

BRIEFING FOR THE MINISTER OF POLICE

Priority	<input type="checkbox"/> Urgent <input checked="" type="checkbox"/> Time-Sensitive <input type="checkbox"/> Routine Police recommends you meet with the Associate Minister of Transport prior to the Cabinet paper being lodged on 27 April		
Title	Police feedback on Transport Draft Cabinet Paper <i>“Legislative amendment to enable oral fluid testing”</i>		
Date	13 April 2023	Ref	BR/23/23GA
Note: This briefing contains privileged legal advice and should not be released, including under an OIA request, without consultation including Police and the Ministry of Transport.			

Executive summary

- The Associate Minister of Transport is undertaking Ministerial consultation on a draft Cabinet paper seeking agreement to legislative amendments to enable the introduction of oral fluid testing (OFT). Current legislative settings mean there is no device that Police can recommend to you for approval (current settings require that the device will never return a false positive result – this technology does not currently exist). As a result, the draft Cabinet paper proposes amending the OFT process to require two positive roadside screening tests followed by an evidential laboratory test before an infringement is issued.
- s.9(2)(g) OIA [Redacted]
- s.9(2)(g) OIA [Redacted]
- Police provided feedback to the Ministry of Transport (Transport) during the drafting and agency consultation phases of the paper’s development. We have proposed, and Transport has rejected, amendments that would provide for a best practice approach that is modelled on high performing Australian States and will enhance road safety outcomes to reduce the impact of drug driving on our roads. These include:

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- a. confirmatory laboratory testing of all second OFT screening samples (including those returning a negative result)
 - b. confirmatory laboratory testing for all qualifying drugs the OFT device can test for, regardless as to whether they were detected in the screening process
 - c. establishing an offence for refusal to provide an oral fluid sample
 - d. reviewing how the approval criteria for OFT screening devices is reflected in legislation and creating requirements for approval of any evidential testing process.
5. Transport has declined to incorporate these proposals during the paper development or agency consultation stages of the process, and Police is concerned this means the amendment process is a missed opportunity to enhance road safety outcomes and reduce the impact of drug driving on road users.
6. As these issues have a significant impact on the ability of Police to deliver a best practice roadside oral fluid testing regime, and any unresolved issues with device approval criteria could delay or prevent devices being deployed, Police recommends that you raise these concerns directly with your colleague, the Associate Minister of Transport.

Recommendations

Police recommends that the Minister of Police:

- | | | |
|----|---|--------|
| a) | note the issues of concern to Police discussed in this briefing | |
| b) | indicate whether you wish Police to brief you in person on the issues identified in this briefing | Yes/No |
| c) | consider whether to meet with the Associate Minister of Transport to discuss Police concerns about the draft Cabinet paper | Yes/No |

Minister's comments and signature

..... / / 2023

Hon Ginny Andersen

Minister of Police

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Police feedback on Transport Draft Cabinet Paper: *Legislative amendment to enable oral fluid testing*

Purpose

1. This briefing outlines the Police concerns about the Associate Minister of Transport's draft Cabinet paper: "Legislative amendment to enable oral fluid testing" that Ministers are currently being consulted on. A number of proposals Police considers would strengthen the road safety outcomes of the legislation are identified for your information and consideration as you prepare your Ministerial feedback on the paper.

Background

2. The Land Transport (Drug Driving) Amendment Act 2022 came into effect in March this year with amending provisions (the amending provisions) being incorporated into the Land Transport Act 1998. These included provisions intended to enable the introduction of random roadside Oral Fluid Testing (OFT).
3. The policy intent underpinning the amending provisions was to detect and deter drug driving, particularly in respect of the drugs most associated with death and serious injury crashes on our roads.
4. The legislation established an infringement offence where a driver returned two positive OFT results for one or more of 25 qualifying drugs at the roadside. New Zealand is the only jurisdiction in the world to have adopted this approach.

Issues with existing legislation mean Police cannot implement random roadside oral fluid testing for drugs

5. OFT devices are designed as screening tools, meaning confirmatory laboratory testing is necessary to verify the presence of a drug in an oral fluid sample. OFT devices have known accuracy issues – returning both false positive and false negative results. Police testing during the procurement process conducted in 2022 found the best devices to be around 90 per cent accurate. Devices are also largely unable to detect specific drugs. While THC and cocaine can be identified, other drugs are only identifiable at the 'family' level (eg opioids, benzodiazepines, amphetamines etc).
6. The legislation design sought to mitigate these issues by requiring two positive test results to establish an infringement offence (to reduce the impact of false positive results) and enabling the driver to elect a blood test to establish a defence against the OFT results.
7. Police raised concerns, later **s.9(2)(h) OIA** that because of the accuracy and specificity issues, there was no OFT device currently available that could meet the legislative requirements for approval, particularly the requirement to never return a false positive test result. The former Minister of Police was advised of this in November 2022 [BR/22/107CH] refers.

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8. The Ministry of Transport and Police then prepared joint advice on options to introduce oral fluid testing (BR23/14 refers) and in February, the Minister of Transport and former Minister of Police agreed that further legislative amendment was necessary. It is understood that Transport officials were directed that the amendments should retain as close a resemblance to the existing approach as possible.
9. After Hon Allan was appointed Associate Minister of Transport in February 2023, the Minister of Transport included this work in her delegations

The Associate Minister of Transport has circulated a draft Cabinet paper for Ministerial consultation

10. The draft Cabinet paper containing proposals for legislative amendment to enable oral fluid testing is a Transport portfolio paper. While Police has worked closely with Transport to provide input and advice into the paper's development, the speed of process and narrow scope taken by Transport mean our preferred position has not been incorporated on some matters.
11. In keeping as close to the original legislation as possible, Police considers that there is a missed opportunity to establish a best practice approach to roadside drug testing. This could be achieved with a small number of additional legislative changes that will improve both the process itself and the detection and deterrence impact of the approach.
12. Because of the timeframe available, Police was unable to review the updated version of the paper before it was circulated for Ministerial consultation. The current Police comment in the paper is inaccurate as Police did not provide it. We will provide an updated comment for the final version going to DEV which will reflect any further amendments to the paper.

Police considers that the proposed approach will not deliver the best road safety outcomes possible

13. Police is principally concerned that our proposal for a proven best practice model has not been incorporated into the paper. This includes the additional step of sending all second screening samples (both positive and negative) for laboratory confirmatory analysis laboratory testing for any qualifying drugs that are present (not just those identified in the screening samples).
14. Police is also concerned that insufficient consideration has been given to the issue of approval criteria for devices. The paper proposes criteria that include reference to the relevant standards for screening devices but no reference is made to any criteria for the evidential testing approach. Police remains concerned that specific approval criteria for the screening devices being tightly defined in primary legislation may result in difficulties in finding a device that meets those criteria. We consider there to be a risk that the proposed criteria may not resolve the issue it is designed to overcome.

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Police has proposed a 'best practice' testing approach modelled on high performing Australian States

15. Police has undertaken an analysis of roadside drug testing approaches in Australian States and developed a preferred model based on the best practice approaches used by States considered by New Zealand Road Police to be high performers in this area (New South Wales, South Australia, and Victoria).
16. In these States, a driver testing positive in a first OFT screening test is required to undertake a second test. If the second test is positive, the driver is forbidden from driving for 12 or 24 hours (dependant on the State or the drug type). The second screening sample is sent for confirmatory laboratory analysis regardless as to whether it returned a positive or negative result. If the laboratory analysis confirms the presence of one or more qualifying drugs that the device can test for then enforcement action (and infringement notice or summons) is issued.
17. While no enforcement action is taken at the roadside against the driver passing a second screening test, this means a driver will be infringed if it is found that their second screening test returned a false negative result. A process diagram of this approach, compared to the process proposed in the draft Cabinet paper is attached as Appendix 2.
18. Police has proposed this approach to Transport on the basis that it:
 - a. reflects current best practice in the Australian States that it makes good sense to emulate
 - b. reflects elements of the current legislation in that a driver must fail a first oral fluid test before a second oral fluid test can be undertaken, and can only be forbidden to drive if they also fail the second test
 - c. reduces the risks of drug driving harm on the roads through increasing the likelihood that drugged drivers will be detected and held to account, which flows on to increasing general deterrence from drug driving overall
 - d. can provide enhanced monitoring and assessment of screening device accuracy by providing data on the number of false negative tests being returned (data on false positives will already be captured based on the number of positive second screening test samples that return a negative result in the laboratory).

There are four high-level components to the best practice approach Police has proposed

Testing of all second screening samples, regardless of whether they are positive or negative results

19. Based on a testing volume of 66,000 drivers each year, it is estimated that eight per cent of drivers (5,280) will return a positive first screening test at the roadside and be required to progress to a second screening test. Applying a false negative error rate of five per cent (the estimated error rate based on procurement testing result), Police anticipates that approximately 264 of those drivers could return a

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false negative second screening test result when they are driving with a qualifying drug in their system. Under the current proposals, these drivers would not have their second sample laboratory tested and no further action would be taken.

20. Police considers that testing all second screening samples offers a stronger detection and deterrence approach that will improve road safety outcomes by identifying and infringing a higher proportion of drugged drivers and improving confidence in the roadside drug testing regime.
21. Police estimates that the additional cost of testing all second screening samples will be minimal. This is because the additional number of tests sent for laboratory analysis will only increase by the number of false negative tests returned in second screening (ie approximately 264 additional laboratory tests per year) Based on an indicative laboratory testing cost of \$670 (GST inc), this is an increase of approximately \$177,000.
22. Transport has indicated potential merit in this approach but notes that exploration of it would require an extension of existing timeframes to progress the legislation. Police considers this opportunity will likely be the only time for some years that a proven, best practice, approach can be incorporated given this process is amending very recent legislation.

Expanding the confirmatory laboratory test to all qualifying drugs for which the screening device tests

23. Police recommends that a second screening sample sent for confirmatory laboratory testing is tested for all of the drugs that the screening device can test for. The current proposal only allows for confirmatory testing for the drugs detected in the screening test.
24. Because it would be unlikely to be cost effective to order specific drug screening for each sample, the laboratory testing process is likely to require that most, if not all, qualifying drugs are included when a sample is tested regardless of what qualifying drugs the screening tests identified.
25. Enforcement based on a complete screening panel supports the intent of the legislation by reinforcing that a driver will be penalised for any qualifying drugs detected in their system by the evidentiary test, resulting in fewer drugged drivers escaping penalty, and avoiding situations where Police are aware of drug driving offences but are unable to act on them.
26. This approach also overcomes the issue of situations where a driver fails two screening tests, but each screening test detects a different drug.

Creating an offence for refusal to provide an oral fluid sample

27. Current settings enable an officer to require a blood sample where an oral fluid sample is refused, with a refusal to provide the blood sample being an offence.
28. Police is concerned that requiring a blood sample simply extends the timeframe over which a driver refuses to cooperate with Police. This has the potential to increase roadside tensions and will also divert Police time from other road

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policing priorities. It is also possible that refusal to provide an oral fluid sample may be used as a tactic to 'game' Police. This could either be by causing delay in the timing of the test while the individual is taken to a location for the test and a medical worker is located to conduct it, or in the hope the test cannot be undertaken (for instance in remote rural areas). Police considers introducing an offence for refusal to provide an oral fluid sample will address these issues.

29. Transport officials have considered and rejected this proposal stating their view that the blood test requirement provides a satisfactory pathway. Police does not agree with this position.

Consideration of a 24 hour stand down from driving for drivers failing two screening tests

30. The paper retains the existing 12 hour period for which a driver is forbidden to drive following two positive screening tests. A number of Australian States have moved to a 24 hour driving prohibition where the driver returns a positive screening result for any drug other than THC (where 12 hours is still used in two States). This is based on evidence that drugs may remain detectable for over 12 and up to 24 hours meaning a driver could fail a screening test even after a 12 hour standdown period.
31. Police has not formed a final position on this matter and has raised the issue only in recent discussions with Transport officials. We suggest Ministers request this approach be assessed with the possibility of incorporating it as a change during the drafting process should evidence support this.

Police remains concerned that the proposed approval criteria for devices may still not be workable and some elements are missing

32. The reason Police is unable to recommend a testing device under current settings is the approval criteria set out in the Land Transport (Drug Driving) Amendment Act 2022 (now incorporated into the Land Transport Act 1998) cannot be met. The criteria were established, in part, in response to concerns about known accuracy issues with OFT screening devices identified by Police in the policy development process and the subject of feedback during the Select Committee stage of the Amendment Act's progress. At its core, the issue relates to the current legislation empowering the use of an OFT device for evidential purposes when they are designed as screening devices.
33. The draft Cabinet paper reflects the intended use of OFT screening devices by introducing the requirement for a confirmatory laboratory test before an infringement offence for drug driving can be established.
34. Police is concerned that it is possible the amending legislation will not resolve the issue of the ability of Police to identify a screening device that meets the approval criteria as the criteria remain linked in primary legislation to elements of the Australia / New Zealand standards for these types of device.
35. From discussion with Transport officials, Police understands agency feedback is strongly in favour of having transparency around the criteria by which the Minister

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of Police approves screening devices meaning they have retained clear definitions around the approval criteria within the Act in order to respond to this feedback.

36. Police notes that there is no reference to how confirmatory evidential testing processes will be approved and there is no reference to the requirements for the collection, storage and management of oral fluid samples.
37. Our strong preference, based on the experience of the existing approval criteria, is that the approval approach reflects that for breath screening. This involves the Minister of Police approving a screening device by Notice¹ without requirements being specified in Primary legislation, and the requirements for evidential laboratory testing following the pattern for any breath testing evidential device or process as detailed in section 75A of the Land Transport Act 1998.

Next Steps

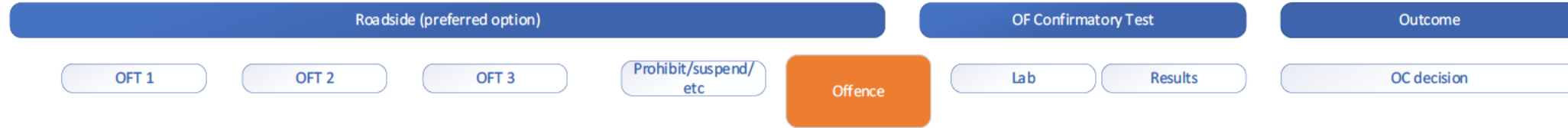
38. Ministerial consultation is currently in progress and closes on 21 April. The paper is currently scheduled to be considered by DEV on 3 May and Cabinet on 8 May.
39. Police are available to meet with you to discuss the Cabinet paper, our concerns and our proposed approach to testing.
40. Police recommends you meet with the Associate Minister of Transport to discuss the matters raised in this briefing. A summary of the current proposal and the Police proposed approach is attached to support this discussion
41. Police will provide a further briefing when the final version of the paper is lodged, together with material to support your engagement in discussions at DEV and Cabinet.

Bronwyn Donaldson

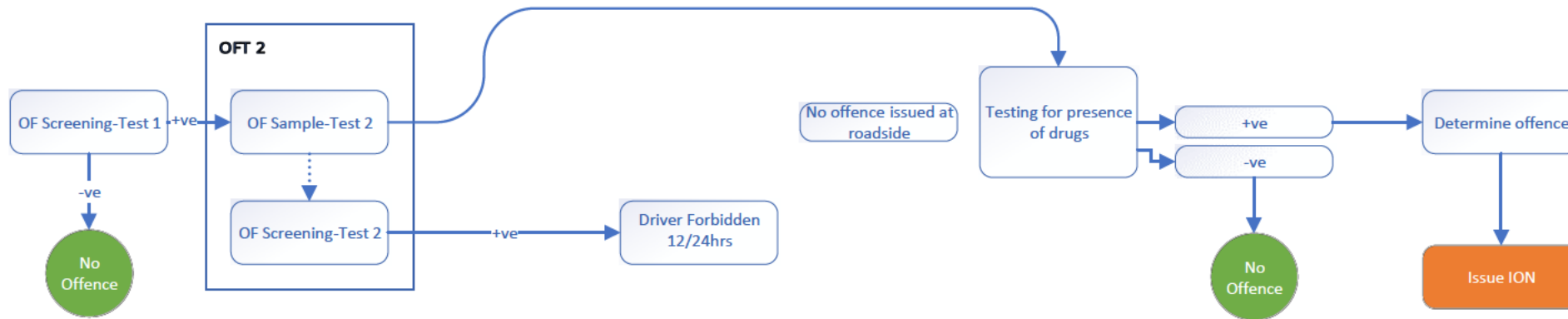
Acting Director Policy

First contact	Bronwyn Donaldson, Acting Director Policy	s9(2)(a)
Second contact	Bruce O'Brien, Assistant Commissioner – Road Deployment & Policing	s9(2)(a)

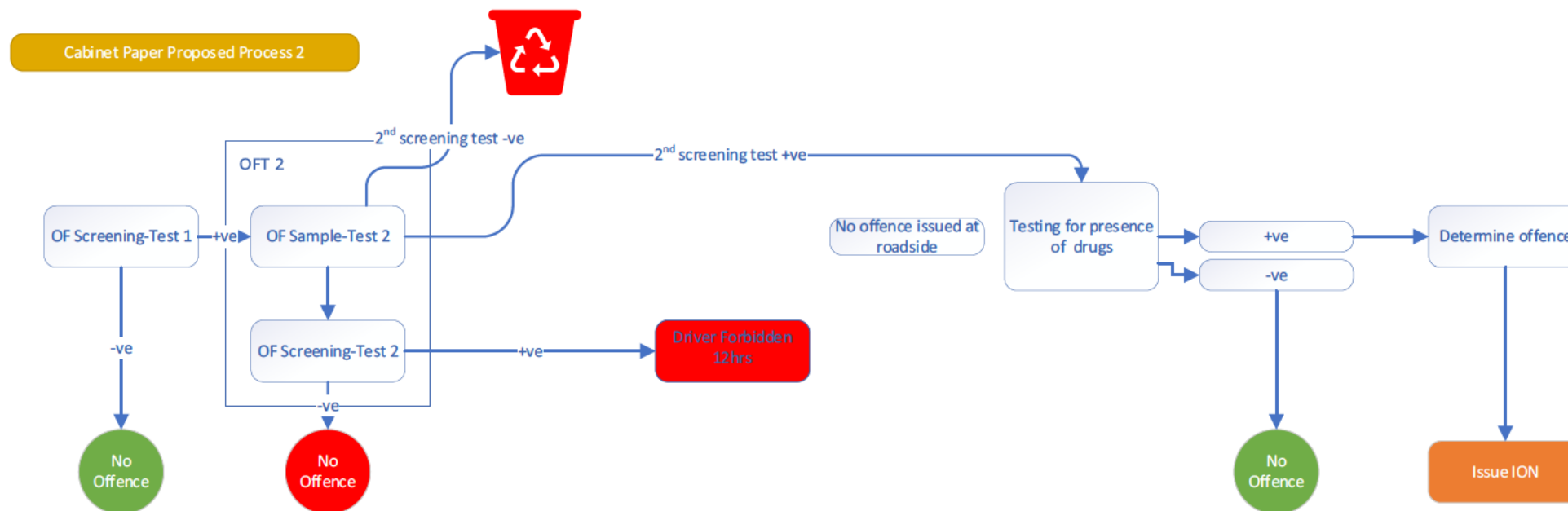
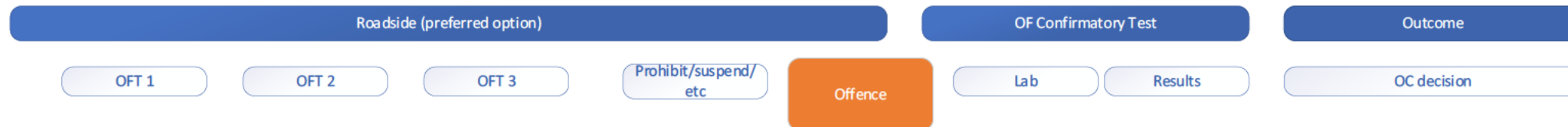
¹ Alcohol breath screening devices are approved in the [Land Transport \(Breath Tests\) Notice 2015](#)



Police Proposed process

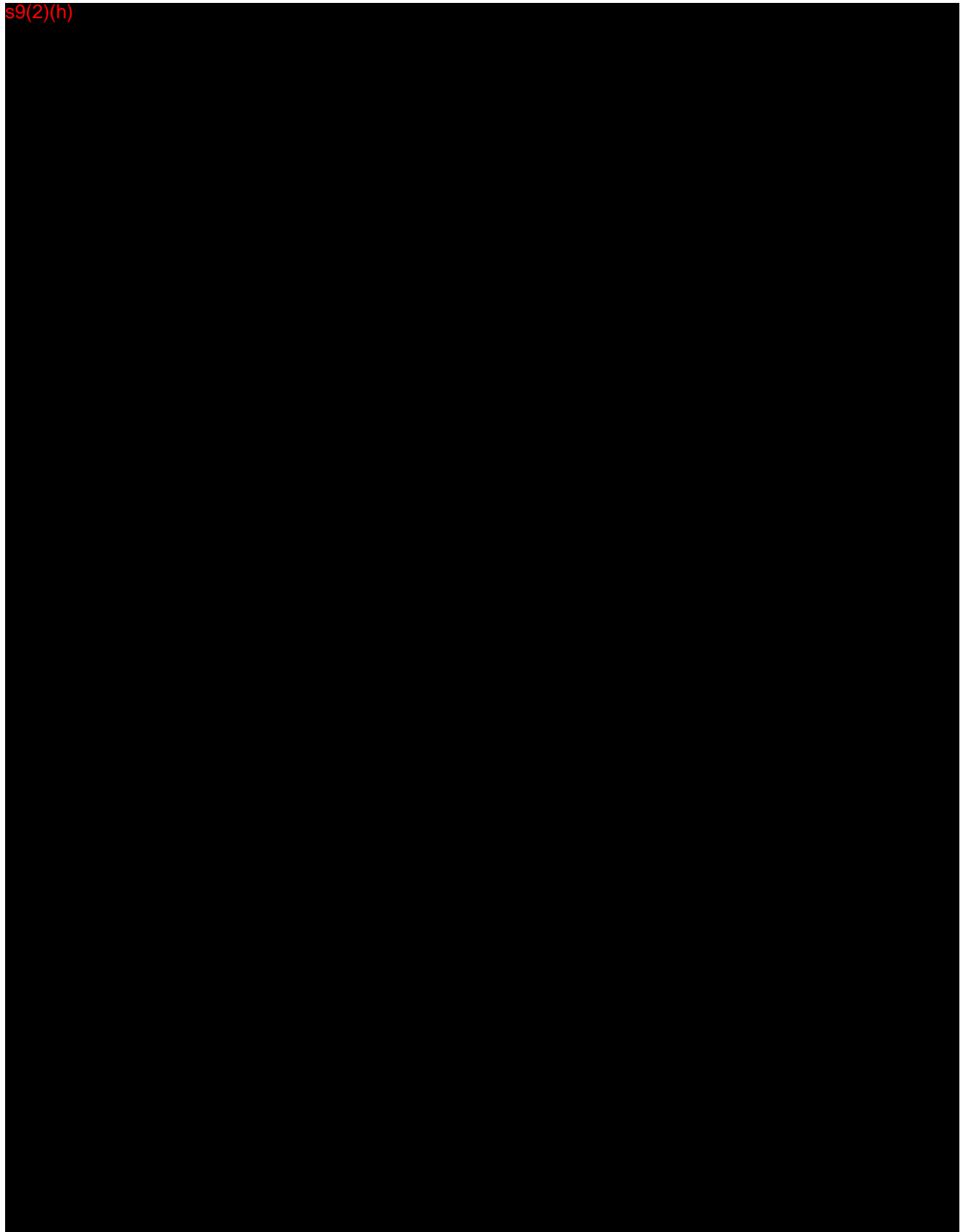


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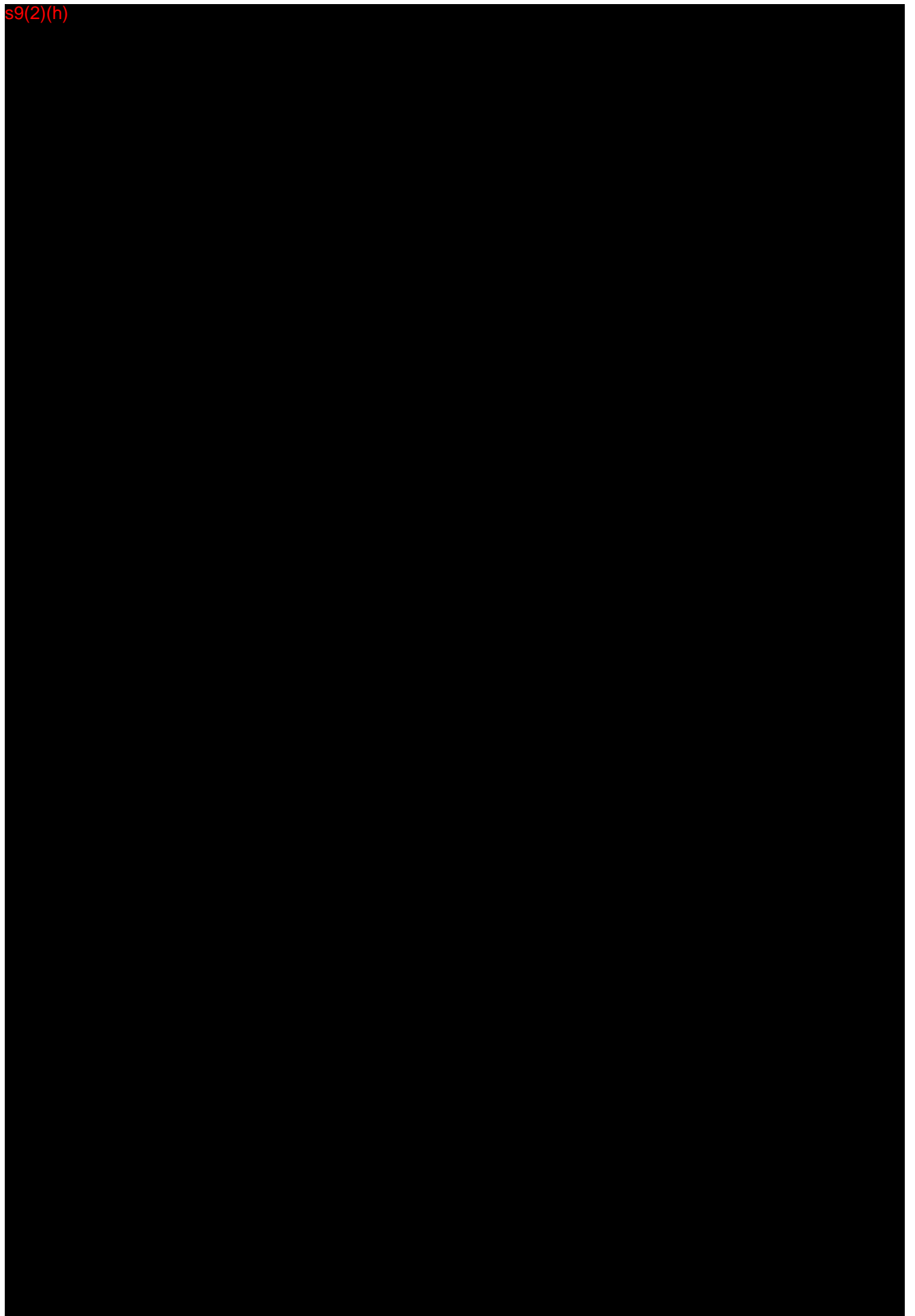


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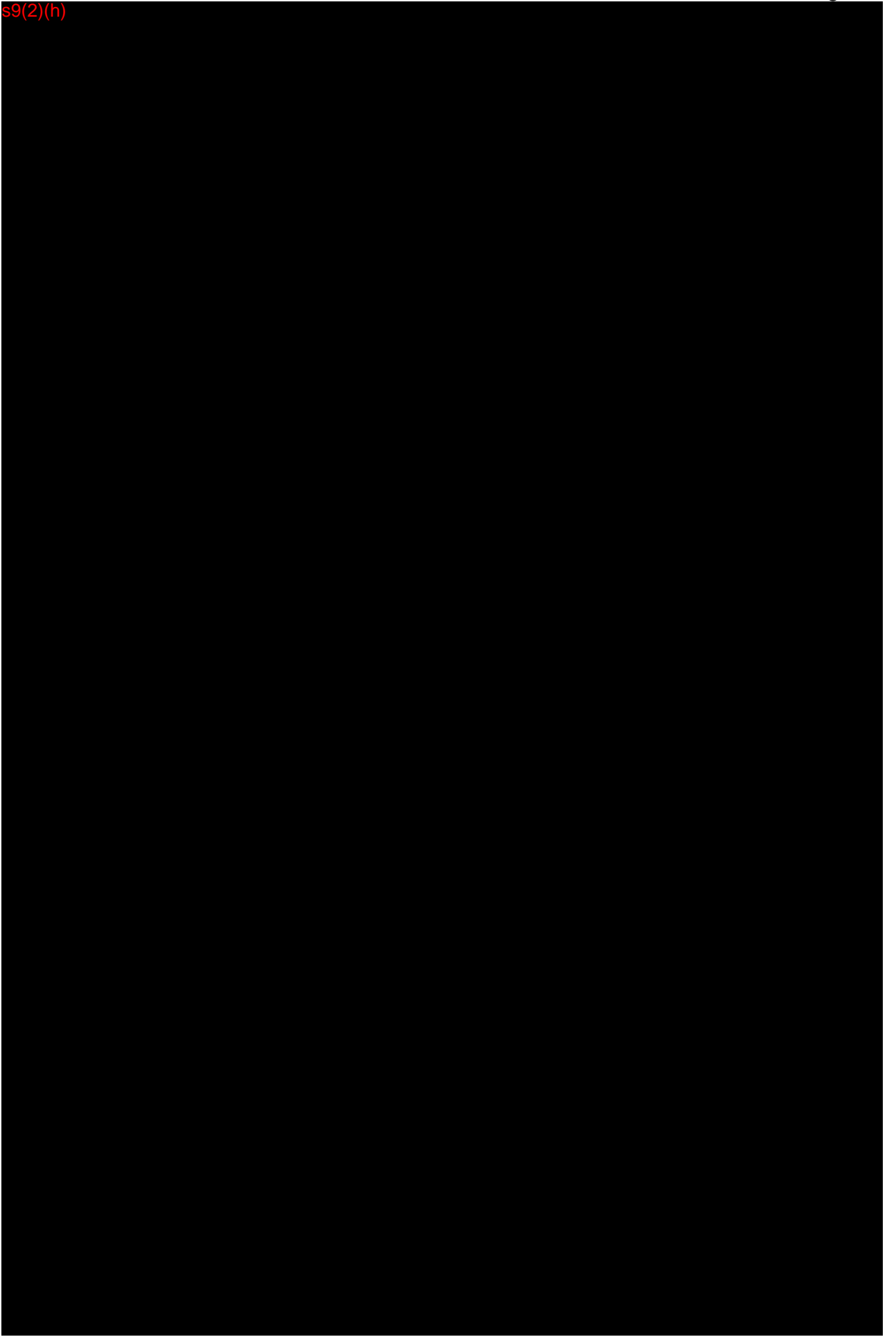


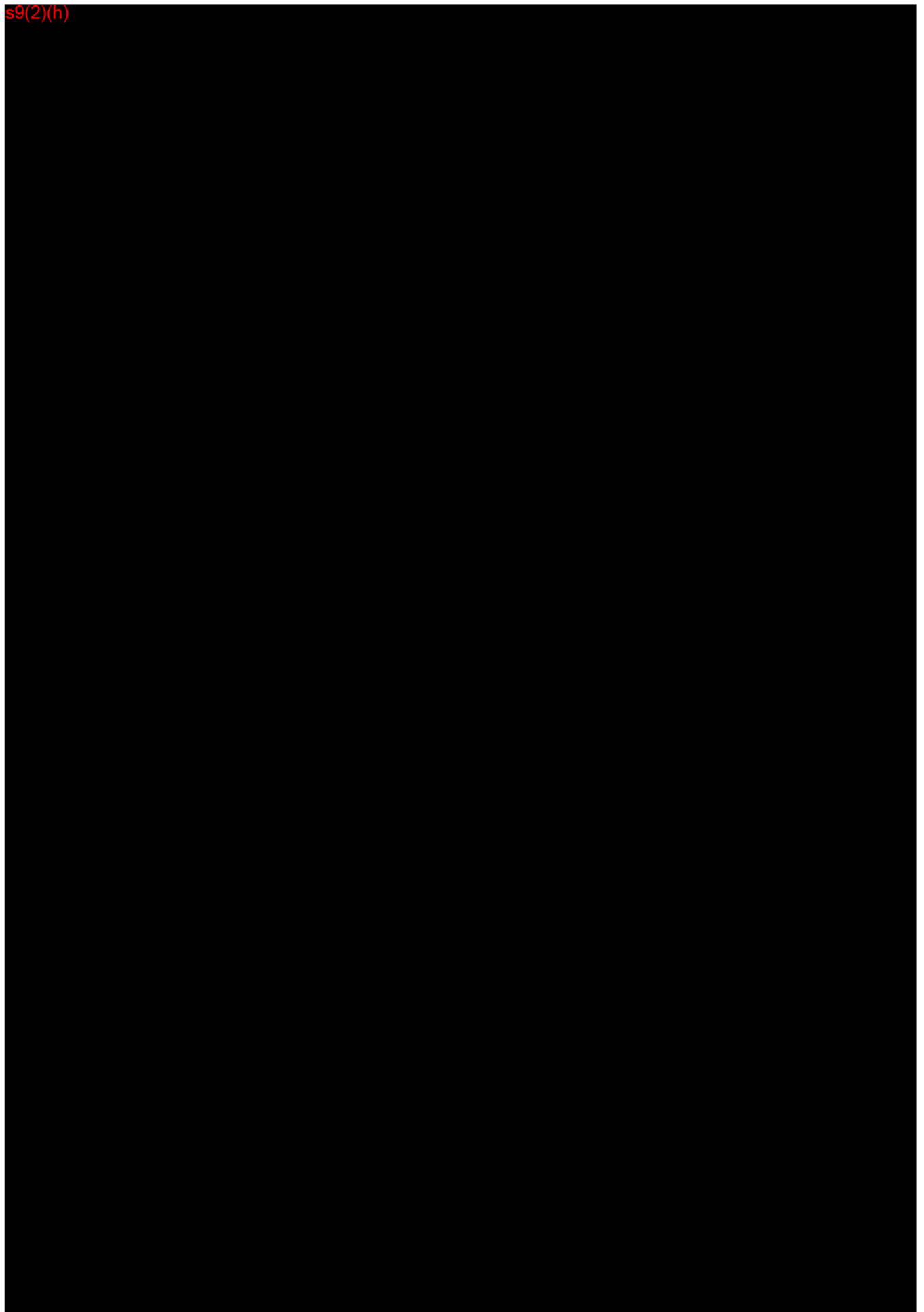
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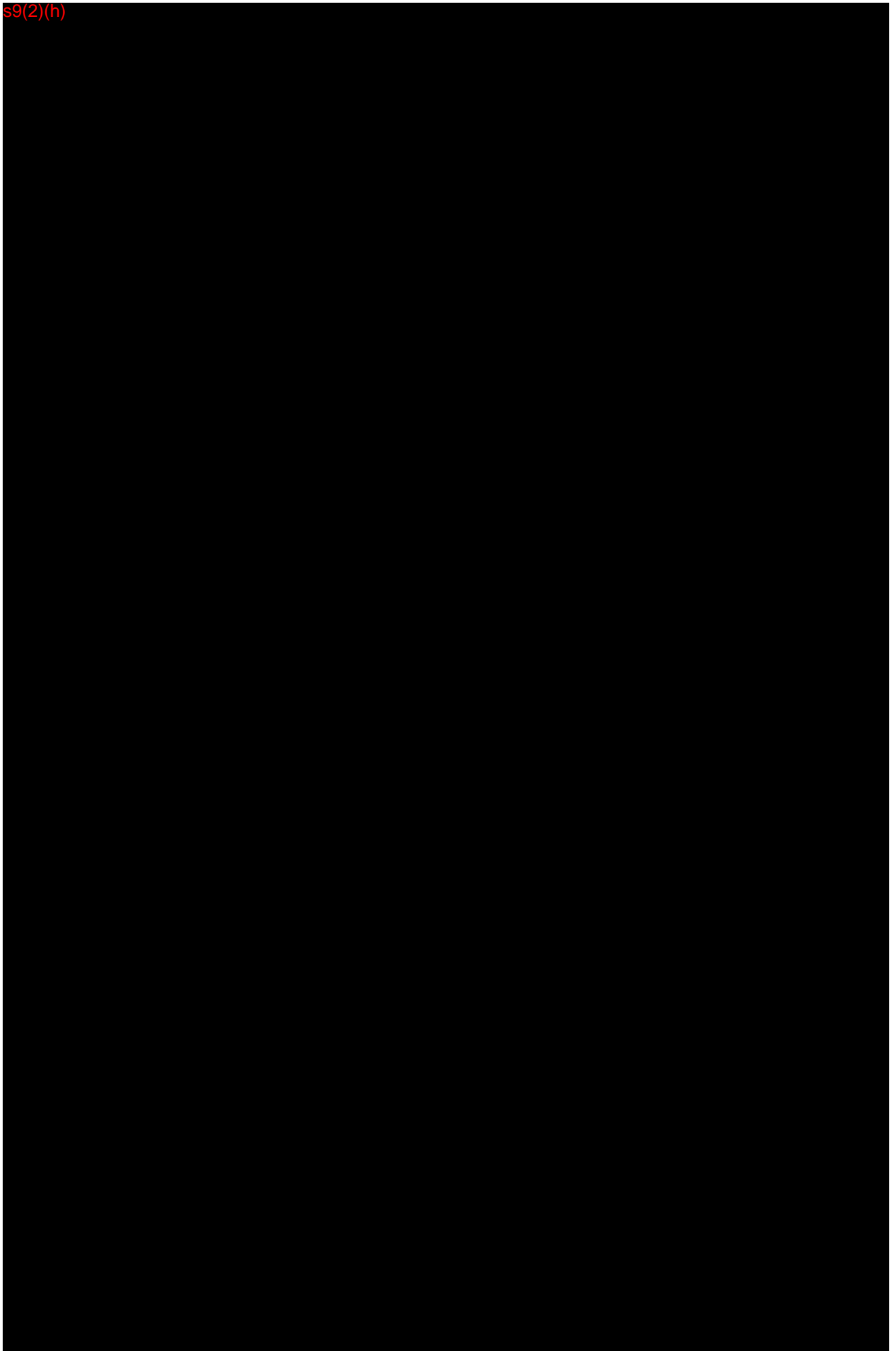
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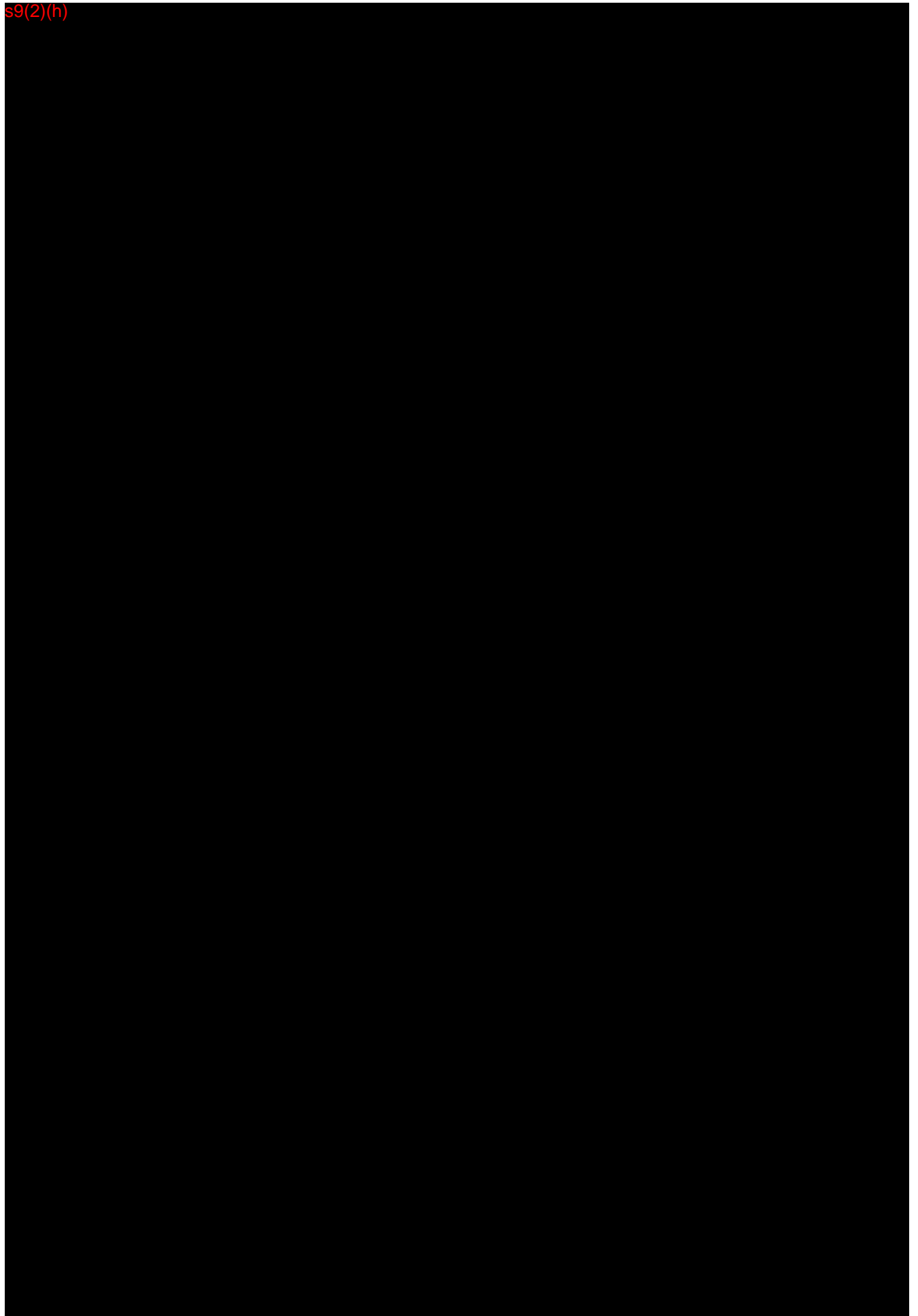
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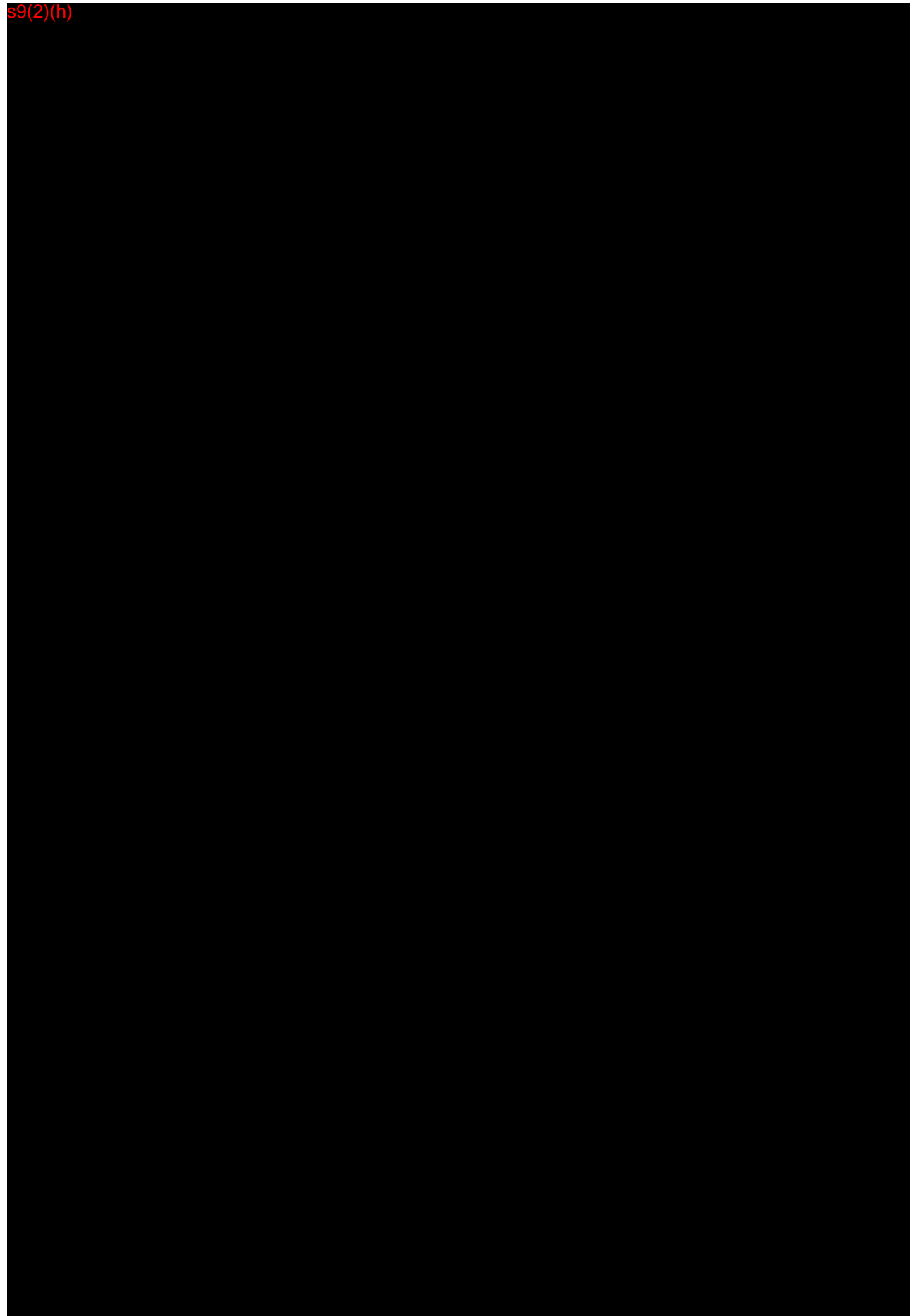
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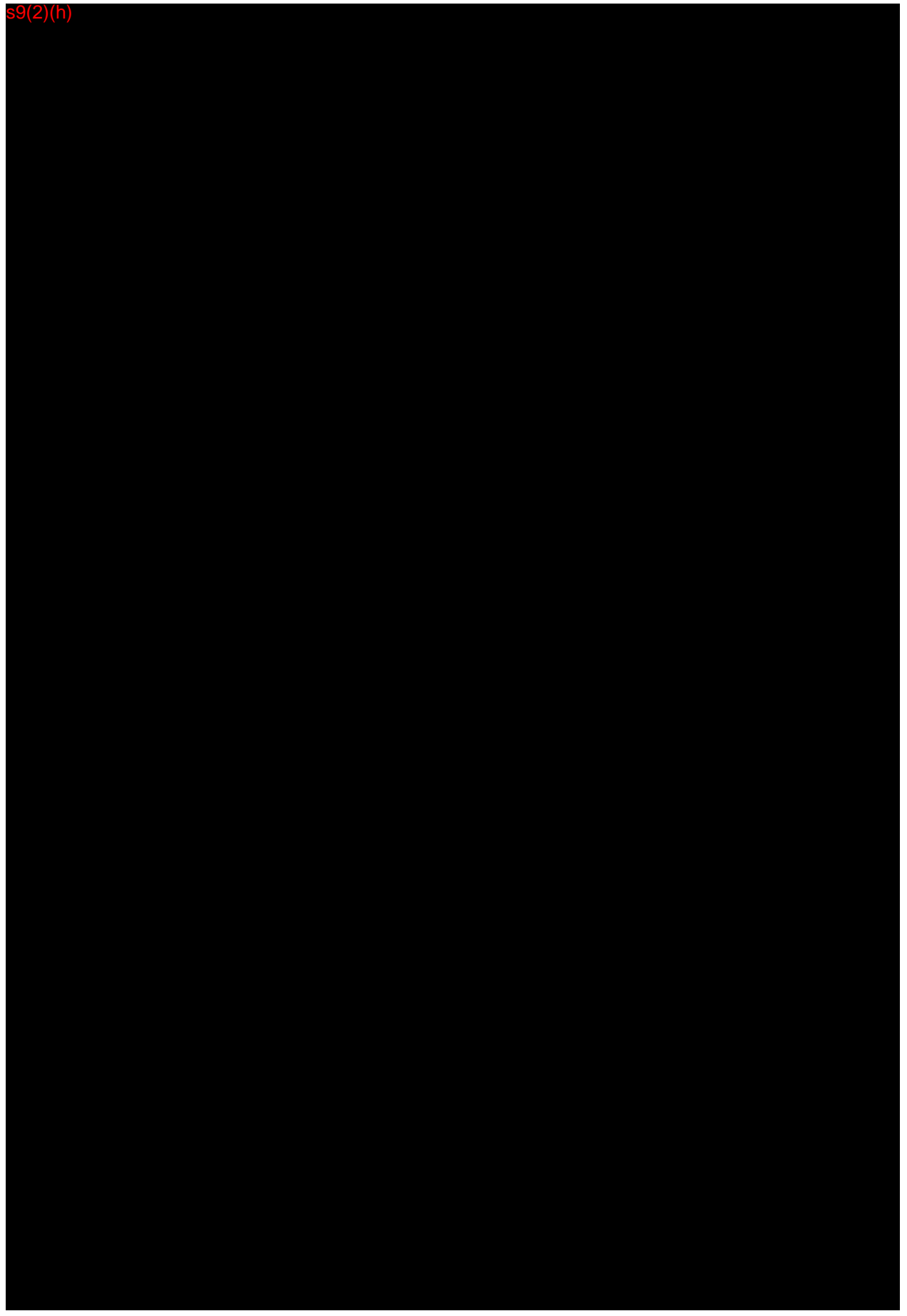


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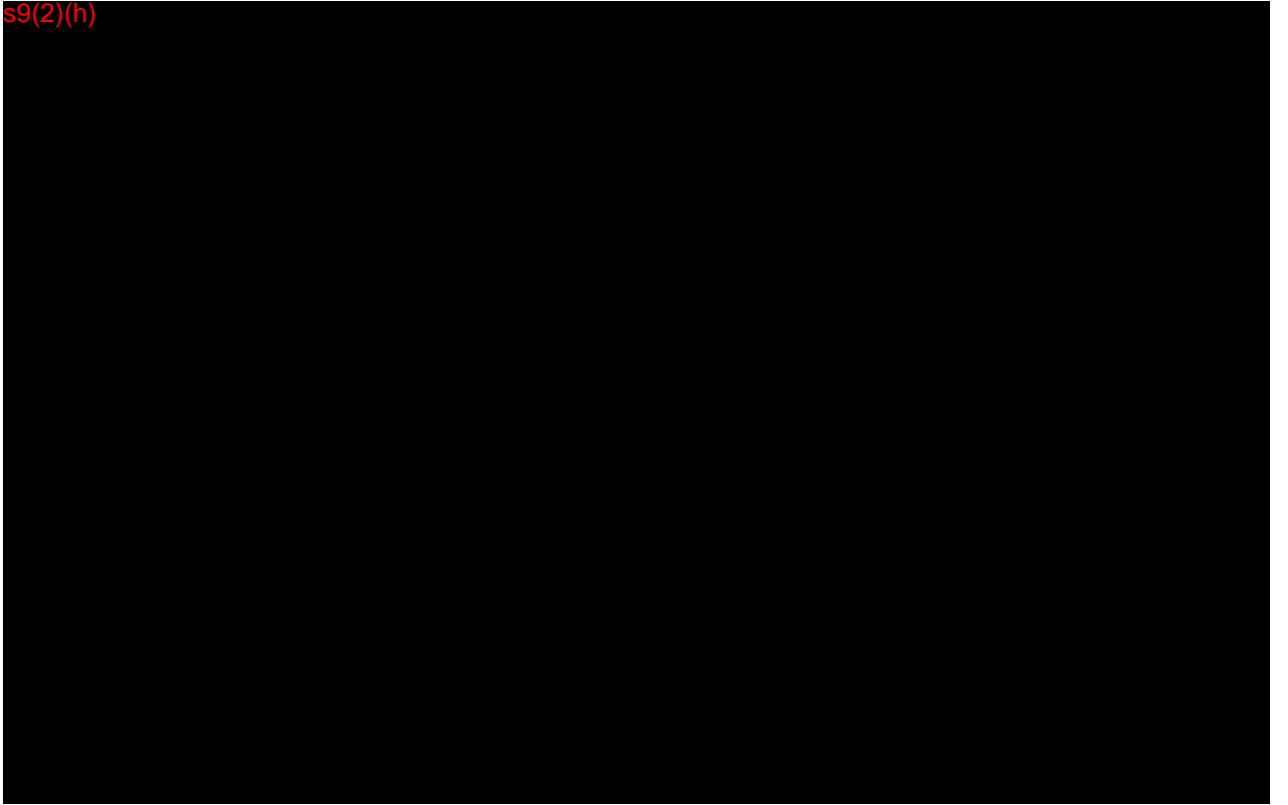




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Appendix Three: High Level Comparison of Proposals

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