Information exchanged during conciliation

The original complaint and submissions exchanged during the OAIC's preliminary inquiries and/or investigation may be considered by the Commissioner when making a determination.

Nothing a party says or does during conciliation will be considered in a determination unless the parties agree to it, however.

The NMAS

Conciliation at the OAIC is conducted in accordance with the practice standards of the National Mediation Accreditation System (NMAS). A copy of the NMAS Practice Standards can be obtained online.

The Law

Personal information as defined at s 6 of the Privacy Act, is information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not.

The Australian Privacy Principles (APPs) at Schedule 1 of the Privacy Act regulate the collection, use, disclosure, and security of personal information held by Australian Government agencies and certain private sector organisations.

The APPs are:

APP 1 — Open and transparent management of personal information

APP 2 — Anonymity and pseudonymity

APP 3 — Collection of solicited personal information

APP 4 — Dealing with unsolicited personal information

APP 5 — Notification of the collection of personal information

APP 6 — Use or disclosure of personal information

APP 7 — Direct marketing

APP 8 — Cross-border disclosure of personal information

APP 9 — Adoption, use or disclosure of government related identifiers

APP 10 — Quality of personal information

APP 11 — Security of personal information

APP 12 — Access to personal information

APP 13 — Correction of personal information

The full text of the APPs is available on our website. Information about how the APPs apply is available in our APP guidelines.

For information about the OAIC's approach to investigation, conciliation and determination of complaints see the *Guide to Privacy Regulatory Action*.

Appendix D — Conciliation preparation toolkit

Conciliation Preparation Toolkit

This Conciliation Preparation Toolkit has been developed to assist parties to better prepare for conciliation at the Office of the Australian Information Commissioner. Under s 40A(1) of the Privacy Act 1988, the OAIC must make a reasonable attempt to conciliate complaints where the Commissioner considers it reasonably possible that the complaint may be conciliated successfully.

A conciliation teleconference is a meeting of the parties with an OAIC conciliator, to discuss the complaint and attempt to resolve it. It is your opportunity to have input into the outcome of your privacy complaint.

This toolkit is designed to assist both the Complainant and Respondent, self-represented or not, to make a final concerted effort at resolving the dispute through effective negotiations, during the allotted conciliation teleconference, without the need for more formal processes.

The toolkit is ***not*** required to be completed, provided to the other party, or lodged with the OAIC.

Checklist

When you receive a conciliation listing please confirm the following:

You have authority to settle the matter at the conciliation
You know which Australian Privacy Principles and/or sections of the Privacy Act are relevant
You have considered the prospects, risks, costs, and possible options for settlement.
(For guidance, it may be helpful to review the list of Privacy Determinations on our website.)

Key questions to consider

What are the main strengths and weaknesses of my position?

Strengths:	Weaknesses:

What are the main strengths and weaknesses of the other party's position?

Strengths:	Weaknesses:

Options

In preparing for conciliation, you should consider possible options for the resolution of the matter. Conciliation is an opportunity to explore all possible options in a confidential and without-prejudice setting. Options and proposals which can be discussed can be broader than just the legal and factual questions before the OAIC. Legal advice is not required prior to conciliation, however some parties find this useful. Please note that you will likely bear your own legal costs should you decide to obtain legal advice.

In considering your potential options to resolve the dispute, the following commonly agreed conciliated outcomes within the privacy jurisdiction may be informative to assist in developing your options (this list is not exhaustive). Parties might agree on:

- an apology or statement of regret
- a commitment to change in practice, procedure, or policy
- a review of privacy policies and procedures
- staff training/staff counselling
- financial compensation
- granting access to documents, or
- some other agreement or undertaking to resolve the complaint.

Some key questions that can assist you to develop a range of options include:

If you are seeking financial compensation from the other party, have you considered the amount you are seeking and whether you can provide any evidence of loss/expenses being claimed?

For example, evidence for non-economic loss (emotional or mental distress, humiliation, mental injury/illness or injury to feelings) may be a statutory declaration or a medical practitioner's letter/report outlining the impact the privacy breach has had on you. Evidence for economic loss or material damage includes receipts of calculable expenses or other financial loss. The Privacy Determinations may provide you with guidance on what is realistic within the Privacy jurisdiction.

_____
_____
_____
_____

Note: Conciliation is not typically an appropriate forum to seek compensation for aggravated damages. Aggravated damages are awarded in very limited circumstances as a punitive measure. During conciliation parties should focus on what they are comfortable to offer/accept which will allow them to consider the dispute resolved.

What proposals is the other party likely to put forward? How will I respond to these proposals?

_____
_____
_____
_____

What proposals can I put forward? How is the other party likely to respond to my proposals?

_____
_____
_____
_____

Are there possible points of compromise between these proposals?

_____
_____
_____
_____

What else is important to me? What options would meet these needs?

_____
_____
_____
_____

What else is important to the other party? What options would meet these needs?

_____
_____
_____
_____

Are there some facts or issues that could be agreed to reduce the time and costs of going through an investigation or a determination?

_____
_____
_____
_____

Communication

Conciliation is a key forum for effective communication between the parties. Communicating well during a dispute can be difficult often due to heightened emotions, barriers to understanding the language of the legislation, or other life factors and circumstances.

The conciliator is experienced in facilitating constructive discussions to assist parties with framing their communications in a positive manner. Parties can prepare by anticipating the key points that could be challenging to communicate and trying to broach these topics with sensitivity and respect.

Consider your key messages that need to be communicated during negotiations.

Your key message	What the other party might hear	Is there another way to present it?
1.		
2.		
3.		

What are some key points the other party may make that could cause you to strongly react? What strategies can you apply to respond in a constructive manner during conciliation?

Other party's points	Techniques to manage your reaction
1.	
2.	
3.	

Appendix E — Precedent conciliation agreement

OAIC REFERENCE: [NUMBER]

Conciliation Agreement

This agreement is between:

[COMPLAINANT NAME]
(**Complainant**)

and

[RESPONDENT NAME]
(**Respondent**)

(**the Parties**)

The Complainant made a complaint under s 36 of the *Privacy Act 1988* (Cth) (the Privacy Act) on **[DATE]** (the Complaint). The Office of the Australian Information Commissioner (OAIC) held a conciliation conference pursuant to s 40A of the Privacy Act on **[DATE]**.

The parties agree to the following in resolution of the complaint:

1. The Respondent will **[DETAILS OF AGREEMENT]**.
2. The Complainant withdraws the Complaint and releases the Respondent from liability arising under the Privacy Act in relation to the Complaint.

This agreement is confidential and made on the basis that, unless the other party consents to disclosure or otherwise specified within this agreement, each party agrees to keep confidential all information disclosed during the conciliation (the Confidential Information). To the extent permitted by law the Confidential Information includes:

- anything discussed with the conciliator in private and
- anything discussed between the parties in the conciliation, and
- documents prepared in connection with the conciliation.

This agreement can be executed in counterparts. This means that execution will be complete when each party holds a copy of this agreement signed by the other party, even though the signatures of both parties do not appear on the same copy.

SIGNATURE BLOCKS BELOW

Complainant Name	**Respondent Representative Name**
……	……
Complainant Signature	**Respondent Representative Signature**
……	……
Signed on this	**Signed on this**
…… of …….. 2020	…… of …….. 2020

Australian Government
Office of the Australian Information Commissioner

Operational Policy: s 40A Privacy Act 1988

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Operational policy: s 40A *Privacy Act 1988*
Date of document: January 2020 Date of review: January 2021

Operational Policy: factors to be considered in relation to section 40A of the Privacy Act 1988.

Section 40A of the *Privacy Act 1988* (the Privacy Act) provides:

40A Conciliation of complaints

(1) If:

(a) a complaint about an act or practice is made under section 36; and

(b) the Commissioner considers it is reasonably possible that the complaint may be conciliated successfully;

the Commissioner must make a reasonable attempt to conciliate the complaint.

(2) Subsection (1) does not apply if the Commissioner has decided under section 41 or 50 not to investigate, or not to investigate further, the act or practice.

(3) If the Commissioner is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation, the Commissioner must, in writing, notify the complainant and respondent of that matter.

(4) If a notification is given under subsection (3), the Commissioner may decide not to investigate, or not to investigate further, the act or practice.

1. There are a number of elements to this provision:

i. It applies only to complaints about an act or practice made under section 36 – and does not relate to investigations undertaken by the Commissioner on their own initiative.

ii. It requires a threshold assessment by the Commissioner – is it 'reasonably possible that the compliant may be conciliated successfully'?
   - 'reasonably possible' means a not far-fetched or unlikely outcome; the outcome does not need to be more likely than not, but should not be a remote possibility
   - 'may be' means that it is a possibility, not a certainty
   - 'conciliated successfully' means that the complainant and respondent agree to an outcome, regardless of whether it is the outcome either was originally seeking.

iii. It is likely that this threshold will be met in relation to the majority of complaints. The following factors may suggest that it is <u>not</u> reasonably possible that a complaint may be conciliated successfully:
   - the refusal to conciliate the matter by either party or a stated intention not to participate in the conciliation process
   - a lack of response from the respondent to the complaint, or cessation of responsiveness by the respondent

- the respondent has entered into administration, liquidation or bankruptcy and is therefore limited in relation to the compensation that might be offered to settle the matter.
- This is not a definitive list.

2. Where the Commissioner forms the view that there is no reasonable likelihood that the complaint will be resolved by conciliation, the Commissioner must notify both the complainant and the respondent of that view.

    i. That notification must be in writing and can be sent electronically.

    It remains open to the Commissioner to decide to investigate or not to investigate the complaint.

3. If the Commissioner considers it reasonably possible that the complaint may be conciliated successfully, they 'must make a reasonable attempt to conciliate the complaint'.

    i. Once the Commissioner forms the view that the complaint may be conciliated successfully, there is no discretion not to attempt conciliation: 'the Commissioner *must*'.

    ii. However, it remains open to the Commissioner to form a different view about the prospects of successful conciliation at any time. If the Commissioner reassesses the prospects of successful conciliation and forms a view that successful conciliation is now not likely, the Commissioner must notify both the complainant and the respondent of that view at that time in accordance with s 40A(3) and as outlined above at paragraph 2.

    iii. A 'reasonable attempt' to conciliate is determined with reference to the particular circumstances of the matter. Parties are expected to cooperate with conciliation processes, including scheduling, unless there are exceptional circumstances. Factors that would indicate that a 'reasonable attempt' to conciliate has been made, even where the conciliation was not successful, are:

        i. where the conciliation has been scheduled and advised to the complainant or the respondent and the complainant or the respondent has not attended, with either no, or little, notice
        ii. where the Commissioner is unable to find a conciliation time suitable to both parties, after two attempts to do so
        iii. where the conciliation has been scheduled for a reasonable duration, but the matter was unable to be resolved within that allocated time, regardless of whether one or more parties wishes to continue the conciliation
        iv. where either party has behaved inappropriately during the conciliation.

iv. Following a reasonable attempt to conciliate the complaint, the Commissioner may decide not to investigate the complaint or to commence an investigation into the complaint.

Version control

Version	Name	Changes	Date
0.1	Elizabeth Hampton	Original draft	30/01/20
		Commissioner clearance	

Australian Government
Office of the Australian Information Commissioner

30 November 2019

Privacy complaint assessment checklist

Risks to be raised immediately

When first reading the complaint, consider:

- ☐ Does the complaint identity or suggest safety issues, for example does the complainant indicate or threaten self-harm, make threats to another individual or party, or suggest they are in danger? If so **immediately** alert a Director.
- ☐ Does the complaint notify the OAIC of an act or practice that may cause serious harm or affects multiple individuals? If so **immediately** alert a Director.

Parties to the complaint

- ☐ Is the complainant properly identified, and are there any issues with the information on their client profile, for example multiple entries with the same information?
- ☐ Are there any related cases for the complainant? If so consider whether the matters need to be cross-referenced, if the new complaint raises the same/similar issues previously considered, and if correspondence on the new complaint should also be kept on the previous complaint/s.
- ☐ Is the complainant also complaining about the handling of someone else' personal information?
- ☐ Ensure any representatives are clearly identified and have authority to act. Be mindful of complaints made on behalf of children. Authority forms are available on our website: https://www.oaic.gov.au/privacy/privacy-complaints/lodge-a-privacy-complaint-with-us/
- ☐ Is the respondent is properly identified in resolve from what the complainant has described (for example is the complaint really about a credit provider not the credit reporting body), and if the industry sector in the respondent client entry has been property identified. If relevant, check that the proper respondent contact is identified.
- ☐ Consider if a second complaint needs to be created, for example as the complainant is also complaining about another individual such as a family member's information, or are they making complaints about additional respondents? If yes send an email to the Enquiries Team to register a new case (see Attachment A)

Jurisdiction, threshold and exemptions

Do we have jurisdiction?	Threshold Issues	Exemptions
☐ Australian Privacy Principles (APPs)	☐ Complaint to the OAIC?	☐ Employee records exemption
☐ Part IIIA (credit reporting)	☐ Complainant's personal information?	☐ Small business organisation (SBO) - Check whether R has opted in to coverage under the Act (within client record)
☐ Failure to notify under NDB Scheme	☐ Personal information in a record?	☐ Political act or practice of a member of parliament
☐ National Privacy Principles (NPPs)	☐ Complainant aware for less than 12 months?	☐ In the course of journalism
☐ Information Privacy Principles (IPPs)	☐ Complained to the respondent?	☐ Royal Commissions
☐ ACT Territory Privacy Principles (TPPs)	☐ Respondent had an adequate opportunity to respond?	☐ Judicial decisions
☐ My Health Records (formerly PCEHR)	☐ Rogue employee?	☐ AHPRA
☐ Tax File Numbers (TFNs)	☐ Spam Act? DNCR Act?	☐ Intelligence agency such as ASIO
☐ Spent Convictions	☐ Related body corporate?	☐ State or Territory authority, or Contracted Service Provider to one
☐ Contracted service providers (CSP) to a Cth agency	☐ Health service provider?	☐ Exempt from FOI 7(1)(a)(i)
☐ Individual Healthcare Identifiers (IHIs)	☐ Extra-territorial application of Privacy Act?	
☐ Data-matching	☐ Consumer credit or commercial credit?	
☐ Personal Property Securities register	☐ Trading in personal information?	
☐ Approved codes such as the APS Privacy Code	☐ Complaint about an individual?	
☐ Unique Student Identifiers (USIs)	☐ In a record?	

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Related matters

- ☐ Does this relate to a current/previous DBN or CII? If so reference in the assessment, and consider whether we need to notify the Directors of the DBN or CII Team and seek their advice.
- ☐ Does this relate to matters that have had media coverage? If so alert a Director who will consider whether the Executive need to be made aware of the matter.
- ☐ Do we need to consult with another team, as the matter raises issues they may be considering? For example, if the matter involves biometric information the Assessments Team in R&S should be notified.
- ☐ Does the matter relate to broader policy issues the OAIC is currently considering, and has commented publicly about?
- ☐ Does the matter relate to the *Freedom of Information Act 1982* (Cth) (FOI Act), for example to an agency's disclosure of personal information under APP 6.2(b) on the basis the disclosure is permitted by the FOI Act, or its decision to refuse access under APP 12.2 on the basis it is required or authorised to refuse access under the FOI Act? If so, discuss with the Director of FOI Early Resolution as to how the matter will be managed – it may be more appropriate for the FOI Team to manage if the application of the FOI Act is to be considered.

Identification of significant or systemic issues

- ☐ Is the Respondent a Minister?
- ☐ Does the complaint include allegations about an agency head, or the equivalent for a large multinational organisation?
- ☐ Does the matter relate to ongoing public debate or highly publicised investigations, or has it attracted media interest?
- ☐ Whether novel issues raised or whether it can be a lead case to address systemic issues?
- ☐ Does it appear there is a pattern of recurring complaints?
- ☐ Does the matter raise concerns about the OAIC's approach to an issue?
- ☐ Are there concerns about an EDR's analysis of privacy issues?

These types of considerations should be noted in the assessment action on resolve, and the Director should discuss with the Assistant Commissioner DR in the first instance. The Director and AC DR may notify the Executive of these issues.

Case fields to be completed

- ☐ EDR used, if yes which one?
- ☐ MOU field, does one apply?
- ☐ Referral source, has the complaint been referred to us from somewhere else?
- ☐ Code flag, does a Code apply?
- ☐ Summary field, ensure you are using key words to capture the issues. Eg, data matching, porting issue, health records, identity theft, fraud, payment default etc.

Writing the assessment

Please be aware of the tone of assessments, and how they set matters on a particular path.

Ensure the assessment:

- articulates the privacy issue
- provides relevant background on what the complainant says occurred

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- identifies the outcome the complainant has said they are seeking if this is something that needs discussion
- outlines the OAIC's view on the particular privacy issue (or if appropriate, that there does not appear to be a privacy issue), what approach we intend to take
- clearly outlines the next steps for the case officer that is allocated the complaint
- highlights any risks or issues the officer needs to be aware of, and refers the case officer to relevant cross-references/related files
- clarifies whether the assessment has been confirmed with the Assistant Commissioner and whether the case officer needs to keep the Director informed of the progression of the matter.

See the following example of an assessment where the OAIC will make inquiries with the respondent:

> C alleges R has inappropriately disclosed her personal information to a third party. C advises that R disclosed her PI when it….C has raised with R and it has advised…
>
> To resolver her complaint, C is seeking…
>
> Be mindful of the sensitive circumstances C has raised. Discuss with C that APP 6 permits the disclosure of PI in certain circumstances, and discuss Cs outcome and outcomes generally possible through OAIC complaint process. Explain ER process and aim to resolve within 4 weeks. Advise if not resolved or finalised at the end of 4 weeks, has to be referred to Investigations Team and we cannot provide a timeframe but can be several months.

See the following example of an assessment where the OAIC will decline the complaint up front:

> C alleges R has inappropriately disclosed her personal information to a third party. C advises that R disclosed her PI when it….C has raised with R and it has advised…
>
> To resolver her complaint, C is seeking…
>
> R appears to have disclosed Cs for the primary purpose it collected the information, as per APP 6.1. 14 day decline under 41(1)(a) on this basis.

Decline powers

Please set out the reasons for the decline with reference to the relevant decline power, and if possible, the relevant APP or provision of the Act.

If a matter falls pre-March 2014 only use the decline powers available at the time of the alleged breach.

Note that if you decide to accept matters out of time (excepting basic credit matters) this should be approved by The Director before finalising the assessment.

Section 36

When it is clear from the outset that we do not have jurisdiction (eg. state government agency, not personal information in a record, etc) the matter is to be assessed as not meeting the requirements of a complaint under **section 36**.

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You can use s 41(1)(a), but this is more appropriate for cases out of jurisdiction when we have conducted preliminary inquiries first (because we have already accepted the matter as a complaint). If in doubt, revert to use s 41(1)(a).

Has complainant complained to respondent?

Section 40(1A)

When the complainant has not complained to the respondent, we have discretion to decline under s 40(1A). The acknowledgement letter the Enquiries Team sends states that generally individuals need to complain to the respondent before the OAIC can investigate. Considerations we may take into account are whether the individual has not complained to the respondent directly due to safety concerns. We should also be mindful of whether there has been a significant delay in the OAIC actioning the matter before exercising this decline power.

Section 41(2)(b)

Where less than 30 days have passed since the complainant complained to the respondent, or in circumstances where it is unclear whether the complainant has lodged an official complaint with the respondent, then it is open to us to decline under section 41(2)(b) on the basis that the respondent has not had an adequate opportunity to deal with the complaint.

This power may also be used when the respondent organisation is clearly dealing with the complaint through something like an internal inquiry and we are satisfied that this is necessary before we can investigate. If this scenario arises discuss with The Director.

Decline powers under section 41- how to apply at assessment stage

Most matters assessed for decline under section 41(1)(a) should allow the complainant 14 days to respond to our intention to decline their complaint, unless the complainant indicates that they do not need us to give them further time to consider the reasons for decline.

Section 41(1)(a) – not an interference with privacy

Broad decline power – there will be some matters where it is clear there is no breach on the papers. If there is any doubt, refer for PIs or if more appropriate, an investigation.

Section 41(1)(c) – complainant complained after 12 months has passed

As a rule we do not accept a complaint after 12 months has passed, unless the complainant was clearly actively pursuing the matter with the respondent or via an EDR, or there are exceptional circumstances. If you are inclined to allow a complaint, please have this checked by the Director or another manager prior to finalising the assessment.

We receive a range of credit matters relating to events that occurred over 12 months ago. Usually, the complainant will only have been recently notified, or we will be unable to discern when they became aware. As credit histories continue to impact on individuals, we tend to generally allow for initial PIs on credit complaints, rather than decline them as out of time at the assessment stage.

An individual's right to access is ongoing, however, the individual should have made a request for access within the last twelve months.

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Section 41(1)(d) – lacking in substance

Primarily used when the details of the complaint cannot be made out, or where the allegations seem unsubstantiated. Consider whether more appropriate to make PIs with the complainant first to see if they are able to substantiate the complaint before declining.

Section 41(1)(da) investigation not warranted

This will depend on the circumstances of the matter and may refer to another decline power. For example, it may appear from the information provided that there is no interference with privacy, but we also consider an investigation is not warranted because the act or practice occurred over 12 months ago and the respondent appeared to have taken steps to try and resolve the matter with the individual at the time.

Section 41(1)(db) not responded to a request for information from the OAIC

Not to be used at assessment stage.

Section 41(1)(dc) being dealt with by a recognised EDR scheme

This should be used if an individual confirms they have lodged a complaint with an EDR scheme about the same issue. If it is not clear if the individual has lodged a complaint, the assessment can recommend questions about this as a basis for a possible decline.

Section 41(1)(dd) more effectively or appropriately dealt with by an EDR scheme

Where it is clear that complainant has not been to an EDR and the issues are squarely issues we can deal with, our usual process is to accept the complaint and do PIs. This decline may be more appropriate where the privacy issue is part of a broader issue the EDR can consider and the OAIC cannot, for example if a complainant considers the respondent has failed to ensure the accuracy of their personal information on their bills and utility account and they are also disputing the billing of their account.

Section 41(1)(e) – adequately dealt with under another law

This is to be used where a matter is being considered or a decision has been made under another piece of legislation that deals with the substance of the complaint to us. (eg. an access request where an FOI request is being considered, or a decision has been made under the *FOI Act*.)

Section 41(1)(f) – more appropriate remedy available under another law

For example, where the substance of the complaint is about a range of issues (where privacy is a small component of broader set of issues) and would be better dealt with under other legislation (eg a complaint about telecommunications issues better dealt with by the TIO under the Telecommunications Act, or contractual issues better dealt with under state Fair Trading legislation).

Section 41(2)(a) – respondent has adequately dealt with, or is adequately dealing with complaint

Primarily used where we have information about the steps a respondent has already taken that are consistent with the steps we would consider reasonable to resolve the matter

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through our complaint process.

Attachment A

Dear Enquiries

Could you please register the below as a privacy complaint. The details are as follows:

- Complainant name:
- Respondent name:
- Date of receipt:
- How received:
- X-reference to case:
- Please **do/don't** send standard acknowledgement
- After registration, matter can be assigned to **Me/Intake** for assessment.

Australian Government

Office of the Australian Information Commissioner

Guidance for staff

Dealing with privacy complaints about the OAIC

oaic.gov.au

OAIC

February 2021

Contents

Background

Purpose

This Guide applies to any officer of the Office of the Australian Information Commissioner (**OAIC**) who receives a complaint from an individual alleging that the OAIC has interfered with their privacy.

References in this Guide to provisions are to those contained in the *Privacy Act 1988* (Cth) (**Privacy Act**) unless otherwise indicated.

This Guide outlines:

- The process for handling a first instance complaint about an act or practice on the part of the OAIC that may be an interference with the privacy of an individual
- The role of the OAIC's privacy officers
- The process for managing a complaint made under s 36 about an act or practice of the OAIC
- The legal basis for appointing an external investigator to conduct an investigation under s 40(1) and the role of the external investigator
- The role of Legal Services team and Corporate Services Branch in procuring and appointing the external investigator
- The role of the relevant Assistant Commissioner, General Counsel and Director of the Legal team in progressing the s 36 privacy complaint
- Supporting the officer about whom a privacy complaint is made.

This policy does not preclude action being taken under the 'Breaches of the APS Code of Conduct Procedures' (if the complaint relates to a current or former OAIC employee) or under an applicable contract (if the complaint relates to a contractor).

OAIC as an agency and as a regulator

The OAIC acts as the regulator in handling privacy complaints made about other Australian Privacy Principle (**APP**) entities.

Under s 36 an individual may complain to the Commissioner about an act or practice that may be an interference with their privacy. If such a complaint is made, and the act or practice may be an interference with the privacy of an individual, under s 40 the Commissioner is obliged to investigate the act or practice, subject to exceptions.

The requirement to investigate only applies if the complainant complained to the respondent first or if the Commissioner decides that it was not appropriate for the complainant to first complain to the respondent.

As an APP entity, the OAIC may also receive complaints from individuals who claim that the OAIC has interfered with their privacy. In these instances, the OAIC is the respondent agency.

Where an individual lodges a complaint about the OAIC's conduct, the OAIC must generally first consider dealing with that complaint in its capacity as a respondent agency, and second, in the event that the complainant continues to press their complaint after an unsuccessful attempt to resolve, in its capacity, as a regulator. There may be instances where it is not appropriate for the complainant to complain in the first instance to the OAIC as an agency, and the Commissioner may, pursuant to s 40(1A), decide to investigate the complaint under s 36.

Where an individual complains to the OAIC under s 36 (in its capacity as a regulator), that the OAIC has interfered with their privacy, there is a risk that the OAIC will be perceived to be biased or may

have a conflict of interest in investigating its own actions. That is, a reasonable observer might consider that the OAIC may not bring an impartial mind as the regulator, in regulating its own actions.

In order to mitigate this risk, the OAIC has decided on a process by which it may seek the assistance of an appropriately qualified and experienced external consultant to conduct an independent investigation into the act or practice about which the complainant complains. The decision to outsource a s 36 privacy complaint against the OAIC to an external investigator must be made by the Australian Information Commissioner (**the Commissioner**) or an Executive delegate.

Related material

- Privacy regulatory action policy
- *Guide to privacy regulatory action*
- Privacy Officer Appointment Instrument
- OAIC Privacy Management Plan (D2018/011921)

Guidance

Role of Privacy Officers

The *Privacy (Australian Government Agencies — Governance) APP Code 2017* (**the Code**) made under s 26G requires the OAIC to appoint at least one privacy officer who is the primary point of contact for advice on privacy matters in an agency and who handles privacy complaints, among other responsibilities.

Under the existing Instrument of Appointment, the General Counsel is the Chief Privacy Officer (**CPO**), while Lawyers, including Senior Lawyers and the Director of the Legal Services team constitute OAIC privacy officers for the purposes of the Code.

In the event that an OAIC officer, including Enquiries staff, receives a complaint in writing from an individual, which alleges that the OAIC has interfered with their privacy, the officer should acknowledge the complaint and refer the complaint to the CPO. The CPO will decide whether attempts to resolve the matter should be undertaken as the agency involved, or whether the matter should be considered under s 36. The CPO will consider the complexity of the matter in reaching their decision, with more complex matters more likely to be managed under s 36.

Privacy officers will liaise with the OAIC Executive about how to approach privacy complaints made against the OAIC. In some instances, as noted above, the Commissioner may consider exercising their discretion to find that it is not appropriate for the complainant to complain to the OAIC and may instead invite the complainant to make, or may decide to treat the first instance complaint as, a complaint under s 36.

Officers who are subjects of the complaint

On receipt of a privacy complaint, the CPO will talk to the manager/s of the officer who is the subject of the complaint. The CPO will generally refer the complaint to privacy officers within the Legal Services team to assist with management of the complaint.

Any officer who is the subject of the complaint will be advised in broad terms of the nature of the complaint and will be directed not to access any of the OAIC's document management systems (such as Content Manager or Resolve) relating to the complaint.

They will be offered support by their manager, including information about accessing such services as Employee Assistance Program.

Complaints will be handled with an appropriate level of confidentiality. Information about the complaint will be disclosed to relevant staff on a need to know basis, including where it is necessary to give procedural fairness to the officer concerned.

Outcomes of Privacy Complaints against the OAIC

If a complainant is dissatisfied with the outcome of their privacy complaint at first instance, they are entitled to make the complaint to the OAIC as a regulator under s 36 of the Act.

If the complainant considers that the OAIC's privacy officer erred in law in their making of a decision about the complaint, it is open to the complainant to seek judicial review of that decision.

Alternatively, if the complainant is dissatisfied with the outcome of the complaint or the way in which the complaint was handled, they may contact the Commonwealth Ombudsman.

OAIC as an agency

The CPO will decide whether the OAIC should attempt to resolve the matter as an agency, ahead of moving to s 36 processes. Relatively straightforward matters, where the officer who is the subject of the complaint agrees with the facts and circumstances put forward by the complainant, may be able to resolved less formally.

In those circumstances, the resolution of the matter will be attempted by the Lawyer assigned to the matter by the CPO. This may involve:

- Obtaining a statement of facts from the officer involved
- Reaching a decision regarding whether those facts amount to an interference with the privacy of the complainant
- Attempting to resolve the matter with the complainant.

Where the matter is more complex, or attempts to resolve the matter informally are unsuccessful and the complainant wishes to pursue the matter, the CPO may decide to investigate the complaint under s 36.

Section 36 complaint

Role of Case Manager

In-house management of s 36 complaint

On receipt of the complaint made under s 36 about the OAIC the CPO will generally allocate the complaint to a Lawyer within Legal Services (**the case manager**). Though the CPO will maintain oversight, the case manager will be responsible for both the management of the s 36 complaint and the procurement of an external investigator. Section 36 complaints against the OAIC will be expedited.

Management of s 36 complaint by an external investigator

Before an investigator is engaged, the OAIC must advise the complainant that the OAIC will engage the third-party investigator (**the investigator**) to investigate the complaint.

The case manager will write to the complainant explaining the decision to outsource the complaint to the investigator, advising that information about the complaint, including the original complaint to the OAIC and the complainant's submissions, will be sent to the investigator.

The case manager will undertake a procurement process to engage an external investigator in accordance with the OAIC's usual legal procurement process. Final approval of the external investigator will be given by the Deputy Commissioner.

The CPO will also ensure that the investigator is appointed to the role under the relevant instrument of appointment. The CPO and Corporate Services will be responsible for processing the invoices provided by the investigator.

The external investigator will treat the complaint under s 36 in the same way that the OAIC would treat any other complaint about an APP entity, including by following the relevant parts of the guidance contained in *Case Management Overview*. However neither the case manager or the CPO, or the external investigator will be the decision-maker. The decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner.

The case manager will liaise with the investigator. The case manager should also write to the complainant, notifying them of the investigator's details and the fact that the investigator will be in contact with them.

The case manager should contact the investigator as soon as the complainant has been notified of the investigator's details. The case manager will generally be the point of contact for the management of the investigation. The case manager will provide the investigator with the documents relevant to the complaint. The case manager will be the contact person if the investigator has any questions during the investigative process.

Apart from outsourcing of the investigative role, the case manager will treat the complaint under s 36 in the same way that it would treat any other complaint about an APP entity. This means that the case manager will communicate with the complainant, providing them with updates on the progress of the case.

On receipt of the draft investigation report from the investigator, the case manager and/or the CPO will review the findings, reasons and recommendations for the following:

- understanding of all the complainant's claims
- factual findings based on evidence
- logical reasoning
- correct application of the law and policy
- consistency with other cases
- any other matters the case manager considers relevant.

It is open to the case manager to go back to the investigator seeking clarification on any aspect contained in the report. The case manager should liaise with the CPO and the decision-maker on these inquiries.

Once the case manager, CPO and decision-maker are satisfied that they agree with the investigator's report, they should provide procedural fairness to the complainant by providing the report and inviting comment, ensuring that enough information is provided to the complainant to enable them to understand why the information is relevant to their complaint.

Depending on the comments made by the complainant in response, the case manager, on consultation with the CPO and decision-maker, may need to confer further with the investigator.

Role of External Investigator

Under s 24 of the *Australian Information Commissioner Act* (**AIC Act**), the Commissioner may engage consultants to assist in the performance of their functions and exercise of their powers, including privacy functions, where the relevant function or power can be delegated to a member of staff of the OAIC under s 25 of the AIC Act.

While it is not open to delegate a power to make a determination about a complaint under s 52, an external consultant is able to make a recommendation arising out of their investigation.

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated.

Alternatively, the investigator may find that there **has been an interference** with privacy on the part of the OAIC, in which case, if this finding is accepted by the decision-maker, conciliation should be considered (see below).

The decision-maker will not be bound by any findings or recommendations made by the investigator. The investigator's report will amount to relevant information to which the decision-maker is to have regard.

Decision-maker

For s 36 privacy complaints about the OAIC, the decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner. It is for the decision-maker in the OAIC to make the decision on a complaint.

Where the investigation of the complaint is outsourced to an investigator, the investigator's report will likely comprise the relevant information upon which the decision-maker makes the final decision but will not be definitive. The decision-maker should set out in a decision record their consideration of the investigator's report.

Decisions

Before making a decision to accept the findings and recommendations of the case manager, CPO and/or investigator the decision-maker will need to be satisfied of the matters outlined above.

Where the complaint investigation has been outsourced

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated. Provided that the decision-maker is satisfied with the investigator's report, including they are satisfied with the matters outlined above, it is open to the decision-maker to finalise the matter by adopting the findings and recommendations of the investigator.

In the event that the investigator finds that there **has been an interference** with privacy on the part of the OAIC, conciliation should be considered. If conciliation is unsuccessful, the decision-maker will need to carefully consider next steps and may wish to seek legal advice.

Depending on the circumstances of the case, it may be that the investigator is asked to provide recommendations to remedy the conduct. If those recommendations are agreed, it may be that the decision-maker considers it appropriate to finalise the matter under s 41(1)(da) on the basis that further investigation is not warranted having regard to all the circumstances.

However, whether to decline to investigate further, and if so on what ground, is a matter that will need to be considered on a case-by-case basis.

Conduct of an OAIC employee

An interference of an individual's privacy is taken to be an act of the OAIC. However, the Code of Conduct requires all APS employees to act with care and diligence and to comply with Australian laws in connection with their employment. Consideration may be given to any conduct by an employee resulting in any interference of an individual's privacy and whether the employee's conduct ought to be referred for consideration under the OAIC's Breaches of the APS Code of Conduct Procedures.

Records Management

Privacy officers will be responsible for registering the matter on Content Manager, liaising with the complainant, dealing with the complaint at first instance and advising the complainant of the outcome. A Resolve LEG case file will also be opened, but will act as a duplicate folder, with all documents to be placed on both the Content Manager and Resolve files.

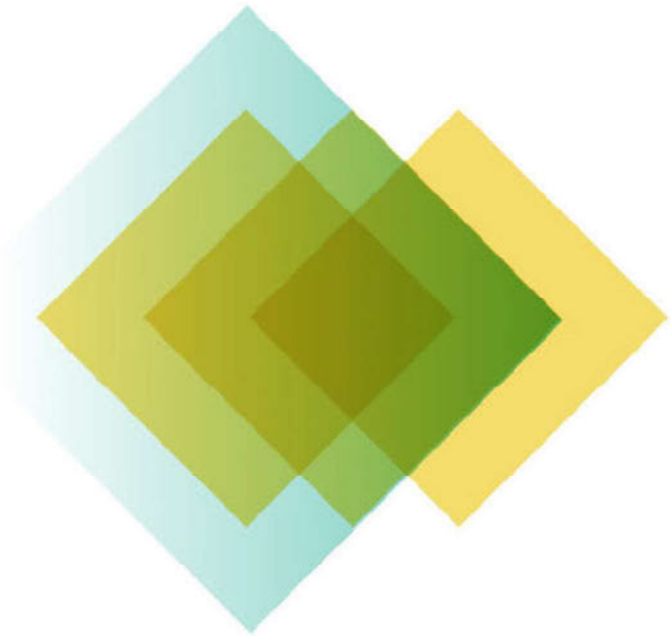
Access to the Content Manager and Resolve files concerning privacy complaints against the OAIC, for both complaints made to the OAIC as an agency and subsequent s 36 complaints, should only be available to officers within the Legal Services team and Executive.

Version	Name	Changes	Date
0.1	A. Nowland	Initial draft	June 2020
0.2	E. Hampton	Amendment to draft	23 August 2020
0.3	C. Whip	Revised draft	22 December 2020
	E. Hampton	Approval of final draft	23 December 2020

Australian Government
Office of the Australian Information Commissioner

Guidance for staff: Privacy in practice

How the OAIC manages its privacy obligations



24 June 2021

OAIC

Audience: OAIC staff

Location: Intranet - FYI

Review date: Annual

Version	Name	Changes	Date
1.0		Original document	November 2018
2.0	Legal	Revised	March 2021
2.1	Legal	Formatting updates	June 2021

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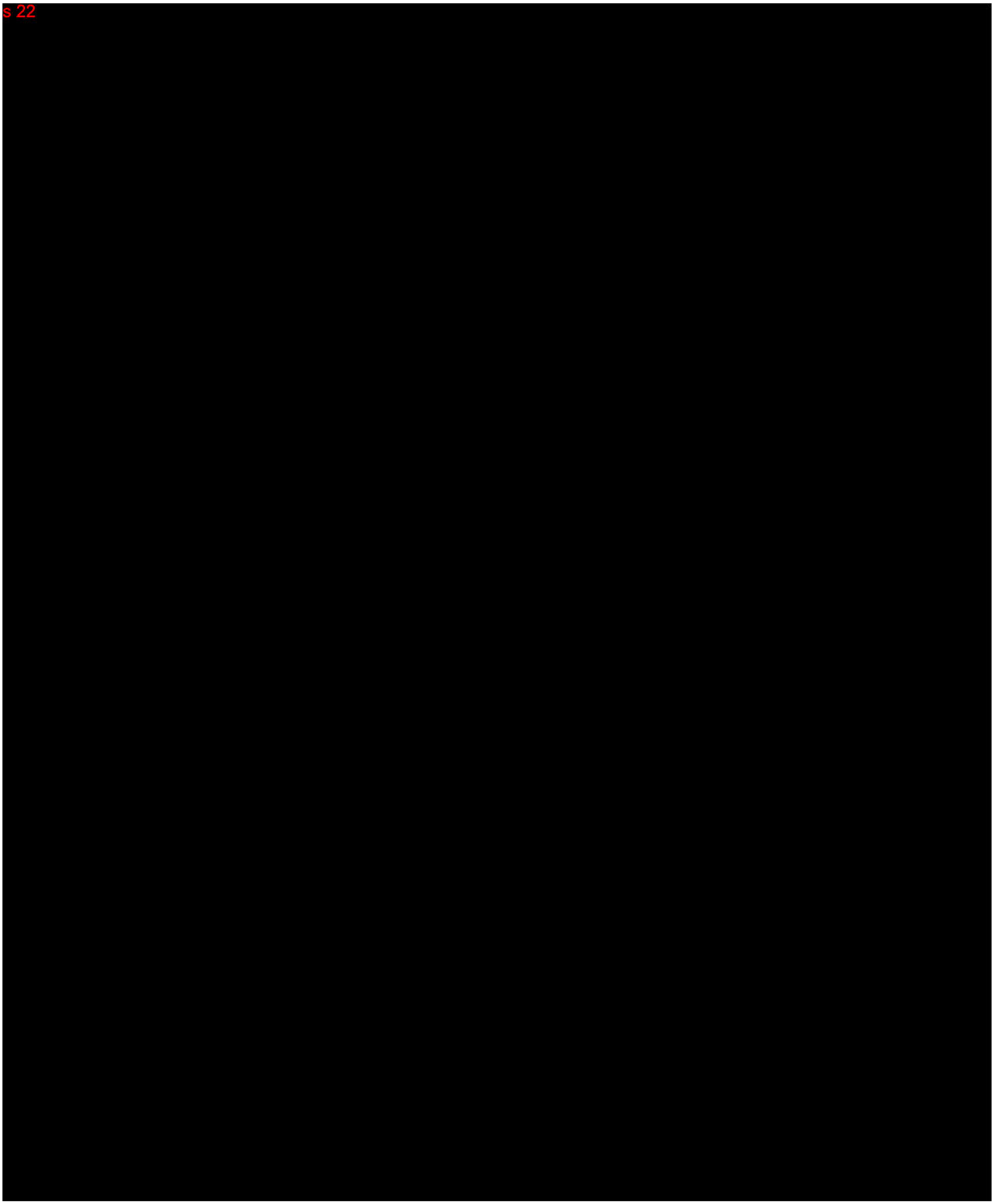

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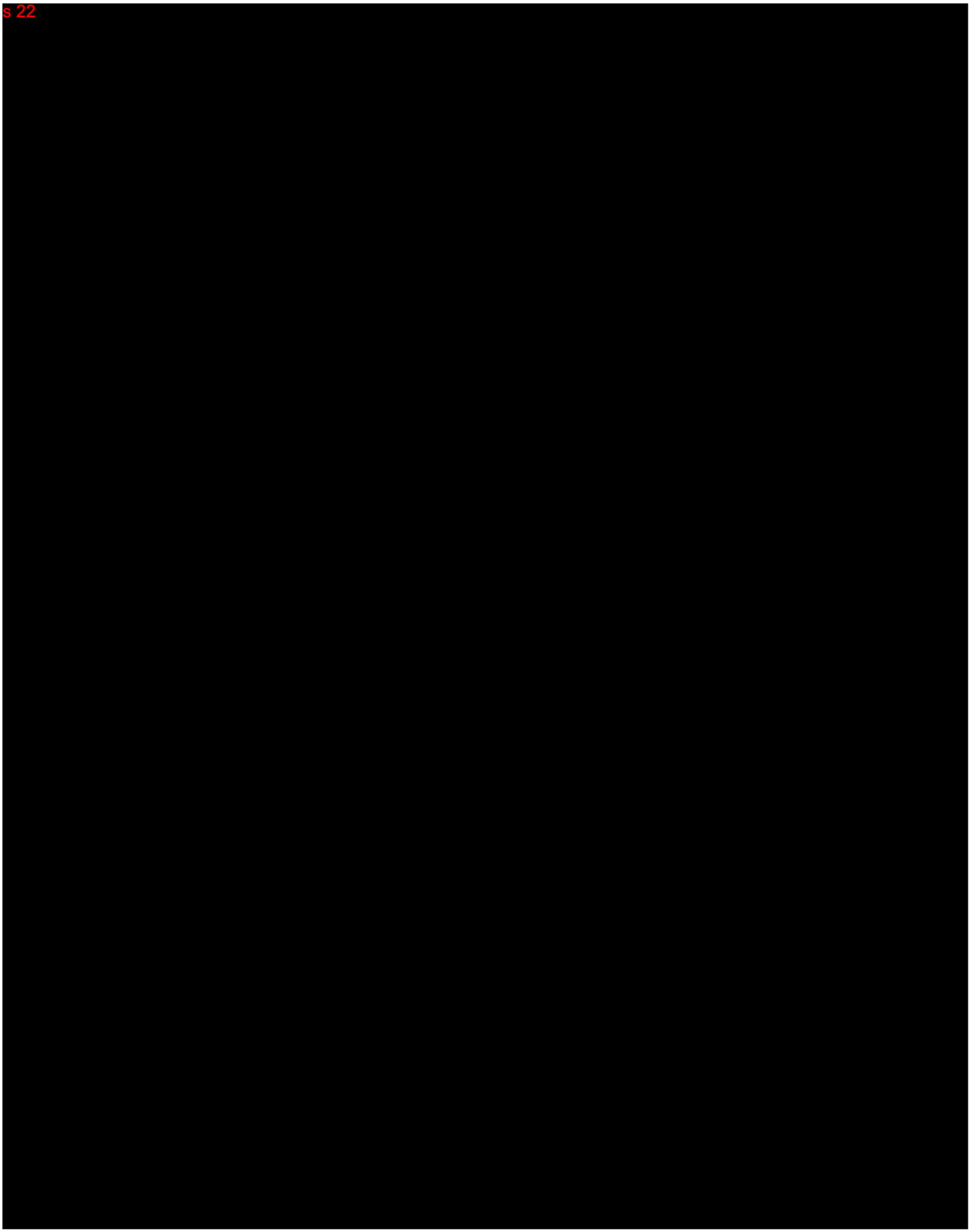

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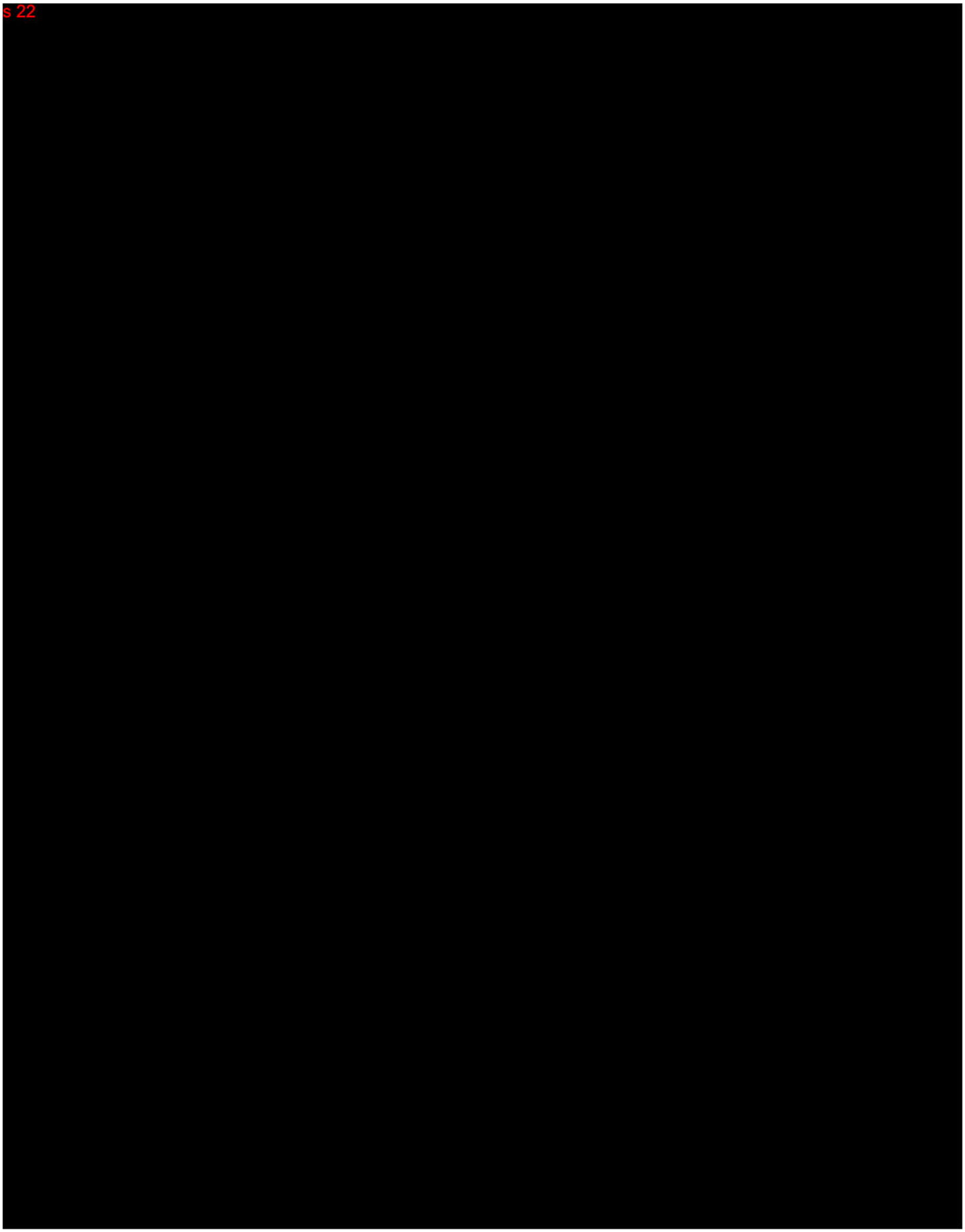

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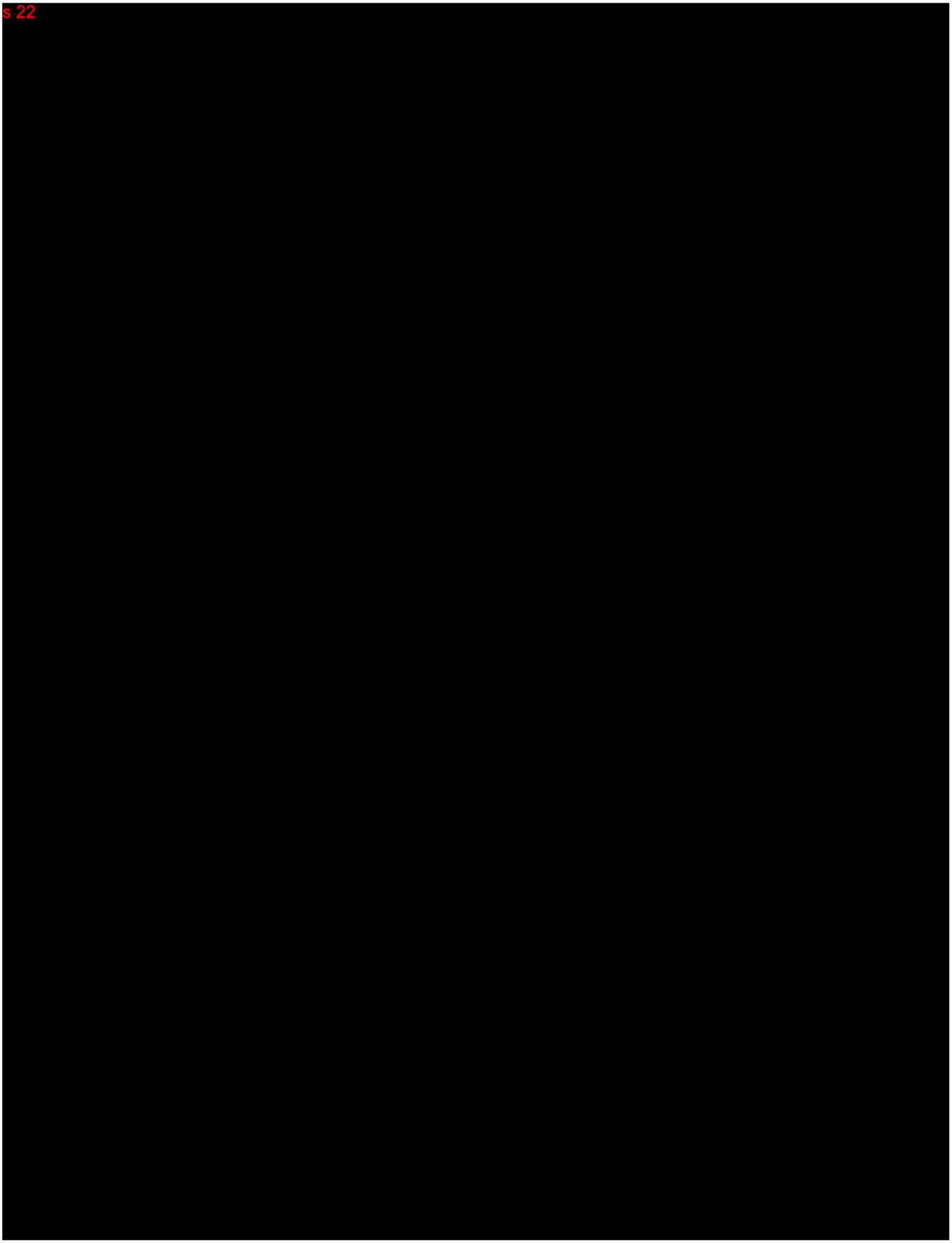

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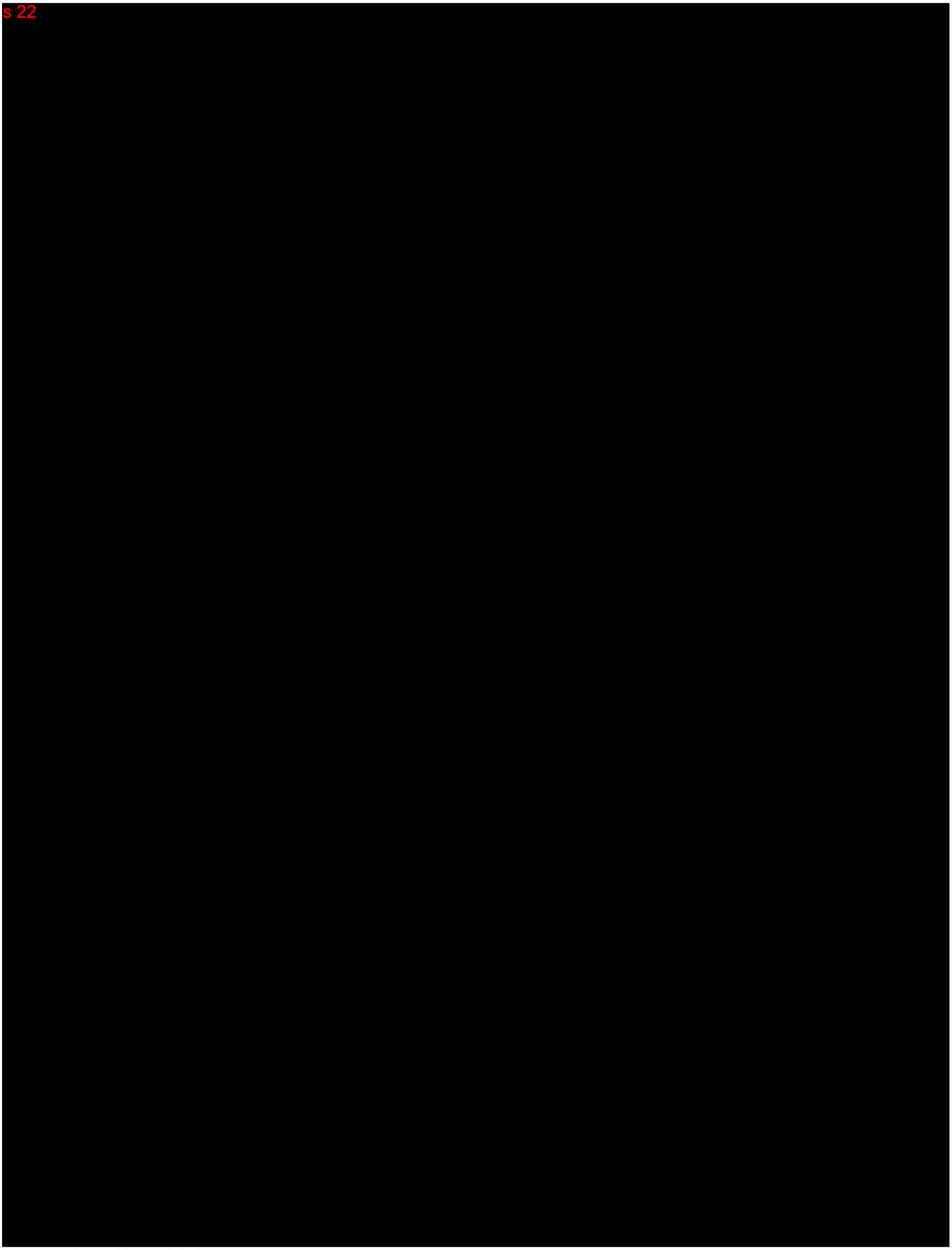

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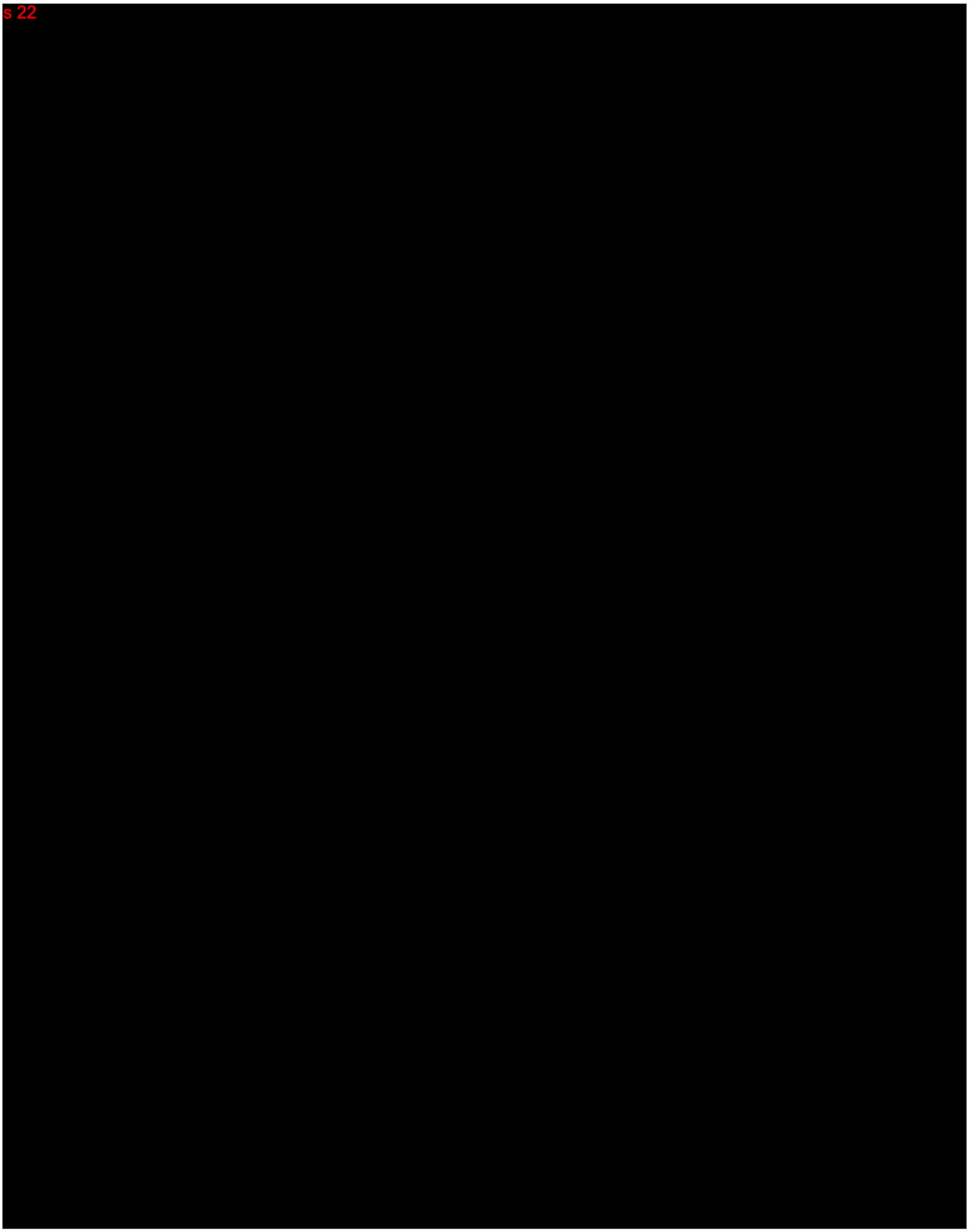

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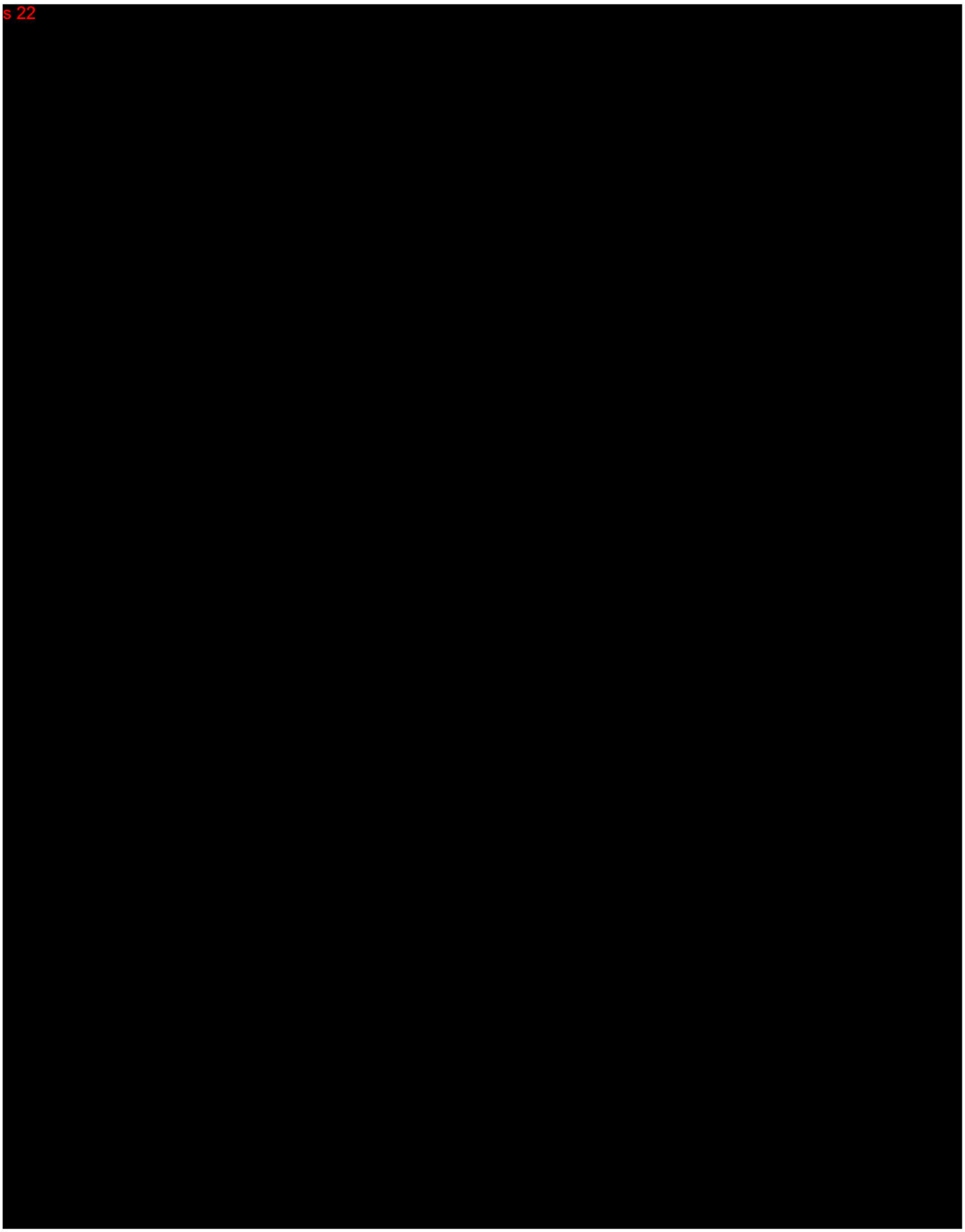

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Complaints and enquiries

Information about how to make a complaint or inquiry about the OAIC's handling of personal information is outlined in our privacy policies, accessible on the OAIC website.

Our internal processes for capturing and managing complaints and inquiries can be found on the Intranet. See for example, our Enquiries Line Resolve Guide D2013/011438 and our Guide to assisting on the Enquiries Line (D2013/011442).

Privacy complaints about the OAIC

Where an individual complains to the OAIC under s 36 of the Privacy Act (in its capacity as a regulator), that the OAIC has interfered with their privacy, there is a risk that the OAIC will be perceived to be biased or may have a conflict of interest in investigating its own actions. That is, a reasonable observer might consider that the OAIC may not bring an impartial mind as the regulator, in regulating its own actions.

If a complaint is made about the OAIC's handling of personal information, it would be handled by a more senior officer than the officer to whom the complaint relates and would be conducted in accordance with the Australian Public Service Values, Code of Conduct and guidelines for handling misconduct.

In order to mitigate this risk, the OAIC has decided on a process by which it may seek the assistance of an appropriately qualified and experienced external consultant to conduct an independent investigation into the act or practice about which the complainant complains. The decision to outsource a s 36 privacy complaint against the OAIC to an external investigator must be made by the

[6] APP Code s 16

Australian Information Commissioner or an Executive delegate. Additional information is available from 'Guidance for staff: 'Dealing with privacy complaints about the OAIC' (D2021/000080).

Review the OAIC Service Charter on how the OAIC deals with privacy complaints against the OAIC conducted at least every 12 months.

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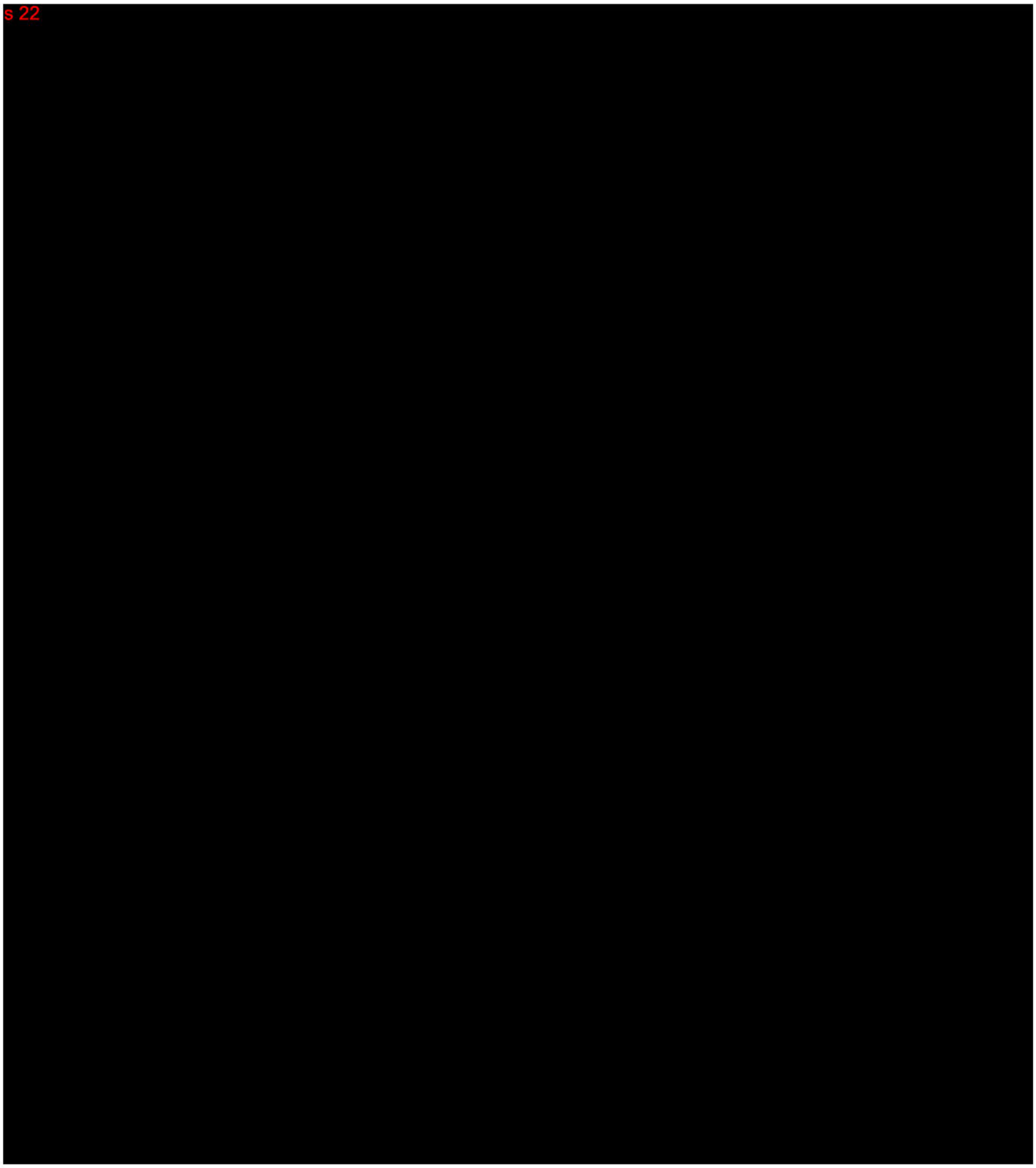

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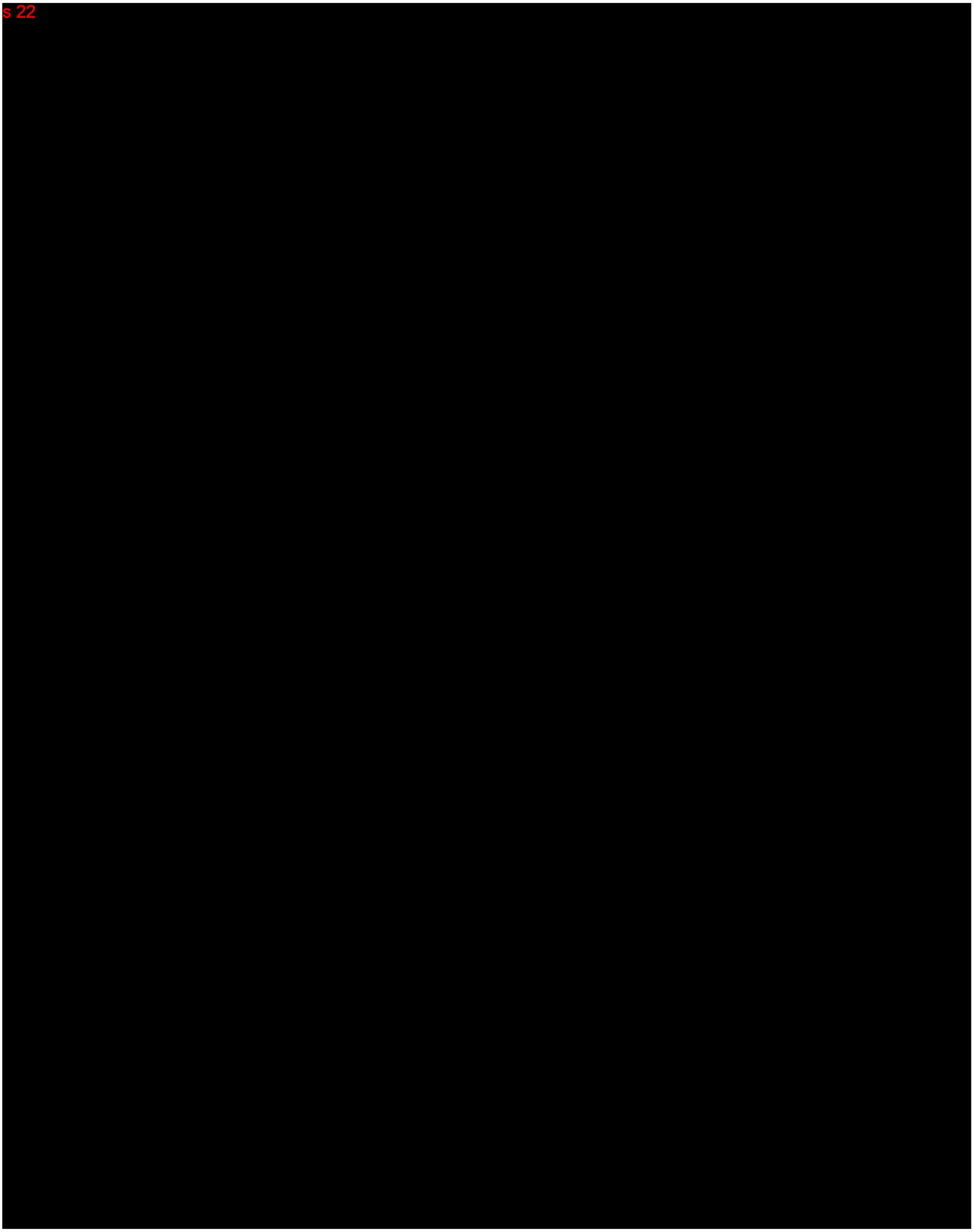

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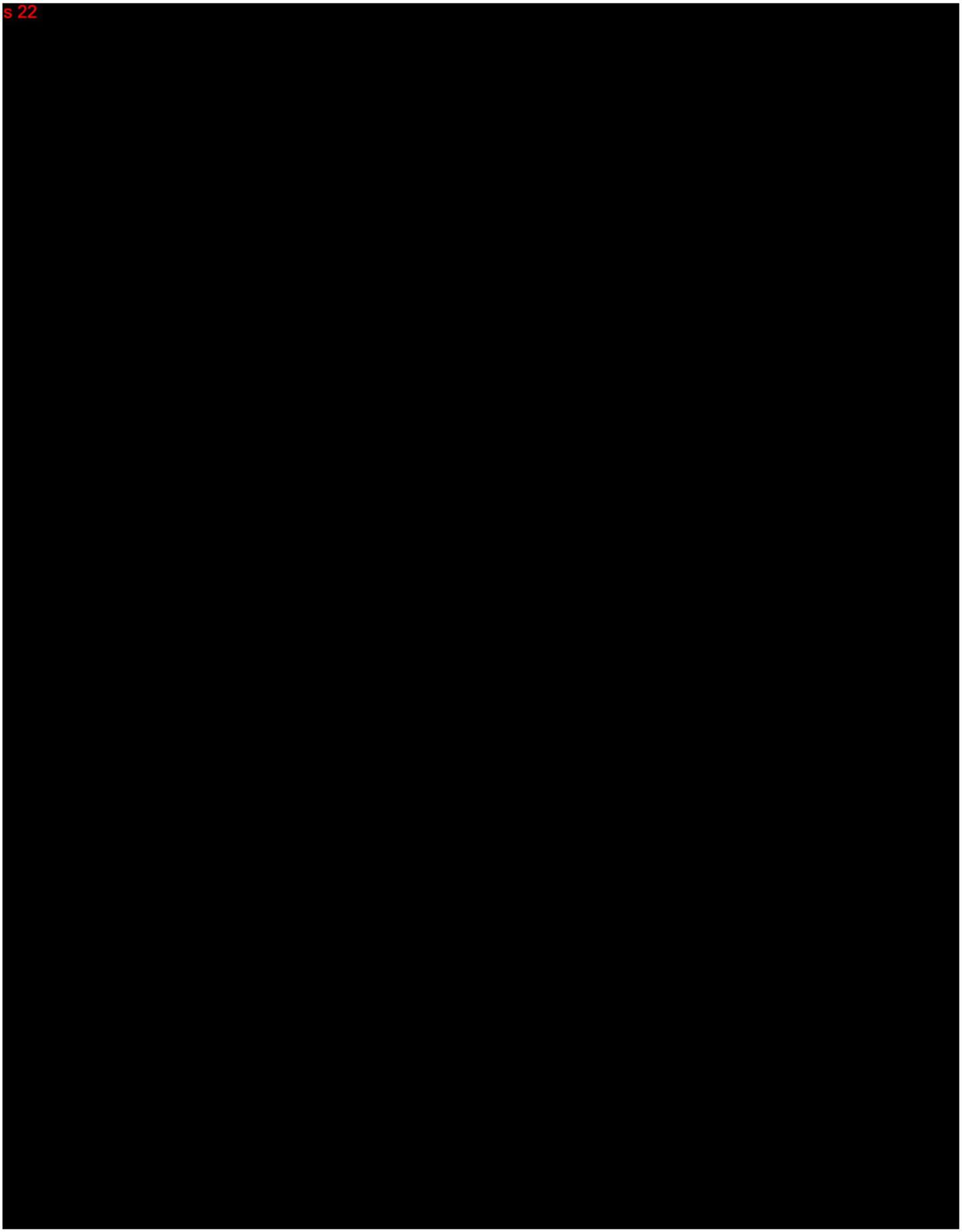

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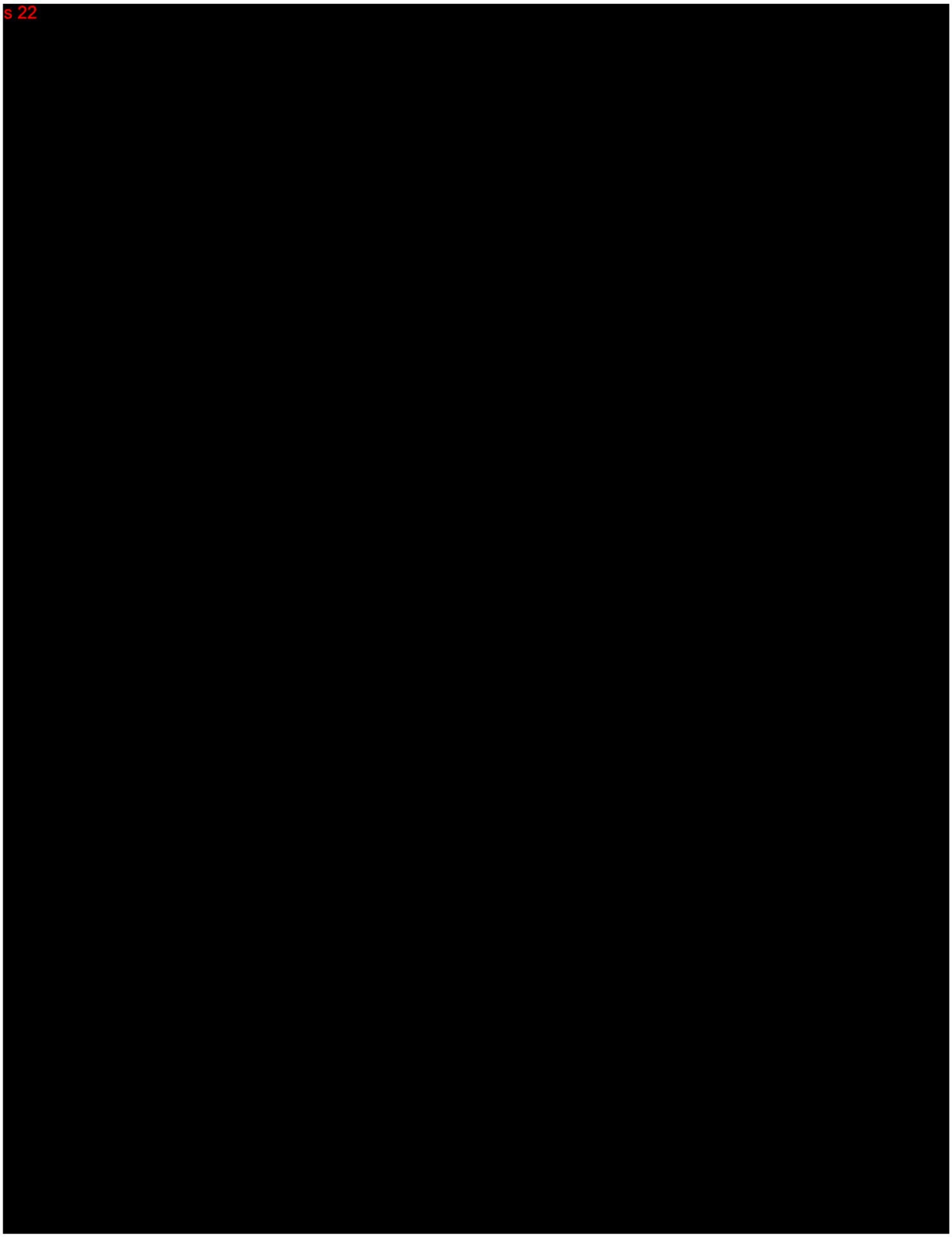

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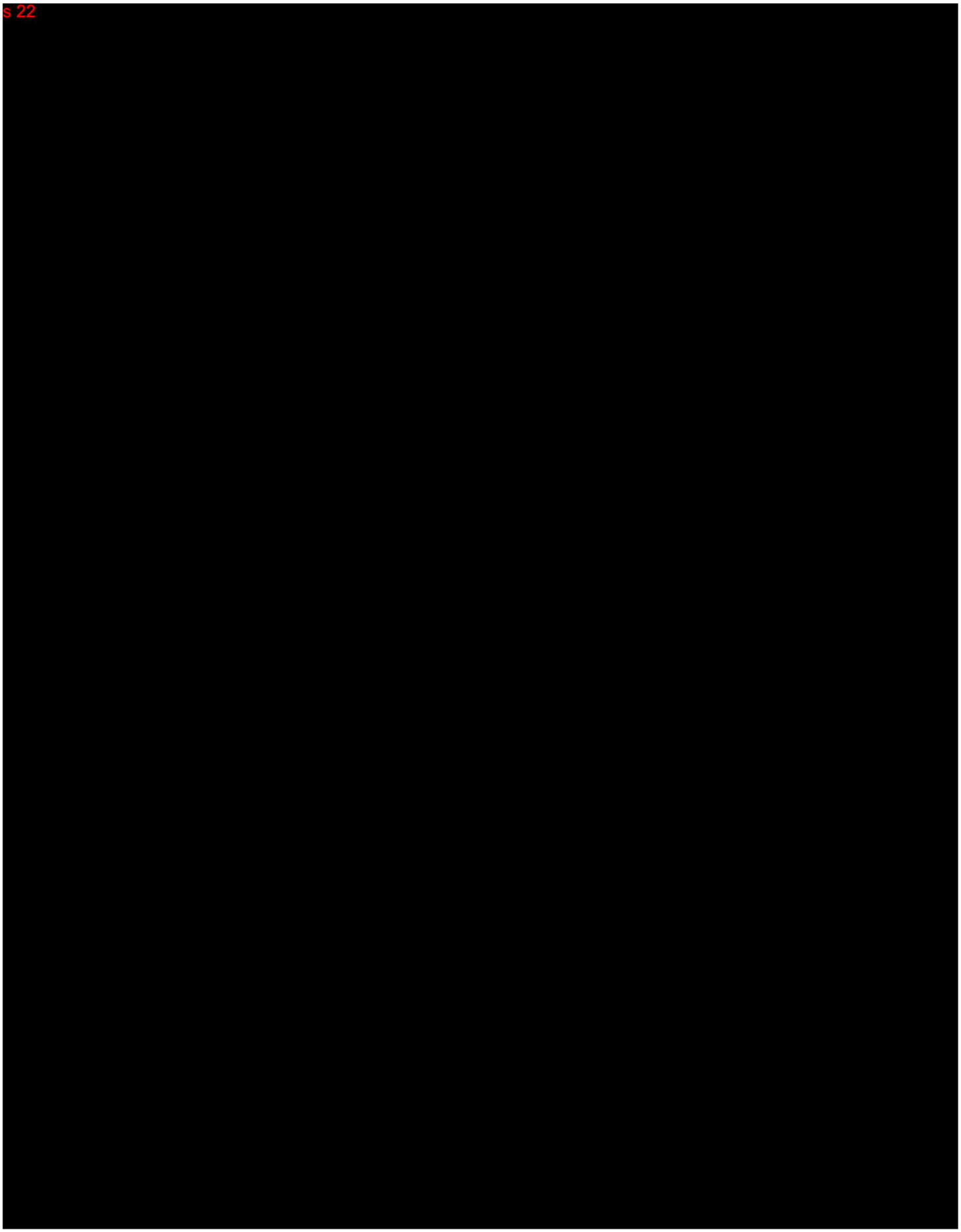

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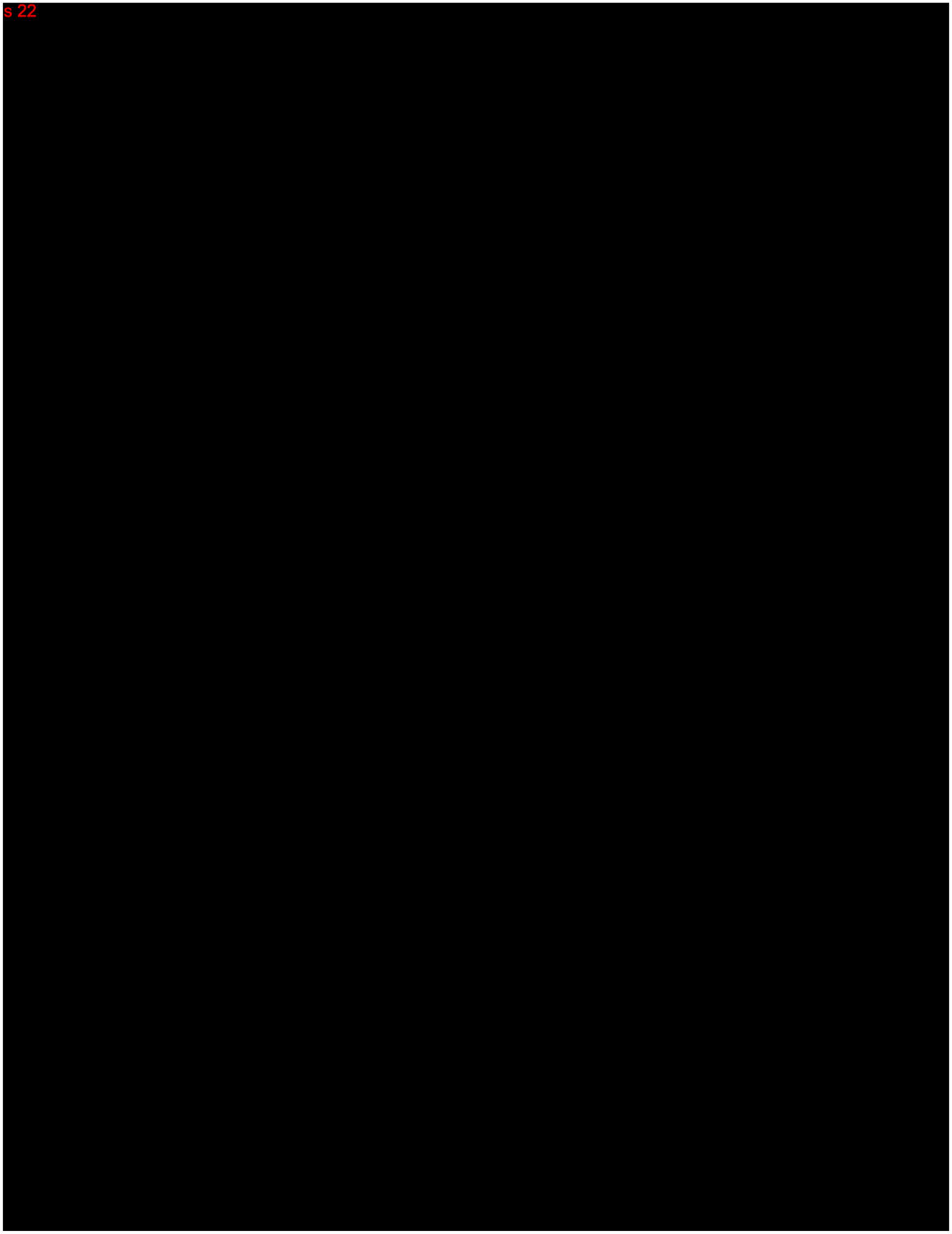

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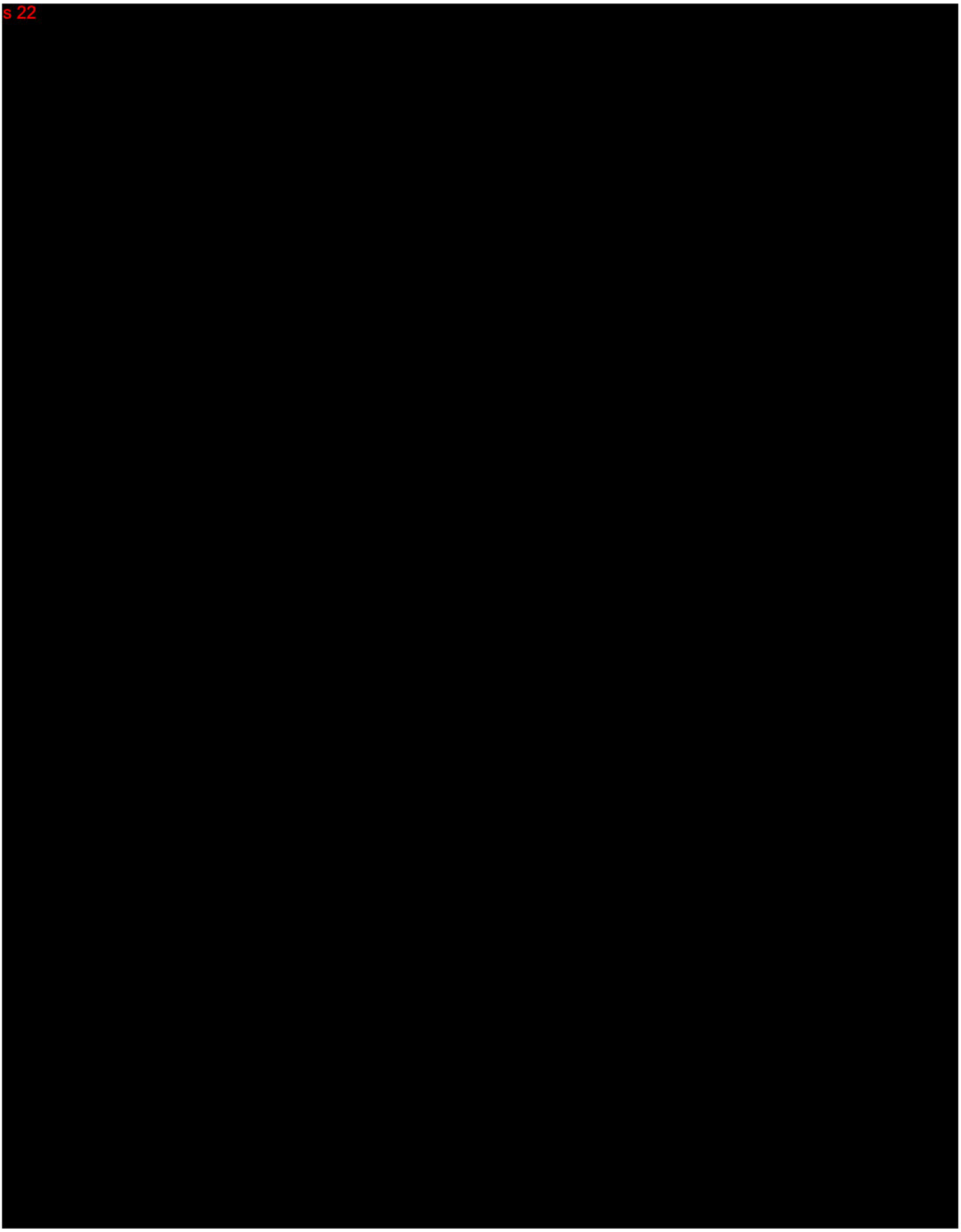

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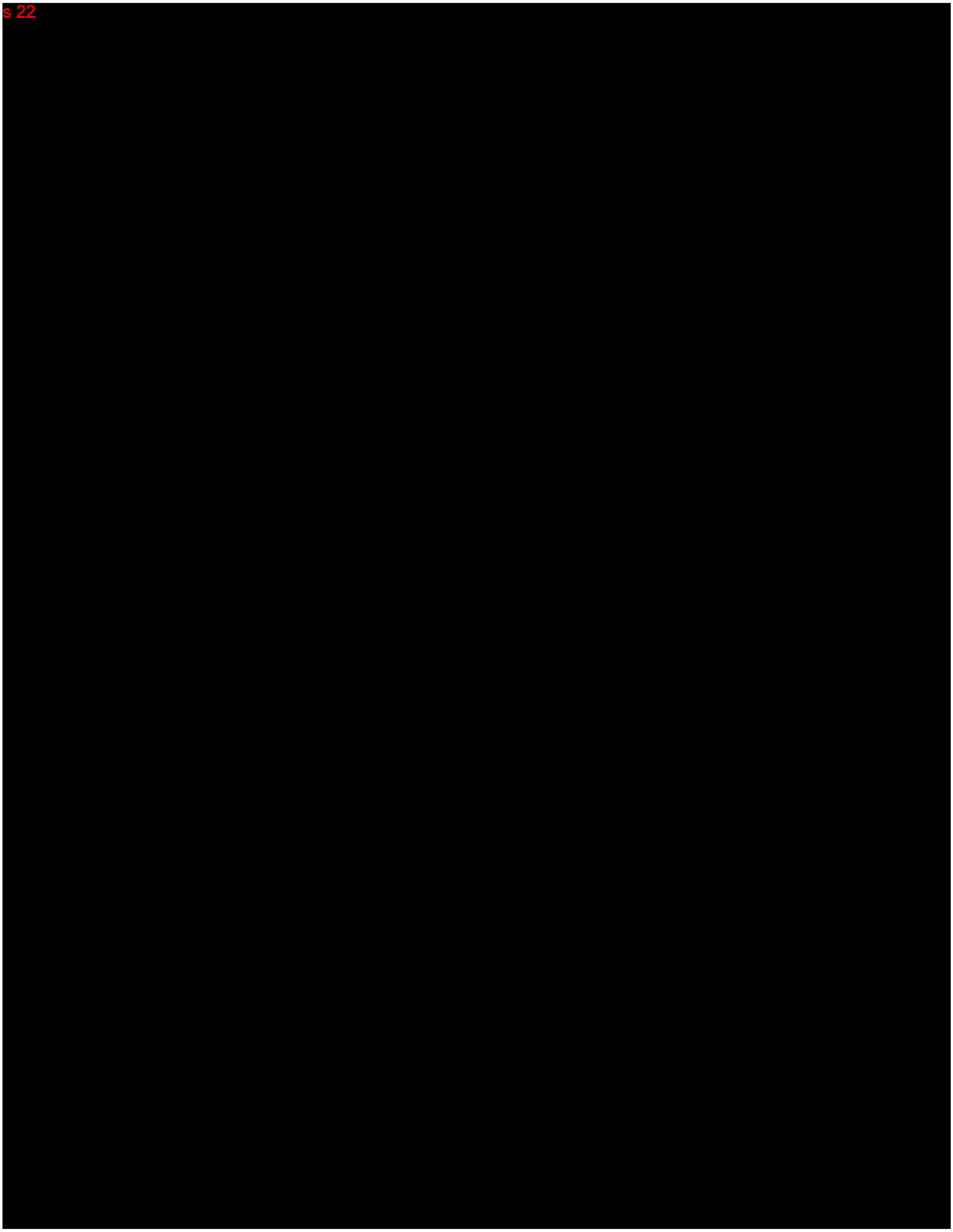

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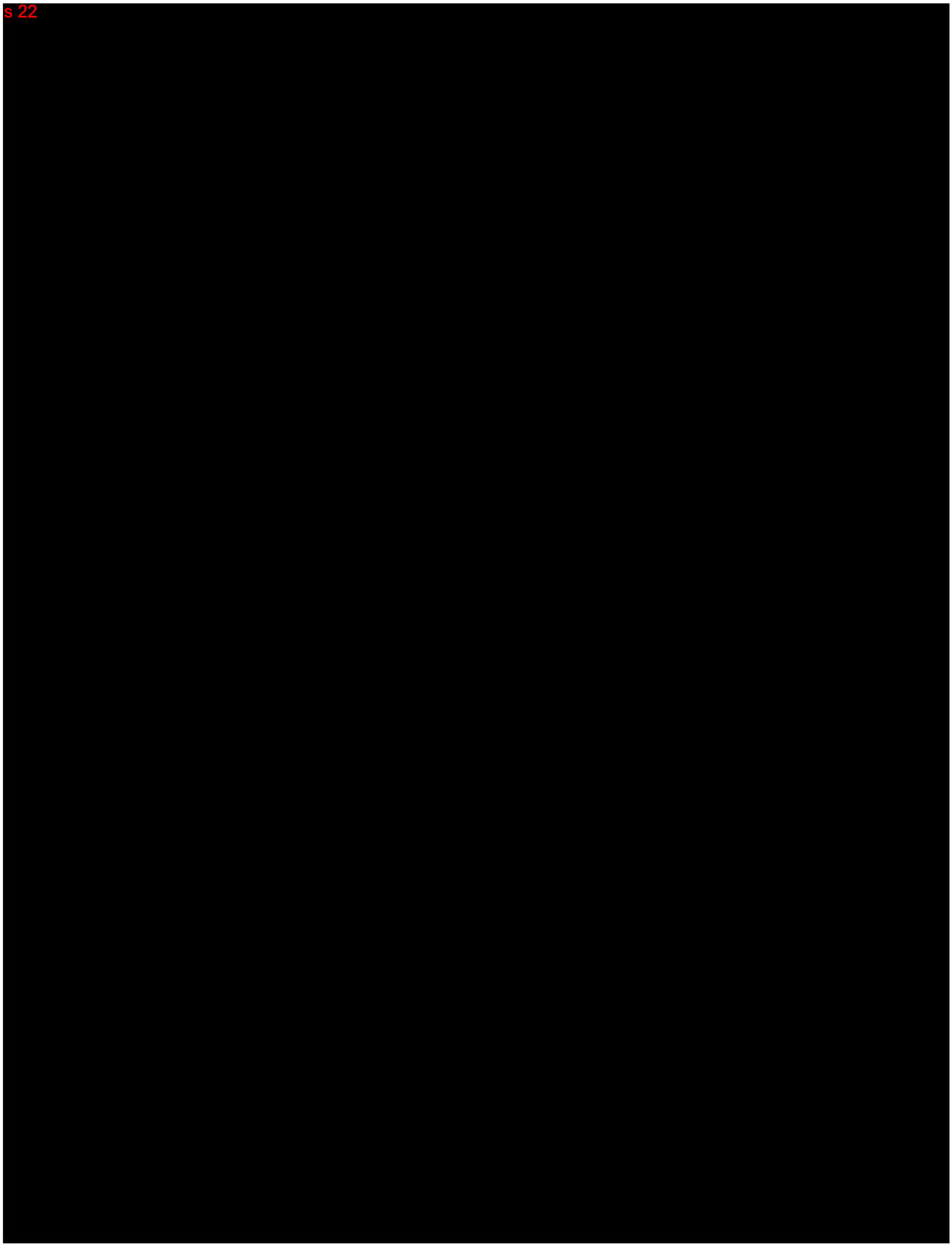

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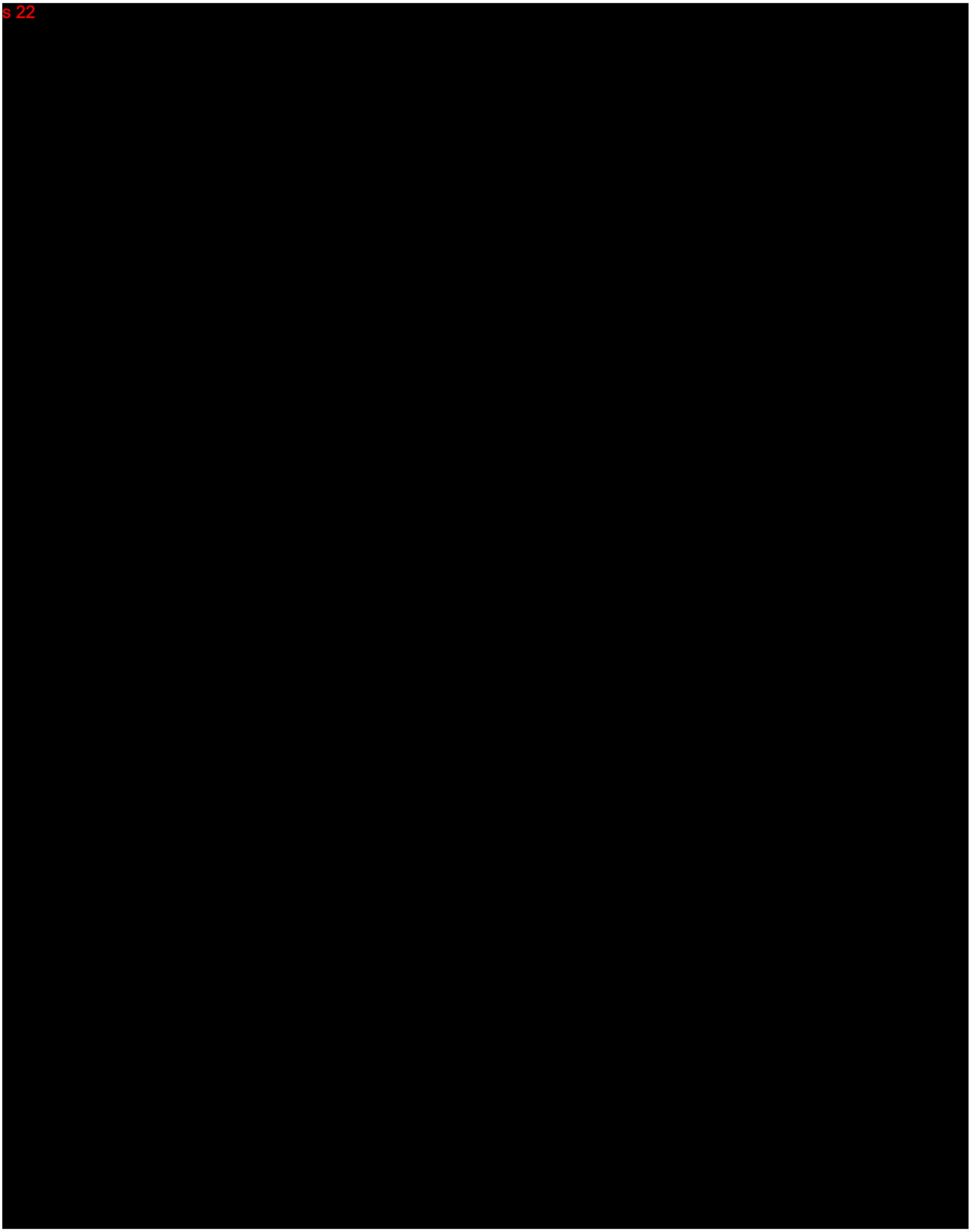

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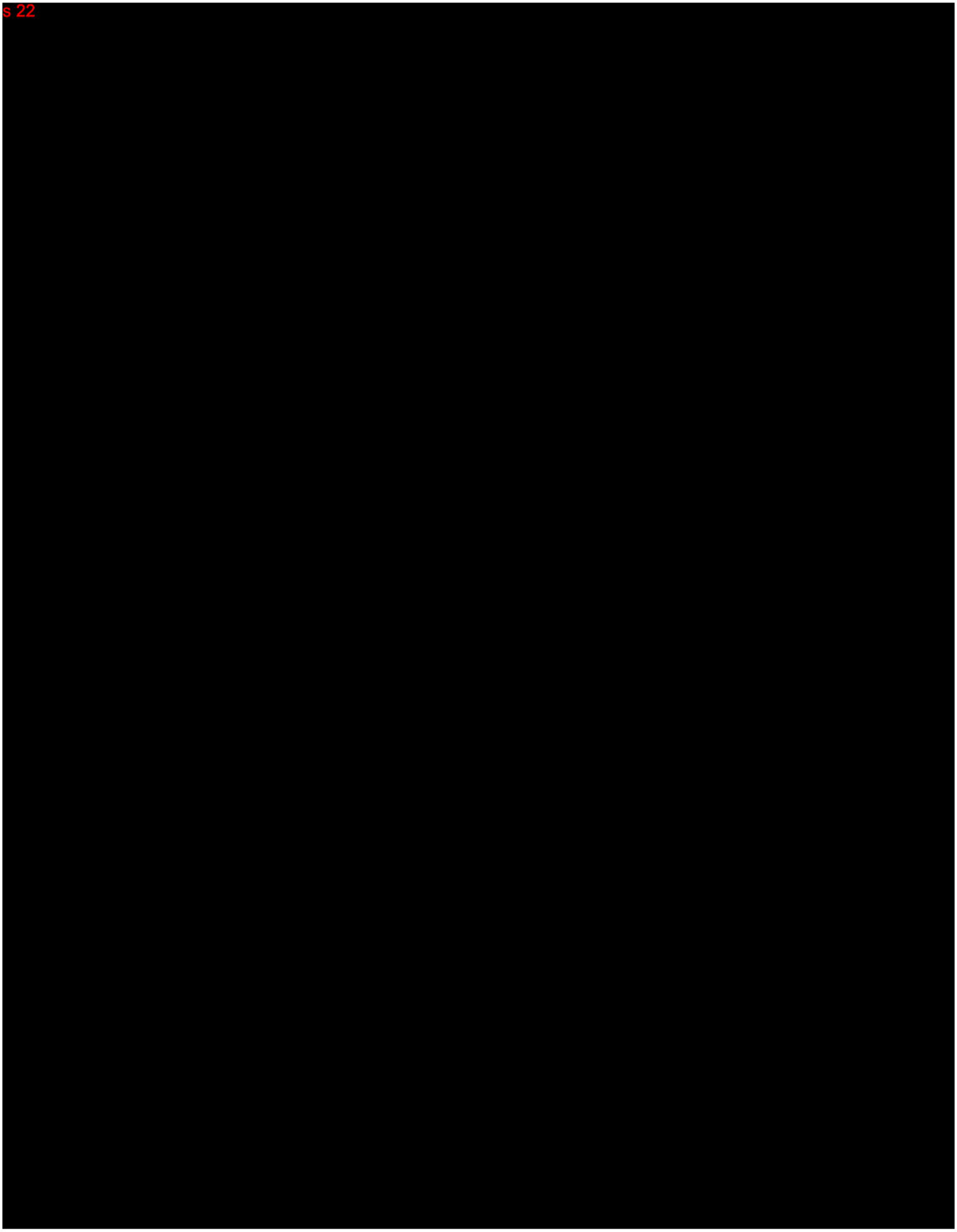

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