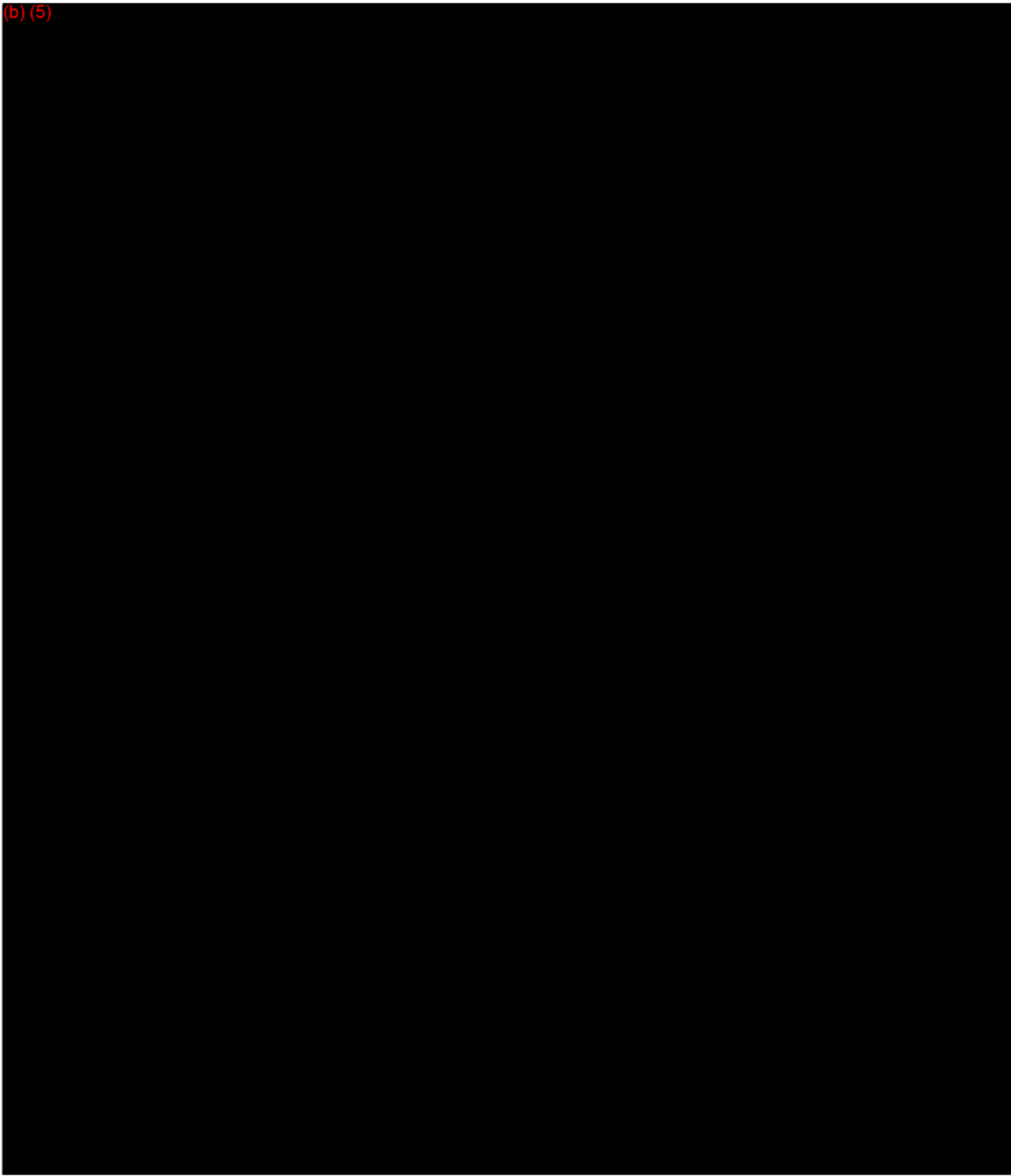
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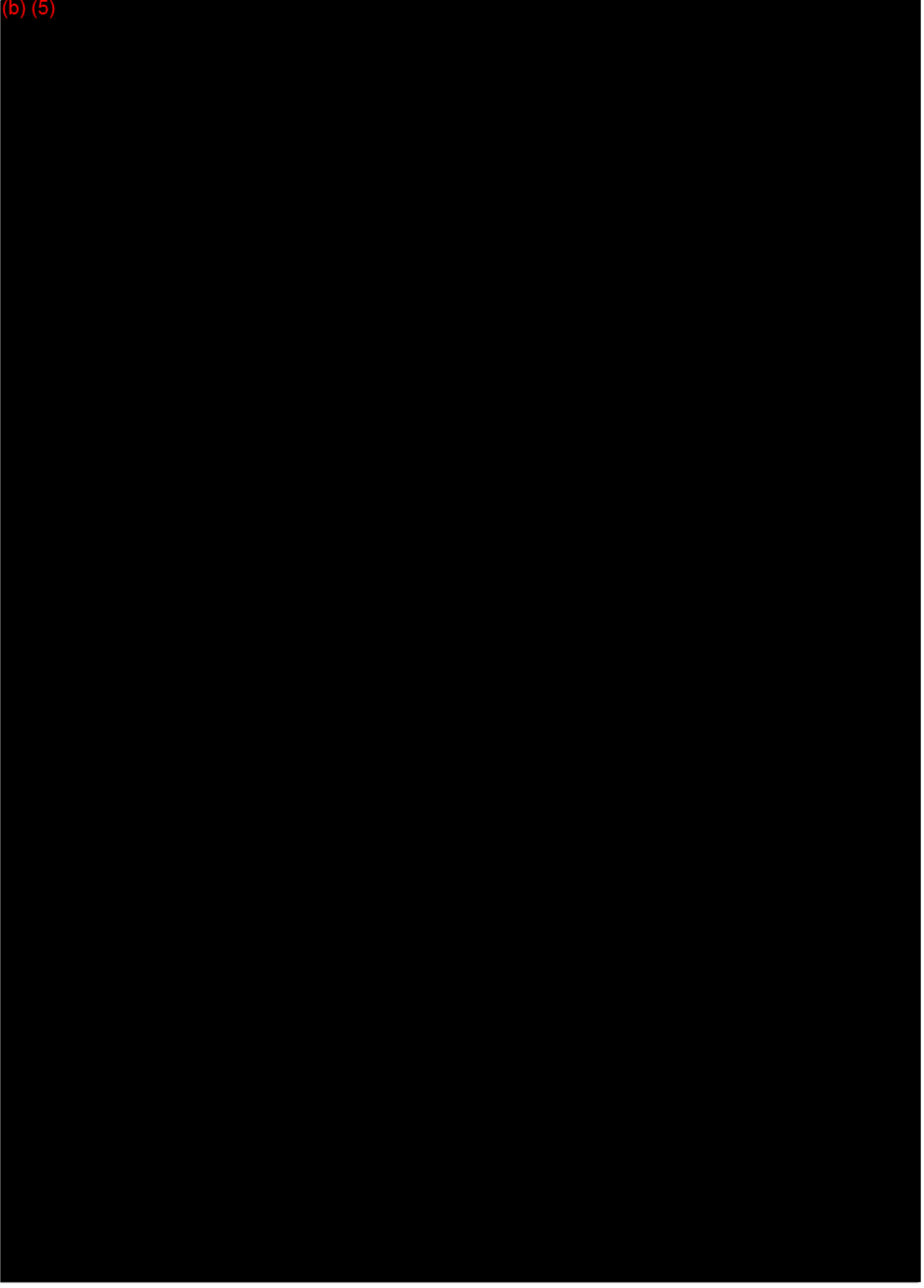
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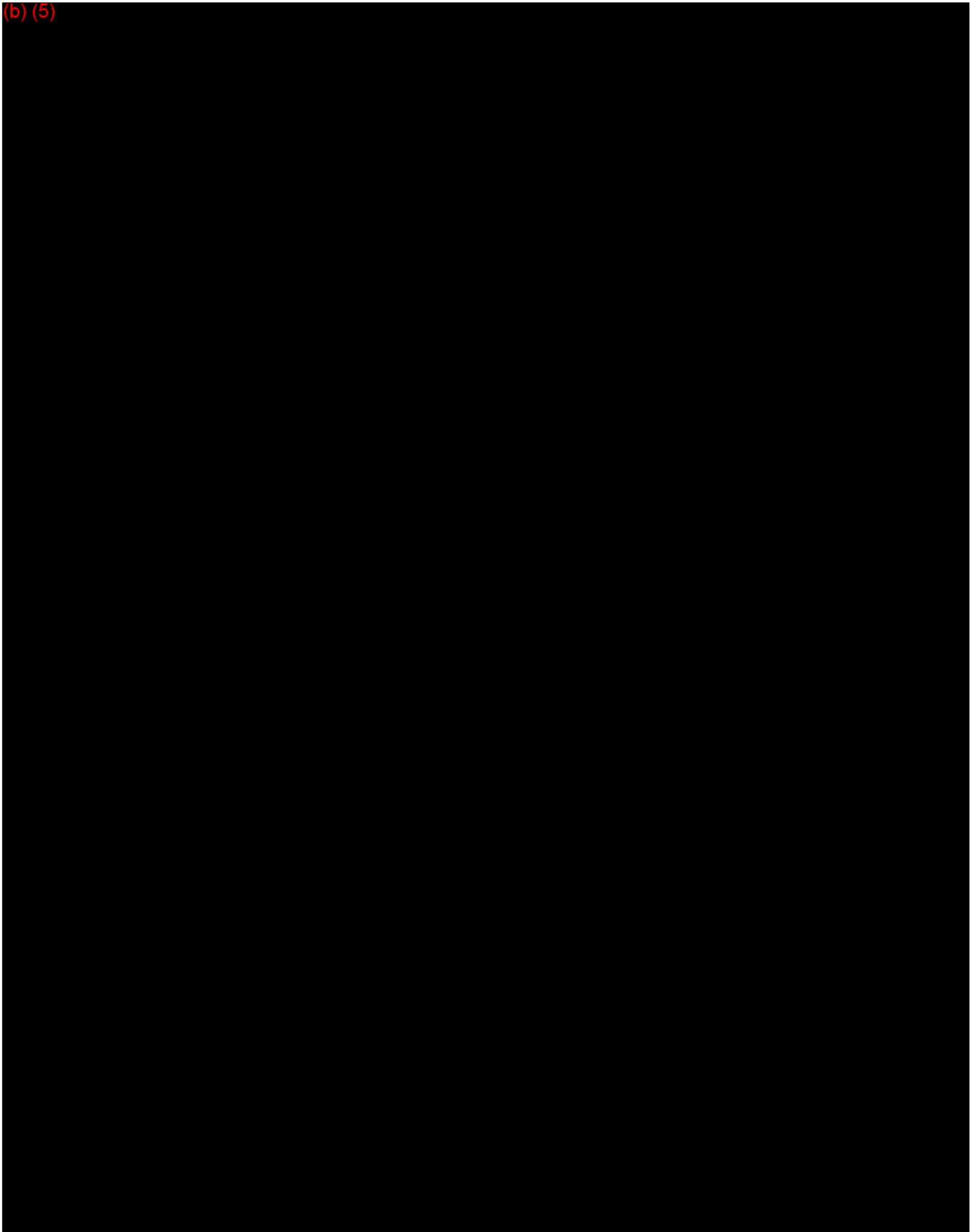
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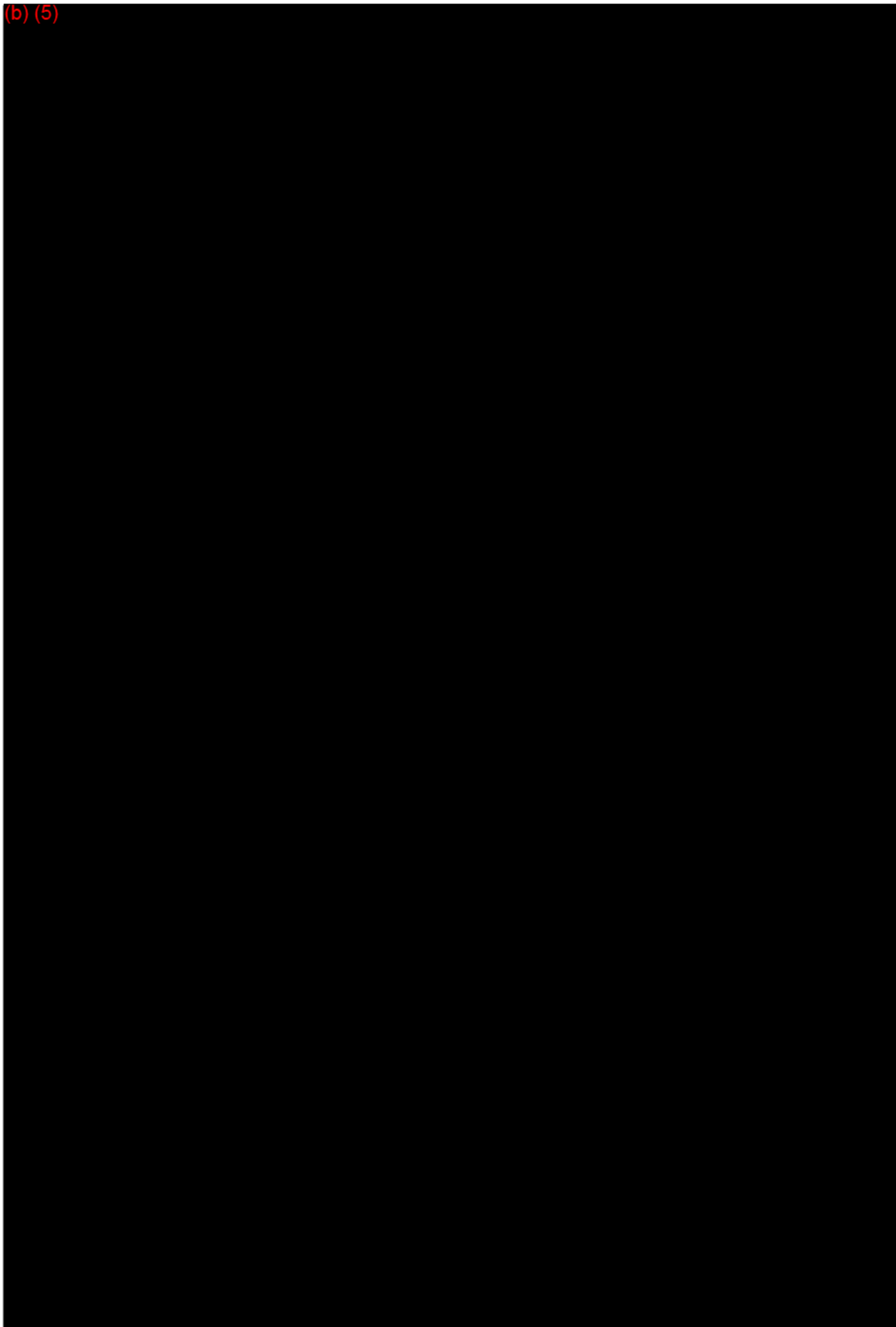
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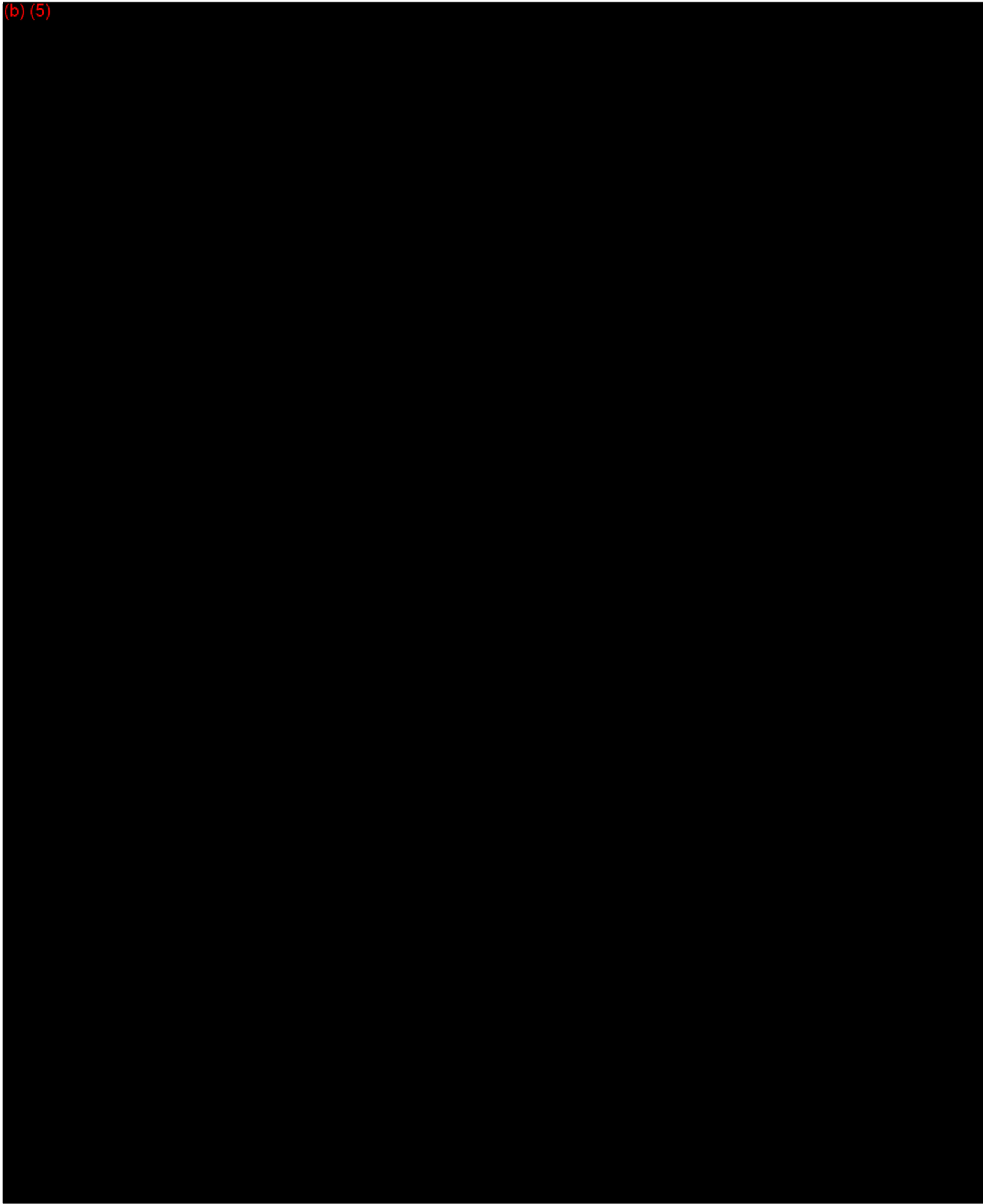
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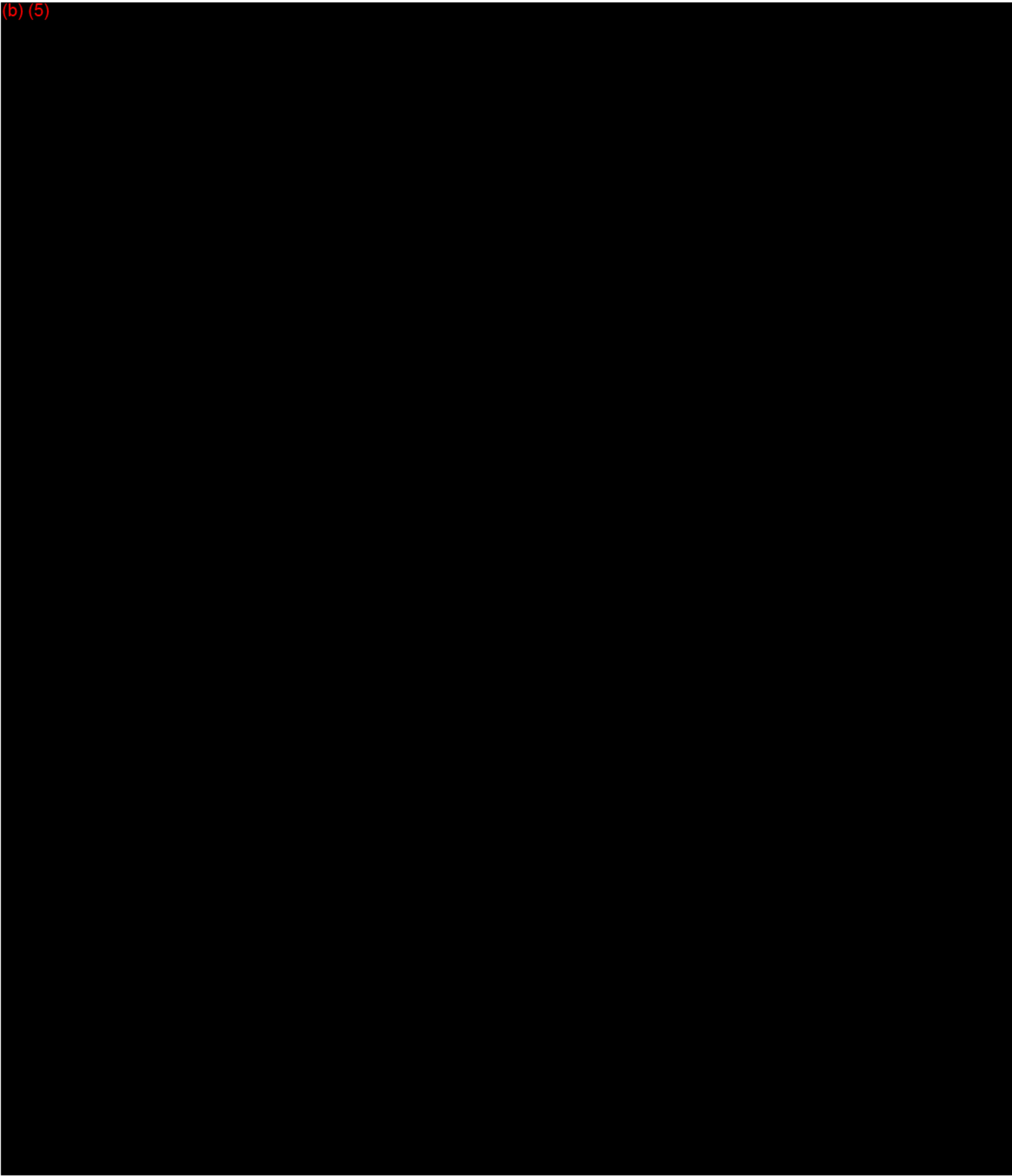
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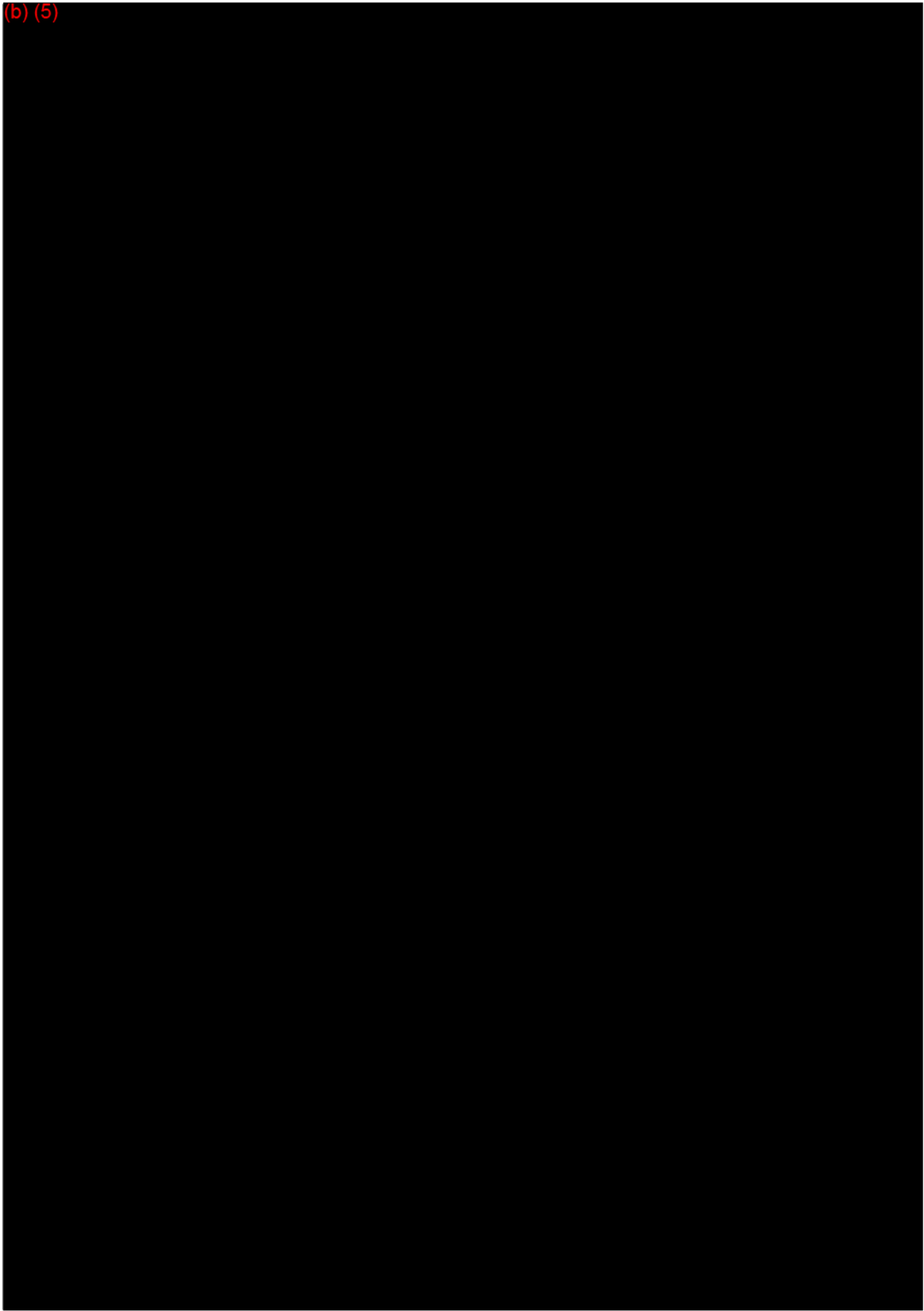
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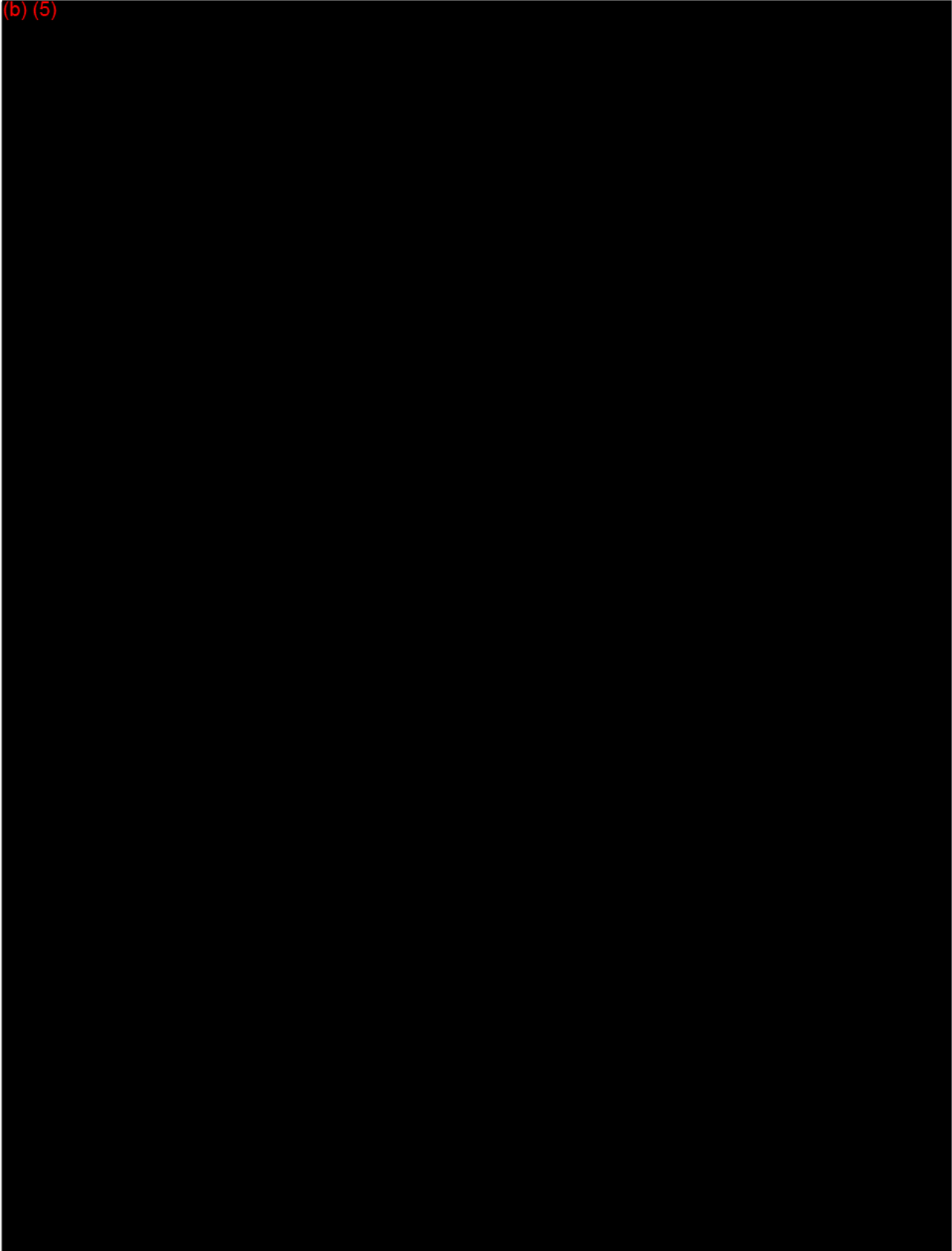
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Cc: Amin, Stacy C. EOP/WHOI (b) (6)
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Subject: Tip Credit RIA suggestions
Received: Fri 9/22/2017 4:14:42 PM
Tip Credit RIA suggestions --- 9-22-2017.docx

Hi Nick,

I understand that WHC passed along some suggestions yesterday on the Tip Credit preamble. In addition to these, OIRA and WHC have been working together on other suggestions for your consideration that are more focused on the RIA—please see attached. Please let us know if you have any questions about these or anything else that might be needed before we advance to formal review.

Thank you,
Josh

Josh Brammer
OMB | Office of Information and Regulatory Affairs

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To: Sieger, Edward - SOL[Sieger.Edward@dol.gov]
From: (b) (6)
Sent: Wed 2/1/2017 10:04:47 AM
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2016 WL 6873249 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

WYNN LAS VEGAS and Steve Wynn, Petitioners,
v.
Joseph CESARZ and Quy Ngoc Tang, et al., Respondents.

No.
16
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163
.

November 16, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

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***i QUESTIONS PRESENTED**

(1) Section 531.52 of the Department of Labor regulations under the Fair Labor Standards Act (“FLSA”) provides that an employer “is prohibited from using an employee’s tips, whether or not it has taken a tip credit,” except for the purposes affirmatively authorized by section 3(m) of the FLSA. The question presented is:

Is the provision of section 531.52 limiting employer use of employee tips valid as applied to an employee who claims that the prohibited use of his or her tips resulted in a wage lower than the minimum wage required by the FLSA, where the employer does not take a tip credit?

(2) Section 216(b) of the FLSA provides a private cause of action for any violation of the minimum wage requirements of the Act. The question presented is:

Does the private cause of action in section 216(b) apply to an employee who claims that an employer’s use of his or her tips resulted in a wage lower than the minimum wage required by the FLSA?

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*1 REGULATIONS INVOLVED

Section 531.35 of 29 C.F.R. provides:

Whether in cash or in facilities, “wages” cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or “free and clear.” The wage requirements of the Act will not be met where the employee “kicks-back” directly or indirectly to the employer or to another person for the employer’s benefit the whole or part of the wage delivered to the employee. This is true whether the “kick-back” is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

Section 531.52 of 29 C.F.R. provides in pertinent part:

The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

*2 STATEMENT

Introduction

This case does not present any circuit conflict. Petitioners challenge the validity of the provision of section 531.52 of the Department of Labor FLSA regulations which limits an employer’s use of employee tips to the circumstances affirmatively authorized by section 3(m) of the Fair Labor Standards Act (“FLSA”). 29 U.S.C. § 203(m). But the Ninth Circuit decision in the instant case is the only appellate opinion regarding the validity of this regulation. The Fourth Circuit decision in *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442 (4th Cir. 2015), expressly did not decide that question. 795 F.3d at 445 n. 5.

There is also no circuit conflict regarding whether the plaintiffs have a private cause of action under the circumstances of this case. The Fourth Circuit in *Trejo* held only that a plaintiff who advanced no minimum wage claim would not have a private cause of action. The plaintiffs in *Trejo* expressly disavowed any claim that they had not been paid the minimum wage mandated by the FLSA. 795 F.3d at 446, 448. In the instant case, on the other hand, the plaintiffs expressly did allege in their complaint, and argued below, that the effect of the defendants’ disputed practices was wages lower than the minimum wage. Although petitioners deny that their practices violate the minimum wage laws, the plaintiffs’ *claim* to the contrary is one for which an express private cause of action is provided by section 216(b) of the FLSA. 29 U.S.C. § 216(b). And at this stage in the litigation, moreover, no question is yet presented regarding the existence of a private cause of action, because neither *3 the Ninth Circuit nor the district court has yet addressed petitioners’ contention that plaintiffs lack a private cause of action.

Petitioners also contend that, even if no conflict is presented by the Ninth Circuit's holding that the complaint states a cause of action, the court of appeals' rationale for that holding conflicts with methodology used in other circuits for determining the validity of a regulation. But section 531.52 is a substantive rule adopted after notice and comment, which by its very nature can impose obligations not contained in the underlying statute. The circuit court cases on which petitioners rely concern the standards for evaluating the validity of interpretive regulations.

The substantive standard embodied in section 531.52 is more than forty years old. That section codifies the manner in which the Department of Labor has consistently enforced the FLSA since 1974, under presidents of both political parties. The very practice at issue in this case, the confiscation of casino dealers' tips to give more money to supervisors, was specifically addressed by a published 1989 Opinion Letter, which advised a different Las Vegas casino that this practice would violate the FLSA's minimum wage requirement.

Legal Background

Section 206(a) of the FLSA provides that "[e]very employer shall pay to each of his employees ... wages at [certain specified hourly rates]." 29 U.S.C. § 206(b). The statute itself provides no standard for determining how much an employer has actually "paid" to an employee.

*4 The lower courts and the Department have long agreed that the determination of how much an employee was paid necessarily requires consideration of not only how much the employer gave to the worker, but also of whether the employer required the worker to kickback money, or other things of value, to the employer. The amount "paid" is net after any such kickbacks. That principle is set out in section 531.35 of the regulations. 29 C.F.R. § 531.35. "Whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" *Id.* Section 531.35 applies to funds paid "directly or indirectly to the employer or to another person for the employer's benefit," whether "in cash or in other than cash." *Id.* Thus if Wynn paid a dealer \$7.50 an hour, but required the dealer (as a condition of continued employment) to agree to sign over to the casino his or her federal tax refund, the amount "paid" for the week in question would be the sum of the cash wages minus the amount of the tax refund.

Wynn has not questioned the general rule in section 531.35, but disputes only whether it should be applied in this case. As the petition correctly notes, the key question here is whether by using employee tips as it did, Wynn "evad[ed] the minimum-wage requirements by effectively forcing employees to make 'kick-back[s]' that 'cut into the minimum ... wages,' in violation of another Department regulation." Pet.12 (quoting *Cumby v. Woody Woo, Inc.*, 596 F.3d 577, 581-82 (9th Cir. 2010). (The "[o]ther Department regulation" to which the petition refers is section 531.35.) The answer depends on whether the "tips belong to employees in the first place." Pet. 12 (quoting *Cumby*, 596 F.3d at 583). Wynn claims that tips given to the employees are really the company's money, like cash *5 given to a bartender to pay for a drink; if that is correct, section 531.35 would not apply. The plaintiff employees, on the other hand, contend that the tips are their money, like a tax refund. Section 3(m) and the validity of the Department's disputed 2011 regulation affect *whose* money the tips are, and thus whether a dealer's after-kickback wage was less than the federal minimum wage.

In 1966 and in 1974 Congress adopted amendments to the FLSA regarding employee tips. The 1966 law affirmatively authorized an employer to take a tip credit based on tips received by an employee; the law limited the proportion of the minimum wage that could be deemed paid through the tip credit, and thus required the employer to pay the remaining portion out of its own funds. Pub.L. No. 89-601, § 101(a), 80 Stat. 830 (1966). That authorization of a tip credit, now somewhat reworded, is set out in the first sentence of the tip provision in section 3(m).

In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between

the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

*6 29 U.S.C. § 203cm).¹

The wording of the 1966 law gave rise to a dispute about whether the authorized tip credit was the exclusive method by which an employer could use an employee's tips.² Congress responded in 1974 with additional language, now codified (also somewhat reworded) in the third and fourth sentences of the section 3(m) tip provision.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Id. The restriction in the last sentence forbids an employer to actually take (as opposed to merely take a credit for) an employee's tips, except in the case of tips placed into a tip pool limited to co-workers "who customarily and regularly receive tips." In 1974 Congress for the first time gave the Secretary authority to promulgate substantive rules "with regard to" tips. "[T]he Secretary is authorized to *7 prescribe necessary rules, regulations, and orders *with regard to* the amendments made by this Act." Pub. L. No. 93-259, § 29, 88 Stat. 55, 76 (1974)(emphasis added).³

The Department's Longstanding Interpretation of Section 3(m)

It was unclear whether the tip provision in the original 1966 FLSA amendments constituted the exclusive manner in which an employer could use an employee's tips, or whether an employer who opted not to use a tip credit was free to seize those tips and use them in whatever way it chose. The Department of Labor interpreted the 1966 provision to impose no limitations on an employer which did not take a tip credit.⁴

In the wake of the 1974 amendments, however, the Department immediately construed the new language to limit employers who did not take a tip credit. In an Opinion Letter issued less than two months after the effective date of the 1974 provision, the Department concluded that the limits in section 3(m) indeed apply to an employer which has not taken a tip credit. FLSA-626, June 21, 1974, 1974 WL 422051. That letter addressed the application of the 1974 provision to an employer who confiscated all tips paid by credit card, and then used those funds to pay the minimum wage; all employees were required to sign an agreement consenting to this arrangement. *8 The Department concluded that this arrangement was unlawful, even though the employer had not taken a tip credit.

The amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are ... turned over to the employer for use by the employer in satisfying the monetary requirements of the Act.... Under the amended Act, a tip becomes the property of the 'tipped employee' Thus, where the employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, [under the proposed agreement] the employee has in effect waived his right to the minimum wage.... It cannot be said that an employee has been paid by his employer when the money used is the employee's own money.

1974 WL 422051 at *2.

An Opinion Letter issued the next year again held that under the 1974 Act an employer which had not taken a tip credit could not confiscate and use its employees' tips, despite written agreements "that amounts presented by customers as tips belong to the employer and will be turned over to the employer daily." WH-310, Feb. 18, 1975, 1975 WL 40934 at *1.

[T]he use of [that] system ... would have the effect of nullifying Section 3(m) as amended. [I]nstead of using the employee's tips for paying a maximum of 50% of the minimum *9 statutory rate [as then provided if a tip credit were claimed], the employer would use his employee's tips to satisfy as much as

100% of the monetary requirements of the Act.... [T]he parties may not agree to an arrangement where the employee's tips are used to satisfy the employer's minimum wage obligation.

Id. The Department announced that its earlier interpretations of the 1966 provision “have no effect to the extent they are in conflict with the amended Act,” and that new regulations were “being prepared which will incorporate the changes resulting from the 1974 amendments.” *Id.*

Another 1975 Opinion Letter explained that the 1974 Senate Report made clear that the Congressional purpose in amending Section 3(m) was ... to insure “that all tips received by such employee must be retained by the employee” ..., except to the extent that there is an arrangement for the “pooling of tips among employees who customarily and regularly receive tips.” (29 U.S.C. 203(m)).... If an employer should elect not to avail himself of [the tip credit], he would have to pay his tipped employees in accordance with the Act's minimum wages standard, and, in addition, allow them to keep their tips

WH-321, April 30, 1975, 1975 WL 40945 at *1. That was followed by a series of opinion letters reiterating the Department's view that under the 1974 provision an *10 employer could not retain or confiscate its workers' tips, regardless of whether the employer took the tip credit. WH-380, March 26, 1976, 1976 WL 41732 at *1 (“Congress ... require[ed] as a general principle that tipped employees retain all of their tips”); WH-386, July 12, 1976, 1976 WL 41739 at *2 (“regardless of whether or not the employer takes a tip credit, the employee must retain all tips”), *4 (“the law forbids any arrangement whereby any part of the tips of a tipped employee belong to the employer or are retained by the employer”); WH-489, Nov. 22, 1978, 1978 WL 51435 at *2 (“The tip retention requirement of section 3(m) applies regardless of whether the employer elects to take credit for tips received”).

A 1989 Opinion Letter declared unlawful the very practice at issue in this case. WH-536, October 26, 1989, 1989 WL 610348. The letter was issued in response to an inquiry from an unnamed Las Vegas casino, which sought to require its dealers to give a portion of their tips, through a tip pool, to casino supervisors, who did not themselves customarily receive tips from customers, and who thus could not be included in a section 3(m) tip pool. The Department responded that the proposed arrangement could violate the minimum wage laws under the anti-kickback regulation. An employee's tips, it explained, “are the property of the employee to whom they are given,” except in the case of a tip pool that meets the requirements of section 3(m). *Id.* at *2.

In this circumstance, therefore, if there is not a valid tip pool, the employee would, in effect, contribute part of his or her property to the employer or to other persons for the benefit of the employer, with the result that an employee *11 would not have received the full minimum wage “free and clear,” as required by section 531.35

*Id.*⁵ Thus confiscating part of a dealer's tips to pay supervisors would violate the minimum wage laws if “the employer does not pay a sufficiently high cash wage to reimburse such employee for such loss plus at least the minimum wage” *Id.* An employer could confiscate and redistribute a dealer's tips only to the extent that the dealer's hourly wage exceeded the minimum wage. The Department noted that under certain circumstances the proposed arrangement would also violate the FLSA's overtime provisions. *Id.* at *3-*4.

The Department successfully brought several actions enforcing its interpretation of the FLSA. In *Usery v. Emersons, Ltd.*, 1976 WL1668 (E.D.Va. Nov. 23, 1976), the employer paid waiters and waitresses the minimum wage, and did not take a tip credit. But it required the workers to agree to a “tip back” arrangement under which they turned over to the employer tips equal to the minimum wage which it was paying them. The court held that arrangement violated the minimum wage requirement of section 206. 1976 WL 1668 at *6. In *Donovan v. Tavern Talent and Placements, Inc.*, 1986 WL 32746 (D.Colo. Jan 8, 1986), the employer also paid the minimum wage and did not take a tip credit, but required the employees to agree *12 to a “tip-back” scheme under which they had to turn over to the employer tips equal to that minimum wage plus an additional \$1 per hour. 1986 WL 32746 at *2. In holding this practice unlawful, the court rejected the employer's contention “that section 3(m) is not the exclusive method of computing tipped employees' wages” *Id.* at *4.

The Adoption of The 2011 regulations

In 2008⁶ the Department published a notice of proposed formal rulemaking (“NPRM”) regarding its FLSA regulations. 73 Fed.Reg. 43654 (July 28, 2008). The draft regulations included language to replace the long-disavowed interpretation of the 1966 Act, and to codify the agency’s longstanding interpretation of the 1974 provision regarding tipped employees. The proposed regulation codified the Department’s longstanding position that section 3(m) sets out the exclusive methods by which an employer can use its employee’s tips. Generally an “employee is prohibited from using an employer’s tips for any reason other than to make up the difference between the required case wage paid and the minimum wage or in furtherance of a valid tip pool.” 73 Fed. Reg. 43667. The Department’s commentary on the proposed regulation referred repeatedly to its 1989 letter disapproving diversion of casino dealer tips. Mat 43659. The proposed regulation and accompanying commentary, however, appeared to permit an employer who paid a worker *more* *13 than the minimum wage to require the worker to give up tips in an amount no greater than the difference between the minimum wage and the higher cash wage. 73 Fed. Reg. 43654.

Although a significant number of employer organizations commented on the NPRM, none objected to the codification of the Department’s well-established position that employers are forbidden to use employee tips even when no tip credit was being claimed, except authorized by section 3(m). To the contrary, the United States Chamber of Commerce expressly endorsed the replacement of the pre-1974 regulation with the new proposed regulation. Pet.App. 111a.⁷ Unions and employee representatives, however, objected to the aspect of the proposed regulation which suggested that an employer could confiscate employee tips in the limited circumstance described above. Pet. App. 108a-113a. The Department responded by rewording the regulation and commentary to indicate that an employer which paid workers more than the minimum wage could only make deductions (to no less than the minimum wage) from the wages paid by the employer itself, not from the workers’ tips. Pet.App. 118a.

The regulation ultimately adopted in 2011 contained in section 531.52 language prohibiting an employer “from *14 using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.” 29 C.F.R. § 531.52. The Department set out three independent justifications for provision. First, the agency explained that the provision embodied its longstanding view that section 3(m) sets out the exclusive circumstances in which an employer is authorized to use an employee’s tips.⁸ Second, the agency reasoned that a regulation forbidding use of tips except in the manner set out in section 3(m) was necessary to prevent employers from resorting to other schemes to evade the limitations in section 3(m).⁹ Third, the Department explained that *15 requiring a worker to kickback all or part of his or her tips would often result in an after-kick back wage below the minimum wage.¹⁰

Factual Background

Wynn Las Vegas (“Wynn”) is a large casino employing approximately 500 table dealers. Wynn generally pays the dealers only the minimum wage; the bulk of the dealers’ income is in the form of tips from gamblers. Tips are paid by the customers in casino chips, and are referred to in the industry as tokens.¹¹

When the casino first opened in 2005, the tips were shared among the table dealers by means of a pool. All tips were centrally collected, and then divided among the individual dealers under a formula not here in dispute. In 2006, however, Wynn decided that it wanted to increase the earnings of certain supervisors. Rather than spend its *16 own money to give raises to the non-tipped supervisors, the company decided instead to confiscate a significant portion of the dealers’ pooled tips, and to use that money to increase the pay of certain supervisors. The amount of additional payment given to each supervisor was determined as a fixed share of the total tips that had been received by the dealers.¹² The supervisors could not have participated in a tip pool under section 3(m) because they were not individuals “who customarily and regularly receive tips.” 29 U.S.C. § 203(m). The plaintiffs contend that about \$17,000 a year was in this manner taken from each dealer¹³, a sum significantly larger than minimum wage a dealer was paid by the casino itself.¹⁴ By using the dealers’ tips, rather than its own funds, to increase the income of the supervisors, Wynn saved several \$8 million dollars a year.

Proceedings below

Plaintiffs brought this action against Wynn, alleging that the seizure and redistribution of their tips violated the FLSA and section 531.52. Specifically, the complaint asserted that the funds taken from the dealers' tips constituted (under the anti-kickback rule described above) a deduction from their casino-paid wages, and that as a result the net wage received from the casino was less than the minimum wage.¹⁵ The complaint claimed that *17 amount of tips seized from each dealer was the appropriate measure of the minimum wage violation¹⁶, the difference between the required minimum wage and the net post-kickback wage received. In both courts below plaintiffs reiterated their contention that Wynn's action denied them the minimum wage required by the FLSA.¹⁷

*18 Wynn moved to dismiss the complaint. It noted that under the 2010 Ninth Circuit decision in *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010), the casino's seizure of the dealer's tips did not violate the FLSA itself, and argued that because of *Cumbie* the relevant provision of section 531.52 was invalid. The validity of that same regulation was at that time the subject of a pending challenge in *Oregon Restaurant & Lodging v. Solis* ("ORLA") in the District of Oregon. On June 7, 2013, the Oregon District Court in *ORLA* held section 531.52 invalid. 948 F.Supp. 2d 1217 (D.Or. 2013). The district court in the instant case, relying on the district court decision in *ORLA*, subsequently dismissed plaintiffs' complaint. Pet. App. 37a-38a. The appeal in the instant case was consolidated with the government's appeal in *ORLA*.

On appeal, both plaintiffs and the Secretary of Labor (the defendant in *ORLA*) argued that the Ninth Circuit's interpretation of the FLSA in *Cumbie* did not preclude the Secretary from issuing section 531.52. The Secretary stressed that under the 1974 Act he was not limited to issuing regulations that interpret section 3(m), but was *19 also authorized "to prescribe necessary rules, regulations, and orders with regard to [section 3(m)]." Brief for Defendants-Appellants, No. 13-35765, pp. 4, 13, 18, 21 n. 2. "[W]hen an agency has been authorized to promulgate 'necessary' regulations for the implementation of the statute, it may adopt reasonable prophylactic measures to ensure the accomplishment of the Act's purposes." *Id.* p. 32 (citing *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) and *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969)). The Secretary explained that in the absence of the disputed regulation, an employer could easily circumvent the restrictions in section 3(m), such as through schemes under which a worker's entire wage was in effect paid out of his or her tips. *Id.* pp. 15, 20, 32, 34. The Secretary also argued, as did plaintiffs, that the improper seizure of a worker's tips would at least usually violate the FLSA because it would constitute a kickback that reduced the worker's wages below the required minimum wage. Brief for Defendants-Appellants, p. 21 n.3.¹⁸

*20 The Ninth Circuit upheld the regulation. Pet.App. 1a-22a. The court of appeals correctly concluded that the question of whether the FLSA itself prohibits the practice in this case (the issue decided in *Cumbie*) is different than the question of whether the Secretary has the authority to issue a regulation forbidding that practice. "The precise question before this court is whether the DOL may *regulate* the tip pooling practices of employers who did not take a tip credit. The restaurants and casinos argue that we answered this question in *Cumbie*. We did not. Our task in *Cumbie* was to decide whether a restaurant tip pooling practice violated the FLSA." Pet.App. 13a (emphasis added). The FLSA itself does not specifically address any employer uses of employee tips other than through a tip credit; the court of appeals held that this silence did not indicate that Congress wanted to protect from regulation all the other possible employer uses of employee tips. "Whereas the restaurants [and] casinos ... equate this silence concerning employers who do not take a tip credit to 'repudiation' of future regulation of such employers, we decline to make that great leap without more persuasive evidence." Pet. App. 18a. The court of Appeals rejected the employers' argument that by failing to address in section 3(m) any of those other possible schemes, "Congress clearly intended to deprive the DOL [of] the ability to [apply any restrictions on] employers who do not take a tip credit." Pet. 20a. "[S]ilence is meant to convey nothing more than a refusal to tie the agency's hands" Pet.App. 18a (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009)). Judge Smith, a member of the panel that had earlier decided *Cumbie*, dissented. Pet.App. 23a-32a.

*21 The employer-defendant in the instant case, and the employer-association plaintiff in *ORLA*, both filed petitions for rehearing en banc. The petition in the instant case was denied on April 1, 2016 (Pet. App. 40a), and this petition followed. The rehearing petition in *ORLA* was denied on September 6, 2016. 2016 WL 4608148 (9th Cir. Sept. 6, 2016). Judge O'Scannlain, the author of *Cumbie*, dissented from the denial of rehearing in *ORLA*. 2016 WL 4608148 at *1-*9.

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE VALIDITY OF 29 C.F.R. § 531.52

There is no circuit conflict regarding the validity of section 531.52. The only appellate decision to address that question is the Ninth Circuit opinion in the instant case. The petition repeatedly points to the Fourth Circuit decision in *Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442 (4th Cir. 2015). But the Fourth Circuit in *Trejo* made emphatically clear that it was not deciding the validity of section 531.52. 795 F.3d at 445 n. 5 “The Plaintiffs have repeatedly argued that they are pursuing a claim only under the FLSA and that the [2011] regulations are ‘not an issue’ in this case.... Accordingly, we have no occasion to opine on the validity of the regulations in this appeal.” 795 F.3d at 445 n. 5; *see* 795 F.3d at 451 (Harris, J., concurring)(“the majority carefully clarifies that we have no occasion to opine on the regulation today.”)¹⁹

*22 On pages 6, 19, and 24, the petition asserts that the court of appeals below held that the FLSA itself restricts use of employee tips by employers that are not taking a tip credit. E.g. Pet. 19 (“The Ninth Circuit[] hold[s] that the FLSA imposes freestanding ... restrictions on tip pooling and creates a circuit conflict.”)(emphasis and capitalization omitted). Such an interpretation of the FLSA, petitioners argue, would conflict with *Trejo*. But on pages 15 and 22, the petition acknowledges, to the contrary, that the opinion below actually accepted the earlier Ninth Circuit decision in *Cumbe* that the FLSA itself does not contain such restrictions, and much of the petition is devoted to arguing that the panel’s acceptance of *Cumbe* should have led it to invalidate section 531.52. Obviously these inconsistent descriptions of the decision below cannot both be correct. The latter version is the sound one; the panel decision proceeded from the premise that under *Cumbe* the FLSA itself does not restrict use of employee tips by an employer which does not take a tip credit. Pet.App. 13a-14a, 21a.²⁰ That is entirely consistent with the Fourth Circuit decision in *Trejo*.

***23 II. THERE IS NO CIRCUIT CONFLICT REGARDING WHETHER THE FLSA PROVIDES A PRIVATE CAUSE OF ACTION TO AN EMPLOYEE WHO ASSERTS A MINIMUM WAGE CLAIM ARISING OUT OF THE CONFISCATION OF HIS OR HER TIPS BY THE EMPLOYER**

The Fourth Circuit in *Trejo* held that the FLSA does not provide a private cause of action for plaintiffs “who are seeking only the recovery of tips *unrelated* to a minimum wage or overtime claim.” 795 F.3d at 448 emphasis added. In *Trejo* “the Plaintiffs essentially concede[d] that they do not have a private right of action under § 216(b) because they [were] not seeking damages for unpaid minimum wages.” 795 F.3d at 446; *see id.* at 450 (Harris, J., concurring)(“Plaintiffs ... expressly disclaim any connection between the tip-related practices of which they complain and the FLSA’s minimum wage requirements.”). The *Trejo* plaintiffs argued only that the tip-credit provision in section 203(m) “creates a free-standing right to bring a claim for lost ‘tip’ wages.” *Id.* at 447. The Fourth Circuit held that section 203(m) did not create such a private cause of action.

Petitioners claim that this aspect of *Trejo* conflicts with the Ninth Circuit decision in the instant case. That is clearly incorrect.

First, the Ninth Circuit never decided whether there is a private cause of action in this case. The district court rejected plaintiffs’ claim only on the ground that section 531.52 is invalid, and never reached Wynn’s separate argument that the plaintiffs have no private cause of action. Pet.App. 33a-38a. The Ninth Circuit also addressed only *24 the validity of section 531.52, and then remanded the case “for proceedings consistent with this opinion.” Pet.App. 22a. Petitioners object that the Ninth Circuit “permitted a suit by private employees to enforce [section 531.52]” (Pet. i), “allowed this suit by private plaintiffs to proceed” (Pet. 18), and “remanded the case to allow the litigation to proceed.” Pet. 25. But none of these objections assert that the Ninth Circuit ever determined or even discussed whether the plaintiffs have a private cause of action. With regard to the existence of a private cause of action, there is simply nothing in the Ninth Circuit opinion with which *Trejo* could conflict. Petitioners’ real grievance is that the Ninth Circuit declined to address an objection that the district court had not yet considered.

Second, - unlike the plaintiffs in *Trejo* - the plaintiffs in this case *do* assert that they were denied the minimum wage and overtime. In the instant case, unlike *Trejo*, the plaintiffs “[c]laim a[] connection between the tip-related practices of which they complain and the FLSA’s minimum wage requirements... [and] tie [the] purported tip violation to the Defendants ... minimum wage obligations” *Trejo*, 795 F.3d at 450 (Harris, J., concurring). Petitioners argue that “[t]he FLSA provides a private right of action *only* for workers seeking ‘unpaid minimum wages’ or ‘unpaid overtime compensation’ (or alleging retaliation).” Pet. 24 (quoting 29 U.S.C. § 216(b)) (emphasis in original). But that is precisely what the plaintiffs seek in this case. Petitioners rely repeatedly on the government’s brief in *Trejo*, which stated that “plaintiffs [who] are not pursuing minimum wage claims or overtime claims, but instead seek only to collect improperly withheld tips, ... do not have a cause

of action under the FLSA.” Dep’t *Trejo* Br. 11, (quoting Pet.App. 161a); see Pet.10, 24, 27. But in the instant case the plaintiffs are pursuing minimum *25 wage and overtime claims.²¹ The government brief in *Trejo* expressly argued that an employer’s improper use of employee tips would constitute a deduction from the employees’ wages, and would therefore violate the minimum wage law if the deduction brought those wages below the minimum wage.²² That is precisely what the plaintiffs contend occurred in the instant case.

III. THERE IS NO CIRCUIT CONFLICT REGARDING THE STANDARD FOR DETERMINING THE VALIDITY OF A SUBSTANTIVE REGULATION

Much of the petition is devoted to objections to the “reasoning” or “rationale” of the court of appeals opinion. Pet. 4, 6, 18. Petitioners assert that the Ninth Circuit held that any federal agency can adopt regulations about any topic whatsoever unless Congress has expressly forbidden the agency to act on that particular issue. Pet. 18. This aspect of the petition rests on a mischaracterization of the court of appeals decision.

*26 The substantive rule at issue here was adopted pursuant to the broad express rulemaking authority in section 29(b) of the Fair Labor Standards Amendments of 1974. Pub L. No. 93-259, § 29, 88 Stat. 55, 76 (1974). That provision authorizes the Secretary “to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.” The statutory requirements that a regulation be “with regard to” a provision of the 1974 Act, and be “necessary,” are precisely the limiting principles that petitioners object are missing from the court of appeals opinion.

Section 531.52 clearly is “related to” an “amendment[] made by th[e] Act”; it concerns the language in section 13(e), now codified in the second, third and fourth sentences in the section 203(m) tip provision. Neither petitioners nor the dissent in this case or *ORLA* dispute the Secretary’s finding that this regulation is needed to prevent circumvention of the restrictions in section 3(m) on employer use of employee tips. As the Secretary of Labor has repeatedly pointed out, in the absence of a limitation such as section 531.52, an employer could seize all of its employees’ tips, and use them to pay its entire minimum wage obligation, thus frustrating the provision in section 3(m) mandating that employers pay at least \$2.13 per hour from their own pockets.

Although the question presented refers circumspectly to tip pools, petitioners at times state quite clearly their view that the Secretary has no authority whatever to limit use of employee tips by an employer which does not take a tip credit. Pet. 19-20. On this view, Wynn could seize all tips and turn them over to its payroll department to be used to pay the federally required minimum wage and *27 overtime, or could create an \$8 million “tip pool” allocated entirely to the company CEO. In the district court cases cited approvingly in the petition, the employers in question had expropriated for their own use all of their employees’ tips, or all tips paid by credit card, or had used the seized tips to pay various business expenses (including wages), or to reward management employees.²³ If the Secretary could not adopt a regulation forbidding such practices, the limits in the section 3(m) tip provision would be virtually meaningless, because any employer could devise a scheme to circumvent the section 3(m) limitations. Since money is fungible, there is no practical difference between using expropriated tips to pay the minimum wage, and using those tips to give raises to managers or to buy slot machines, and then diverting for the payment of minimum wages the funds that would otherwise have been spent for those other purposes.

Nothing in the text of section 29(b) precludes the Secretary from addressing the manifest necessity of preventing such schemes. Wynn argues that the broad grant of authority in section 29(b) is restricted by the tip provision in section 13(e) of the 1974 Act, not because section 13(e) contains on its face any express limitation on the Secretary’s section 29(b) rulemaking authority, but solely because section 13(e) fails to mention any tip-related practices other than tip credits. Wynn contends that this mere silence - the absence from section 13(e), for example, of a prohibition against expropriation of a worker’s tips *28 to pay the worker’s entire minimum wage - implicitly excludes from the scope of the regulatory authority established by section 29(b) all tip-related practices that do not involve a tip credit subject to section 13(e). The court of appeals correctly rejected that argument, holding that in the face of the express and broadly written grant of rulemaking authority in section 29(b), Wynn was required to show that some other provision of the FLSA affirmatively barred the regulation at issue. It was silence in the face of the express grant of authority in section 29(b), not mere silence, that confirmed the Secretary’s power to adopt the regulation in question.

The Fourth Circuit decision in *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152 (4th Cir. 2013), on which

petitioners rely, refused to read such merely implicit limitations into an express grant of rulemaking authority. “[I]f Congress had intended to curtail in a particular area the broad rulemaking authority granted [by one section of a statute], we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section.” 721 F.3d at 159 (quoting *American Hospital Association v. NLRB*, 499 U.S. 606, 613 (1991)). Petitioners describe *Chamber of Commerce* as having “emphatically refused to equate the absence of statutory language directly addressing an issue with a license for an agency to regulate.” Pet. 33. But the aspect of this decision to which petitioners refer merely holds that because with regard to the particular regulation at issue in that case “there [was] no general grant of [rulemaking] power to the NLRB” at all, “there [was] simply no authority to be limited.” 721 F.3d at 159-60.

***29** This Court’s decision in *Mourning v. Family Publications Service, Inc.*, rejected precisely the argument advanced by petitioners. In that case, the substantive provisions of the Truth in Lending Act required disclosures of certain specified information *only* if a seller imposed a finance charge. Acting under a statutory provision authorizing the issuance of “necessary” regulations, the agency administering the Act required that those disclosures be made in any case in which a buyer was to pay for goods or services in more than four instalments, regardless of whether the seller imposed a finance charge. 15 U.S.C. § 1640. The defendant in *Mourning* challenged the validity of that regulation, arguing that “in requiring disclosure as to some transactions [those involving a finance charge], Congress intended to preclude the [agency] from imposing similar requirements as to any other transactions [those with no finance charge].” 411 U.S. at 372.²⁴ This Court ***30** upheld that regulation as reasonably adopted to prevent “evasion by subterfuges,” noting that a seller could simply build its finance charges into the price of the goods or services involved. 411 U.S. at 371. “To accept respondent’s argument would undermine the flexibility sought in vesting broad rulemaking authority in an administrative agency.” *Id.* at 372. “Neither the sections of the Truth in Lending Act which refer specifically to transactions involving finance charges nor any other section of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board’s regulations might apply.” *Id.* at 373. “Where the empowering provision of a statute states simply that the agency may ‘make ... such rules and regulations as may be necessary to carry out the provisions of this Act,’ we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’ ” *Id.* at 369 (quoting 42 U.S.C. § 1408 and *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280 (1969))(footnote omitted).

In *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), this Court upheld an FLSA regulation prohibiting homework in the embroidery industry. The FLSA itself did not impose any limitations on homework, but the Administrator was authorized to impose “such terms and conditions as the Administrator find necessary” to carry out the minimum wage rules. 324 U.S. at 248. The absence of any statutory limitation on homework did not mean that “homework was ... put beyond [the Administrator’s] power to prescribe the means necessary to achieve the purposes of the ... Act.” 324 U.S. at 262. “When command [to enforce the minimum wage standards] is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short ***31** of express limitation or abuse of discretion in finding necessity exists should undermine the action taken to execute it.” *Id.* at 255. The Ninth Circuit did not err in holding that, in the absence of any such express limitation in section 13(e), section 29(b) authorized the Secretary to issue section 531.52.

Petitioner argues that because the Ninth Circuit had earlier held in *Cumby* that the FLSA itself clearly did not restrict the use of employee tips by an employer which did not claim a tip credit, the court below was required to hold section 531.52 invalid. But that argument overlooks the critical distinction between an interpretive regulation and a substantive regulation promulgated after notice and comment. See *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1203-04 (2015). The cases on which petitioners rely concern agency rules or regulations which merely interpret statutory provisions. In such cases, a finding that the statute is unambiguous indeed ends the inquiry. “A court’s prior judicial construction of a statute trumps agency *construction* otherwise entitled to ... deference ... if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) (emphasis added). But in the instant case, section 531.52 is a substantive rule, adopted after formal notice and comment, and intended (like the regulations in *Mourning* and *Gemsco*) to prevent evasion of - not merely to reiterate - the commands of the statute. Such regulations can create obligations and rights over and above those contained in the underlying statute; the very purpose of the authority provided in provisions such as section 29(b) is to authorize such regulatory action.

***32 CONCLUSION**

For the above reasons, certiorari should be denied.

Footnotes

- ¹ The effect of subsection (1) is to require employers to pay at least \$2.13 an hour, no matter how much their employees earn in tips.
- ² See Brief of the Secretary of Labor as *Amicus Curiae* In Support of Plaintiff-Appellant, *Cumbe v. Woody Woo, Inc.*, No. 08-35718 (9th Cir.), pp. 10-12.
- ³ This is the same provision that authorized the regulations upheld in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007). The statutory exemption for domestic service employees was part of the 1974 FLSA amendments.
- ⁴ 29 C.F.R. § 531.55 (1970).
- ⁵ “[W]here tips are redistributed to employees who do not customarily and regularly receive tips ..., an employee who has originally received tips will be considered to have contributed all such improperly redistributed tips to the employer for purposes of determining where he or she has received the minimum wage, free and clear.” *Id.*
- ⁶ Petitioner asserts that the regulations were adopted “in response to *Cumbe*” (Pet. 12) and “for the express purpose of repudiating the [Ninth Circuit’s] prior decision [in *Cumbe*].” Pet. 17-18. The Department’s proposal pre-dated *Cumbe* by two years, and always contained the general rule that an employer may not use an employee’s tips for purposes outside the scope of section 3(m).
- ⁷ Letter of Randel Johnson to Wage and Hour Division, Sept. 26, 2008 (“the Proposed Rules will eliminate references in [the pre1974 regulations] to agreements between employer and employees that would make tips the property of employer or require employees to turn tips over to employers. Congress amended the FLSA in 1974 to clarify that employers are not permitted to retain employees. ... [T]he Proposed Rules will eliminate the misleading and confusing references. The Chamber supports these revisions”).
- ⁸ Pet. App. 104a (“Under the 1974 amendments to section 3(m), an employer’s ability to utilize an employee’s tips is limited to taking a credit against the employee’s tips as permitted by section 3(m). Section 3(m) provides the only method by which an employee may use the tips received by an employee.”), 111a (“Congress... amended the FLSA’s tip credit provisions in 1974 to clarify that section 3(m) provides the only permitted uses of an employee’s tips - through a tip credit or a valid tip pool among those employees who customarily and regularly receive tips. This has been the Department’s longstanding position since the 1974 amendments.”), 112a (“section 3(m) provides the only permissible uses of an employee’s tips regardless of whether a tip credit is taken.”), 117a (“section 3(m) sets forth the only permitted uses of an employee’s tips - whether or not the employer has elected the tip credit.”). The commentary noted the contrary interpretation of section 3(m) in *Cumbe*, which had been decided after the initial NPRM, and set forth the agency’s reasons for disagreeing with that opinion. Pet.App. 113a-116a.
- ⁹ Pet. App. 116a (in the absence of the regulation, “an employer could simply eschew the tip credit and use a greater part of its employees’ tips toward its minimum wage obligation than permitted under section 3(m)”); “instead of using only a portion of its employees’ tips to fulfill its minimum wage obligation, [an employer] could use all of its employees’ tips to fulfill its entire minimum wage obligation to the tipped employees or other employees.”; “[in the absence of such a regulation] an employer can mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose.”); 117a (“an employer that does not utilize a tip credit [could] use its employee’s tips to a greater extent than an employer that does utilize such credit. This ... makes the 1974 amendment superfluous.”).
- ¹⁰ Pet. App. 105a (“[where the employer had only paid the worker the minimum wage] any deductions by the employer from the employee’s tips would result in a violation of the employer’s minimum wage obligation”).
- ¹¹ Complaint, Doc. 6, pp. 3-5; see *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 98-99 (Nev. 2008).
- ¹² *Id.*
- ¹³ Affidavit of Daniel Baldonado, Doc 19-1, p. 6.
- ¹⁴ A dealer who worked 40 hours a week for 50 weeks a year and paid the minimum wage of \$7.25 would earn \$14,500.

- 15 Complaint, paragraph 13:
Defendants, by implementing the policies alleged [above], have effectively failed to pay any wages whatsoever to the plaintiffs, in that defendants recoup from the plaintiffs, through the taking of a portion of the plaintiffs' tips, an amount far in excess of the amount it nominally pays to the plaintiffs from the defendants' own funds, such actions by the defendants violating the purpose and intent of the FLSA which is to make all employers pay FLSA required minimum wages and overtime wages and all other wages solely from the resources of the employer and not by appropriating employee tips to make such wage payments, the FLSA also preventing an employer from engaging in such an appropriation by using a tip pool, such as the one used by defendants, to compensate employees who do not regularly and customarily receive tips with a portion of the tips received by other employees who do regularly and customarily receive tips.
Doc. 6, pp. 4-5.
- 16 The complaint also alleged that the seizure of the dealer tips resulted in a violation of the overtime provisions of the FLSA.
- 17 Response in Opposition to Defendants' Motion to Dismiss, p. 2 ("[The] defendants ... seek to ... evad[e] the Fair Labor Standards Act's ... minimum wage requirements.... Defendants would do so by taking the tips received by the plaintiffs and actually paying the plaintiffs nothing whatsoever, as those seized tips will far exceed the \$7.25 an hour minimum wage the defendants give back to the plaintiffs.");
Appellants' Opening Brief, pp. 11-12 ("This ... arrangement allows Wynn to take the tips received by the Dealers and actually pay the Dealers nothing whatsoever, as the seized tips will far exceed the \$7.25 an hour minimum wage the Wynn gives ... to the Dealers in the form of 'minimum wage.' "); Appellants' Reply Brief, pp 1-2 ("The Wynn assets that: [']plaintiffs do not ... contend that the Wynn failed to make a cash wage payment in an amount equal to or greater than the minimum wage....['] Wynn Brief p. 9. The Dealers contend ... that the Wynn has done precisely what the Wynn insists the plaintiffs "do not ... contend." It is undisputed that the Wynn takes tips give to its dealers It is also undisputed that the amount so taken by Wynn is far in excess of the minimum hourly wage.")
- 18 "When the employer uses tips for its own purposes, whether to supplement wage payments to non-tipped employees or to otherwise offset its own business expenses, such as by taking the tips directly from employees and putting them in the cash register, it is in effect making a deduction from employees' wages. The use of tips by the employer for its own purposes permits the employer to shift its costs to the employee To this end, the department is not regulating the employer's use of the tips; it is regulating the employer's statutory wage payment obligation. Depending on the amount of the direct wage payment made by the employer, the deduction may bring the employee below the minimum wage. This would constitute a violation of the FLSA because an employer cannot be permitted to undermine the minimum wage and overtime guarantees of the FLSA by paying an employee wages and then requiring the employee to bear a portion of the employer's expenses."
- 19 The Fourth Circuit in *Trejo* concluded only that the FLSA itself does not restrict the manner in which an employer who does not utilize a tip credit may seize and use its workers tips. 795 F.3d at 448. In his dissenting opinion in *ORLA*, Judge O'Scannlain insisted "that holding necessarily forecloses the Department's effort to ban tip pooling by employers who do not take a tip credit." *Oregon Restaurant and Lodging Ass'n v. Perez*, 2016 WL 4608148 at *9 (9th Cir. Sept. 6, 2016)(O'Scannlain, J., dissenting from denial of rehearing en banc). But the central conclusion of the Ninth Circuit in the instant case is the absence of such a requirement in the FLSA itself does *not* necessarily mean that the Secretary could not impose such a requirement by regulation.
- 20 Judge O'Scannlain correctly characterized the opinion below in this way. 2016 WL 4608148 at *4.
- 21 Petitioners argue that "[a]s the Department has acknowledged, '[t]here is no cause of action' under Section [2]16(b) for claims for tips 'divorced from a minimum wage claim or an overtime claim.' " Pet. 10 (quoting Dep't *Trejo* Br. 12). In the instant case, however, plaintiffs' objections to Wynn's tip practices are married to a wage and overtime claim.
- 22 Pet.App. 162a-63a ("When an employer uses tips for its own purposes, whether to supplement wage payments to non-tipped employees through an invalid tip pool or to otherwise offset its own business expenses, such as by taking the tips directly from employees and putting them in the cash register, it is in effect making a deduction from employees' wages... Depending on the amount of direct wage payment made by the employer, the deduction may bring an employee below the minimum wage. This would constitute a violation of the FLSA").
- 23 *Brueningsen v. Resort Express Inc.*, 2015 WL 339671 at *1 (D.Utah. Jan. 26, 2015); *Azeez v. Ramaiah*, 2015 WL 1637871 at *7 (S.D.N.Y. April 9, 2015); *Malivuk v. Ameripark, LLC*, 2016 WL 3999878 at *1 (N.D.Ga. July 26, 2016) *Platak v. Duquesne Club*, 961 F.Supp. 835, 836 (W.D.Pa. 1995).
- 24 See Brief for Respondent, *Mourning v. Family Publications Service, Inc.*, 15-16:
It is petitioner's fundamental contention that: "The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave

regulation of the transaction to the Board.” Pet. Br. 9. This position is clearly unsound.... Congress ... specifically limited the scope of the Act to creditors who impose a finance charge ... [T]he explicit limitation of the requirements of the Act to finance charge transactions cannot rationally be said to manifest “an intent to leave regulation of [all other transactions] to the Board.” Plaintiffs thesis would lead to the conclusion that the Board is authorized to regulate everything not dealt with by Congress.

End of Document

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To: Geale, Nicholas C. - SOL[Geale.Nicholas.C@DOL.gov]; Jeff Wall (b) (6)
From: Amin, Stacy C. EOP/WHO
Sent: Fri 10/13/2017 4:21:30 PM
Importance: Normal
Subject: RE: EXPEDITED Clearance Request: WHD NPRM - due Friday COB
Received: Fri 10/13/2017 4:22:01 PM
Tip NPRM redlined version for Dept. Clearance 10-12-17 final v2 sca.docx

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From: Geale, Nicholas C. - SOL [mailto:Geale.Nicholas.C@DOL.gov]
Sent: Thursday, October 12, 2017 7:10 PM
To: (b) (6)
Subject: Fwd: EXPEDITED Clearance Request: WHD NPRM - due Friday COB

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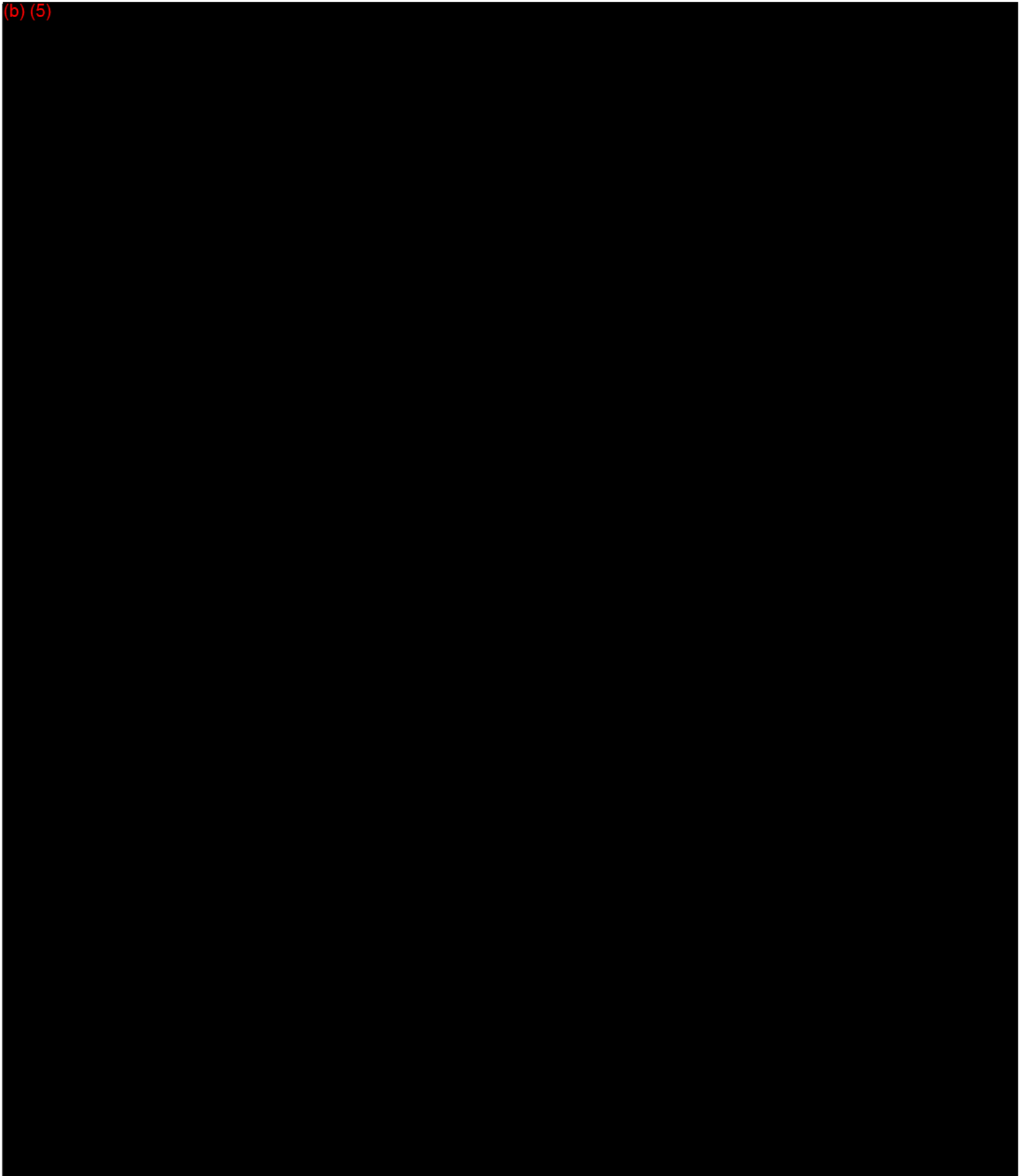
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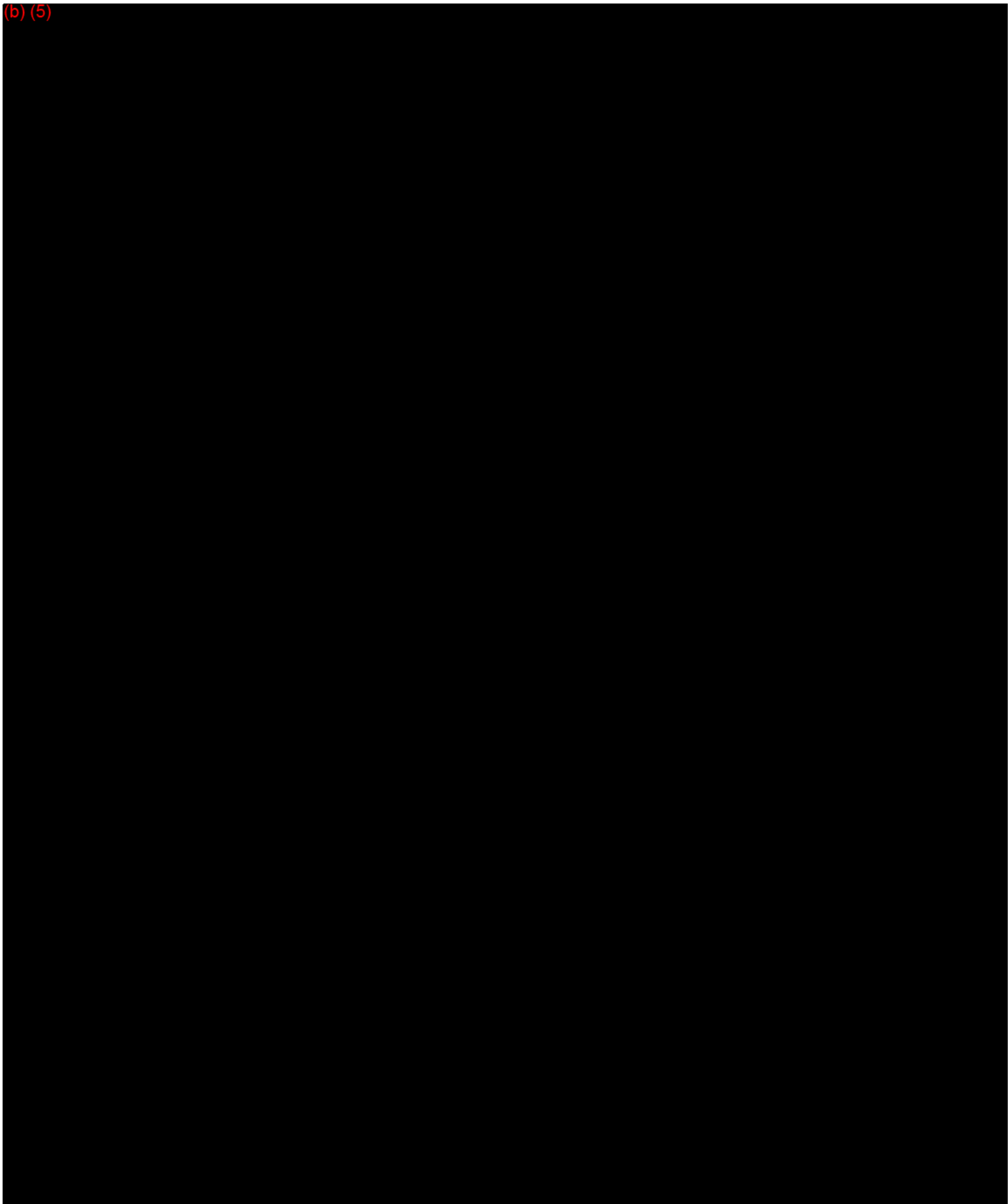
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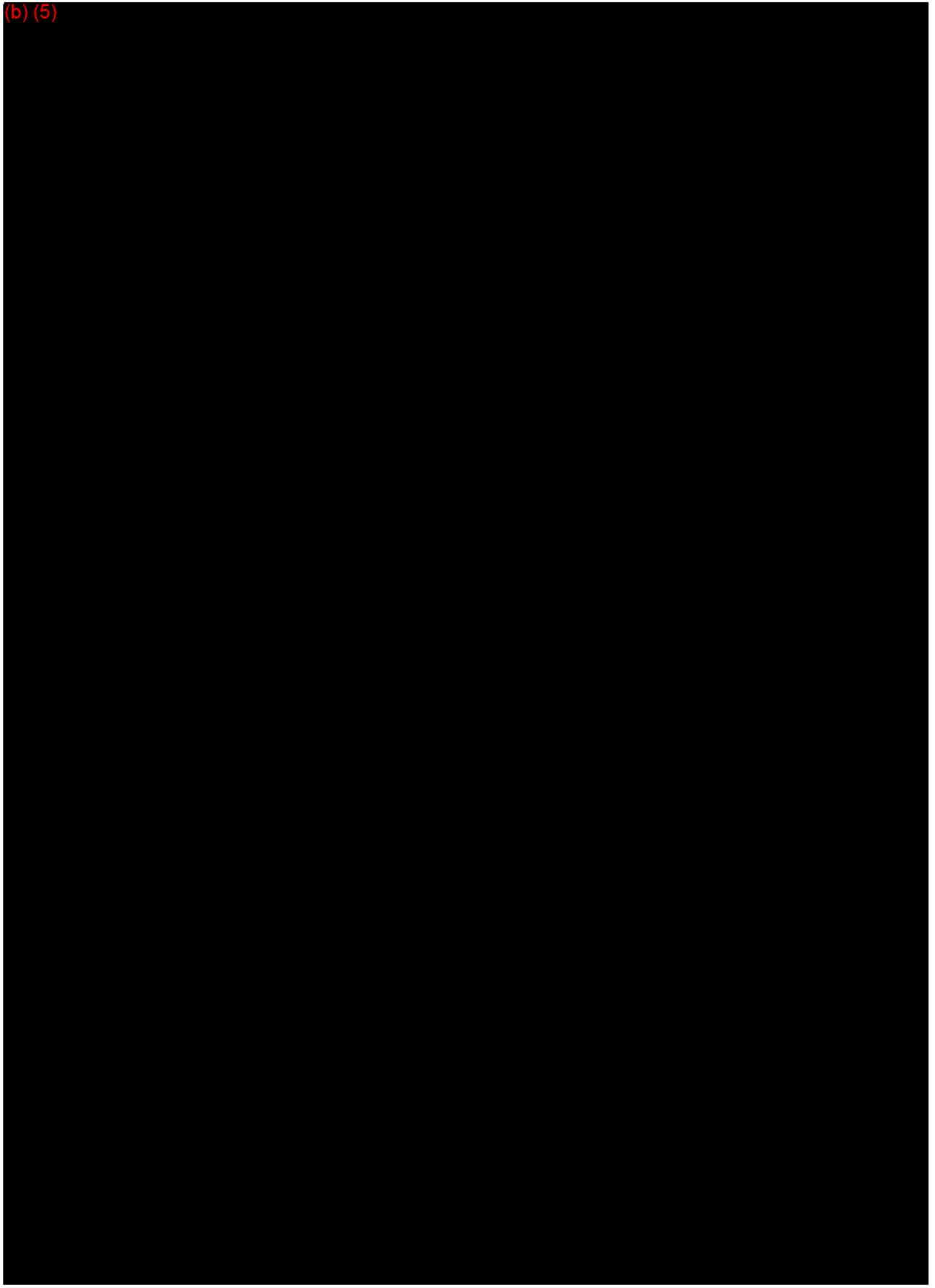


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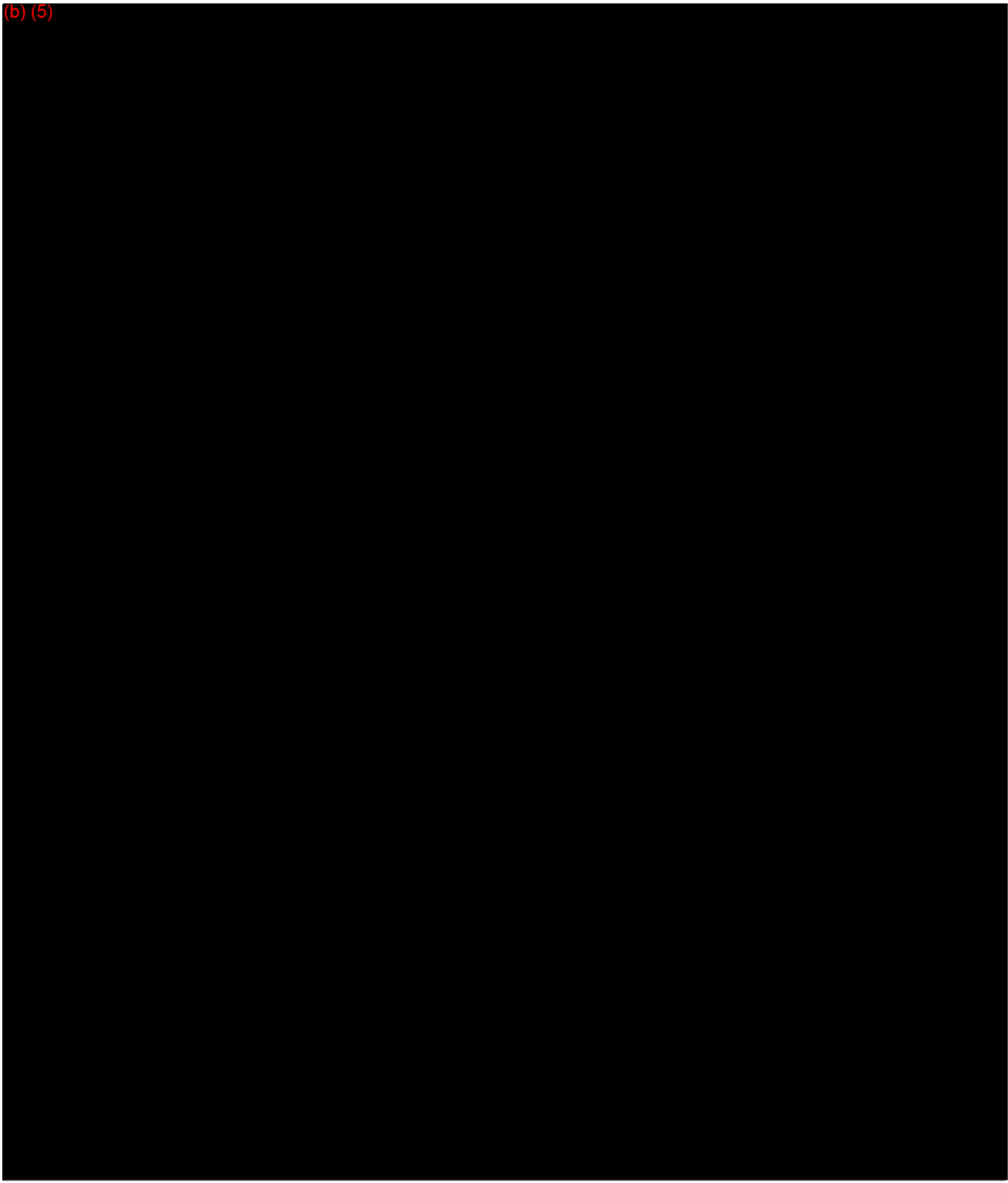
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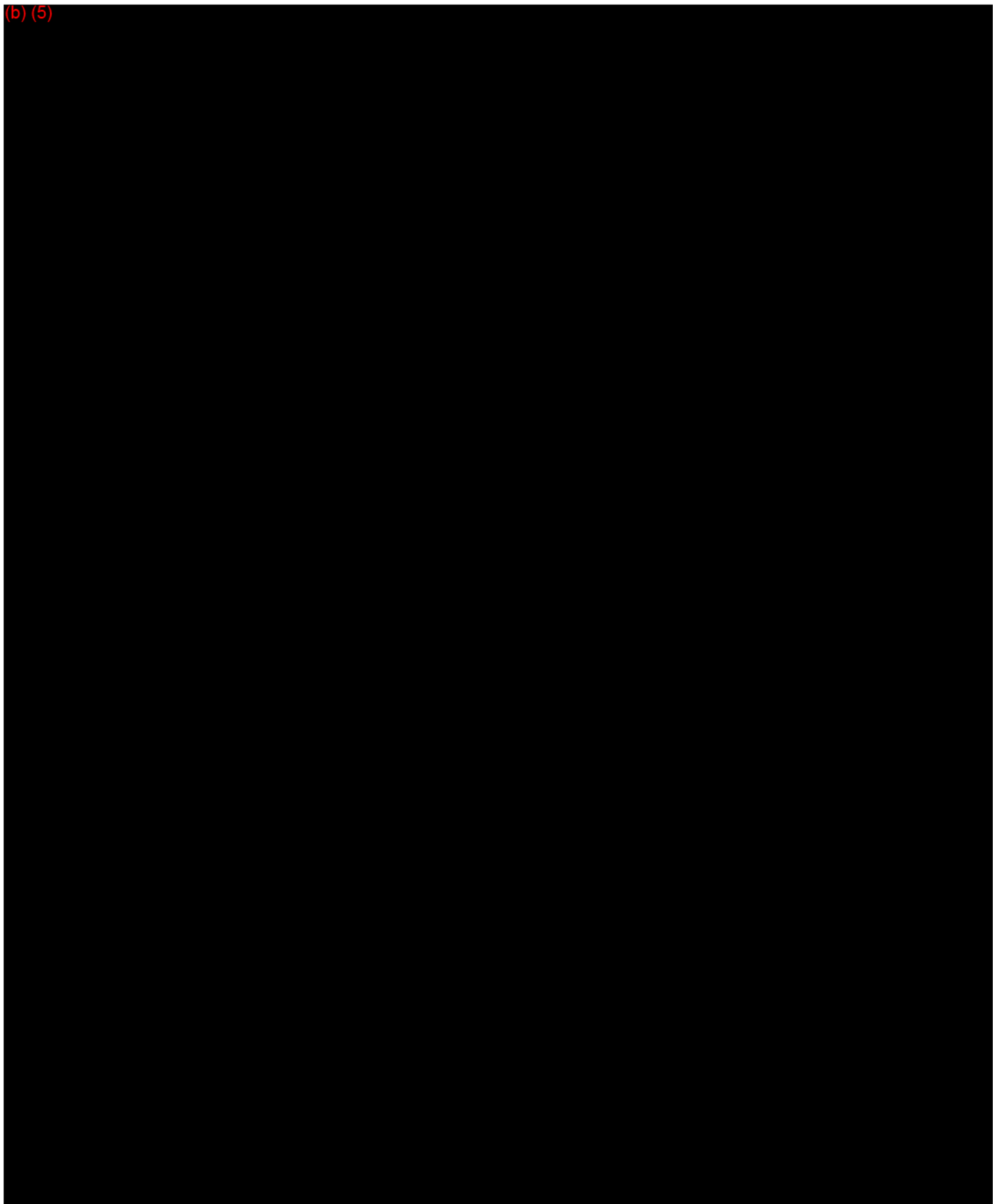


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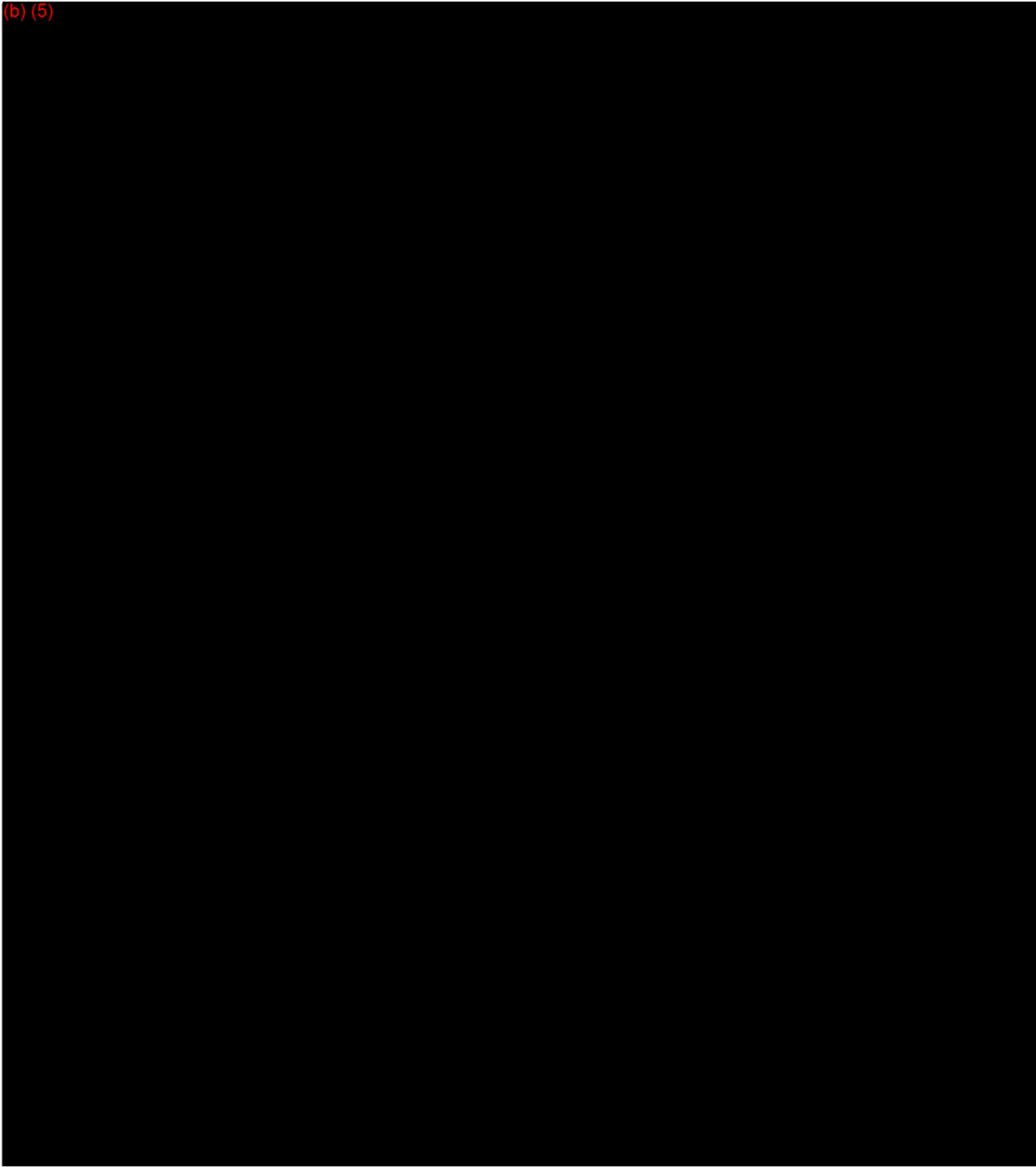
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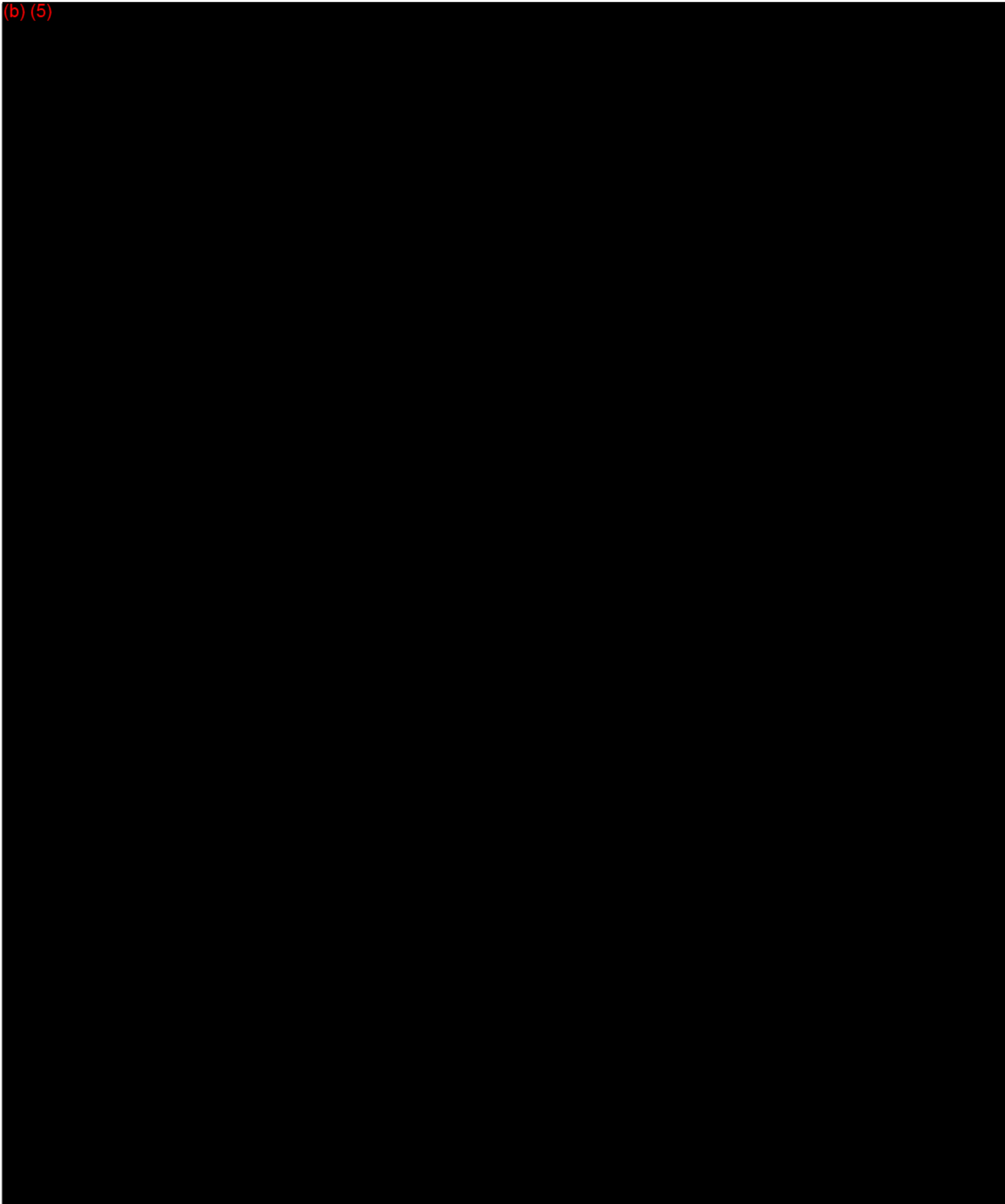


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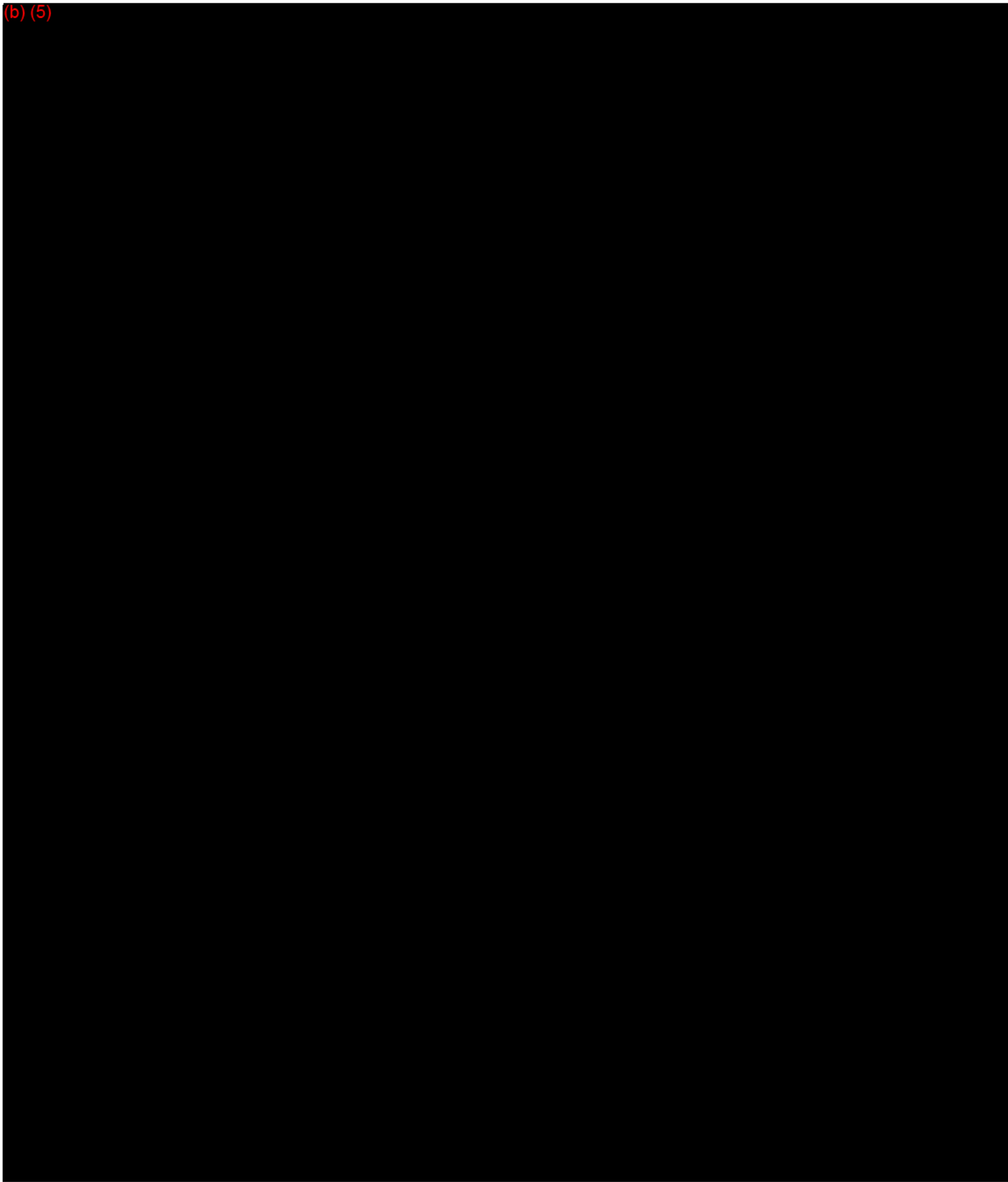
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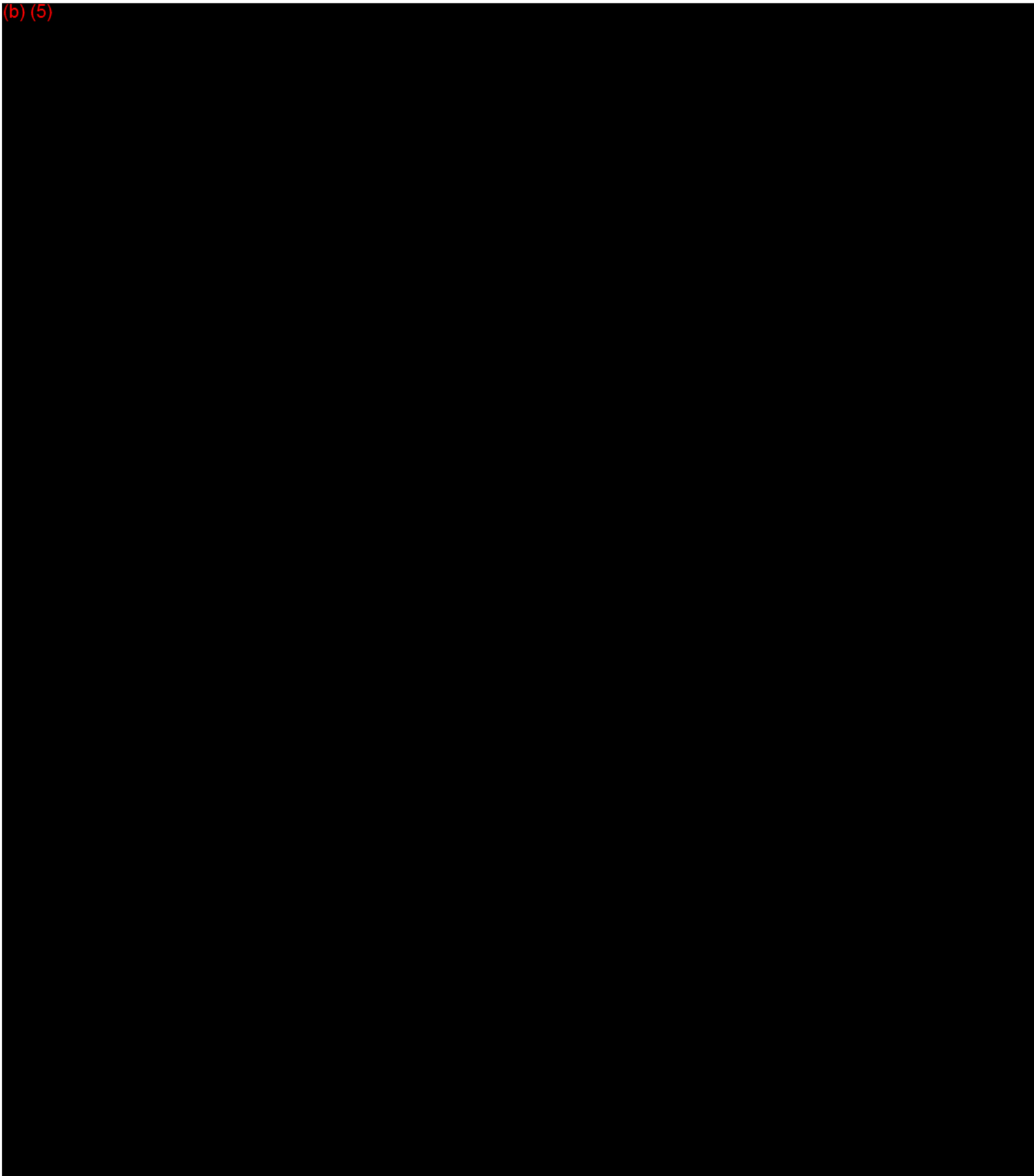
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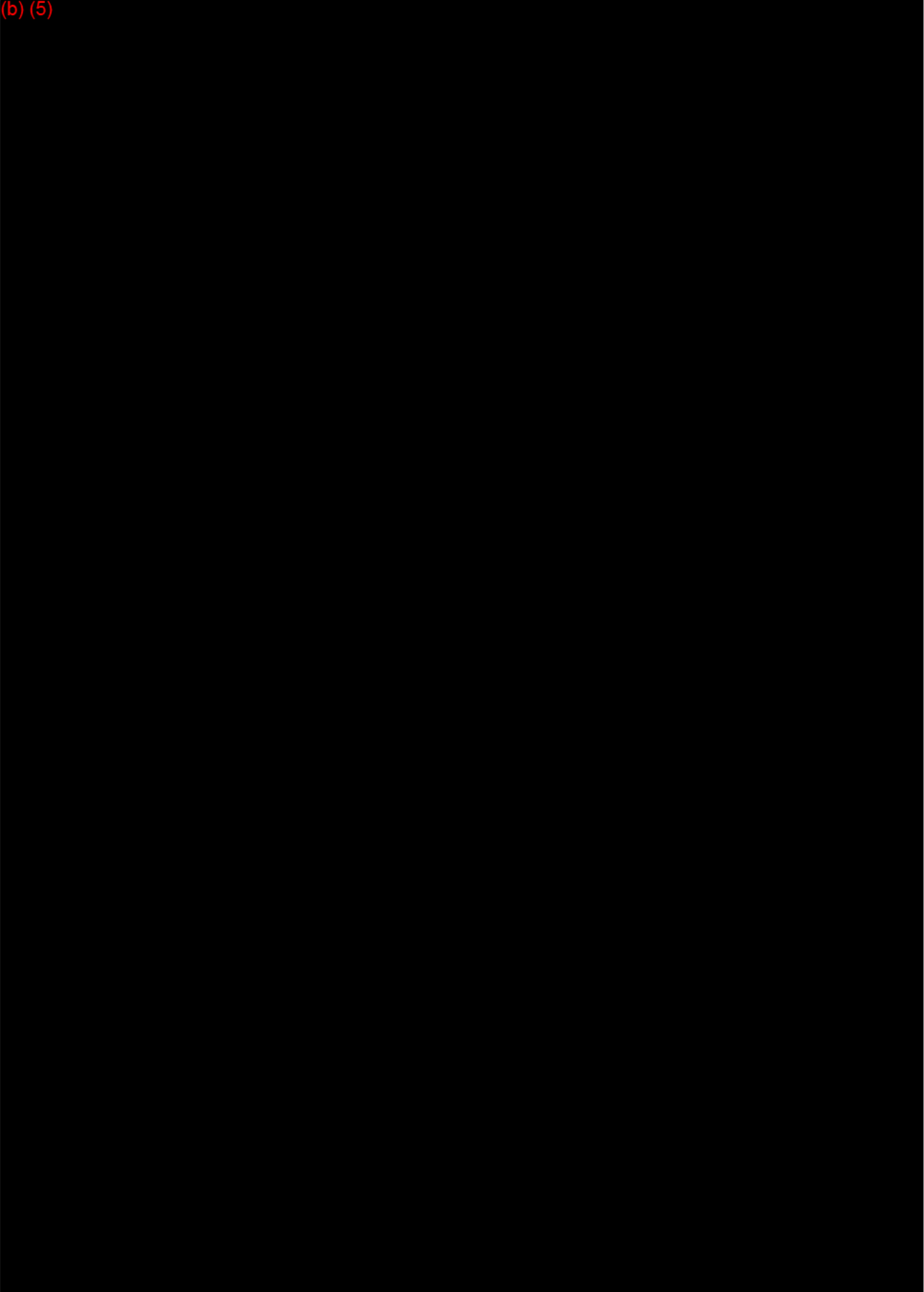
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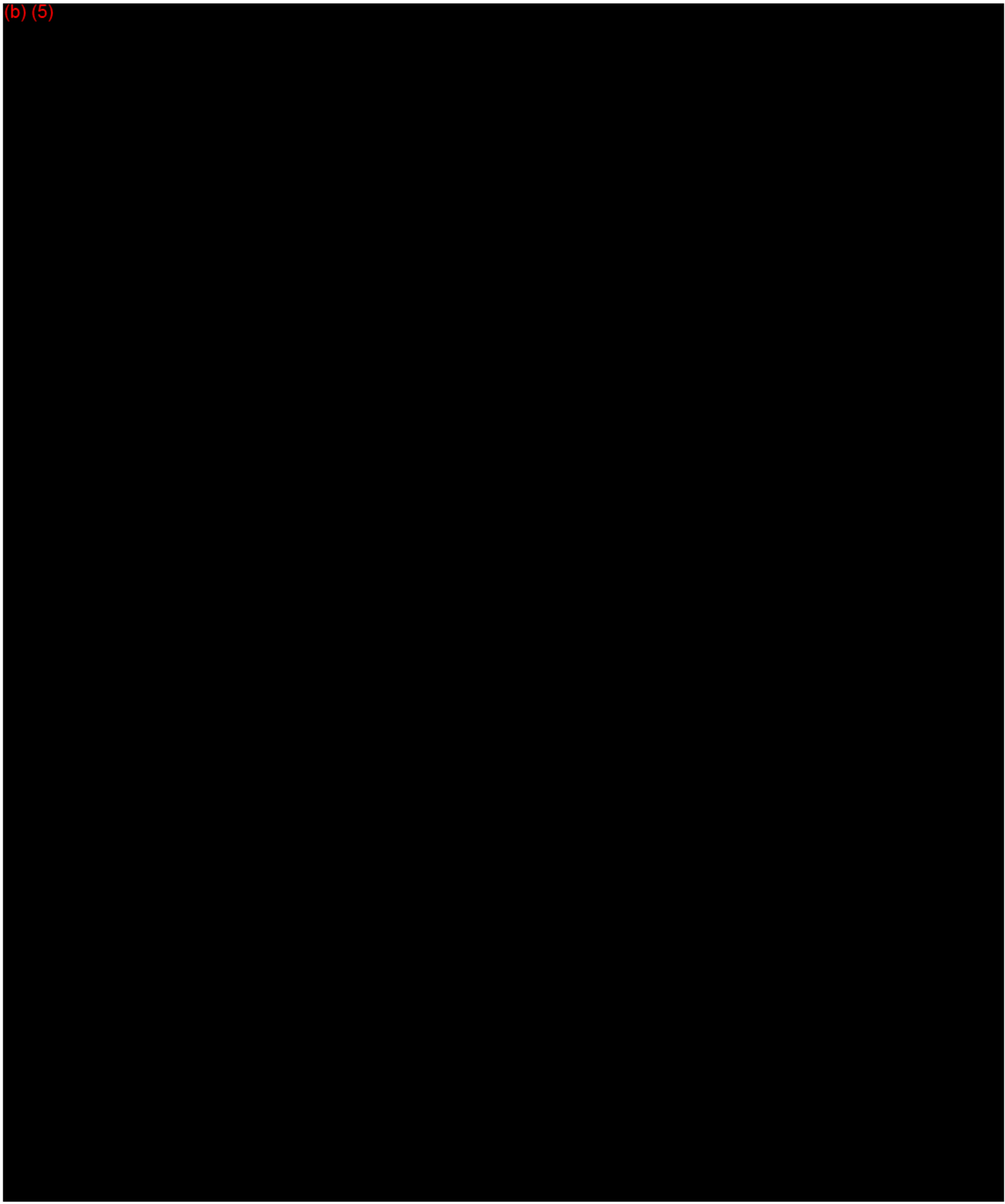
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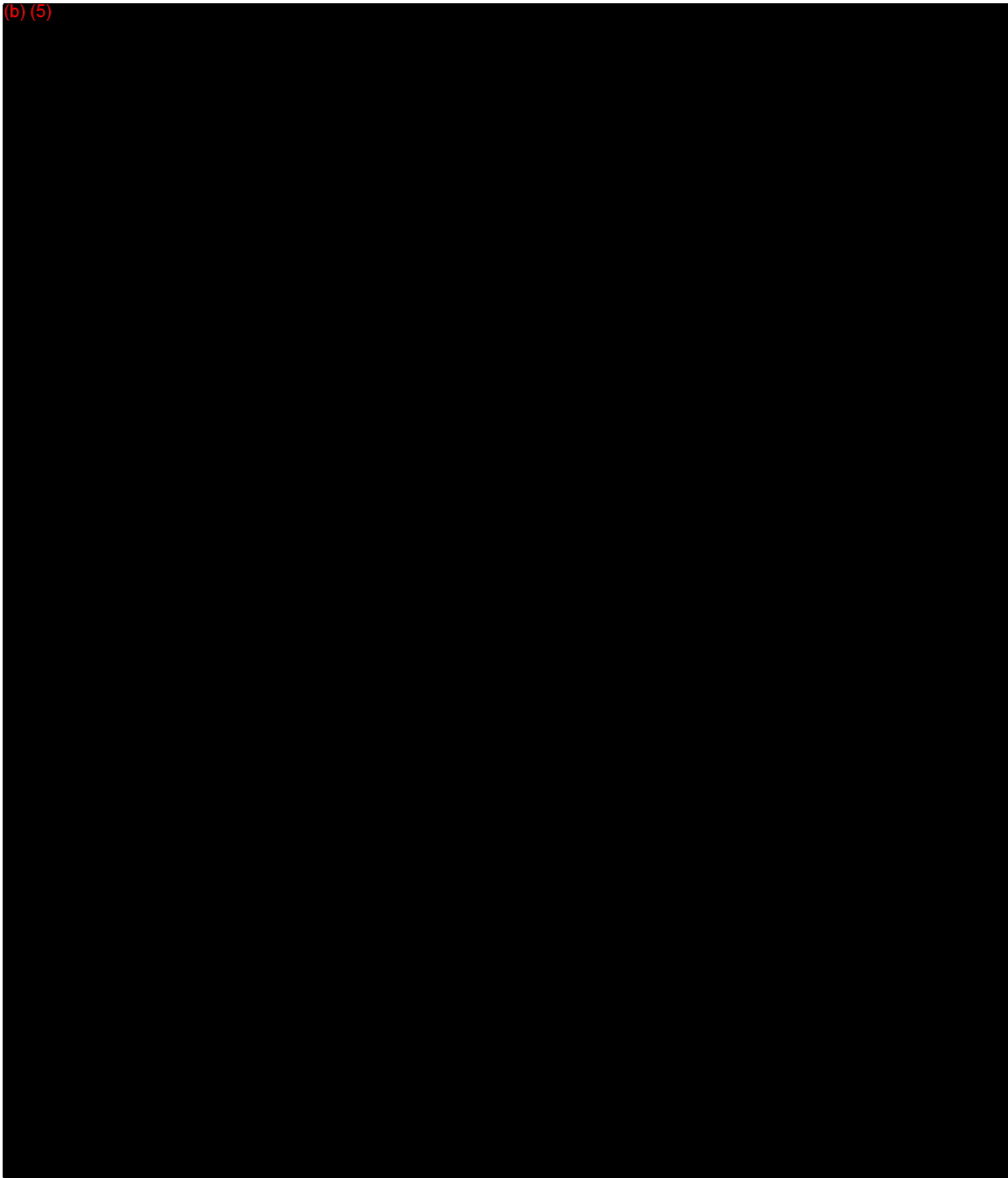
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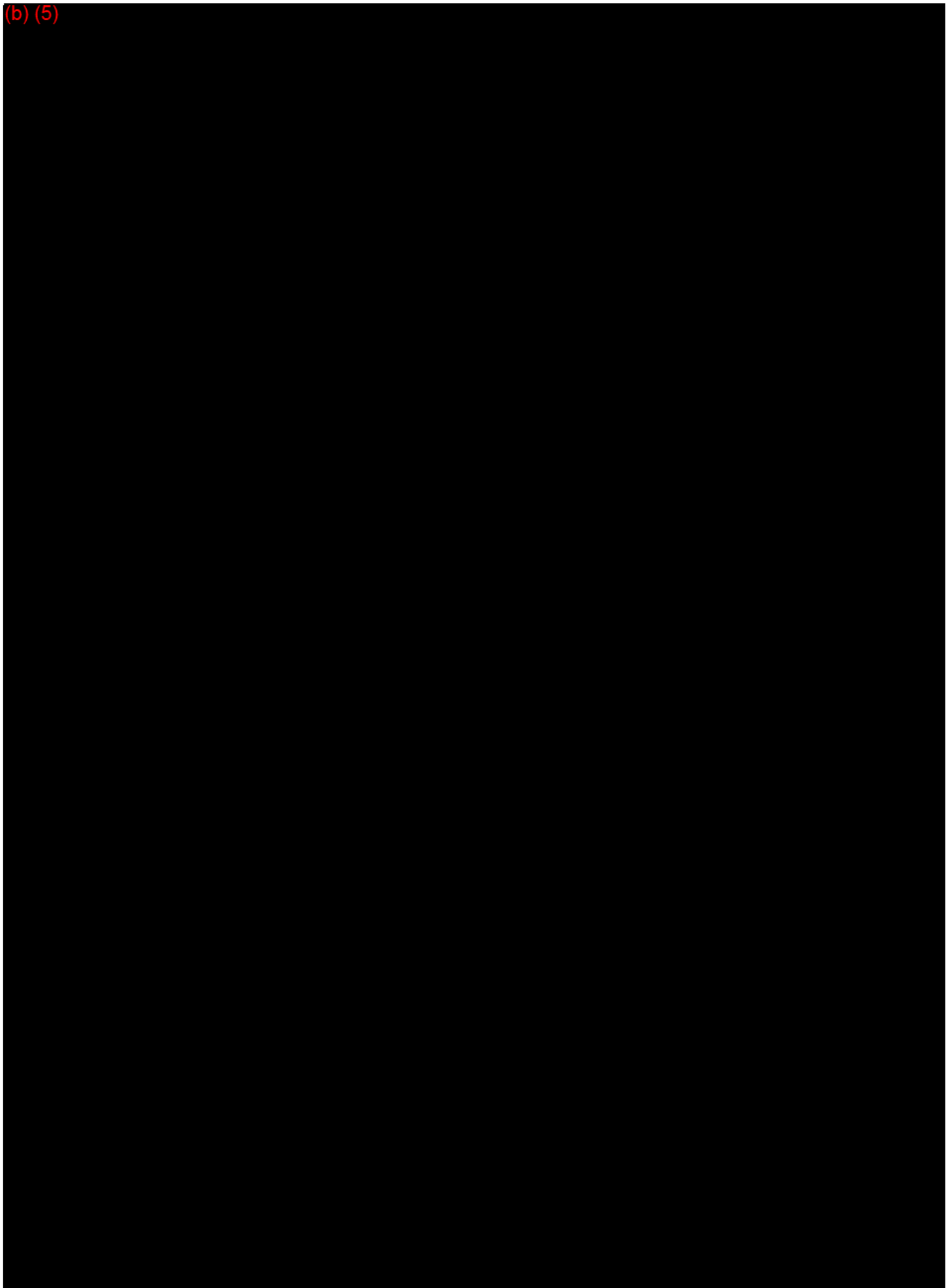
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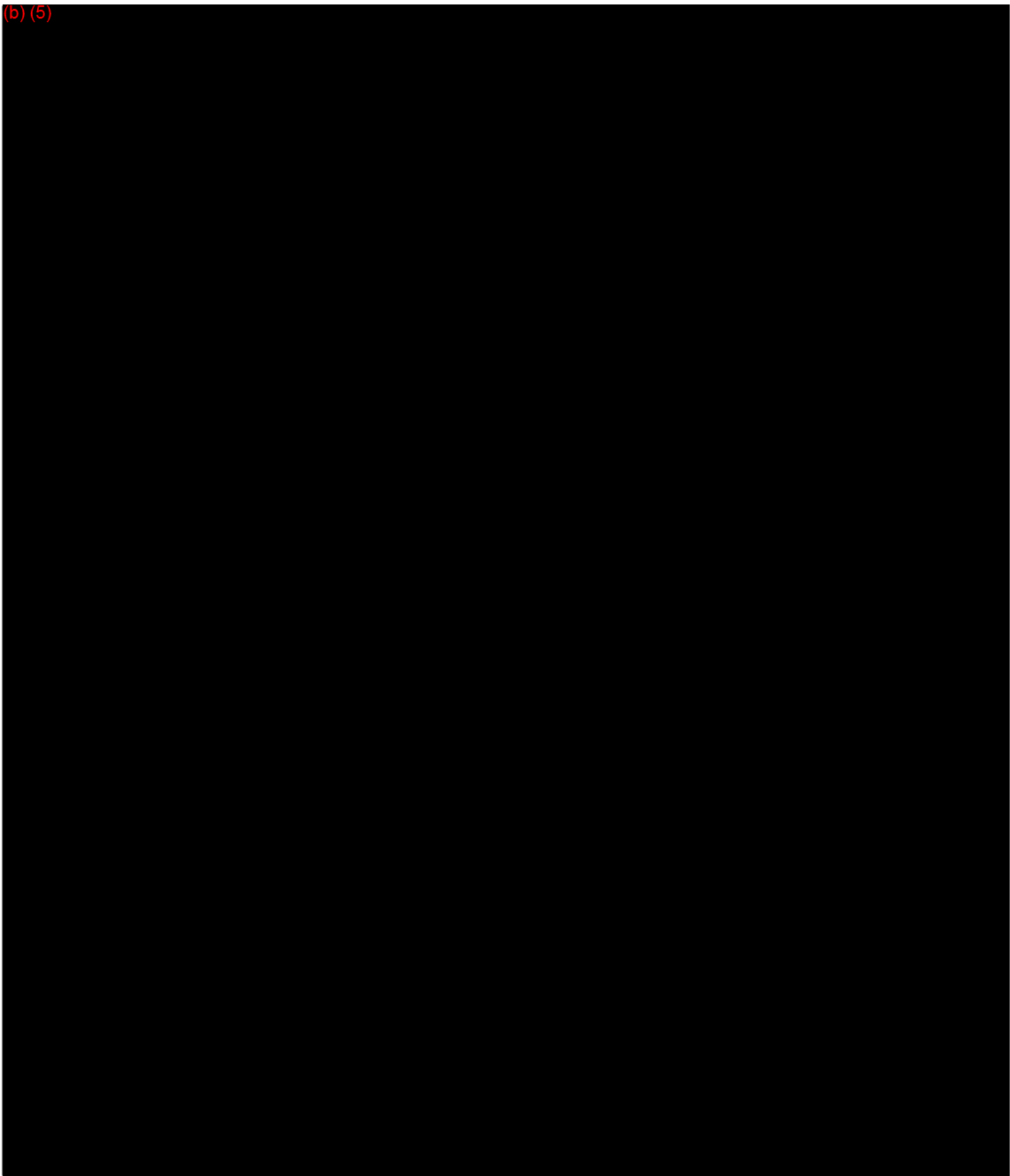


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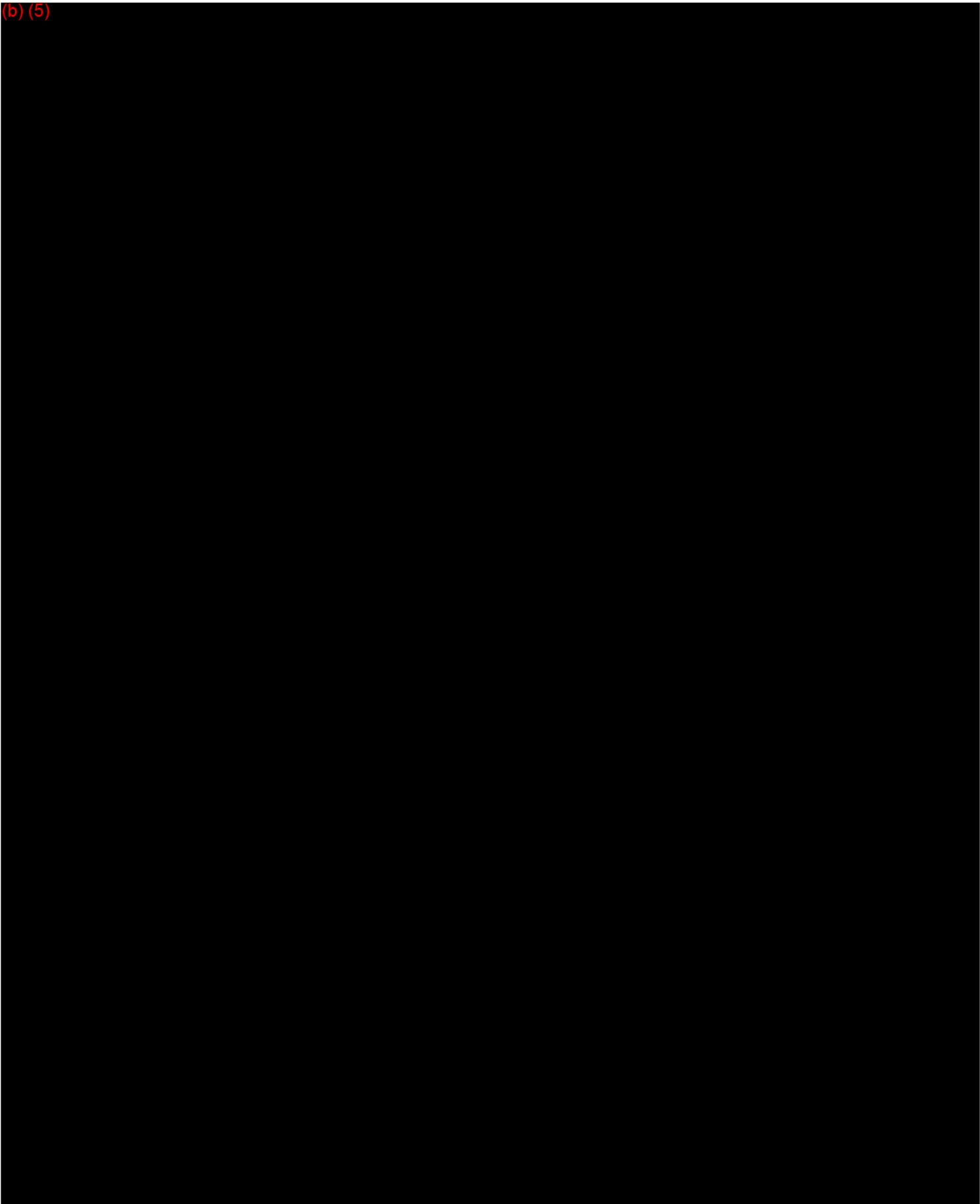
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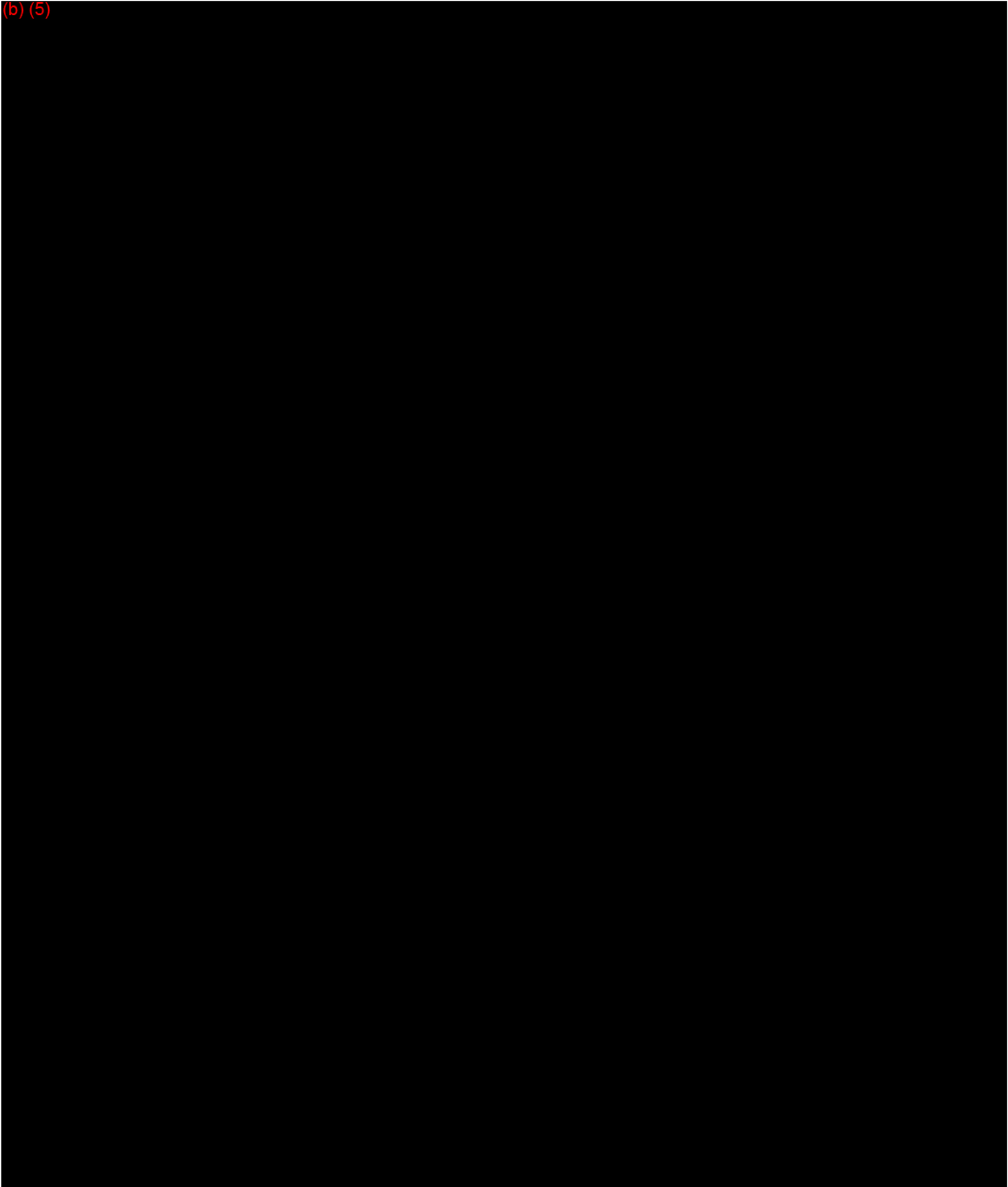
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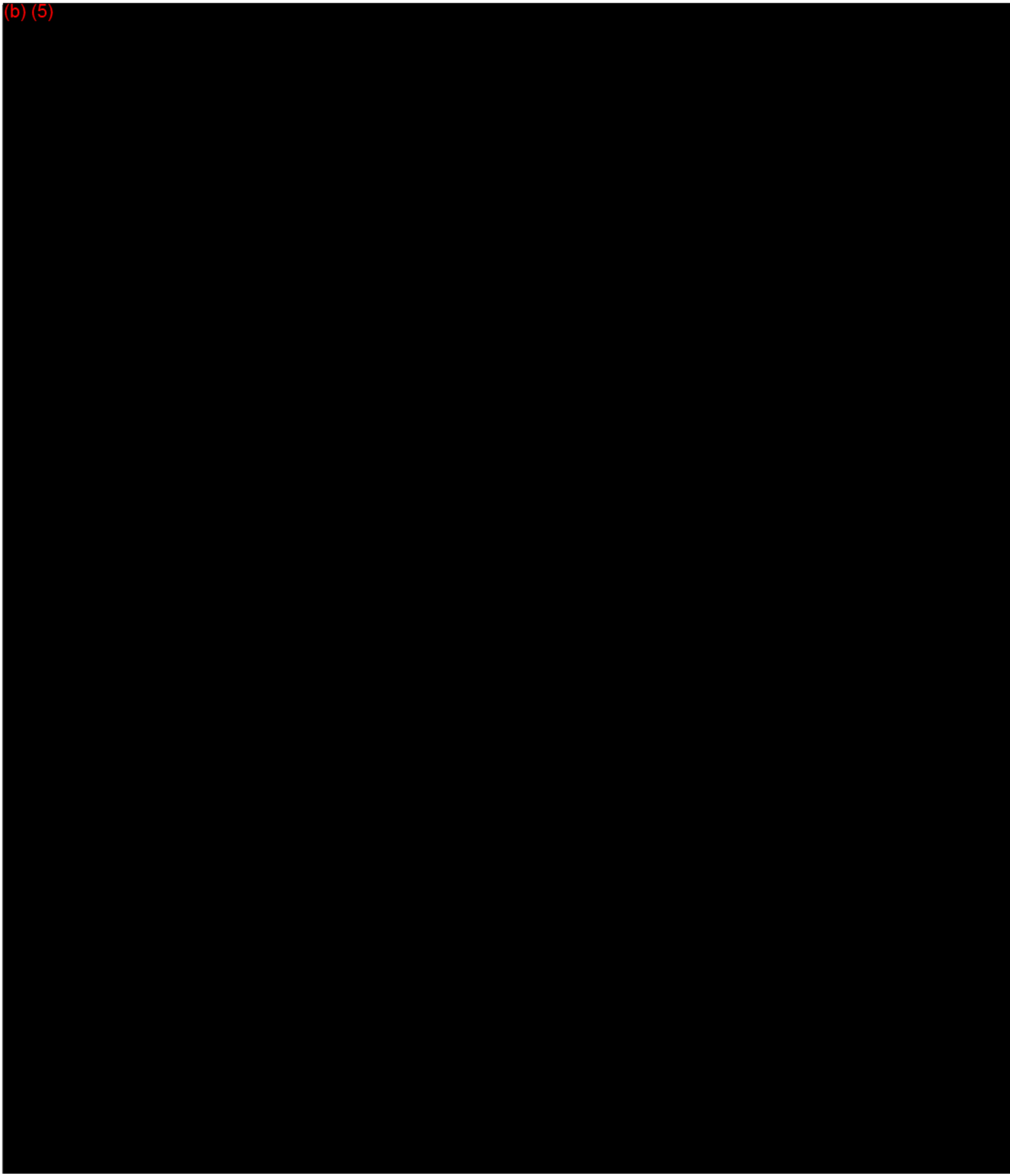
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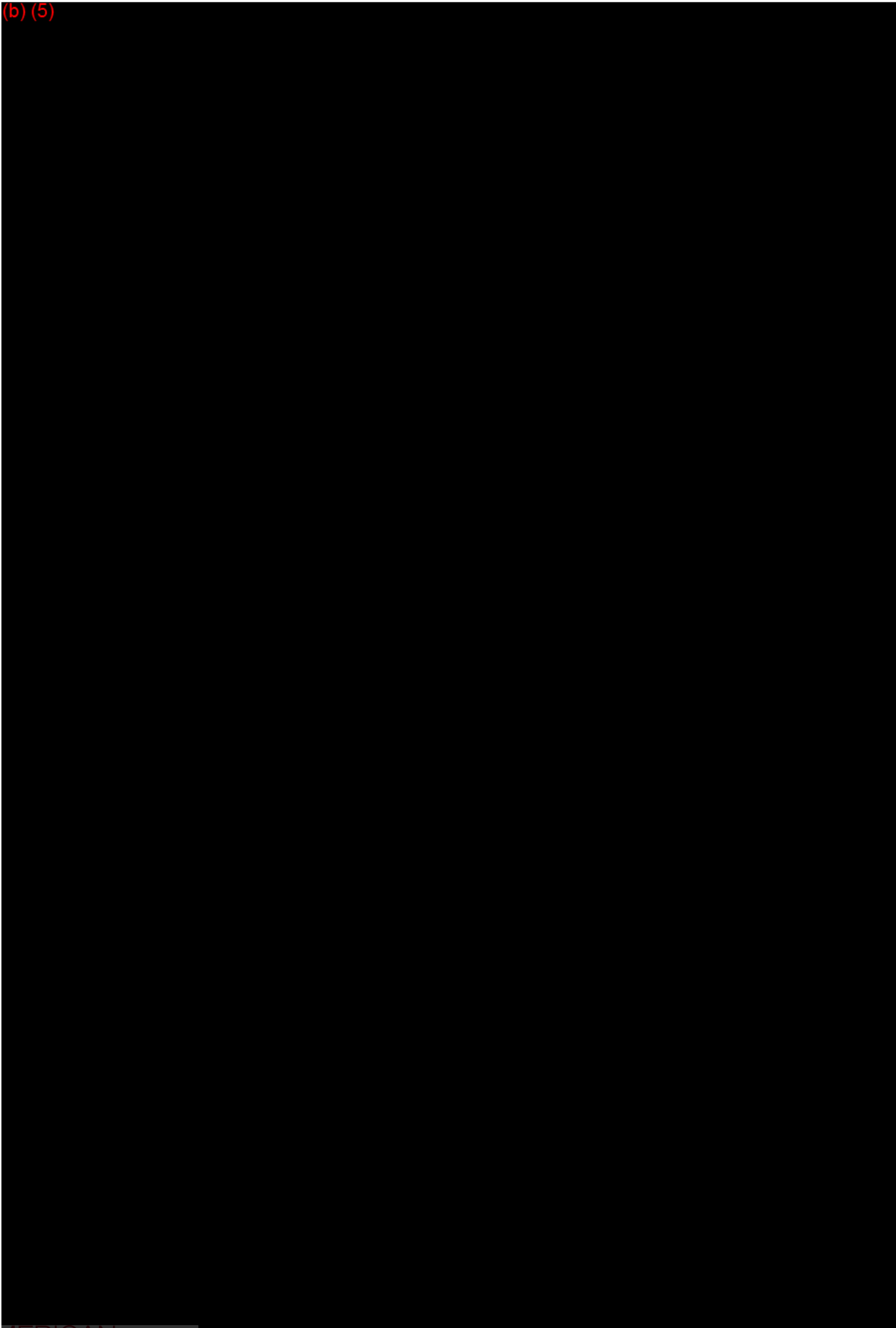


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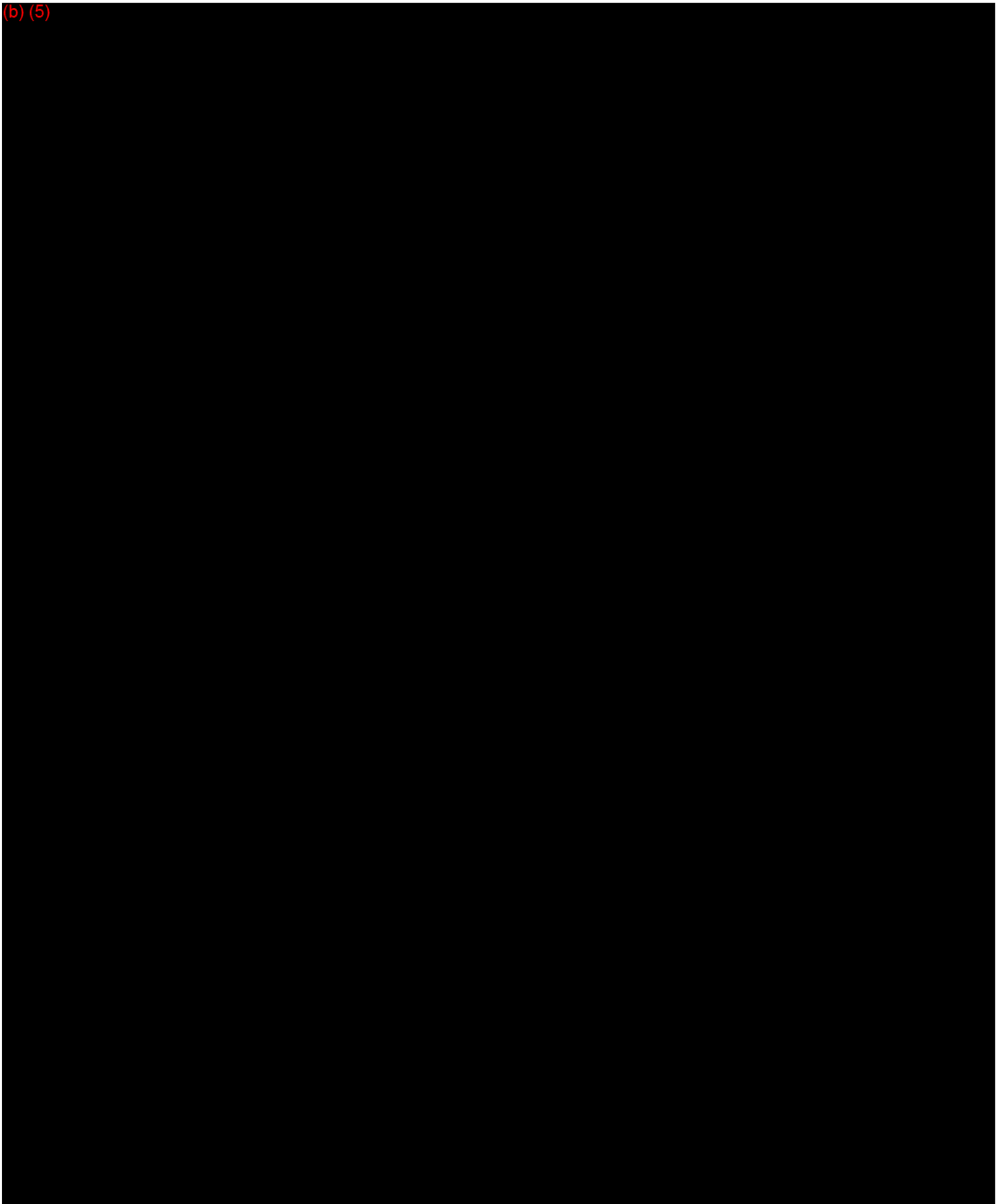
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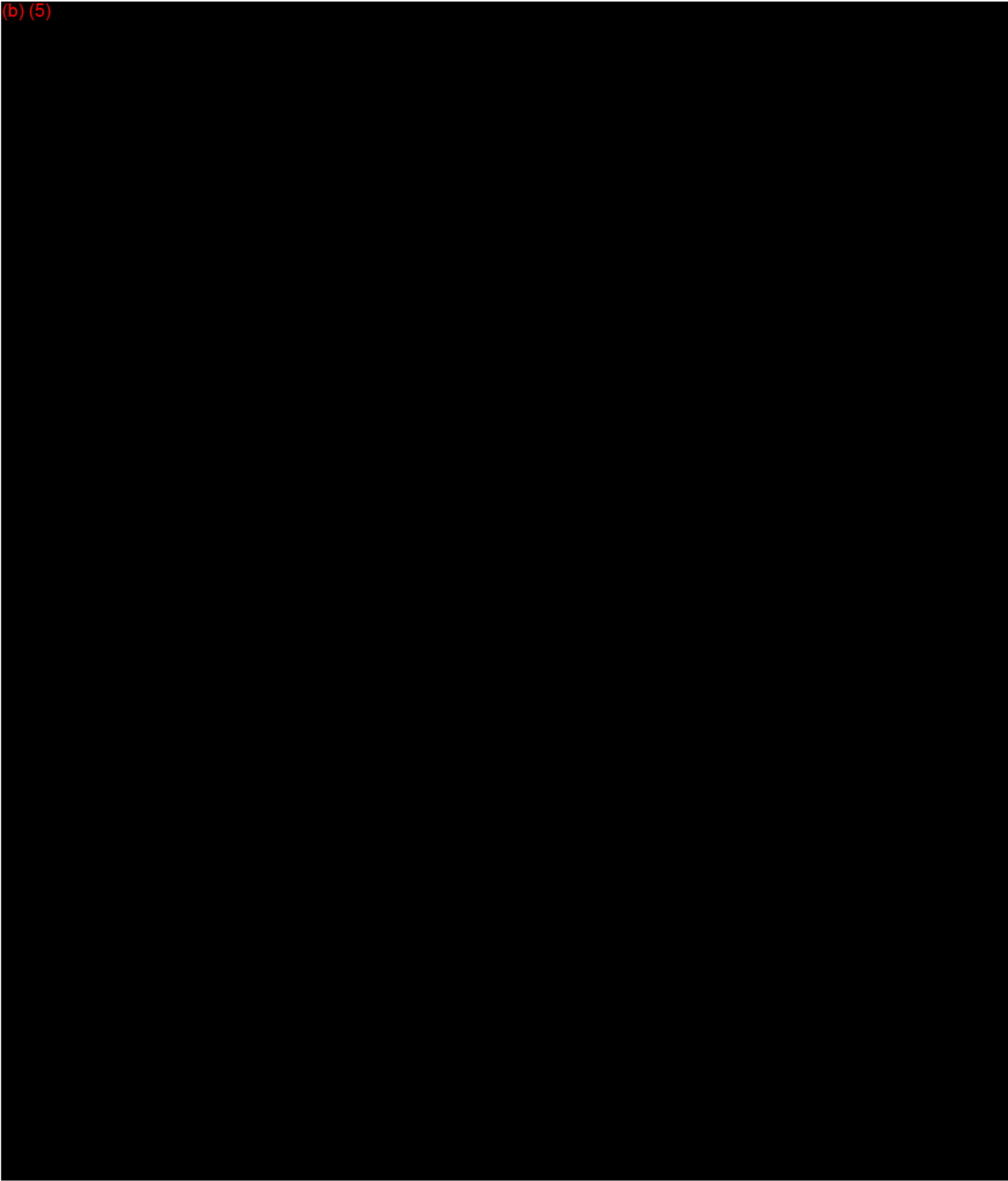
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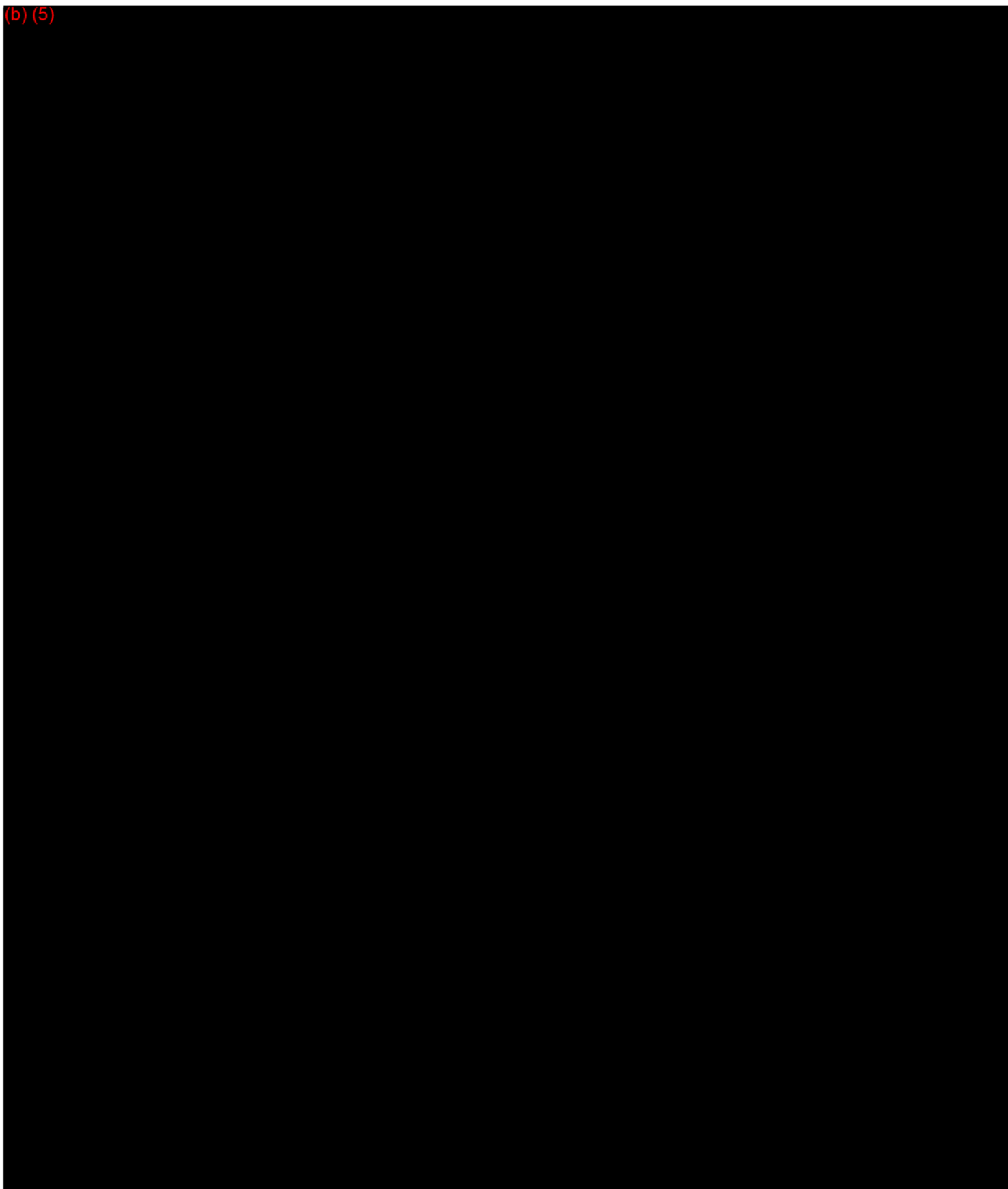
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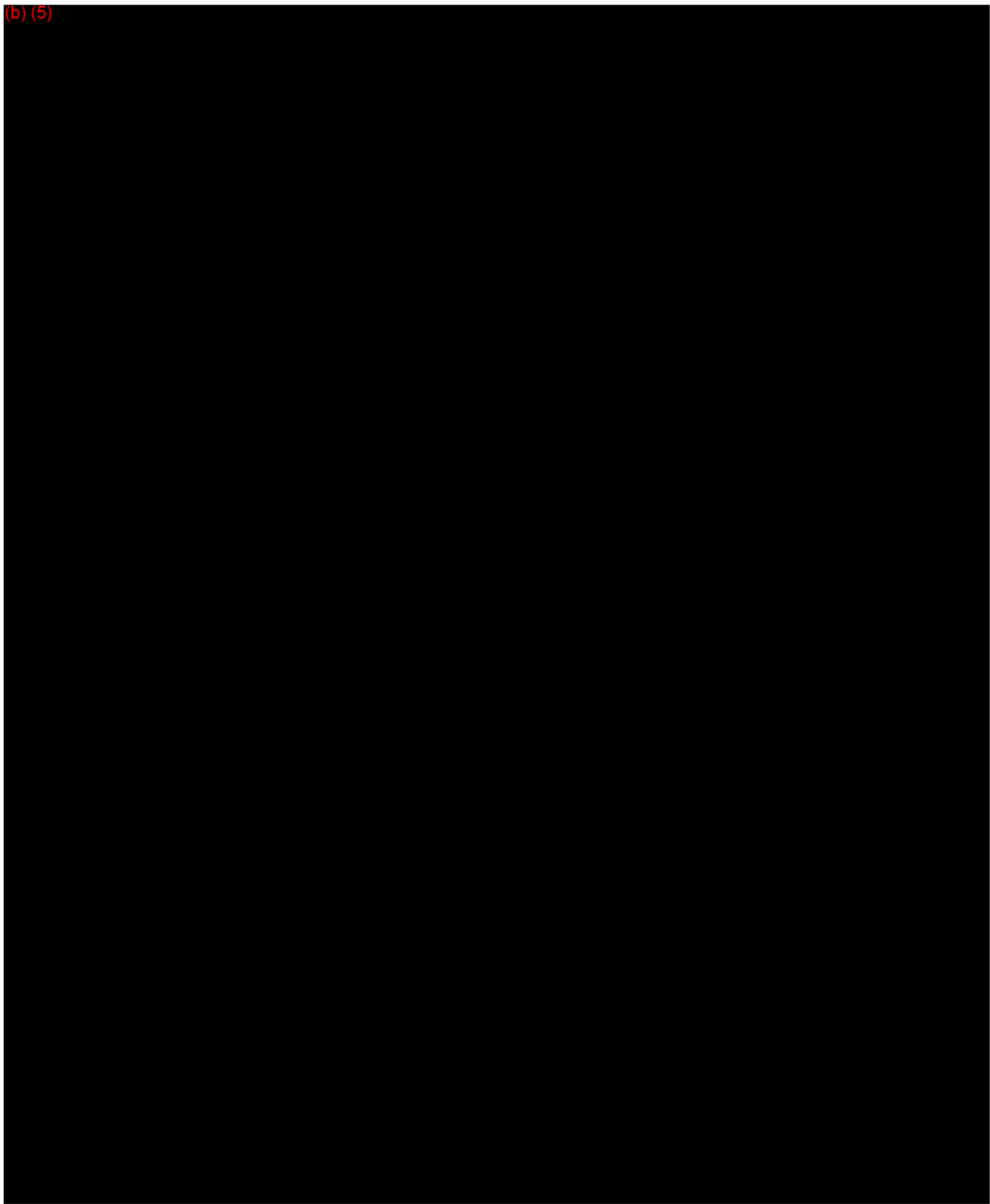
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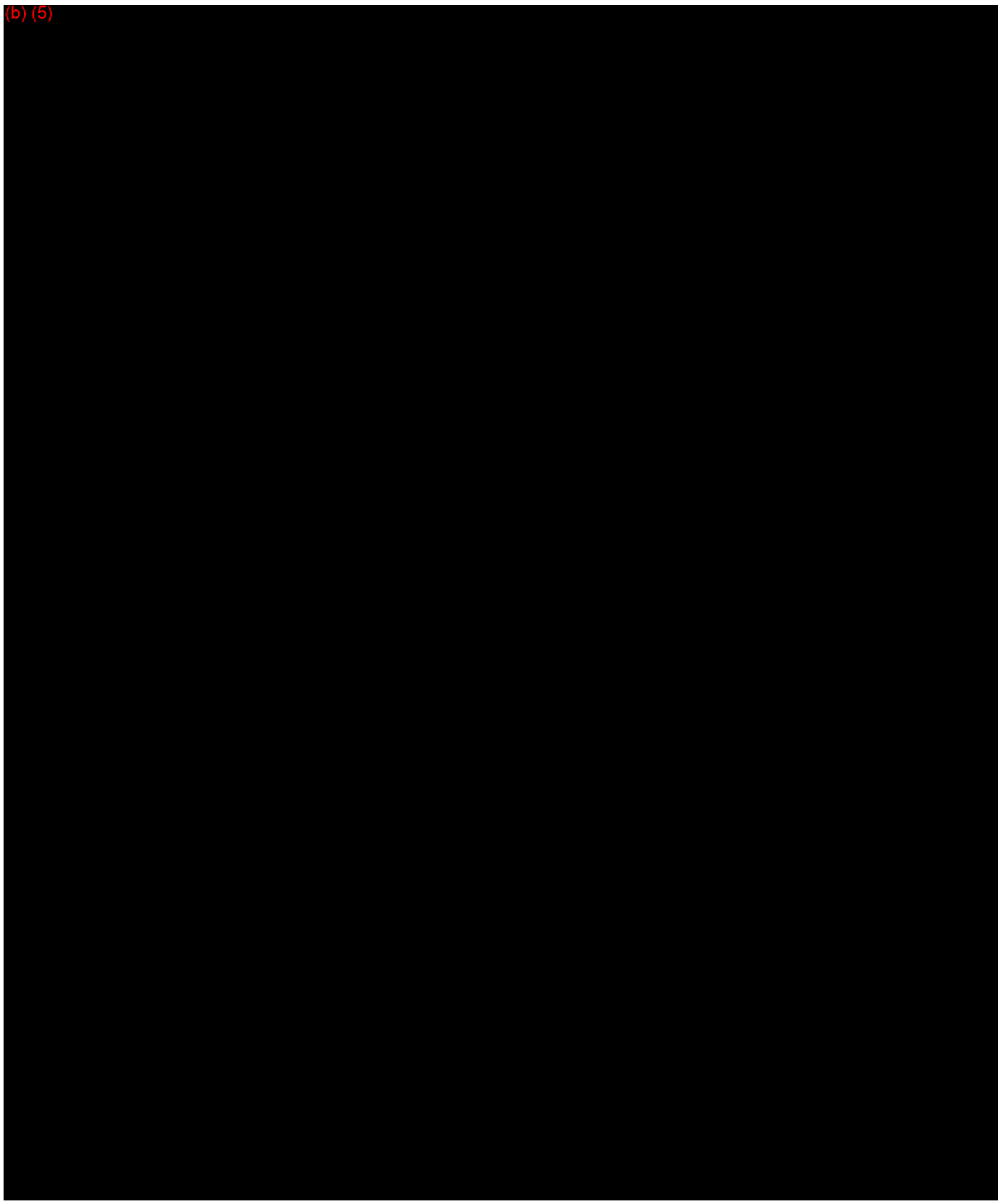
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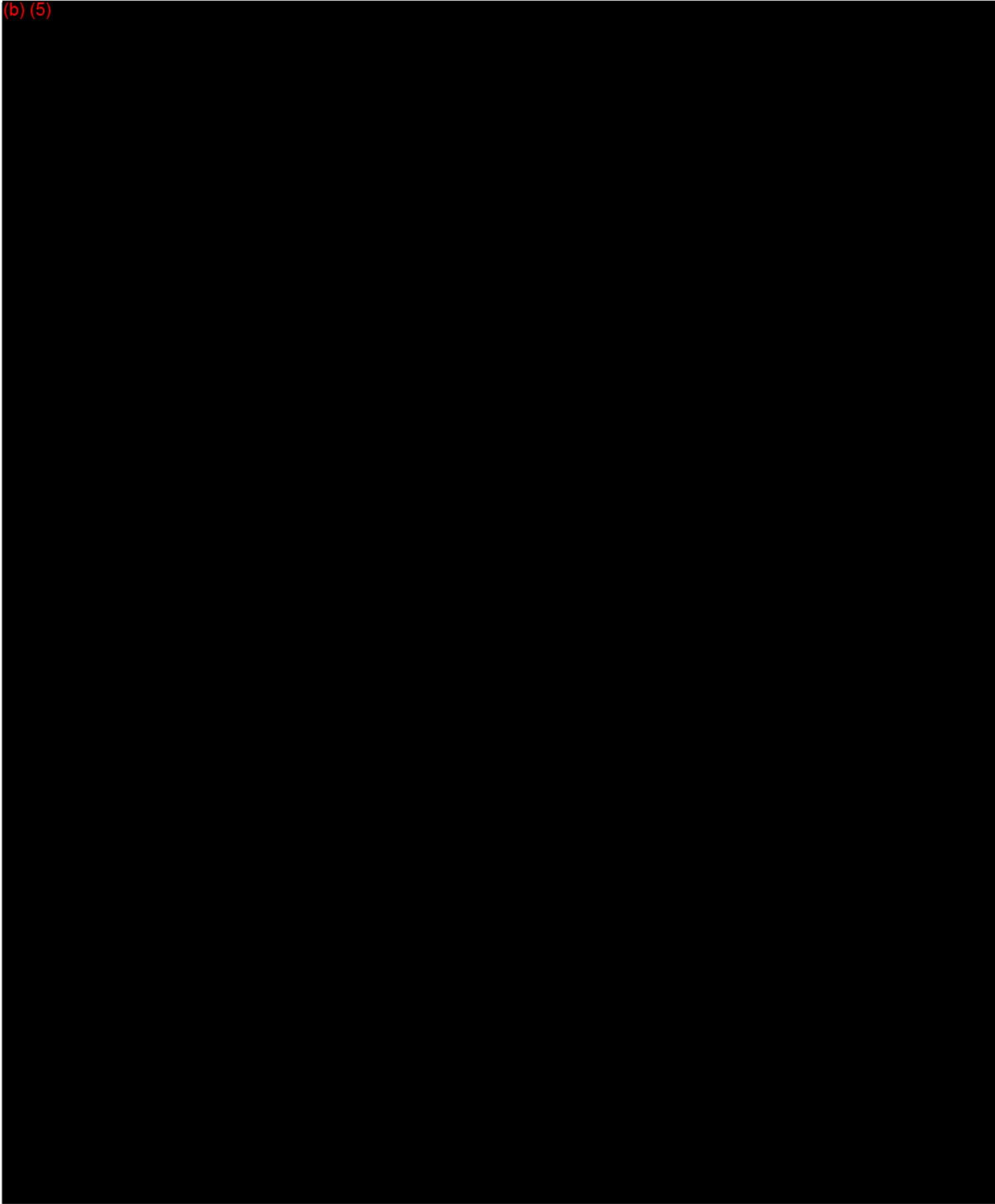
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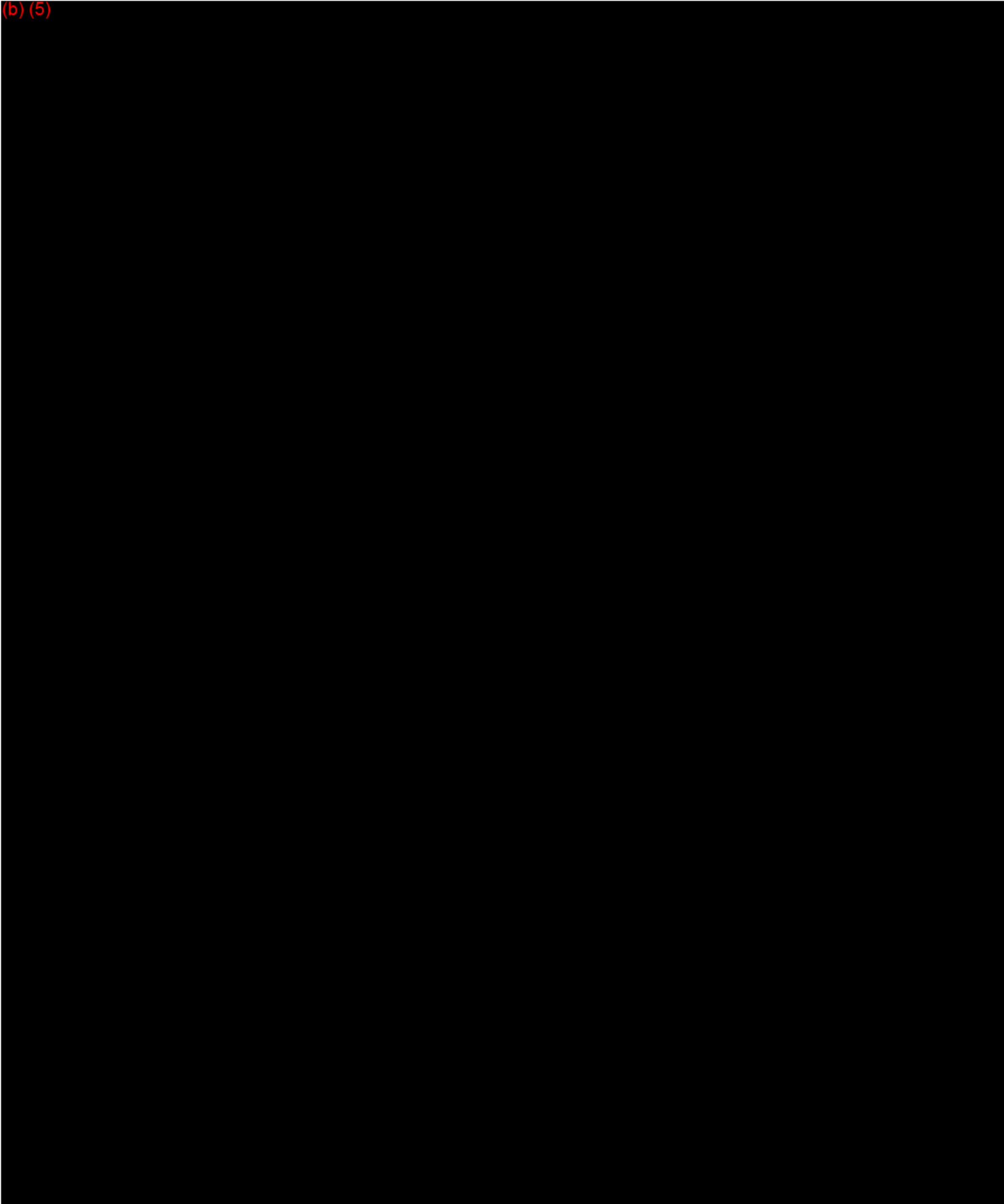
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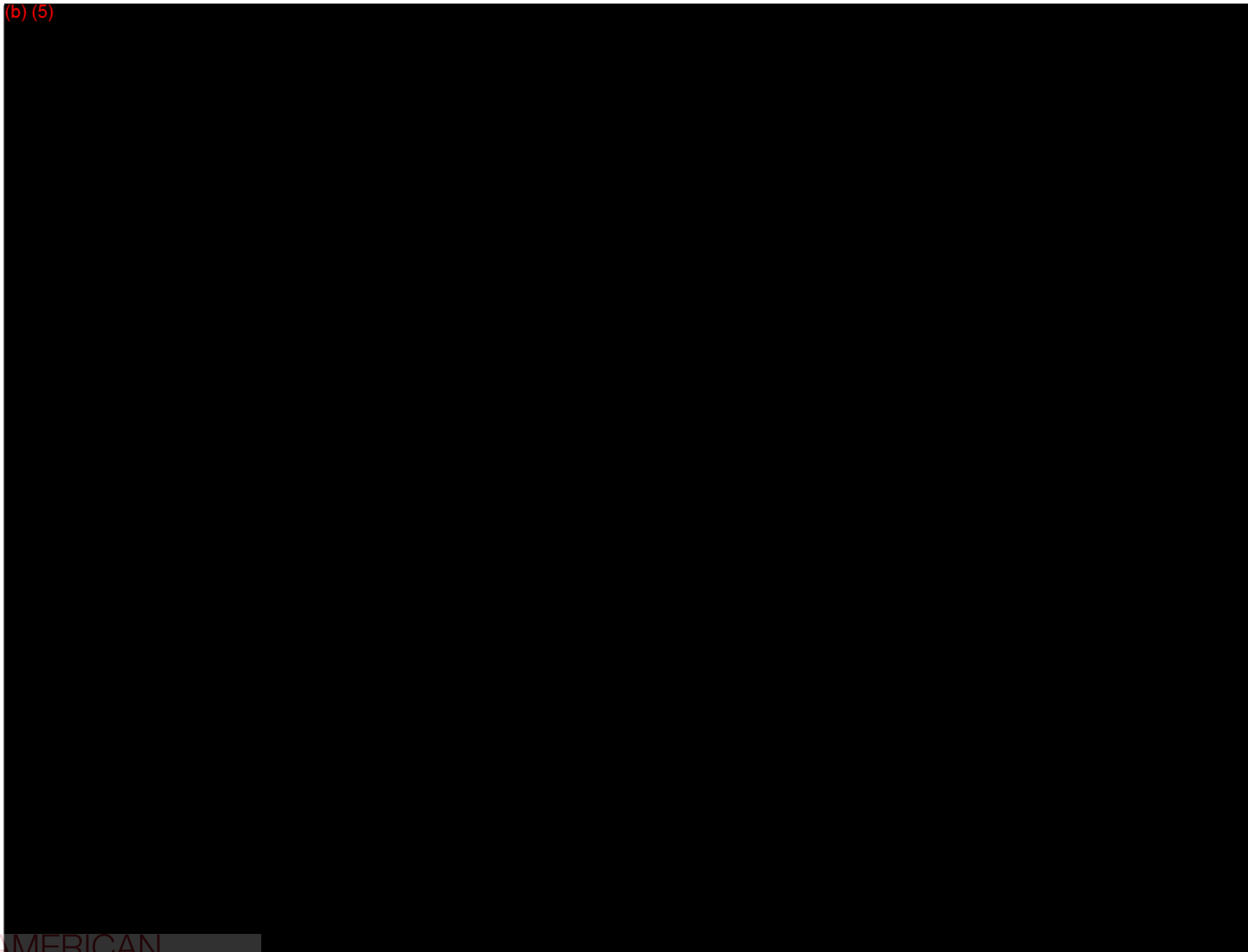
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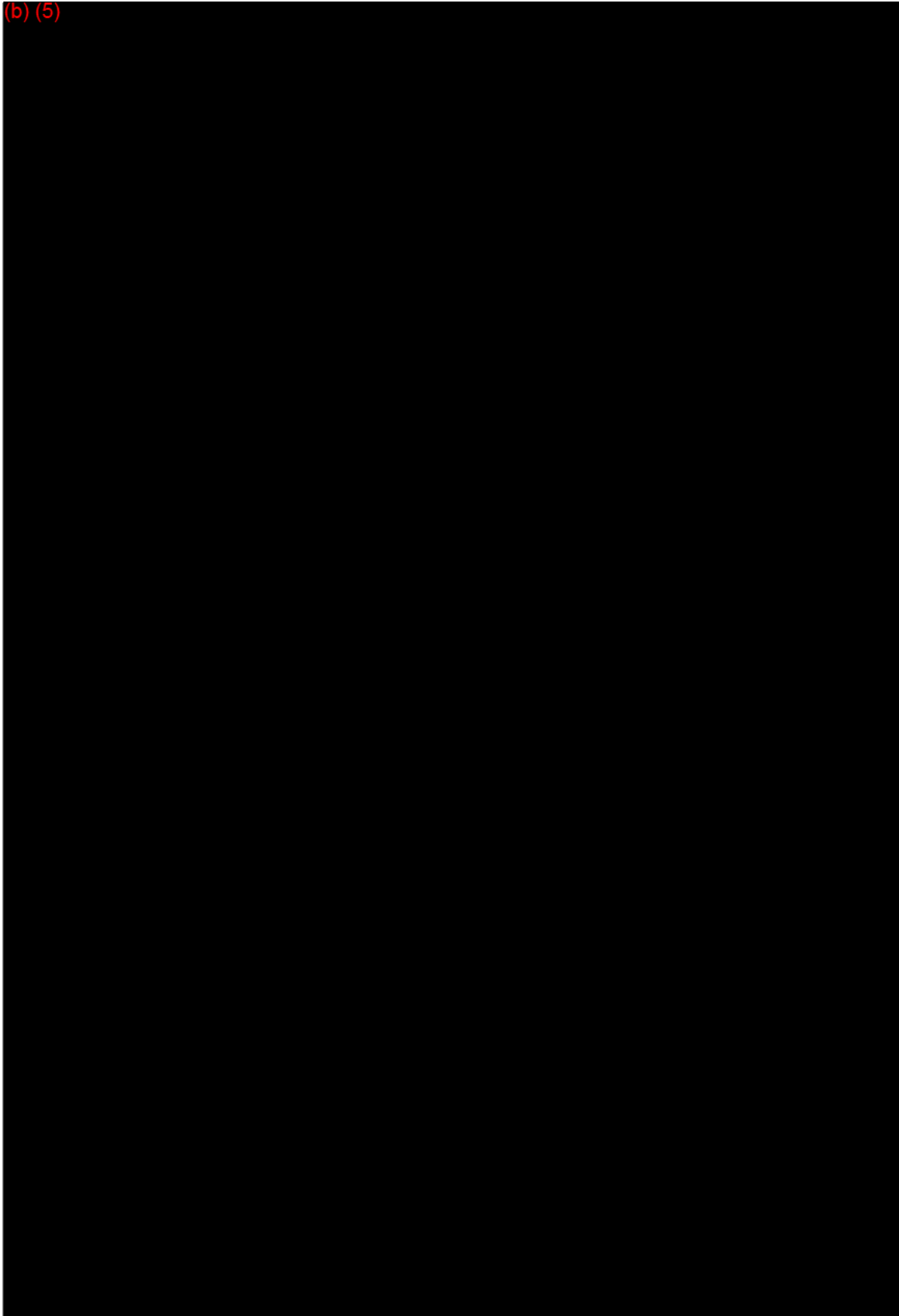


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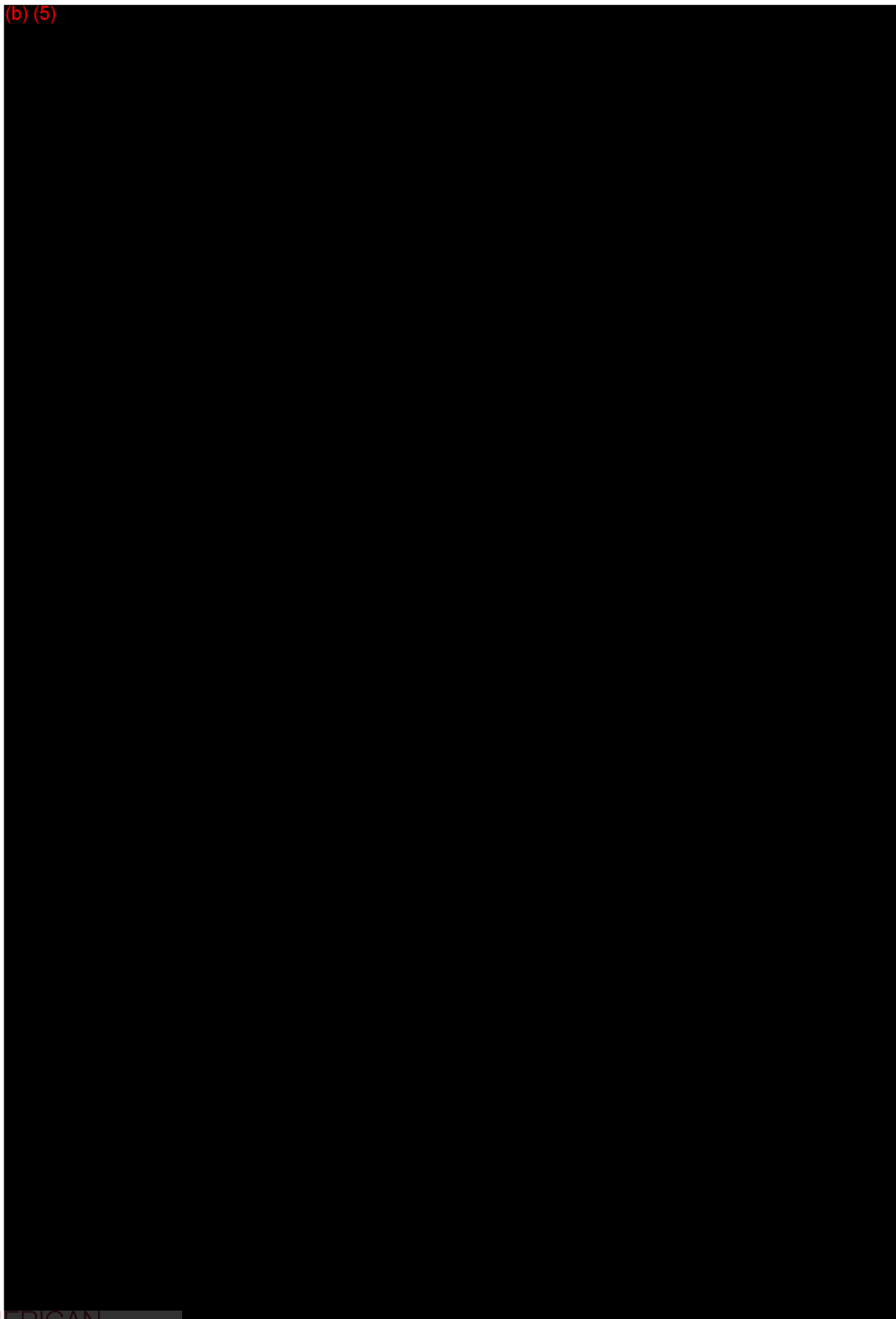
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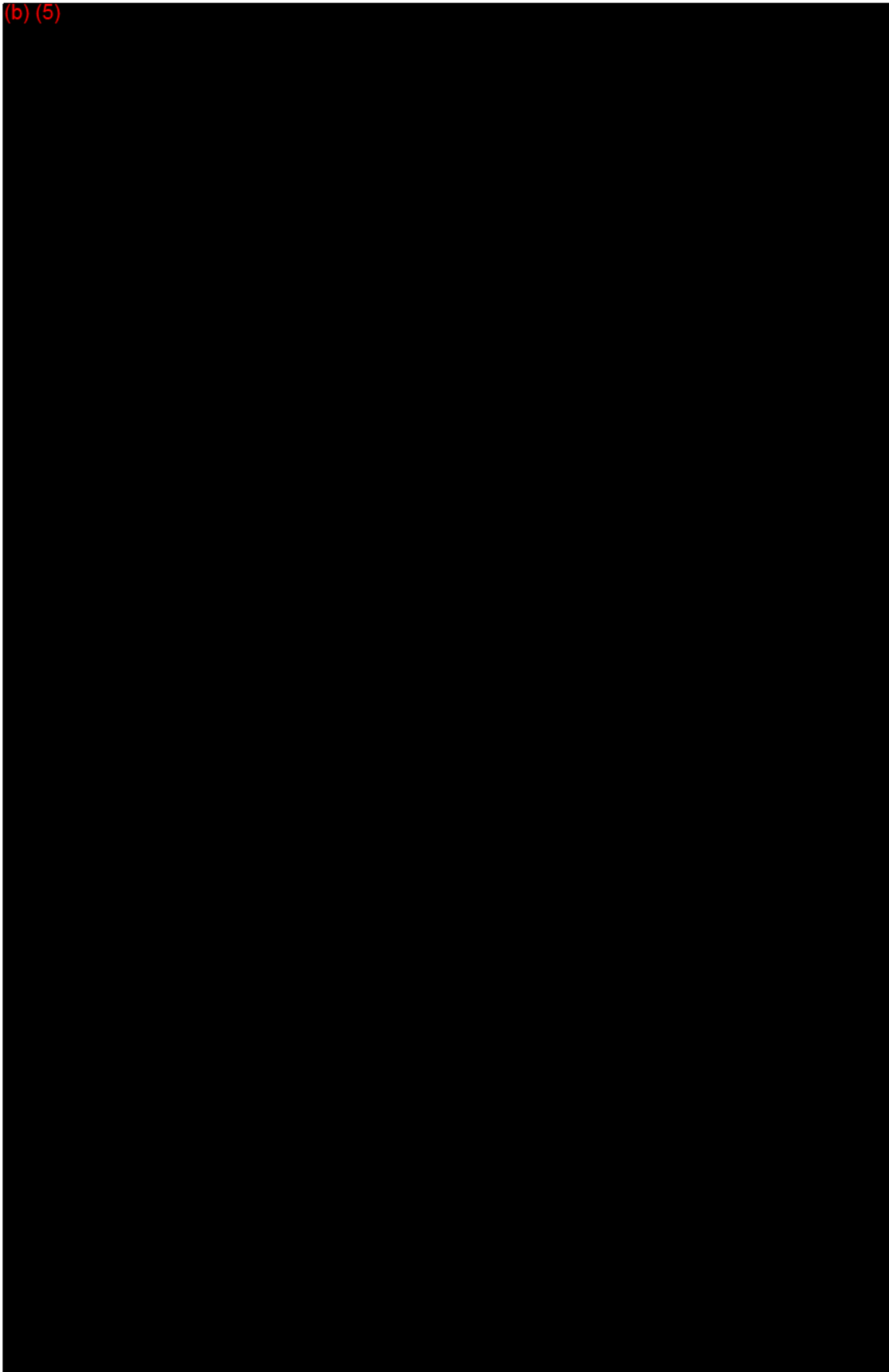
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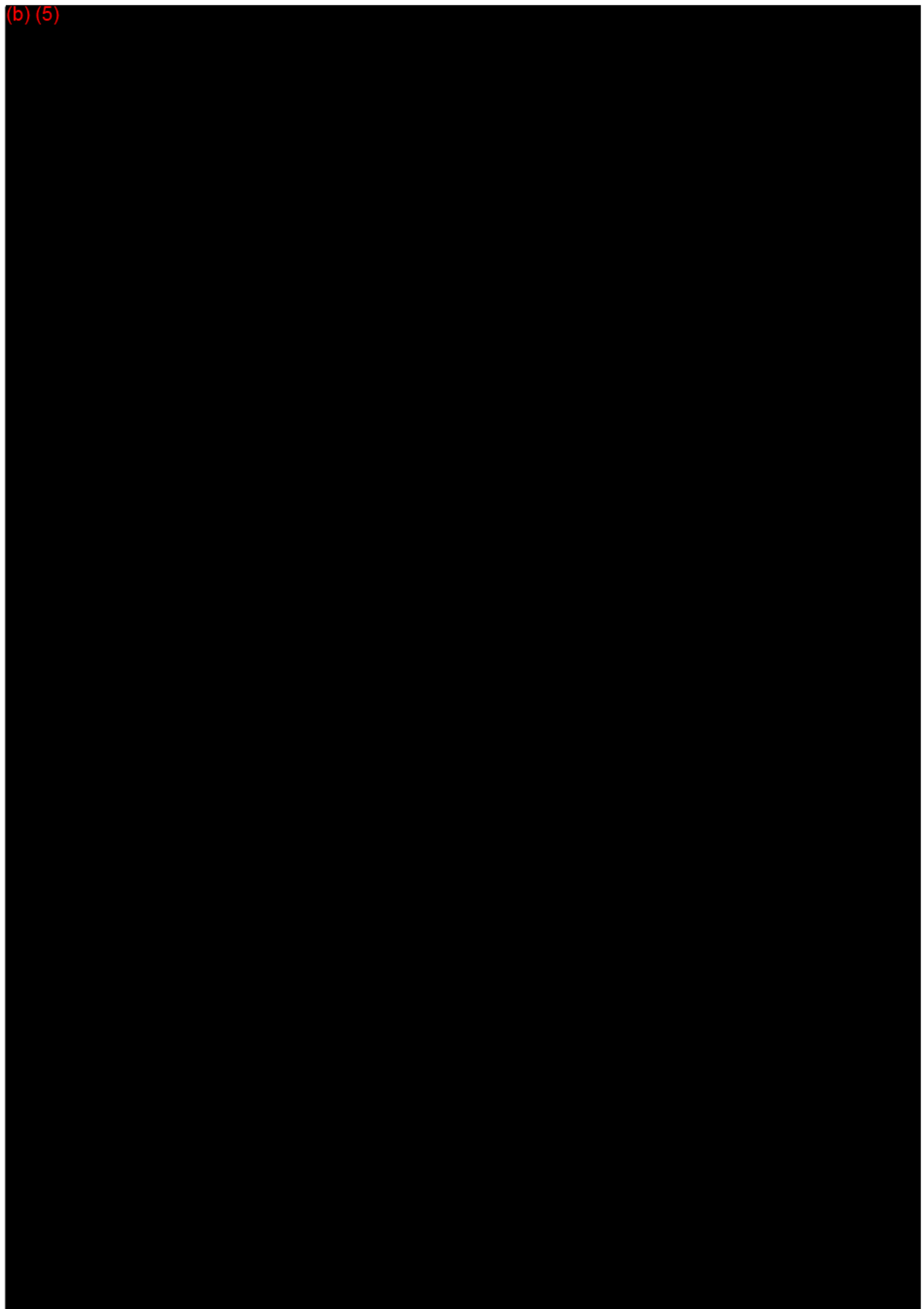
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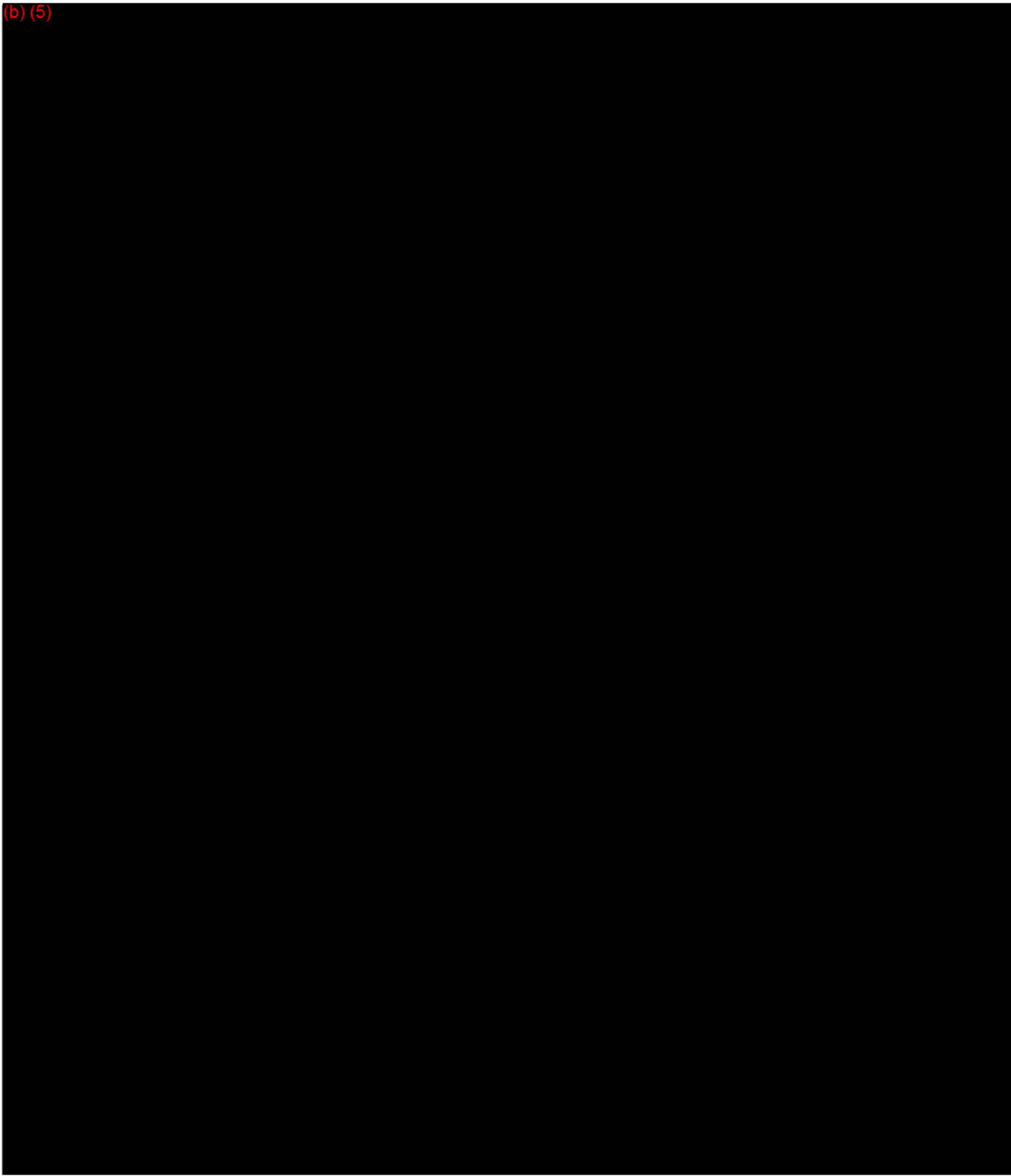
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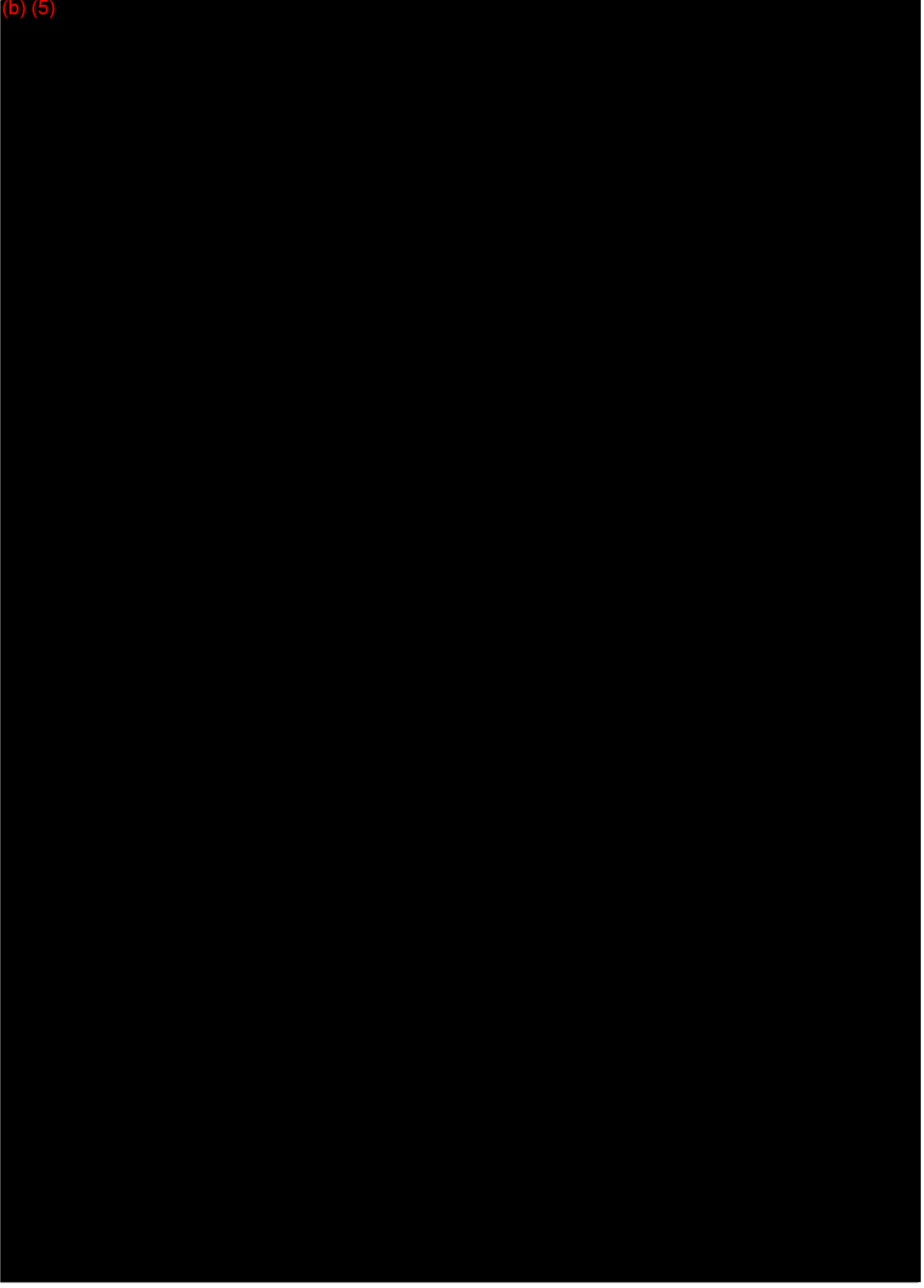
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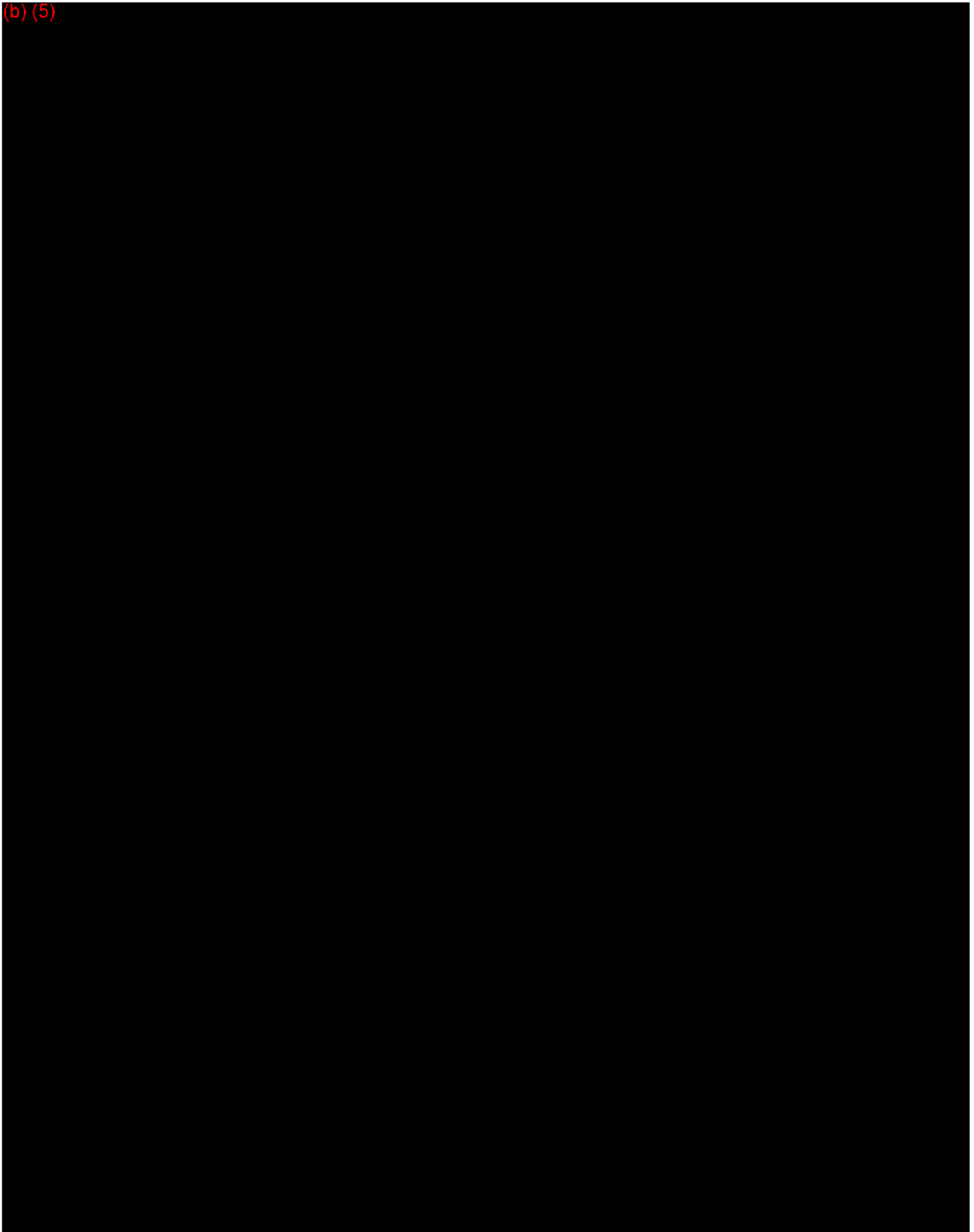
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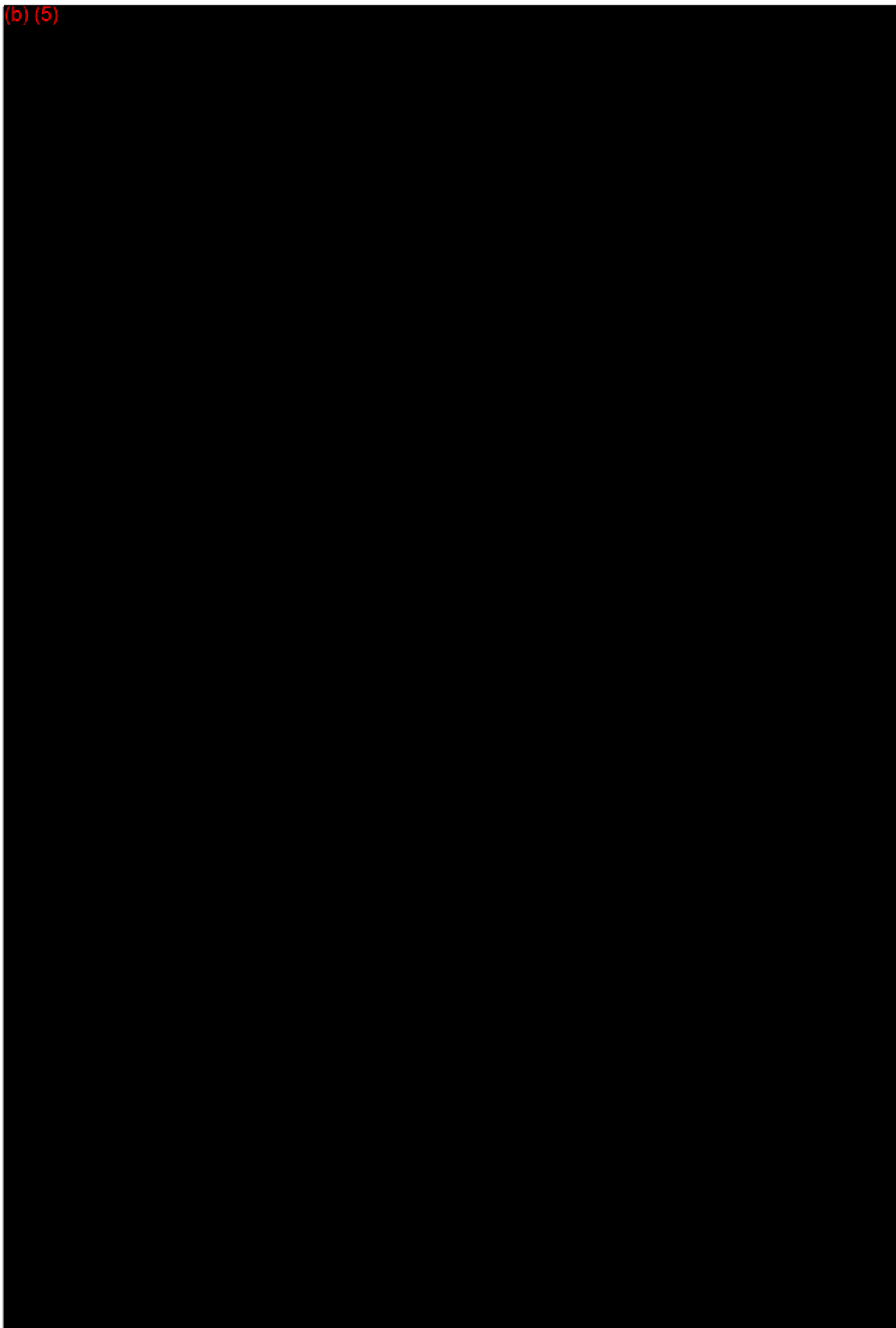
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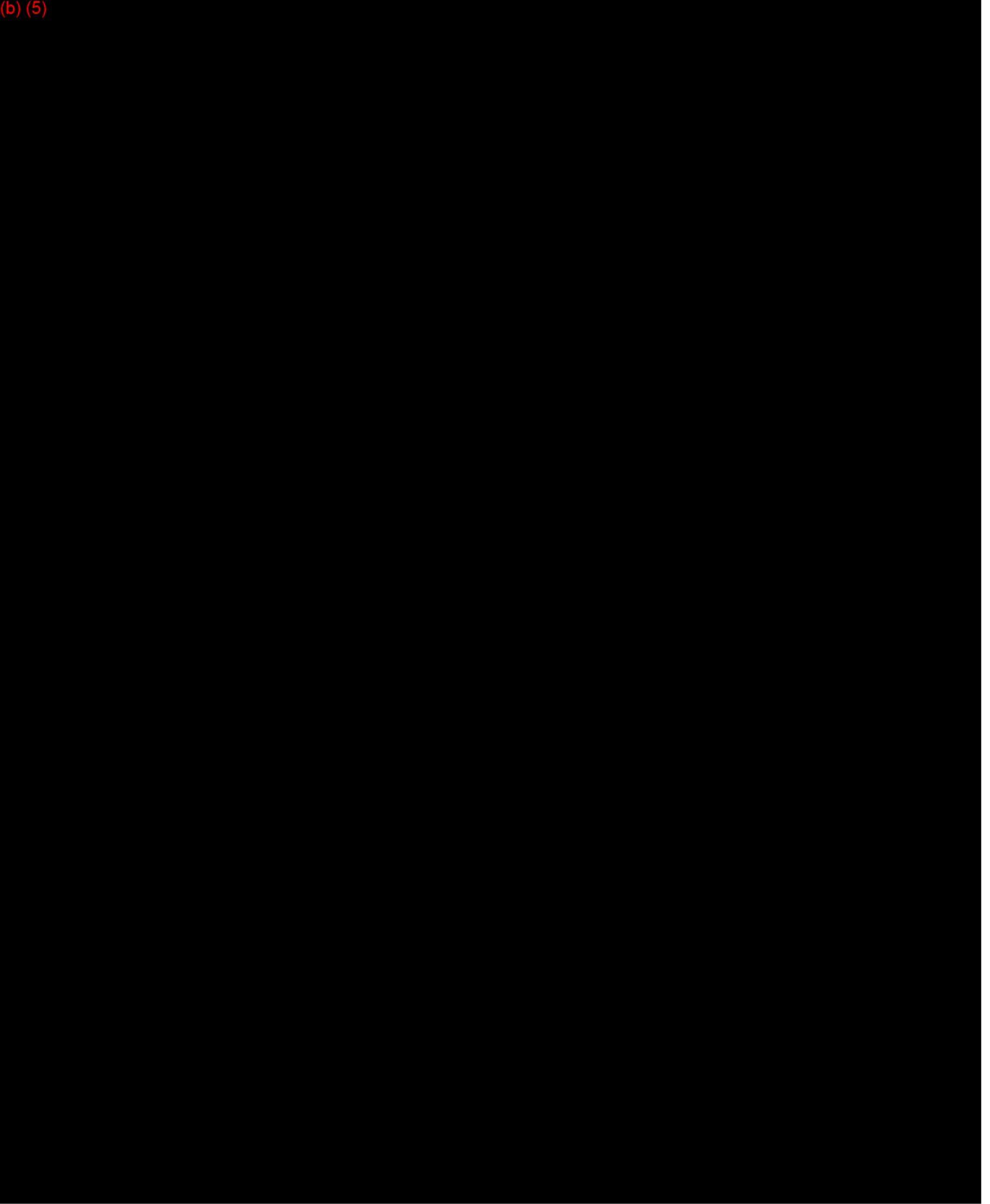
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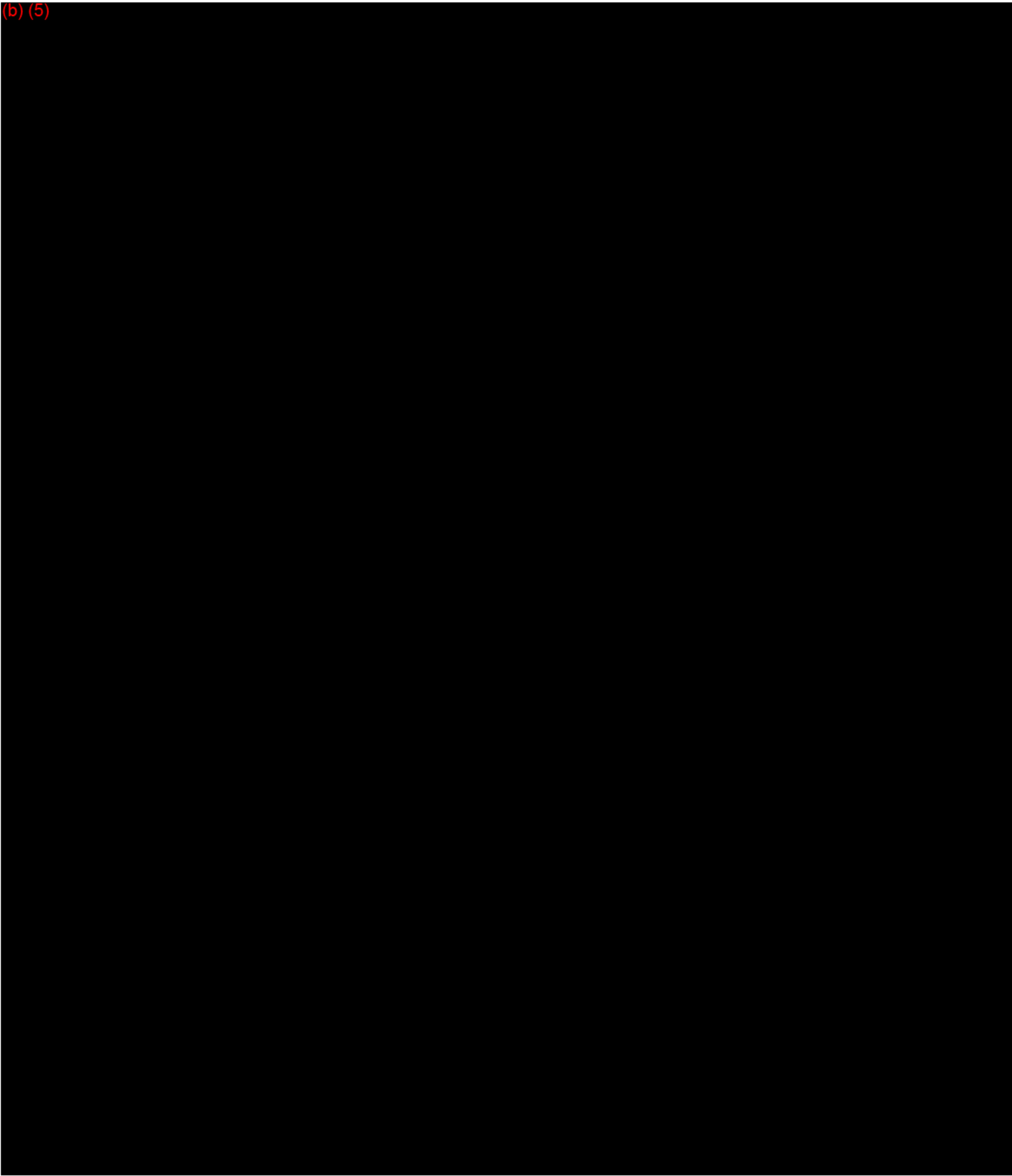
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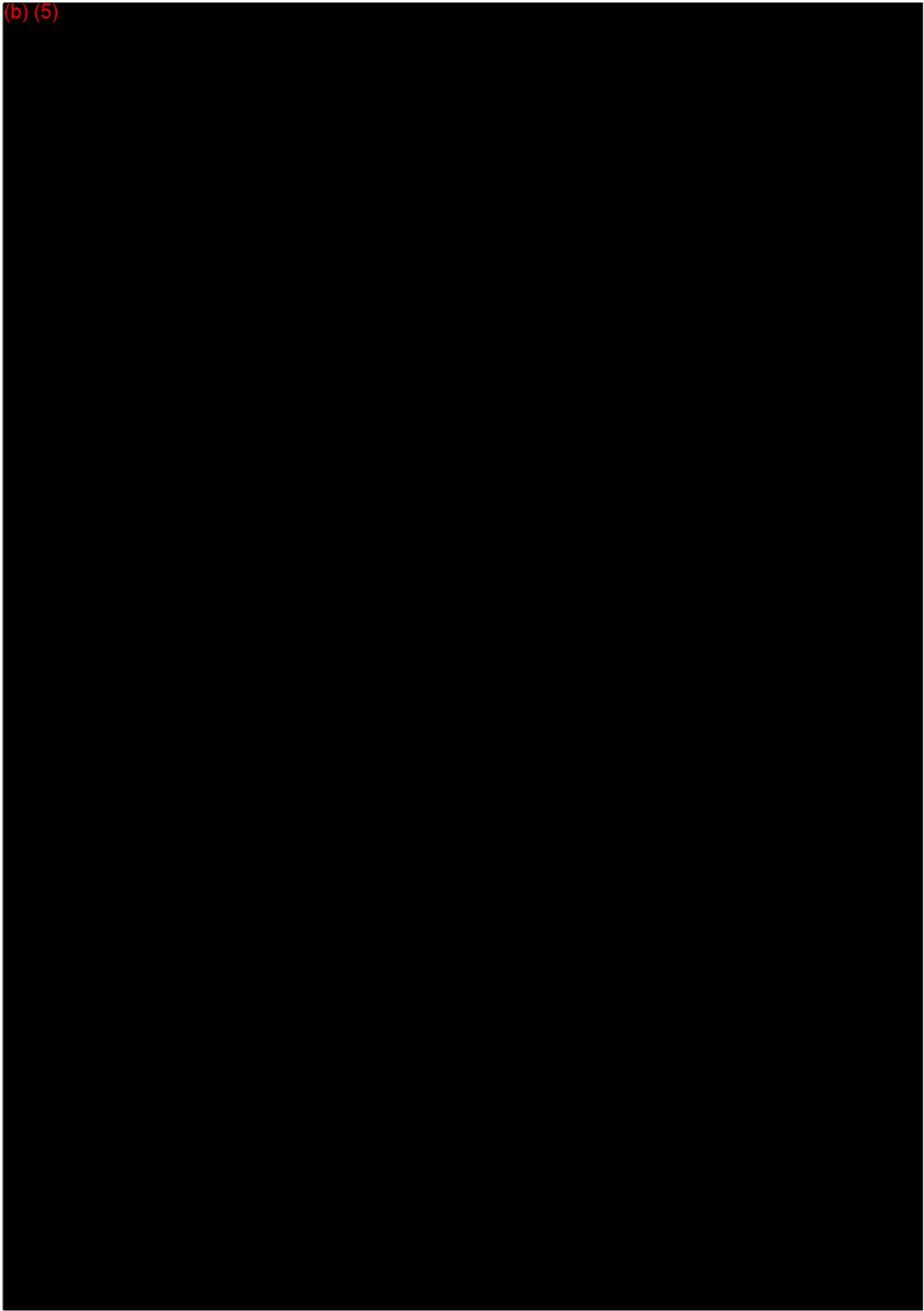
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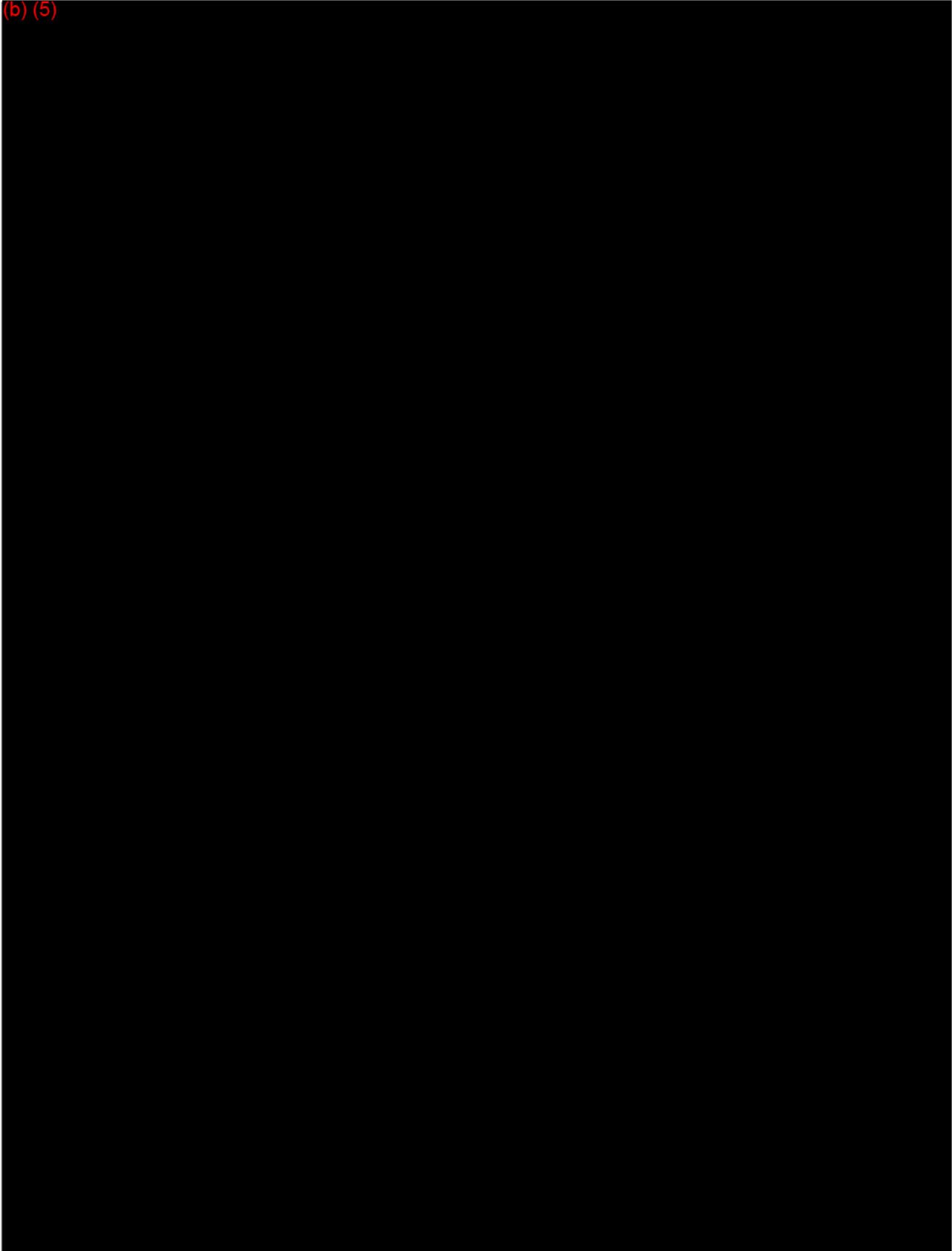
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To: Geale, Nicholas C. - SOL[Geale.Nicholas.C@DOL.gov]
Cc: Amin, Stacy C. EOP/WHOI (b) (6)
Harris, Jeffrey M. EOP/OMB (b) (6) Aguilar, Brenda L. EOP/OMB (b) (6)
From: Brammer, Josh J.
Sent: Fri 9/22/2017 4:13:00 PM
Importance: Normal
Subject: Tip Credit RIA suggestions
Received: Fri 9/22/2017 4:14:42 PM
Tip Credit RIA suggestions --- 9-22-2017.docx

Hi Nick,

I understand that WHC passed along some suggestions yesterday on the Tip Credit preamble. In addition to these, OIRA and WHC have been working together on other suggestions for your consideration that are more focused on the RIA—please see attached. Please let us know if you have any questions about these or anything else that might be needed before we advance to formal review.

Thank you,
Josh

Josh Brammer
OMB | Office of Information and Regulatory Affairs

(b) (6)

(b) (5)

Fw: [Ext]Re: Freedom of Information Act Request No. # 873478 and 878035

FOIA <foia@americanoversight.org>

Mon 3/2/2020 1:55 PM

To: Dylan Winters <dylan.winters@americanoversight.org>

■ 4 attachments (5 MB)

OSEC Letterhead - Re Freedom of Information Act Request No. 873478 and 878035_American Oversight Steve Wynn_Response Letter.pdf; 873478 and 878035 - American Oversight (Steve Wynn) FOIA Litigation-Responsive Records - Part 2 of 3.pdf; 873478 and 878035 - American Oversight (Steve Wynn) FOIA Litigation-Responsive Records - Part 3 of 3.pdf; 873478 and 878035 - American Oversight (Steve Wynn) FOIA Litigation-Responsive Records - Part 1 of 3.pdf;

Hi Dylan,

Please process this production as DOL-19-0139, DOL-19-0140-A!

Thanks,
Vibha

From: OSEC FOIA <OSEC-FOIA@dol.gov>

Sent: Monday, March 2, 2020 11:03 AM

To: FOIA <foia@americanoversight.org>

Cc: Whitten, Emily S - SOL <Whitten.Emily.S@DOL.GOV>

Subject: [Ext]Re: Freedom of Information Act Request No. # 873478 and 878035

Dear Mr. Evers,

This letter responds to your Freedom of Information Act (FOIA) requests of February 1, 2019, in which you requested 1) all records reflecting communications with the White House (including but not limited to anyone whose email ends in @who.eop.gov) about Steve Wynn, Wynn Las Vegas, or Wynn resorts, and 2) all records reflecting communications with Steve Wynn, Wynn Las Vegas, or Wynn resorts, or any individuals acting on Wynn's behalf, including any individuals with email addresses ending in @wynnlasvegas.com, @wynnresorts.com, @wynnmacau.com, @wynnpalace.com, or with the email addresses cspies@clarkhill.com and wmoschella@bhfs.com between January 20, 2017, and May 17, 2019. Your requests were received in our office on February 6, 2019, and assigned FOIA tracking number 873478 and on May 16, 2019, and assigned FOIA tracking number 878035. Both requests are currently in litigation.

A search for responsive records of the Office of the Secretary (OSEC) was conducted based on your request. A total of 671 document pages were located;

- 70 pages are being released without redactions, and
- 601 pages which have been redacted in part under to 5 U.S.C. § 522(b)(6) which permits the withholding of personnel, medical and similar files when disclosure of such

information would constitute a clearly unwarranted invasion of personal privacy and in combination with (b)(5) which permits the withholding of information during client-attorney communications and the deliberation process.

If you have questions about this response, you may contact the Office of the Secretary (OSEC) FOIA point of contact at OSEC-FOIA@dol.gov or the DOL FOIA Public Liaison, Thomas Hicks, at 202-693-5427 or by email at hicks.thomas@dol.gov. Alternatively, you may contact the Office of Government Information Services (OGIS), within the National Archives and Records Administration, to inquire about the mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. You can also reach that office by e-mail at ogis@nara.gov, by phone at 202-741-5770, by fax at 202-741-5769, or by calling toll-free at 1-877-684-6448.

Thanks in advance,

Maurice Fluelling,
Special Assistant
Office of the Secretary
U.S. Department of Labor
200 Constitution Ave., N.W., Room S2511
Washington, DC 20210
202-693-6084 (Direct)
202-657-2912 (Cell)
202-693-6081 (OSEC IT Support)
202-693-6000 (Main)